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(157 N. Y. 201)

MOOT v. BUSINESS MEN'S INV. ASS'N.
(Court of Appeals of New York. Nov. 22, 1898.)

VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT—FURNISHING A "SEARCH"—WAIVER—"SATISFACTORY" TITLE—WHAT CONSTITUTES.

1. A vendor agreed to furnish "a search truly showing the condition" of his title. He furnished a search that purported to be a mere abstract of the indexes of the record, to which vendee made no objection at the time, on the ground of its form or insufficiency. *Held*, that the vendee could not afterwards deny the sufficiency of the search as a ground for refusing to perform the contract.

2. A vendee agreed to purchase, and the vendor agreed to sell, premises at a specified price, and a sum was paid on the contract, and the vendor agreed to execute, on or before a certain date, time being of the essence of the contract, a good and sufficient warranty deed, "a search truly showing the condition of the title being furnished at [his] expense." The search furnished, which purported to be merely an abstract of the indexes of the records, showed on its face that there was a conflict between the diagram of the property and the description in an intermediate judgment in partition. The vendee's attorney, who examined the title, found the apparent defect, and the vendee refused to accept a deed. The judgment roll of the cause in partition showed that the judgment had been amended so as to make it correct, though such amendment did not appear on the judgment book. *Held*, that the duty rested on the vendee to discover the true title, and hence he was not justified in declining to perform the contract on the ground of the apparent insufficiency of the vendor's title.

3. An agreement by a vendor to furnish "a search truly showing the condition" of his title is complied with by furnishing a mere abstract of the indexes of the records.

4. A good marketable title, free from reasonable doubt, is a good and "satisfactory" title, within a contract to convey.

5. The fact that an amendment correcting a mistake in a judgment in partition which was a link in the vendor's chain of title, though it appeared on the judgment roll, did not appear on the judgment book or transcript, does not constitute a breach of the agreement to convey a "good and satisfactory" title, since the defect could have been supplied without resorting to parol evidence, and without involving a question of fact.

Parker, C. J., and Vann, J., dissenting.

Appeal from supreme court, general term, Fifth department.

Action by Adelbert Moot, as trustee, against the Business Men's Investment Association.

52 N.E.—1

From a decision of the general term (35 N. Y. Supp. 737) affirming a judgment for plaintiff, defendant appeals. Reversed.

This action was to recover \$1,000 purchase money paid upon a land contract, and \$300 for the services of an attorney in examining the title to the premises which were the subject of purchase and sale. The defendant, after denying many of the material facts alleged in the complaint and admitting others, set up as a counterclaim the agreement between the parties, and alleged that it had tendered performance upon its part by offering the plaintiff a good title as required by the contract, and a judgment for the amount due upon it was demanded. On the 5th day of May, 1893, the plaintiff, representing certain clients, and the defendant, who was the owner of real estate in the city of Buffalo, therein described, entered into a land contract by which the latter agreed to sell to the former certain premises on Main street that were 91 feet front, running through to Washington street, where they were 70 feet in width. The premises were about 240 feet and 8 inches south of the south line of Tupper street. The plaintiff agreed to purchase them, and pay therefor \$127,400, \$1,000 to be paid upon the execution and delivery of the contract and the remainder as provided therein, the particular terms of which need not be stated. The \$1,000 was paid. The defendant agreed, on or before the 20th day of May, 1893, to execute and deliver to the plaintiff a good and sufficient deed containing covenants of warranty, which should convey a good and satisfactory title, "a search truly showing the condition of the title being furnished at the expense of the" defendant. It was also agreed that time was of the essence of the contract, and that it should be performed on or before the 20th day of May. The time was, however, extended by the stipulation or agreement of the parties until the 6th day of the following June. On the 5th day of June the defendant made a tender of performance upon its part, and demanded that the plaintiff complete his contract. Before the day of performance the defendant delivered to the plaintiff a search furnished by the Buf-

falo Guaranty Company, which purported to show what appeared as to the property described in the contract upon an examination of the indexes to the records, papers, files, documents, and judgment dockets in the office of the clerk of the county of Erie from July 26, 1814, to and including December 28, 1893. Upon the first page of the abstract so furnished there was a diagram of the premises, upon which the distance of parcel A from Tupper street was given as $272\frac{8}{11}$ feet. The twenty-third paragraph of the search showed that an action for the partition of premises which included parcel A, and which were included in and were a portion of the premises described in the contract, had been commenced in the superior court of Buffalo, and that a lis pendens was filed July 27, 1865. In paragraph 24 it was stated that a judgment in that action was signed July 24, 1866, and recorded in Liber 258 of Deeds, at page 383, August 4, 1866, by which parcel A on the diagram was allotted to Eberard Palmer, an intermediate grantor, and that part of the premises was described as commencing 269 feet south of Tupper street. The plaintiff accepted the search as sufficient under the contract, and delivered it to George L. Lewis, a lawyer in the city of Buffalo, whom he employed to examine the title to the premises, and for whose services he was awarded \$300 by the trial court. The distance of the premises from Tupper street was incorrectly stated in the complaint, report of the commissioners, and in the judgment in the action of partition, which was referred to in the twenty-fourth paragraph of the search. Subsequently, however, and on the 11th day of October, 1866, the error having been discovered, upon notice to all the parties to that action, an application was made to the superior court for an order correcting the complaint, report of commissioners, and judgment, by giving the correct distance of the premises from Tupper street, which was $272\frac{8}{11}$ feet. That order was granted. In pursuance of it, the complaint, report of the commissioners, and judgment were amended by striking out the erroneous distance, and substituting the correct one. That order was annexed to and made a part of the original judgment roll in the action, and filed in the clerk's office of the superior court. The original judgment was entered in the judgment book in that office, but the judgment there entered was not changed or amended, nor was the amending order recorded or filed in the Erie county clerk's office, and the record of the judgment in that office was not changed or amended. So that, after the order amending the proceedings in the partition action was granted, the judgment roll contained the order, and the proceedings were amended in pursuance of it, except the entry in the judgment book and the transcript of judgment entered in the Erie county clerk's office.

Spencer Clinton, for appellant. Adelbert Moot, in pro. per.

MARTIN, J. (after stating the facts). The right of recovery in this action is based upon the theory that the defendant was guilty of a breach of the contract between the parties, and hence the plaintiff is entitled to recover the amount paid thereon, together with the expenses he incurred in examining the defendant's title. The alleged breach of the contract was based on the claim that the defendant's title to the premises was defective, and not satisfactory to the plaintiff, and that the defendant could not convey a good and satisfactory title. The plaintiff's first objection was that the defendant had no record title to the south 3 feet and 8 inches of the premises marked upon the diagram in the search as parcel "A." The diagram indicated that parcel A was 65 feet front by 200 feet deep, situated on the easterly side of Main street, 272 feet and 8 inches south of Tupper street, while paragraph 24 of the search gave the distance south of Tupper street as 269 feet. Thus, upon the face of the search furnished, it was apparent that the distance given upon the diagram and that given in paragraph 24 were unlike. Hence the attention of a reasonably prudent or careful lawyer must have been called to the fact that the diagram and description did not agree.

The principal, if not the only important, question in this case is whether there was such a defect in the defendant's title as justified the plaintiff in refusing to fulfill the contract upon his part, and entitled him to recover the money paid thereon, and the expense of examining the defendant's title. That the deed offered was valid, and would have conveyed a good title to the premises, there is no doubt. That the record in the clerk's office of Erie county did not clearly show the defendant's title to have been valid as to all the land is also true. If, under the contract, the defendant was bound to furnish the plaintiff with a search or abstract which disclosed correctly the actual condition of its title, it has not been complied with. If, upon the other hand, the defendant was only required to furnish the plaintiff with a search, by reference to which an ordinarily prudent person would have ascertained the true state of the title, we apprehend there was no breach of the contract in this respect. By its contract the defendant agreed to convey a good and satisfactory title. If the title was good, and the plaintiff should have ascertained that fact, the deed tendered should be regarded as a compliance with that provision.

But it is said that the defendant agreed to furnish a search truly showing the condition of the title. It furnished a search which, upon its face, purported to be a mere abstract of the indexes of the records in the office of the clerk of Erie county. When this was furnished the plaintiff made no objection to it on the ground of its form or insufficiency. By his acceptance he treated it as a compliance with the provisions of the contract. It is also alleged in the complaint that the search was delivered in pursuance of the contract, and no claim is made that it was in any respect insufficient. It

is now too late for him to object that the search furnished was not in fact an abstract of title, or because it differed in some way from the search required by the contract. The plaintiff, having accepted it without objection, could not wait until the law day had passed, and then insist upon its insufficiency as a breach of the contract. If he was not satisfied with it, it was his duty to speak. Having been silent when he should have spoken, he should not, after the defendant's time to furnish a search had expired, be heard to deny its sufficiency under the contract.

This brings us to the consideration of the question whether it was the duty of the plaintiff's attorney to make such an examination as would have disclosed the true condition of the defendant's title. It is obvious that the plaintiff did not intend to and did not rely upon the search which was furnished. The evident purpose of the provision in the contract relating to that subject was to require the defendant to furnish a search which would indicate to a person accustomed to examining titles sufficient facts to enable him, by a proper examination, to ascertain the true state of the title. The defendant furnished a search which disclosed that a lis pendens had been filed in a partition action in the superior court of Buffalo; that a judgment had been entered therein allotting a portion of the premises to one of the defendant's intermediate grantors; and that upon that judgment its title depended. The plaintiff's attorney, in examining the title, was bound to exercise the reasonable care and diligence of a good and faithful expert in that business, to ascertain the defendant's true title, before the plaintiff was justified in refusing to perform the contract upon the ground of an apparent defect in the title, when no real defect existed. As an intending purchaser, he must be presumed to investigate the title, to examine every deed or instrument forming a part of it, especially if recorded, and to have known every fact disclosed, or which an inquiry, suggested by the record, would have led to. *McPherson v. Rollins*, 107 N. Y. 316, 322, 14 N. E. 411; *Kirsch v. Tozier*, 143 N. Y. 390, 397, 38 N. E. 375; *Bernstein v. Nealis*, 144 N. Y. 347, 39 N. E. 328. By the search furnished the plaintiff was apprised of the fact that the title to a portion of the premises depended upon a judgment in an action of partition entered in the superior court of Buffalo. The validity of such a judgment would depend upon a great variety of circumstances, and the regularity of the proceedings in that action was important, and could be ascertained only by an examination of the judgment roll. How the plaintiff's attorney could determine that the court had jurisdiction of the action without examining the judgment roll is not apparent. When the plaintiff was notified by the search that the defendant's title to a portion of the premises was dependent upon a judgment in partition rendered by the superior court, it was his plain duty to ascertain the contents of the judgment roll, to determine the validity, char-

acter, and extent of the judgment. This was clearly so when, upon the face of the search furnished, it appeared that there was a conflict between the diagram and statement.

When the defendant contracted to furnish a search, and furnished one, which was accepted by the plaintiff as a sufficient performance of the contract, the duty of examining and ascertaining the defendant's title rested upon him. Instead of fully discharging that duty, through lack of diligence he failed to ascertain the defendant's actual title, but merely discovered what was once a defect in it, without making sufficient examination to find that it had been remedied. Under these circumstances, he could not rely upon that apparent defect as a ground for refusing to comply with the contract, or as a basis for recovery against the defendant for the expenses of examining the title, when the failure to discover the true title was caused by his own neglect. Moreover, the justice of allowing the plaintiff \$800 for his expenses in examining the title, when, through lack of diligence, he succeeded only in discovering a defect which had been remedied, so that the title was good and should have been satisfactory, is not quite apparent.

If correctly understood, the decision of the special term was based upon the idea that by the provisions of the contract the plaintiff was entitled to a search which disclosed a good and satisfactory title in the defendant, and the actual condition of its title to the premises. If that finding was justified and that question was at issue between the parties, the decision was perhaps correct. But it is to be observed in the first place that no such issue existed, as no allegation of that kind was contained in the complaint. The right of action alleged is based solely upon the grounds that the title to the premises was found by the plaintiff to be unsatisfactory, and that the defendant could not convey a good and satisfactory title. In the second place, while it is true that the language of the contract is that a search should be furnished truly showing the condition of the title, it is manifest that the parties did not intend that the defendant should furnish an abstract of title which actually disclosed all the facts that were necessary to show that the defendant's title was good. When the defendant furnished a search which upon its face revealed that it did not and was not intended to disclose all the facts necessary to show the defendant's title, and it was accepted by the plaintiff as a compliance with the contract, it cannot be justly held that the defendant was guilty of a breach of the contract upon that ground. Plainly, it was the intention of the parties, as their acts prove beyond doubt, that the defendant should furnish precisely what it did, and that the title should then be properly examined by the plaintiff in the light of the information contained in the search, for the purpose of discovering the sufficiency of the defendant's

title. The duty rested upon the plaintiff to make a proper and thorough examination in the light of the search furnished, before he was justified in declining to perform the contract upon the ground of the insufficiency of the defendant's title.

The provision in the contract was that the defendant should furnish a search as to its actual title, and not as to its record title. We are of the opinion that, when the defendant tendered to the plaintiff a deed which would have vested in him a perfect title, he could not, under the contract and the circumstances established upon the trial, refuse to accept it, and declare the contract void, as it was by reason of his own negligence that he failed to discover that the title offered was in fact valid.

But it is said that the language of the contract was that the deed should convey a good and satisfactory title. Much stress is placed upon the word "satisfactory." We think that word in no way changes the contract. A good title must be regarded as a satisfactory one. As was said by Chief Justice Kent: "Nor will it do for the defendant to say he was not satisfied with his title, without showing some lawful incumbrance or claim existing against it. * * * The law in this case will determine for the defendant when he ought to be satisfied." *Folliard v. Wallace*, 2 Johns. 395, 402. This doctrine was reasserted in *City of Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, 479, and again in *Miesell v. Insurance Co.*, 76 N. Y. 115, 119. See, also, *Rigney v. Coles*, 6 Bosw. 479; *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195. The plaintiff was entitled under his contract to a marketable title, free from incumbrances and defects, and as to which there was no reasonable doubt. He was entitled to one which would enable him to hold his land free from probable claim by another, and which, if he wished to sell, would be reasonably free from any doubt which would interfere with its market value. *Vought v. Williams*, 120 N. Y. 253, 257, 24 N. E. 195; *Shriver v. Shriver*, 86 N. Y. 575, 584; *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. 905. If there had been a defect in the record title which could be supplied only by resort to parol evidence, and the title might depend upon questions of fact, the plaintiff might not have been required to accept it. *Irving v. Campbell*, 121 N. Y. 353, 24 N. E. 821; *Holly v. Hirsch*, 135 N. Y. 590, 598, 32 N. E. 709.

In this case, however, when the plaintiff's title is properly examined and understood, it is manifest that, so far as this question is concerned, his title was valid and reasonably free from any doubt which would interfere with its market value, and the defect in the record could have been supplied without resort to parol evidence. Nor would any question of fact have been involved. Therefore,

none of the authorities to which we have referred justified the plaintiff in claiming a breach of the contract upon the part of the defendant, as the title tendered was valid beyond reasonable doubt. If the error in the original judgment roll had not been corrected, the plaintiff would not have been required to take action to cure it. *Toole v. Toole*, 112 N. Y. 333, 19 N. E. 682; *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527. It may also be said that if the plaintiff had called the attention of the defendant to the defect in the record, and asked that it procure the judgment entered in the clerk's office of Erie county to be corrected, so as to show it as it actually existed, and the defendant had declined, he would not have been required to accept the title. But the title being actually good, we do not think he was justified in rejecting it upon the slight ground that it was not correctly recorded in that office. We are therefore of the opinion that the court below erred in holding that the defendant's title was defective in that respect.

The respondent also claimed that the defendant had no record title to the north sixteen one-hundredths of a foot of parcel C, as delineated upon the search furnished by it. It is obvious, from an examination of the record, that this objection was of little consequence, and it was also clearly established that the property had been in the actual possession of the owner having the record title much longer than 20 years. This objection was not of sufficient moment to induce its consideration either by the general or special term. It was at most but technical, and one that the defendant was able to correct, if it existed, and did so.

The only remaining objection that need be considered is the claim that the defendant acquired no title to any of the premises for the reason that under the will of Chandler J. Wells and the codicil thereto the executors had no sufficient power of sale to convey a good title, even in conjunction with the owner of the life estate. The trial court found adversely to the plaintiff upon that question, and that under the provisions of such will and codicil the executors had full power to sell the land in question. Upon a careful examination of those instruments, we are clearly of the opinion that the special term was right, and that this objection has no force, and did not justify the plaintiff in declining to receive the title offered. These considerations lead to the conclusion that the judgments of the special and general terms were incorrect, and that they should be reversed, and a new trial granted. The judgments should be reversed, and a new trial granted; with costs to abide the event. All concur, except PARKER, C. J., and VANN, J., dissenting, and HAIGHT, J., not sitting. Judgments reversed, etc.

(157 N. Y. 151)

BECK v. BOARD OF SUP'RS OF ERIE COUNTY.

(Court of Appeals of New York. Nov. 22, 1898.)

SHERIFFS — COMPENSATION — DISBURSEMENTS — SALARIES OF UNDER-SHERIFF AND DEPUTIES.

Laws 1891, c. 108, § 1, provides an annual salary for the sheriff of Erie county "for his services," to be fixed by the board of supervisors; section 2 provides that the salary fixed shall constitute the whole compensation to which he shall be entitled for the performance of "official services"; section 9 provides that he shall be entitled, in addition to his salary, to the fees in civil causes, and to the services of the under-sheriff and other employes in such cases; section 10 provides that he shall receive the necessary disbursements incurred in the discharge of his official duties; and section 11 provides that for the services of a deputy sheriff in certain cases there shall be no compensation, "when he is a regular employe of the sheriff's department, and under a salary from him or from the county." A general statute authorizes the appointment of an under-sheriff and necessary deputies. Laws 1892, c. 686, §§ 181, 182. *Held*, that such sheriff was entitled to be reimbursed by the board of supervisors for such reasonable sum as was necessarily paid by him for the services of an under-sheriff and deputies.

Bartlett, Haight, and Vann, JJ., dissenting.

Appeal from supreme court, appellate division, Fourth department.

Application by August Beck for a peremptory writ of mandamus against the board of supervisors of Erie county. From an order denying the application, relator appealed to the appellate division, and from a judgment of affirmance (53 N. Y. Supp. 156) he appeals. Reversed.

John Cunneen, for appellant. Adolph Rebadow, for respondent.

PARKER, C. J. Prior to the passage of chapter 108 of the Laws of 1891, the sheriff of Erie county, like the sheriffs of most of the counties in this state, was compensated for his services, and those of his under-sheriff and deputies, by fees payable by the county, except for services rendered in civil business, which was paid by or collected from private parties. As sheriff, he was required by statute to appoint an under-sheriff, and authorized to appoint as many deputies as he deemed proper, not exceeding one for every 3,000 inhabitants. 1 Rev. St. p. 379, §§ 71, 72, now found in sections 181 and 182 of the county law (Laws 1892, c. 686). The powers and duties of his under-sheriff were in some respects on broader lines than those of the deputies, for he, like the sheriff, could depute persons to do particular acts. In the absence of the sheriff, he was required to attend the drawing of juries for the courts of his county; and, if the sheriff was away, he was formerly required to attend upon the execution of a criminal; and, in the event of a vacancy in the office of sheriff, an under-sheriff has in all things the powers of a sheriff until one should be either elected or appointed. The amount of compensation of the under-sheriff and deputy sheriffs, as well

as the method of paying it, was a matter of agreement between the sheriff and such officers,—whether it should be by way of salary, or by allowing to them a portion of the fees to which the sheriff should become entitled for services rendered. Having noted the relations existing between the sheriff and his deputies as regulated by statute, we come to the statute referred to in the opening sentence. Apparently the view was entertained in the county of Erie that the sheriff's office was unjustifiably profitable, and that a saving could be effected for the county without injustice to the sheriff, and hence was enacted the statute in question, which undertakes to provide that the sheriff shall not receive any fees from the county for his services, but, in lieu thereof, shall be paid an annual salary, not exceeding \$5,000, and have, in addition, his fees in civil cases and proceedings, and the services of the under-sheriff and other employes of his office in such cases and proceedings. This relator entered upon the discharge of his duties as sheriff, and appointed an under-sheriff, as it was his duty to do under the general statutes of the state, and two deputies, whose services he deemed necessary for the proper conduct of his office; and that their services were actually required is not questioned. He construed the statute to mean that he was bound to make these appointments, and was entitled to collect as a disbursement the amount reasonably paid for their services. He deemed a compensation of \$2,500 for the under-sheriff, and \$1,450 each for the deputies, as just and reasonable, and agreed to pay them that amount, which he did. For this disbursement he presented his claim to the board of supervisors of Erie county, but it was not allowed, whereupon he instituted this proceeding, whereby he sought a writ of mandamus against the board of supervisors requiring it to audit and allow his claim. It is not contended that he paid to these officers more than their services were fairly worth, but mandamus was refused on the ground that, as compensation was neither fixed nor allowed by statute, the services of these officers must be deemed to have been rendered gratuitously, and the court said: "It may be a serious omission of the legislature, but the courts cannot supply it, for their functions are not legislative, but of a judicial character only. The principal and his deputies accepted their positions with knowledge of the defect in the statute, and they must, therefore, perform their duties gratuitously, and trust to the justice of future legislatures." This, as well as other portions of the opinion, indicates that it was the judgment of the learned court that the result of its decision was a hardship to the relator, and so it was, for its effect was to require him to pay out of his own pocket the sum of \$5,400, which exceeds the salary paid to him for his services by the sum of \$400. It seems to me, from a careful examination of the

opinion, that the court was led into error by treating the application of relator as one really made in behalf of the under-sheriff and the two deputies, whereas in fact the application is one for disbursements incurred by the sheriff in the proper discharge of the duties of his office as he understood them. The inquiry on such application naturally is: (1) Does the statute entitle the sheriff to receive from the county his necessary disbursements in the performance of the county's business? (2) Is the amount reasonably paid by the sheriff as compensation for a necessary under-sheriff and deputies a proper disbursement under the statute? (3) Was it necessary for the relator to appoint an under-sheriff and two deputies, and was the amount paid them reasonable? An affirmative answer to all three of these questions would necessarily entitle the relator to receive from the county the sum of \$5,400, the amount paid by him to the under-sheriff and his two deputies for their services.

The answer to the first two questions must be found in the statute, so to it we direct our inquiry. The first section provides that after the term of the present incumbent the sheriff shall receive as compensation "for his services" an annual salary, to be paid by the board of supervisors, of not less than four thousand dollars nor more than five thousand dollars per annum. Section 2 of the act reads as follows: "The salary so fixed by said board of supervisors shall constitute the whole compensation which shall be allowed or paid to or received by said sheriff for all the official services performed by him or required to be performed by him as sheriff in his attendance upon any and all courts of record held in the county of Erie and for all services performed by him for the United States, the state of New York, or for the county of Erie, or chargeable thereto or which he is or shall be required or authorized by law to perform by virtue of his office as such sheriff, and no compensation, payment or allowance shall be made to him for his own use for any of such services except the salary aforesaid." It will be observed that the statute provides that the compensation "so fixed" is for the official services performed by him. It does not cover disbursements, but is to pay the sheriff for "his services." Sections 3 to 6 of the act provide, in effect, that all the fees which the United States or the state shall pay for services rendered by the sheriff in attendance upon courts, in conveying a prisoner, or in discharging other duties, shall belong to the county; and these sections also regulate the manner of receiving and accounting for such fees. Section 10 reads as follows: "The said sheriff shall also be allowed and entitled to receive the necessary and actual disbursements incurred by him in the discharge of the duties designated in section two of this act, or in performing any service for which the county receives, or is entitled to receive the fees therefor under

this act, which said disbursements shall be audited and allowed by the board of supervisors as other claims against the county are audited and allowed." Here we have a statutory declaration that the sheriff shall be entitled to receive the necessary and actual disbursements incurred by him in the discharge of the duties designated in section 2, and that the board of supervisors shall audit the claim made for them as other claims are audited and allowed. The statute therefore requires that the first question shall be answered in the affirmative.

In looking through the statute for the answer to the second question, we note, first, that the second section provides that the sheriff shall receive the sum fixed by the board of supervisors in full compensation for all of his services rendered in the discharge of the duties designated therein. He is not to receive the salary for services and necessary expenses and disbursements, but for services alone. Section 10 assumes that as sheriff he will necessarily be compelled to incur expense in the discharge of the many and varied duties designated in section 2 of the act, and accordingly provides that the sheriff "shall also be allowed and entitled to receive" his necessary and actual disbursements. Now the sheriff cannot perform all of the duties enjoined by section 2. Aside from the United States courts there are a number of local courts of record, and their proper attendance in a county ranking third in population among the counties of the state requires assistance. And that this was a fact which the legislature recognized is made apparent by other provisions of the statute. Independently of this statute, the sheriff was, by a general statute, required to appoint an under-sheriff, and authorized to appoint necessary deputies; and that this fact was fully appreciated is evidenced by section 9, which provides that "the sheriff shall be entitled, in addition to the salary above specified," to the fees which he shall receive in civil causes and proceedings, and to "the services of the under-sheriff and other employes of his office in such cases and proceedings." Reading this section in connection with section 11, which will be referred to later, it will be observed that the act referred to the under-sheriff and deputies as employes. And the services of such employes the statute declares the sheriff shall have in civil cases and proceedings. The statute, therefore, not only recognizes the necessity of an under-sheriff and necessary deputies in a proper discharge of the duties devolved upon the sheriff by section 2, but it provides that, "in addition" to his salary, he may have their services in civil matters. Clearly, this provision does not contemplate that he shall pay such officers out of his own pocket, and no such intent can be spelled out of it without doing violence to the language employed. The sheriff is to receive something "in addition" to his salary, viz.

fees in civil business and the services of an under-sheriff and employes in the conduct of such business; and it need not be argued that, if the sheriff pays the under-sheriff and deputies out of his salary, he does not receive their services "in addition" to his salary. Section 11 also recognizes the necessity of assistance to the sheriff in the performance of the duties enjoined by section 2, and that a salary may be paid to the deputies appointed, for it provides that for the services of a deputy sheriff in attendance upon the courts or in serving warrants there shall be no compensation when he is "a regular employe of the sheriff's department, and under a salary from him or from the county," but he may receive his disbursements, to be audited and allowed by the board of supervisors. The board of supervisors did not employ any under-sheriff or deputy sheriffs under the act in question, nor fix the salaries of those appointed by the sheriff. The sheriff was bound to appoint an under-sheriff and such number of deputies as the duties devolved upon him by section 2 required, and such reasonable sum as was necessarily paid by him for their services constituted a proper disbursement under this statute, which the board of supervisors was, by it, required to audit and allow.

The third question should have been considered by the board of supervisors when the bill was presented for audit, but it is not now before this court. The orders of the appellate division and special term should be reversed, with costs.

BARTLETT, J. (dissenting). I wish to explain my vote in a few words. As the court is not advised of the amount of fees received by the sheriff of Erie county in civil causes and proceedings in addition to his salary, we are not able to consider the statute of 1891 (chapter 108) from the standpoint of the legislature; but, presumably, these fees are large, and must have been taken into account in fixing the total compensation. If the aggregate compensation of the sheriff from salary and fees was deemed sufficient to warrant the legislature in requiring him to pay the salaries of the under-sheriff and deputy sheriffs, as he had always done, it was only necessary to leave the subject untouched by the act of 1891 to accomplish that result. If the aggregate compensation was not deemed sufficient, then it is reasonable to suppose that so radical a change as to make these salaries a county charge, either directly or by way of disbursements allowed the sheriff, would have been expressed in apt language. There is no such provision in the statute, and resort must be had to inference and forced construction to find legislative intention to that effect. The compensation of the sheriff comes from two sources, public and private; and the act of 1891, dealing with the sheriff of Erie county, turned the public fees into the county treasury, and

gave the private fees to the sheriff. The scheme of the statute seems, to my mind, clear. In lieu of the public fees, the sheriff is given a salary of \$5,000, which is in full for all his services in those matters out of which the public fees arise, but he is permitted in that connection to collect his actual disbursements. It is also provided that the services of deputy sheriffs in these same matters shall be paid for at the rate allowed by law, except that where the deputy is a regular employe of the sheriff's department, and under a salary from him or from the county, he is confined to actual disbursements. In addition to his salary, the sheriff is entitled to the fees in civil causes and proceedings, paid by litigants and individuals, as compensation for his services and disbursements rendered therein, and liabilities thereunder, and the services of the under-sheriff and other employes of his office in such cases and proceedings. It thus appears that the only disbursements allowed to be collected by the sheriff from the county are those he actually incurs in the matters out of which the public fees arise, as those made in civil causes or proceedings are paid by the litigants or individuals interested. When we consider that the under-sheriff and deputies are occupied to a very great extent in rendering services and incurring disbursements in civil causes and proceedings, which are paid for by the parties, I cannot believe that it was the legislative intention to change the old rule in any way, but rather to leave the sheriff to take all the fees, and pay his under-sheriff and deputies as heretofore. I vote for affirmance of the order appealed from.

PARKER, C. J., reads for reversal. **GRAY, O'BRIEN, and MARTIN, JJ.**, concur. **BARTLETT, J.**, reads for affirmance, and **HAIGHT and VANN, JJ.**, concur.

Orders reversed, and proceedings remitted to the special term for further disposition, with costs in all courts.

(176 Ill. 311)

KELLEY v. LEITH et al.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

ASSIGNMENT FOR CREDITORS—DISCONTINUANCE.

The fact that the members of a firm which had made an assignment for the benefit of its creditors proposed to a majority in number and amount of such creditors, whose claims were undisputed, to pay their respective claims in full, conditioned, however, that they sign a petition for a discontinuance of the assignment proceedings, as allowed by Hurd's Rev. St. 1889, p. 162, providing for such discontinuance on such majority consent, and remitting to all creditors the rights which they had previous to the assignment, is not a fraudulent procurement of such creditors' assent.

Appeal from appellate court, First district.

In the matter of the assignment of Alexander B. Leith and others, David Kelley, a cred-

¹ Rehearing denied December 9, 1898.

tor, opposed the petition of a majority of creditors, in number and amount, for a discontinuance of the insolvency proceedings. From an affirmance in the appellate court of the order allowing such discontinuance (70 Ill. App. 35), said Kelley appeals. Affirmed.

On July 25, 1896, appellees herein, Alexander B. Leith, Benjamin Hampton, and Arthur J. Adams, constituting a co-partnership under the name and style of "Fulton Machine Works," made their deed of assignment, under the statute, to George T. Roble, for the benefit of creditors. The assignee qualified and took possession, and proceeded under the statute for the distribution of the estate until the 28th of November, 1895, when, upon petition of the insolvents and a majority of creditors who had filed claims against such estate, the assignment was discontinued, and the property turned over to the original assignors. The inventory of the assignee showed the good assets to be worth \$163,153, consisting of personal property, \$124,353; real estate, \$20,000; and good accounts, \$18,802. The claims filed within the short time allowed by the statute amounted to \$54,705.35, among which was a claim by appellant amounting to \$6,243.32. Shortly before the order of discontinuance was entered by the county court, the attorney for the insolvents addressed a letter to each claimant, inclosing him an assignment of his claim, and also a petition requesting the discontinuance, and directing that such assignment and petition for discontinuance should be placed in the hands of F. E. Brown, of the First National Bank of Chicago; the letter indicating that each creditor whose claim had been allowed and was not contested should receive a check for 100 per cent. of his claim, such checks to be delivered to Brown, and with the agreement they were not to be presented for payment until the petitions for discontinuance had been presented and the order of discontinuance allowed by the county court. This form of letter was sent by Brown to all creditors whose claims were not in dispute. An arrangement had been entered into with one Herbst, a banker, by which he was to loan \$75,000 to the insolvents, being a sufficient amount to take up all undisputed claims, and also to pay the disputed claims, should judgment be rendered against the insolvents upon trial. Herbst, in consideration of this loan or advancement, was to have the active management and control of the insolvents' property for a time, under a salary, and to advance such other moneys as might be needed by them to get themselves in good working condition. Some creditors had not filed claims within the time allowed by the statute, but these, where not otherwise disputed, were to be paid in full by appellees. No arrangement was made with Herbst to advance any money or make the loan or have any connection whatever with the property until the order of discontinuance was entered, and the insolvents fully invested with their property, by the county court. It

was then the plan of the insolvents to have all their property in the hands of the assignee turned back to them, to be reinvested by them, they to carry on their business in their own names. A majority of the creditors, in number and amount, of appellees, signed the petitions for discontinuance, and such, together with the request of the insolvents, were presented to the county court; whereupon an order of discontinuance was entered, and the property taken out of the hands of the assignee and turned over to the assignors. The claim of appellant was a disputed one, and at that time no action had been taken on it. Herbst then took the chattel mortgage for \$75,000, and all claims not disputed were fully paid. Appellees were reinvested with the possession, control, and title of their property, and resumed business. Appellant insists the consent of a majority, in number and amount, of creditors who petitioned to discontinue was obtained by fraud, inasmuch as they were offered to be paid 100 cents on the dollar of their claims at the time of delivery of the assignment thereof, together with their petitions for discontinuance. Objection was made by appellant to the entry of the order of discontinuance by the county court, and the restoration of the assigned property to the insolvents, and such objections were by the county court overruled. Upon appeal to the appellate court for the First district the order of the county court was affirmed, and from that judgment this appeal is prosecuted to this court.

Defrees, Brace & Ritter, for appellant. F. M. Cox (E. M. Ashcraft, of counsel), for appellees.

PHILLIPS, J. (after stating the facts). The only question presented for the determination of this court is whether or not it was error for the appellate court to affirm an order of the county court of Cook county granting a discontinuance of the assignment for the benefit of the creditors, and directing the property to be turned over to the assignors. Section 15 of "An act in relation to assignments for the benefit of creditors" provides as follows: "All proceedings under the act of which this section is amendatory may be discontinued upon the assent in writing of such debtor and a majority of his creditors, in number and amount, and in such case all parties shall be remitted to the same rights and duties existing at the date of the assignment, except so far as such estate shall have already been administered and disposed of; and the court shall have power to make all needful orders to carry the foregoing provision into effect." Hurd's Rev. St. 1889, p. 102. That a majority, in number and amount, of the creditors of appellees, together with the insolvent debtors, petitioned the county court for an order discontinuing the services of the assignee, and ordering the property to be reinvested in the debtors, is not controverted. In the absence of fraud connected with the procurement of

the assent of a majority, in number and amount, of creditors petitioning for such discontinuance, the above statute fully authorizes a county court to discontinue such assignment proceedings, upon compliance with its provisions. It is contended in this case, however, that the signatures of the creditors who petitioned for the discontinuance were procured by fraud. The only fraud insisted on is that appellees, through their attorney, proposed to all such creditors to pay them 100 cents on the dollar of their respective claims, conditioned, however, they should sign a petition asking the discontinuance of the assignment proceedings. Such proposition, in the form of a letter, was addressed to, and apparently accepted by, every creditor who had filed his claim before the assignee, and which claim was not disputed or contested. In addition to this, such proposition was apparently made to a number of such creditors who had not complied with the statute in filing their claims within three months with the assignee. The claim of appellant was disputed by appellees, and therefore had not been allowed by the assignee. Such a condition of affairs certainly does not show fraud, either apparent or constructive. It presents an entirely different question from other cases passed upon by this court, where the property in the hands of the assignee was proposed to be sold, conveyed, and turned over to some person other than the debtor, and where it was proposed to pay to creditors only a small per cent. of the amount of their claims. In this case the original debtors, by an order of discontinuance entered by the county court of Cook county, were reinvested with the title and possession of all of their property as fully and to the same extent as before the assignment. Appellant, under the order of the court, was then in a position to establish his claim at law, if one existed, and to proceed against the property of the debtors as fully and to the same extent as though an assignment had not been made or an order of discontinuance entered.

It is insisted by appellant, however, that simultaneously with, or immediately after, the order of discontinuance, a chattel mortgage for \$75,000 was placed upon the property of appellees. An examination of this record, however, discloses this could not be to the prejudice of the appellant. The total amount of property inventoried by the assignee, after deducting doubtful and worthless accounts, was \$163,155. The indebtedness and lien created by the chattel mortgage were only sufficient to pay the just claims presented and allowed against the debtors, and enough, also, to pay the claim of the appellant, should he succeed in procuring a judgment. Such acts on the part of appellees and their attorney in no wise constituted a fraud, but were apparently only consummated in an honest desire and purpose to pay their debts in full and protect their creditors.

Appellant insists on a reversal of the judgment of the appellate court in this cause on the

authority of *Howe v. Warren*, 154 Ill. 227, 40 N. E. 472; *Terhune v. Kean*, 155 Ill. 506, 40 N. E. 481, and *Bank v. Walker*, 164 Ill. 135, 45 N. E. 271. None of these cases will bear the construction placed upon them by appellant, nor is anything said in either of the above cases in conflict with our views held and expressed in this case. The case of *Howe v. Warren* was a bill in chancery filed by the creditors after an order of discontinuance of assignment proceedings, setting forth fraud upon a part of the debtors, the assignee, and a third person, whereby the county court was procured to enter an order of discontinuance, turning over the property of the debtor to a third person, whereby creditors only realized about 35 per cent. of their claims, and which order of discontinuance was said to have been procured without the knowledge or consent of the complainant, and by fraud practiced upon those creditors who petitioned for the discontinuance. In that case, instead of the property of the debtor being turned over to the debtor himself, thus leaving it subject to be resorted to by creditors who had not received payment of their claims, the effect of the order of discontinuance was to deprive such creditors, by fraud, or any future remedy. The case of *Terhune v. Kean*, *supra*, involved, in most respects, the same question presented in *Howe v. Warren*, *supra*. Some of the same parties, the same assigned estate, and the same transaction were questioned. It involved the right of the county court, under an order of discontinuance, to order the property of the debtor turned over to a third party, whereby it was no longer subject to the claims of a creditor against an original debtor, and in that case we said (page 509, 155 Ill., and page 481, 40 N. E.): "We held in the *Howe* Case that, upon a discontinuance of an assignment proceeding under section 15 of the amendatory act (Rev. St. 1893, c. 10a) concerning voluntary assignments, the assigned estate, or so much of it as remained unadministered, should revert to the assignor, and still remain liable for the payment of his debts, just as it was at the date of the assignment; that upon the discontinuance the unadministered assets must be treated as though no assignment had been made, each creditor standing upon the same footing, of right, to proceed against it as it existed when the assignment was executed. The language of the statute, 'and in such case all parties shall be remitted to the same rights and duties existing at the date of the assignment, except so far as such estate shall have already been administered and disposed of,' admits of no other construction, as is shown by the opinion filed in that case." In both the *Howe* and *Terhune* Cases, *supra*, it was not the intention to pay the creditors in full. On the contrary, it is apparent, from a reading of the opinions in those cases, it was intended to prefer some creditors to others. The funds of the estate were used to effect such settlement. This was a fraud upon the rights of other creditors who received no payments. In each of those cases,

also, the property was not returned to the assignor, leaving it subject to his debts, but was turned over to a third person. In the case of *Bank v. Walker*, supra, the bank was the creditor for about \$10,500, and agreed with the president of the insolvent concern, after ascertaining the value of the assets, to pay 40 cents on the dollar on all the other claims, whereby, as the bank computed, it would receive its indebtedness in full. This proposition was made to creditors, and by them accepted, apparently without knowledge of the fact that the bank, as one creditor, was securing payment of its claim in full. The county court, upon proper showing, entered an order of discontinuance, directing the assignee to turn over the assets to such person or persons as the debtor might direct. The bank controlled the direction as to whom the assets should be paid, and also such assets for its own benefit. The result of this was the payment in full of one creditor to the detriment of others, and the disposition of all the assets of the insolvent debtor in such a manner as to preclude creditors from any further remedy. That case has not the features presented by this record. In this case appellant had no judgment, and, if the property had remained in the hands of the assignee, appellant would have been compelled to have shared pro rata with all other creditors having legal claims. The situation, after the order of discontinuance by the county court, was that all such claims were fully paid, and instead thereof a chattel mortgage was placed upon the property. It still remained subject to the same equities, rights, and remedies of appellant, and in the control, ownership, and possession of appellees. In the absence of any fraud, therefore, and there having been a compliance with the terms of the statute above mentioned, it was proper for the county court to enter an order of discontinuance, and the judgment of the appellate court affirming the order of the county court of Cook county is affirmed. Judgment affirmed.

(178 Ill. 142)

ELDER v. CHAPMAN.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

SALE OF LAND—RESCISSION—DAMAGES—GAMBLING CONTRACTS.

1. Where a buyer contracts for the purchase of, and pays part of the consideration for, land for which a good title is to be furnished, he may recover the consideration so paid, if the seller declares that he cannot furnish a good title, and rescinds the contract.

2. A syndicate was formed for the purchase of certain lots under an agreement providing that there should be as many shareholders as lots; that, after all the shares had been sold, the lots should be assigned to the shareholders under the direction of a board of directors, elected by the shareholders; that the directors should receive bids for the choice of lots, the highest bidder to make his choice; that bids should then be received for the choice of lots remaining unselected, until there appeared to be no other choice, when the remaining share-

holders should draw "by lot" for the remaining unselected lots. *Held*, that such agreement was not a gambling contract, under Cr. Code, § 180 (Hurd's Rev. St. 1895), prohibiting a disposition of property to be made dependent upon any chance by dice, lot, or other gambling device, since the lots to be so distributed, being of equal value, the joint owners might determine "by lot" which lot should go to each.

Appeal from appellate court, First district. Action by George W. Elder against Simcoe Chapman to recover a partial payment on a purchase of land. From a judgment of the appellate court (70 Ill. App. 288) affirming a judgment of the circuit court in favor of defendant, plaintiff appeals. Reversed.

Flower, Smith & Musgrave and E. L. Waugh, for appellant. H. Stuart Derby (Edward S. Elliott, of counsel), for appellee.

PHILLIPS, J. This is an appeal from a judgment of the appellate court for the First district affirming the judgment of the circuit court of Cook county. The question involved in this record is whether or not the contract between the plaintiff and the defendant was void as a gambling contract, by virtue of the provisions for the distribution of the lots contained in the proposed syndicate agreement annexed thereto, and made a part thereof. The contract referred to recites the receipt by appellee from appellant of \$3,000 as part payment towards the purchase of blocks 5 and 6 of a certain subdivision of land, containing 96 lots, bargained by appellee to be sold to appellant for \$33,000, which said \$3,000, the declaration avers, one "Robert S. Elder advanced and paid to the said Simcoe Chapman [appellee], for and on account of the plaintiff [appellant], * * * by way of commissions or services, or in some manner satisfactory to the said Chapman; which said \$3,000 said Simcoe Chapman, in and by said last-mentioned agreement, duly acknowledged the receipt of from this plaintiff, and for the repayment of which to the said Robert S. Elder he then and there became duly obligated to the said Robert S. Elder." The contract further provided that appellant should act as trustee for as many shareholders as there were lots (96), in a syndicate to be formed for the purchase of the lots in accordance with the terms of a form of certificate to be given to each shareholder, thereto attached, and made a part of the contract, and that the appellee should accept notes and trust deeds made by future shareholders in the syndicate, in part payment of the said contract price, and the balance in cash upon the delivery of warranty deeds. The form of certificate provided for and made a part of the contract first recites the receipt of \$50 from a person whose name is left blank, and is called "the subscriber," as the "first payment for one share of stock in the syndicate formed for the purchase and development" of the said lots, and then proceeds as follows: "This receipt is given on the following conditions, which the

¹ Rehearing denied December 9, 1898.

said subscriber hereby accepts: The said fifty (\$50) dollars payment is made for the purpose of obtaining a contract with the owner of said premises by G. W. Elder, as trustee for the holders of this and ninety-five (95) other shares of stock in said syndicate. Each share is of the value of four hundred (\$400) dollars, and entitles the holder thereof to receive a good and sufficient warranty deed and a merchantable abstract to one lot in the subdivision of said premises, upon the fulfillment of each and every of the conditions herein specified. Said subscriber agrees to further pay the sum of three hundred and fifty (\$350) dollars, less one ninety-sixth ($\frac{1}{96}$) part of the profits derived by sale of choice of lots as hereinafter provided, in the manner following: The sum of fifty (\$50) dollars when all of said shares are subscribed for, and the balance on delivery of warranty deed, or in substantially three equal payments, payable in one, two, and three years after February 16, 1891, said deferred payments to be secured by trust deed on the lot assigned and conveyed to said shareholder. The assigning of lots shall be under the direction of a board of directors, who shall be elected by the shareholders. Each share shall constitute one vote, and may be voted by the holder of said share, or his proxy. Said directors shall notify each of said ninety-six (96) shareholders of the time and place for the assigning of said lots, said notice to be deposited in the post office of the city of Chicago, with postage prepaid, at least five days before the date of the meeting for the assignment of said lots. At said meeting bids will be received from said shareholders for choice of lots. The highest bidder, in every case, shall immediately select his choice of said lots. Bids will be received for choice of the lots remaining unselected, until there appears to be no further choice, when the remaining shareholders will draw by lot from the remaining unselected lots. Upon the selection of a lot by a shareholder, said shareholder shall immediately pay one-fourth of the amount he has bid for choice, in cash. The remaining three-fourths of said amount shall be paid in cash upon delivery of the warranty deed to the lot so selected by said shareholder, or may be divided into substantially three equal payments, consolidated with the deferred payments above mentioned, and all be secured as said deferred payments first above mentioned. No one shall originally subscribe for more than five shares of stock in this syndicate without the consent of the holders of two-thirds of the shares at that time subscribed for. Said subscriber shall receive a warranty deed to the lots selected by him, upon the fulfillment of the conditions hereinbefore mentioned, ten days after the assignment of said lots as aforesaid. On failure of said subscriber to fulfill each and every of the conditions hereinbefore mentioned at the time and in the manner herein mentioned (time being the essence of this certificate),

this share of stock in said syndicate shall be forfeited."

The record discloses a plat of said lots, with a valuation of each lot marked thereon, ranging from \$350 to \$1,550, and also a bill rendered by R. S. Elder to the appellee, bearing the same date as said contract, February 16, 1891, and receipted by said R. S. Elder, as follows: "To commissions on sale of blocks five (5) and six (6) in North Chicago Lawn, to G. W. Elder, \$3,000. Received payment by contract to G. W. Elder of even date herewith." The record also discloses a contract dated December 1, 1890, between the appellee and said R. S. Elder, constituting the latter appellee's sole agent for the sale of said lots at the prices named in said plat, and providing for various other matters not pertinent to the issue raised by this appeal; and it also discloses a contract between the two Elders, bearing the same date as that between the parties to this suit, concerning the same property, and providing that R. S. Elder should make the advance payment on the said contract between appellee and appellant, and for a division between themselves of the profits to be realized out of the syndicate transaction; all of which may be said to be merely preliminary to and explanatory of the circumstances and surroundings attendant upon the making of the contract sued upon.

It is averred in the declaration that Robert S. Elder was the agent and broker for the appellee, and that the foregoing agreement was entered into for the sale of the property to the plaintiff, and thereupon the \$3,000 for commissions to Robert S. Elder was credited on the account of plaintiff for the purchase money. It is further averred that appellee did not own the premises, and could not furnish good and sufficient warranty deeds and a merchantable abstract, but declared his inability to do so, and on or about the 26th day of August, 1891, revoked the right, power, and authority granted in the agreement, and withdrew from the market and withheld from sale all the unsold lots in the subdivision mentioned in the agreement, and that notice of rescission was directed and mailed to the appellant. It is further averred that appellant demanded of appellee the \$3,000.

After the proof of the signatures to the agreement, appellant offered in evidence the foregoing contract, which was objected to by appellee's counsel as being a gambling contract. Appellant then made a specific offer of proof to sustain all the averments of his declaration, which was also objected to by appellee. Both objections were sustained, and to each ruling of the court in sustaining the objections the appellant's counsel excepted. Thereupon the court instructed the jury to find the issues for the defendant, to which appellant excepted. A verdict was returned as directed, and appellant entered his motion to set aside the verdict and for a new trial, which was overruled, and an exception taken, and judgment entered on the verdict. On ap-

peal to the appellate court for the First district that judgment was affirmed, and this appeal was prosecuted.

This contract having been made, and \$3,000 paid thereon, which was advanced by Robert S. Elder, and its receipt acknowledged, to recover which this suit is brought, the question is presented as to whether a buyer contracting for the purchase of a tract of land for which a warranty deed is to be made, and a good, merchantable abstract of title furnished, and a part of the consideration paid, may recover back the part of the consideration so paid, where the seller not only declares that he cannot furnish a good title, nor a good, merchantable abstract, but also declares the contract rescinded. The right of the purchaser to recover the consideration so paid is clear. *Fox v. Kitton*, 19 Ill. 519; *Chamber of Commerce v. Sollitt*, 43 Ill. 519; *Follansbee v. Adams*, 86 Ill. 13; *Kadish v. Young*, 108 Ill. 170; *Roebbing's Sons' Co. v. Lock-Stitch Fence Co.*, 130 Ill. 666, 22 N. E. 518. Section 180 of the Criminal Code (Hurd's Rev. St. 1895), in force at the time the contract was made and now, is as follows: "Whoever sets up or promotes any lottery for money, or by way of lottery disposes of any property of value, real or personal, or under pretense of a sale, gift or delivery of any other property, or any right, privilege or thing whatever, disposes of, or offers or attempts to dispose of, any real or personal property with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property, * * * shall for each offense be fined not exceeding \$2,000." Under the statute of this state, a lottery scheme, to come within its prohibition, must contemplate the distribution of prizes by chance, and there must be a chance to gain or lose by the drawing. *Dunn v. People*, 40 Ill. 465; *Thomas v. People*, 59 Ill. 160. Where parcels of land of very unequal value are sought to be distributed by lot, and where the drawing or lottery is to be had before any right or title is vested in the ticket holders to any part of the land, the transaction must be condemned as a lottery. *Wooden v. Schotwell*, 23 N. J. Law, 465; *Seldenbender v. Charles' Adm'rs*, 4 Serg. & R. 151. So, where a scheme provides for the sale of a tract of land in lots of unequal value, to be distributed among the purchasers by chance, by means of tickets of numbers bought at a fixed price greatly exceeding the value of the majority of the lots and much less than the value of other lots, such scheme would constitute a lottery, as it would be a mere device to attract adventurers, holding out the hope of great gain by mere chance. *Seldenbender v. Charles' Adm'rs*, 4 Serg. & R. 151. There is a broad distinction, however, between a division of property by lot and a lottery. A par-

tition of property into parts as nearly equal as possible, where owned by joint owners, may be made, and a determination had by lot as to which part shall go to each joint owner, severally, without coming within the prohibition of the statute. The joint owners being seised of the whole estate before partition, and the object of the lot being to assign to each his particular portion, the whole having been previously divided into parts as nearly of equal value as possible, such partition would not constitute a lottery. Under the contract offered in evidence, and under the offered evidence, it appears that when contracts were made for the sale of all the lots, each and every holder of a share became entitled, by reason of the contract, to an undivided $\frac{1}{96}$ part of the proceeds of the sale of the lots. So long as there was a choice of lots which could be sold at auction to the members, each member would receive his pro rata share of any sum arising from such sales of such choice lots. No auction was to take place until the whole 96 shares had been sold, and when that was accomplished the shareholders would clearly be tenants in common under this contract. So long as there was a choice, the sales were to be made, and the proceeds of the sale divided. When there was no longer any choice, there could be no difference in value. If there was a difference in value, there would be a choice, and no distribution by chance was to take place so long as there was a choice, and hence lots to be distributed were of equal value, and a partition was thus to be made. We hold the contract in question was not a gambling contract within the meaning of the statute, and the court erred in sustaining the objection to the offered evidence. The judgments of the appellate court for the First district and of the circuit court of Cook county are each reversed, and the cause is remanded. Reversed and remanded.

(176 Ill. 234)

HACKER et al. v. MUNROE et al.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

SALES — FRAUD — RESCISSION — REPLEVIN — INNOCENT PURCHASERS — FIXTURES —
APPEAL — REVIEW.

1. An instruction that the seller of machinery might rescind and replevy it if the buyer did not, at the time of the sale, intend to pay for it, is not misleading because of its omission to state the rights of intervening bona fide purchasers, where the right to recover was elsewhere stated to be subject to the condition that the property had not passed to such a purchaser.

2. A seller of goods fraudulently bought may rescind the sale for the fraud, and reclaim the goods from any person not an innocent purchaser for value.

3. A person cannot complain of an instruction as omitting a necessary qualification, where he has omitted the same qualification in one given at his own request.

4. Whether personal property is or is not fixtures depends on whether it was annexed to the

¹ Rehearing denied December 9, 1898.

reality or some thing appurtenant thereto, whether it was appropriate to the use to which that part of the reality was put, and the intention of the parties.

Appeal from appellate court, Second district.

Action by R. Munroe & Son against Christian Hacker and others. A judgment for plaintiffs was affirmed in the appellate court (61 Ill. App. 420), and defendants appealed. Affirmed.

This is a suit in replevin, begun on December 21, 1892, by the appellees against the appellants to recover the possession of three boilers, and the smokestacks, plates, valves, and attachments belonging thereto. The valves and attachments were not found. There was a count in trover in the declaration to recover the value of the articles not found. The pleas were non cepit, non detinet, property in defendants, and that the boilers, etc., were fixtures, belonging to real estate and buildings owned by defendants, and designed for a tin-plate mill and plant, and, therefore, not the subject of replevin. To the plea of property in defendants the plaintiffs replied that the property replevied was the property of plaintiffs, and not of defendants; and they also replied that the property replevied was not fixtures. Plea of not guilty was filed to the count in trover. Two trials were had. Upon the first trial verdict and judgment were in favor of the plaintiffs. Upon appeal to the appellate court the judgment was reversed, and the cause was remanded, as will be seen by reference to the case of *Hacker v. Munroe*, 56 Ill. App. 532. Upon the remandment of the cause to the circuit court it was redocketed for trial, and tried a second time. Upon the second trial the jury found the issues in favor of the plaintiffs, the present appellees, on the counts in replevin, and assessed their damages at one cent; and they also found the defendants guilty of withholding the goods named in the trover count, and assessed the damages at \$180. Motion for new trial was overruled, and judgment was rendered upon the verdict and for costs against defendants. An appeal was taken to the appellate court from this second judgment, and the judgment has been affirmed, as will appear by reference to the case of *Hacker v. Munroe*, 61 Ill. App. 420. The present appeal is prosecuted from such judgment of affirmation.

The appellees made the boilers and attachments at their factory in Pennsylvania, and sold and delivered them to the Lewis Steel-Sheet & Tin-Plate Company, an Illinois corporation, engaged in building a tin-plate and steel-sheet plant in Joliet, Ill. D. Trevor Lewis held an official position in this company, and in July, 1891, went to the office of appellees in Pittsburg for the purpose of buying boilers for the mill to be erected in Joliet. In August, 1891, J. Davis Lewis, president of the company, had a conversa-

tion with R. Munroe, Jr., one of the appellees, and there closed the contract for the boilers. By the terms of the contract the company was to pay \$1,261 cash down, and give a note for \$1,700. On October 26, 1891, the boilers and attachments, etc., were shipped on board the cars to said Lewis Steel-Sheet & Tin-Plate Company at Joliet. Although \$1,261 was to be paid down, nothing had been paid when the boilers reached Joliet. The company had no money to pay for the boilers. Nobody was at Joliet to give the note for \$1,700. The company was insolvent, and unable to pay the freight on the boilers and attachments. Some property owners in Joliet, interested in the establishment of the tin-plate mill upon and near their property, made an agreement with the tin-plate company and the Lewises, by the terms of which the Lewises agreed to bring to Joliet a corporation having a paid-up capital stock of not less than \$500,000 and to erect upon 20 acres of land, offered by the property owners, a mill for the manufacture of tin plate and sheet steel; and said property owners agreed to donate said 20 acres of land to be deeded to the said Lewises, but the deed to be held in escrow until the completion of the said mill. By the terms of said agreement said property owners also agreed to pay to the said Lewises the sum of \$20,000, to be expended for the benefit of the plant. The original agreement thus referred to was made on February 24, 1891. A supplemental agreement was entered into between the tin-plate company and J. Davis Lewis, and Nathaniel D. Lewis, of the first part, and said property owners, including one Thomas M. Creevy, of the second part, which supplemental agreement was dated July 2, 1891. By the terms of the latter agreement it was recited that the landowners feared that said parties of the first part would be unable to comply with the terms of their contract, and it was therein agreed that a part of the capital stock of said company should be placed in the hands of a trustee to secure the performance of said contract; and the property owners thereby agreed to pay over within a certain time the unpaid portion of said sum of \$20,000 towards the completion of said plant, and to convey 10 acres of land to a trustee, named Speer, until the terms of the contract should be performed. When the boilers arrived in Joliet, said Creevy, one of said property owners, who was in possession of block 18, upon which the erection of the mill had been begun, was notified by the railroad company to take the boilers; and thereupon he paid the freight out of his own pocket, and placed the boilers on blocking, made of timbers, some 14 inches higher than the walls where the legs of the boilers would eventually rest, but said boilers were in no way attached to any part of the boiler house or to any part of the brick walls thereof. Creevy testified that he took the boilers, and

placed them on the land, for the purpose of saving them for the appellees, as appellees had received no pay for them. Some arrangement was afterwards made in consequence of the failure of the tin-plate company to erect the mill, by the terms of which the real estate in question was transferred to the wife of one of the Lewises, in trust for her brother and father, the brother-in-law and father-in-law of one of the Lewises, who bought the boilers from the appellees. No actual transfer of the boilers themselves and the attachments thereto was ever made to Mrs. Lewis. One of the property owners interested in the property where the tin-plate mill was to be erected, and whose name was Zarley, had, prior to the organization of the tin-plate company, contracted to sell the land turned by him into the common pool, and conveyed to Speer, as trustee, to the appellants herein. Such contract of sale from Zarley to the appellants was of record. Appellants filed a bill for the specific performance of the contract, and obtained a decree requiring Zarley to convey the premises to them, and he had conveyed the premises to them. The title of Mrs. Lewis was junior in right to this claim of the appellants, but thereafter Mrs. Lewis and her husband conveyed by deed whatever interest they had to the appellants. There is no evidence, however, that any transfer of any kind was made of the boilers and attachments to the appellants.

George S. House, for appellants. J. W. D'Arcy and El. Meers, for appellees.

MAGRUDER, J. (after stating the facts).

1. Appellees claim that the Lewis Steel-Sheet & Tin-Plate Company, through its officers, procured the purchase of the boilers, smokestacks, plates, and attachments by fraudulent representations, knowing the company to be insolvent, and without any intention of paying for the same. They furthermore contend that by reason of such fraud the sale was void, and no title passed to the tin-plate company, and that, therefore, they had the right to rescind the sale, and bring replevin for the possession of the property. Accordingly, upon August 19, 1892, written notice was served upon the company by the appellees that they rescinded the sale of the property, and claimed to be the owners thereof.

The first question is as to the character of the sale. Was the sale so fraudulent that the appellees had the right to rescind it, and bring this action of replevin? This question was submitted to the jury by instructions, asked by both parties to this controversy, and given on behalf of both parties. In addition to such instructions, the following interrogatory was submitted to the jury at the request of the appellants, and the following answer was made by the jury thereto: "First question: Did the Lewis Steel-Sheet & Tin-

Plate Company, or its officers or agents, at the time of the making and executing of the contract of sale of the boilers, boiler attachments, and fixtures, of date August 20, 1891, in evidence in this case, intend not to pay said R. Munroe & Son for the same? Answer: They did intend not to pay said R. Munroe & Son for the same." There was evidence tending to show that the officers of the tin-plate company did make false and fraudulent representations in order to obtain the goods in question. They reported that the tin-plate company had a paid-up capital stock of \$500,000, when such was not the fact. They reported that the company had on deposit in banks in Joliet the sum of \$25,000, when they had no deposit whatever in such banks. Whether or not the tin-plate company obtained the goods with the intention not to pay for them was a question of fact to be determined by the jury from the evidence and from all the circumstances in the case. The jury and the lower courts have found this question of fact against appellants, and therefore we are precluded from considering it.

2. The next question in the case is whether or not the appellants were bona fide purchasers for value of the property in question from the original vendee, the tin-plate company, or those holding under such company, without notice of the fraudulent character of the sale, and of the rights of the appellees arising out of the rescission of the sale. This also was a question of fact, which was submitted to the jury by instructions asked by and given for both parties. In addition to such instructions, the following special interrogatories were submitted, at the request of the appellants, to the jury: "Second question: At and just before the service of the writ of replevin in this case, were the defendants in this case the bona fide purchasers for value of the boilers, boiler attachments, and fixtures in controversy in this case, and entitled to the possession thereof? Answer: No. Third question: At and just before the service of the writ of replevin herein, were the defendants in the actual possession of the boilers, boiler attachments, and fixtures in controversy in this case under a bona fide purchase for value from some person other than the plaintiffs in this case? Answer: No." The judgment of the circuit court, based upon the verdict thus rendered by the jury, and the judgment of the appellate court affirming such judgment of the circuit court, are conclusive upon us as to the second question of fact.

3. A third question was submitted to the jury by the instructions given for both parties, and that question was whether the property replevied was attached to the real estate in such a way as to be a part thereof, and so as to pass by the deed of the real estate itself. This question also has been found by the verdict of the jury and by the judgment of the lower courts against the appellants.

What has already been said is sufficient to dispose of the present case, and necessarily leads to the affirmance of the judgment of the appellate court. But we will proceed to notice some of the assignments of error made on behalf of the appellants, so far as they are urged upon our attention by appellants' counsel in his brief. It is not claimed by counsel that the court below committed any error in the admission or rejection of evidence. It is urged, however, that some of the instructions given by the court below were erroneous. The second instruction given for the appellees is complained of. That instruction is as follows: "If you believe from the evidence that at the time of the sale of the boilers and fittings in question by the plaintiffs to the Lewis Steel-Sheet & Tin-Plate Company through its officers, the said Lewis Steel-Sheet & Tin-Plate Company, through its officers, had no intention or purpose of ever paying for such boilers and fittings, then this would constitute such fraud on the plaintiffs as would give them the right, under the law, to rescind such contract of sale of such boilers and fittings; and in determining as to whether the Lewis Steel-Sheet & Tin-Plate Company did or did not, at the time of the purchase of said boilers and fittings, intend to pay for them, you may take into consideration the statements, if any, or the officers of such company, made by them, or either of them, to the seller, at or before the time of said sale, as to its financial standing and ability to pay the purchase price therefor, and all other facts and circumstances disclosed on the trial." The objection made to this instruction is, that it omits all consideration of a transfer of the property to a third party, for value, before the vendor attempted to rescind the sale. It is true that the instruction omits any reference to the question whether or not the appellants were bona fide purchasers for value of the property in question. But the jury were expressly told in the third, ninth, and tenth instructions given for the appellees, and in instructions 17 and 18 given for the appellants, that the right of the appellees to rescind the contract of sale and reclaim the property was conditioned upon the finding by the jury that the property had not passed into the possession of a purchaser in good faith, for value, before the same was replevied. In view of what was thus stated in other instructions, the jury could not have been misled by the omission complained of in the second instruction. All the instructions, taken together, must be considered as one charge.

Counsel for appellants also complains of the third instruction given for appellees. That instruction is as follows: "If you believe from the evidence that at or before the time of the bargain and sale of the boilers and fittings in question in this case by the plaintiffs, J. Davis Lewis and D. Trevor Lewis were officers of the Lewis Steel-Sheet &

Tin-Plate Company, and if you further believe from the evidence that for the purpose of inducing the plaintiffs to make a sale of such boilers and fittings, the said J. Davis Lewis and D. Trevor Lewis made false and fraudulent representations of the financial ability and responsibility of the said Lewis Steel-Sheet & Tin-Plate Company, and if you further believe from the evidence that the plaintiffs believed and relied upon the representations of the said officers, and were deceived thereby, and were thereby induced to make shipment of the boilers and fittings in question, and that said officers then had, and acted with, the fraudulent intent and purpose that said boilers and fittings should not be paid for, then the plaintiffs would be entitled to rescind such contract of sale, and to reclaim the said boilers and fittings from any one not an innocent purchaser of the same for value, unless the jury should believe from the evidence that the said boilers and fittings had become part of the real estate, before plaintiffs attempted to reclaim the same by replevying them in this case." It is said, in criticism of this instruction, that it requires the purchaser from the fraudulent vendee merely to have knowledge of the fraud practiced by the vendee in the purchase of the goods from the original vendor. It is said that, even if the purchaser from the fraudulent vendee knew of the fraudulent character of the purchase, the possession by the fraudulent vendee would justify the purchaser in buying the property. The contention of counsel for appellants is that the sale from the appellees to the tin-plate company, even though fraudulent as claimed, was not void, but voidable, and that whether it should be set aside depended altogether upon the exercise by the appellees of their election to rescind the sale. Counsel says that knowledge must be brought home to the purchaser from the fraudulent vendee of the election of the original vendor to rescind the sale, and that the property cannot be reached in the hands of such purchaser until notice is brought home to him of the exercise, by the original vendor, of his right to rescind the sale. Without entering into any discussion as to the soundness of this contention, it is sufficient to say that, if it be admitted to be sound, the evidence does show the giving of the notice which counsel claims to have been necessary.

Before the appellants came into possession of the property in question, the agent of the appellees informed the agent and attorney of the appellants that he had served a written notice upon the tin-plate company, and upon J. Davis Lewis, the president thereof, rescinding the sale, and claiming the ownership of the property. Under the law as laid down by this court, the instruction is correct, so far as it states that plaintiffs would be entitled to reclaim the boilers and fittings from any one not an innocent purchaser of the same for value. In *Henshaw v. Bryant*, 4 Scam. 97, we held it to be a rule, clearly

deducible from the authorities, "that where a person, who knows himself to be insolvent, by means of fraudulent pretenses or representations obtains possession of goods under a pretense of purchase with the intention not to pay for them, but with the design to cheat the vendor out of them, a court of chancery will set aside the sale, and order a return of the goods, if they have not passed into the hands of a bona fide purchaser; or the vendor may bring replevin or trover for them." In *Patton v. Campbell*, 70 Ill. 72, we again said: "We understand the rule to be that if a party, knowing himself to be insolvent, or in failing circumstances, by means of fraudulent pretenses or representations purchases goods with the intention not to pay for them, but with the design to cheat the vendor out of his goods, such facts would warrant the vendor in rescinding the contract for fraud, and would justify him in recovering possession of the property by replevin, where the goods had not in good faith passed into the hands of third parties." In *Schweizer v. Tracy*, 76 Ill. 345, where the facts showed a fraudulent purchase of goods from certain wholesale dealers in clothing, named Mack, Stadler & Co., and executions were levied upon them while the goods remained in the hands of a fraudulent vendee, we said: "Had the vendee, before the reclaiming of the goods by Mack, Stadler & Co., sold them to an innocent purchaser for value, no doubt, under the decisions of this court, the purchaser would have acquired a valid title to the goods." See, also, *Jennings v. Gage*, 13 Ill. 610; *Railroad Co. v. Phillips*, 60 Ill. 190; *Young v. Bradley*, 68 Ill. 553; *Gray v. St. John*, 35 Ill. 222; *Bowen v. Schuler*, 41 Ill. 192; *Ryan v. Brant*, 42 Ill. 78; *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024.

Counsel for appellants criticises the fourth instruction given on behalf of the appellees. That instruction is as follows: "The court instructs the jury that one of the material issues of this case is whether the boilers and fittings in question passed by deed of the real estate to the defendants as fixtures to the real estate, or were, at the time of the execution and delivery of such deeds, personal property only. If the jury believe from the evidence in this case, under the instructions given you, that the boilers and fittings in question were not so attached to the said real estate as to become fixtures thereto, but were personal property only, then the same did not pass by conveyance of the real estate." This instruction merely states that the boilers and fittings would not pass by a deed conveying real estate, unless they were attached to the real estate so as to become fixtures. The instruction does not assume to say that the title to the personal property may not have passed by delivery thereof, independently of the conveyance by deed. A defendant has no right to complain of error in an instruction given for the plaintiff when like error ap-

pears in the instructions given at the defendant's request. *Coal Co. v. Haennl*, 146 Ill. 614, 35 N. E. 162. If, therefore, the fourth instruction is erroneous, in holding that personal property would not pass by the deed, unless it was attached to the real estate so as to become a fixture thereof, appellants cannot complain of such error, because they embodied the same idea in instructions asked by them and given for them. Instruction No. 20, asked by the appellants, and given for them, is as follows: "Property which has been attached to and become a part of real estate is not the subject of replevin; and if the jury believe, from the evidence in this case, that at the time of the issue and service of the writ of replevin herein, December 21, 1892, the defendants were the owners and in the actual possession of block 18, * * * and that prior to that time the property in controversy, or any part thereof, had become attached to and made a part of such real estate, then, as to such property so attached and made a part of the real estate, the jury will find in favor of the defendants." The same requirement—that the jury should find whether or not the property in question was attached to the real estate—is embodied in instructions 22, 24, 25, and 26 given for the appellants. In none of the deeds or instruments in writing brought to our attention in the case does any specific intention of the parties appear as to whether the property in question should be regarded as personalty or as real estate. The books lay down the rule that in such cases the effort of the court will always be to ascertain the intention of the parties, and to give it effect. Where no specific intention is apparent, such property as that here in controversy will pass or not, as between grantor and grantee, according as the same is or is not in law part of the realty. *Ewell*, *Fixt.* pp. 292, 294, 295, 310. Here the court instructed the jury that in determining the character of the property in controversy as to whether the same was fixtures or not the following tests should be applied to the evidence: First. Whether the boilers and fittings in question were actually annexed to the realty, or something appurtenant thereto. Second. Their application to the use or purpose to which that part of the realty where they were situated, or with which they were connected, was appropriated. Third. The intention of the parties, who placed the said boilers and fittings where they were situated, when taken by the plaintiffs in this suit, as to whether they were to be permanent accessions to the freehold or not. *Ewell*, *Fixt.* p. 293. This instruction presented to the jury the tests which the law requires in determining the question submitted to them. Counsel for appellants objects to the sixth instruction given for the appellees, upon the ground that it omits to call the attention of the jury to the question whether or not the property had passed to a purchaser in good faith. But as this idea was embodied

in so many of the other instructions given on both sides, the defect could have caused appellants no injury.

The objection made to the tenth instruction given for the appellees is substantially the same as the objection made to the third instruction already considered; and what has been said in reference to the third instruction disposes of the objection made to the tenth.

Having thus carefully considered the grounds for reversal set up by counsel for appellants in his brief, we have come to the conclusion that we ought not to disturb the judgments of the courts below. Accordingly, the judgment of the appellate court is affirmed. Judgment affirmed.

CARTWRIGHT, J., having heard this case in the appellate court, took no part in its decision here.

(176 Ill. 100)

PIONEER FIREPROOF CONSTRUCTION CO. v. HANSEN.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

MASTER AND SERVANT—INDEPENDENT CONTRACTORS—LIABILITY—ASSUMPTION OF RISK—EVIDENCE.

1. In an action against two defendants, the directing of the jury to find one of them not guilty is waived by the other, unless objected to, and an exception taken.

2. A subcontractor is liable for the negligent acts of servants of the contractor in hoisting material to be used by the subcontractor, since in doing such acts they are the servants of the subcontractor.

3. The power to discharge is the test of the relation of master and servant.

4. A contract between a building contractor and a subcontractor for filling in the floors and partitions with fireproof material provided that the latter should sufficiently finish, under the directions of the architects, acting as the agents of the contractor, all the work specified, and that they should allow the architects and all persons appointed by the architects to visit and inspect the work during its progress. *Held*, that there was no reservation to the contractor of the power of controlling the work, or of controlling the men employed by the subcontractor, so as to create the relation of master and servant between the contractor and employes of the subcontractor.

5. In an action for the death of a servant, alleged to have been caused by the negligent acts of defendant's servants in allowing material to fall from the upper stories of a building to the alley, where intestate was hoisting the material, evidence that intestate knew that material had previously fallen into the alley is not admissible to show that he accepted the risk, unless it is also shown that he had notice that the material which had previously fallen had fallen by reason of the "negligent acts" of defendant's servants.

6. Evidence that a master engaged in working in the upper stories of a building being erected had erected a shed in the alley where his servant was working in guiding the hoisting of material, is not admissible to show that the servant accepted the risks of the occupation, knowing it to be dangerous, where it was not shown that he had knowledge of the alleged sufficiency of the shed as a protection from fall-

ing material, and especially where, as a matter of fact, it would be impossible for him to guide the hoisting from under a shed.

Appeal from appellate court, First district.

Action by Louise Hansen, as administratrix of the estate of Oscar Hansen, deceased, against the Pioneer Fireproof Construction Company and another. From a judgment of the appellate court (69 Ill. App. 659), affirming a judgment for plaintiff against the Pioneer Company, said company appeals. Affirmed.

This is an action for damages under the statute by Louise Hansen, as administratrix of the estate of her deceased husband, Oscar Hansen, against the George A. Fuller Company and the Pioneer Fireproof Construction Company. In February, 1892, the George A. Fuller Company was engaged, as general contractor, in erecting a 14-story building at 34 and 36 Washington street, Chicago. The deceased, Oscar Hansen, was an employé of the Fuller Company. The Pioneer Fireproof Construction Company was employed by the Fuller Company to fill in the floors and partitions with fireproof material, and to put on the tile roof. The building faces north. Along the eastern side is an alley, in which material for the building was unloaded, and from which, by means of a derrick placed on the roof, it was hauled up. Oscar Hansen was stationed in the alley, and, with another employé of the Fuller Company, controlled the hoisting operation from that point. The material was loaded on a platform, called a "boat," five feet wide by seven feet long. This "boat" was then fastened to the rope of the derrick, and hauled up, until it was level with the roof. Then the "boom," or arm of the derrick, over the end of which the hoisting rope passed, was raised, thus swinging the "boat" in until it was over the spot where it was to be landed, when it was lowered, and guided to its resting place. This was done by the employes of the Fuller Company. The tile was then unloaded by laborers paid by the fireproof company. At this particular time the roof was partly on, and the "boat" had to be pulled into a space left in the roof for a dormer window, the iron rafters slanting up on each side thereof. Running north and south on the floor, and near the slope of the roof, was a six-inch steam pipe. When the loaded "boat" was hauled in through this hole in the roof, it was lowered, and rested across this pipe. There was sufficient room where it could have been drawn in clear of this pipe. On the morning of February 15, 1892, a "boat" load was landed above and rested across the steam pipe. Thereupon the workmen began unloading the tile from the side nearest them, —the inner side,—and, after a certain quantity of tile had been removed from the inner side, the "boat" tilted across the steam pipe, and one or more of the tiles slipped off, striking the steep roof, and thence fell down into the alley. A piece of tile struck Hansen on

¹ Rehearing denied December 9, 1898.
52 N.E.—2

the head, and from the wound he died. At the close of the evidence the court instructed the jury to find the defendant the George A. Fuller Company not guilty. The case proceeded against the Pioneer Fireproof Construction Company, and the jury returned a verdict finding it guilty, and assessing the damages at \$5,000. Motion for a new trial was overruled, and judgment was entered on the verdict. This judgment has been affirmed by the appellate court, and the present appeal is prosecuted from such judgment of affirmance.

Burnham & Baldwin, for appellant. Sullivan & McArdle, for appellee.

MAGRUDER, J. (after stating the facts). The main contention of the appellant in this case is that the court refused to give the fourth instruction asked by the appellant. That instruction told the jury that if they believed from the evidence that the servants of the defendant the Pioneer Fireproof Construction Company were not left entirely free as to the manner of doing the work in which they were engaged at the time the accident occurred, but that the George A. Fuller Company, as general contractor, retained control over them, with the power to direct them in the manner of doing the particular work in which they were engaged, then the appellant was not guilty, and that the jury should so find by their verdict. The point made by the objection to the action of the court in refusing this instruction is that the relation of master and servant existed between the George A. Fuller Company and the employees or servants of the appellant. On the other hand, the contention of appellee is that the appellant was an independent contractor, and liable for the negligent acts of its servants. The action was a joint one for pecuniary damages to the wife and next of kin of Oscar Hansen, deceased, against the contractor the George A. Fuller Company, and the subcontractor, the Pioneer Fireproof Construction Company. The declaration charges that there was in course of erection a certain building on Washington street, in Chicago, adjoining a public alley, and that the defendants were engaged in unloading a "boat" of tiles on the fourteenth floor thereof while the deceased was in this public alley. The specific negligence charged in the declaration is that the defendants carelessly and negligently unloaded said tiles from the "boat" or platform, on which they were elevated to the fourteenth floor of the building, and that by reason of such negligence part of the tiles fell from the "boat" upon the deceased, causing his death. Pleas were filed by both defendants, and trial was had thereon. The Fuller Company offered no evidence, but at the close of the appellee's case made a motion that the court instruct the jury to find defendant the George A. Fuller Company not guilty. This motion was denied at that time,

but was renewed at the close of the appellant's testimony; and thereupon the court instructed the jury that there was no evidence to support a verdict of guilty against the defendant the George A. Fuller Company, and that the jury should find said defendant not guilty. The present appellant made no objection to this motion or instruction, and took no exception to the giving of the instruction. At the close of appellee's case, the appellant, the Pioneer Fireproof Construction Company, also moved the court to instruct the jury to return a verdict in its favor. This motion was denied, and was not again renewed at the close of appellant's testimony. No instructions were asked on behalf of the appellee, the plaintiff below. But the appellant asked the court to give, and the court did give, an instruction telling the jury that, in order to entitle the plaintiff below to recover damages from the defendant the Pioneer Fireproof Construction Company, she must prove by a preponderance of the evidence that said defendant was guilty of the negligence charged against it in the declaration, and at the same time must also prove that the deceased, Oscar Hansen, was himself free from any negligence which contributed directly to his death. The court also instructed the jury, at the request of appellant, that, if they believed that the appellant was guilty of the negligence charged against it, and that the deceased was negligent in a manner directly contributing to the accident, then their verdict should be in favor of the appellant.

The George A. Fuller Company was the general contractor for the construction of the building, and a written contract was executed between the appellant, the Pioneer Fireproof Construction Company, as party of the first part, and the George A. Fuller Company, as party of the second part. By the terms of this contract the appellant was a subcontractor under the George A. Fuller Company for the purpose of filling in the floors and partitions with fireproof material, and putting on a tile roof. Such portions of this contract as are material will be stated hereafter.

If the servants of appellant were, under this written contract, the servants of the Fuller Company, so as to relieve appellant of liability, and cast the liability upon the Fuller Company, then it was error in the court below to instruct the jury to find for the Fuller Company, and thereby dismiss that company out of the case, which thereafter proceeded against the appellant alone. By allowing the motion of the Fuller Company for a direction to the jury to find it not guilty, the trial court so construed the contract in question as to hold that the servants of the appellant were not the servants of the Fuller Company. In other words, by dismissing the case as to the Fuller Company the trial court held that the relation of master and servant did not exist between

the Fuller Company and the servants of the appellant, but that the appellant was an independent contractor, liable for the negligent acts of its own servants. The appellant, by failing to object to the action of the court in instructing the jury to find the George A. Fuller Company not guilty, acquiesced in what the court did in that regard. If the appellant considered the instruction or ruling of the court dismissing the Fuller Company out of the case detrimental to its rights and interests, it should have saved an exception to the action of the court. *Wrecking Co. v. Dandell*, 143 Ill. 409, 82 N. E. 258.

There was no evidence in the case, so far as we have been able to discover, upon which to base the fourth instruction asked by the appellant. There is no proof in the record showing that any employé of the Fuller Company had anything to do with the unloading of the "boat" containing the tiles. The employés of the appellant took the tiles from the "boat," and stacked them up. The evidence tends to show that when these employés of the appellant stepped from the "boat" in carrying off a portion of the tiles, they tipped the "boat" in such a way as to cause the tiles remaining on the "boat" to slip off, and fall to the ground. It is true that the boom derrick, which was used for elevating the material, belonged to the Fuller Company, and was engaged in elevating the material not only for that company, but for all the subcontractors engaged in the construction of the building. So far as the servants of the Fuller Company hoisted appellant's tiles up to the roof of the building, where they were landed, they were ad hoc merely the servants and employés of appellant. Where one of the crew of a vessel assisted a stevedore to unload the vessel, he was, as to his negligence, held to be not the servant of the vesselman, but of the stevedore. *Murray v. Currie*, L. R. 6 C. P. 24.

Whether or not the appellant was an independent contractor, liable for the negligence of its own servants, or whether the relation of master and servant existed between the contractor, the George A. Fuller Company, and the employés of the appellant, depends upon the construction of the written contract executed between the appellant and the Fuller Company. The relation in which the appellant stood to the Fuller Company is to be determined by the terms of that contract. The contract being in writing, its construction is a matter of law. *Linnehan v. Rollins*, 137 Mass. 123. He is the master who has the choice, control, and direction of the servants. The master remains liable to strangers for the negligence of his servants, unless he abandons their control to the hirer. Control of servants does not exist, unless the hirer has the right to discharge them, and employ others in their places. The doctrine of respondeat superior is applicable where the person sought to be charged has the right to

control the action of the person committing the injury. It follows that the right to control the negligent servant is the test by which it is to be determined whether the relation of master and servant exists; and, inasmuch as the right to control involves the power to discharge, the relation of master and servant will not exist unless the power to discharge exists. *Shear. & R. Neg.* §§ 160, 162; 2 *Thomp. Neg.* p. 892, § 12; *City of Erie v. Caulkins*, 85 Pa. St. 247.

The first provision of the contract is that "the contractors shall and will well and sufficiently perform and finish, under the direction and to the satisfaction of Holabird & Roche, architects (acting as agents of said owners), all the work," etc., specified. In the event of any doubt or question arising, reference was to be made to the architects. By the fifth provision of the contract the contractors were required to permit the architects, and all persons appointed by the architects, to visit and inspect the work, or any part thereof, at all times and places, during the progress of the same. By the fourth provision the contractors were required, within 24 hours after receiving notice from the architects, to proceed to remove from the ground or building all material condemned by them, or to take down all portions of the work which the architects should condemn. The twelfth clause provides that, should the contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality, the owners were at liberty, after three days' notice, to provide such labor or material; and on the architects' certificate the owners were at liberty to terminate the contractor's employment and to employ any other person or persons to complete the work. It will be noticed that, by the terms of the contract, the Fuller Company is spoken of as owner, although it was merely a contractor, and the appellant is spoken of as contractor. The foregoing provisions of the contract are those upon which the appellant relies to establish the claimed relation of master and servant between the Fuller Company and the appellant, or its employés. It is contended by the appellant that these provisions of the contract show that the Fuller Company had such right to control as indicated the existence of the relation of master and servant. As no part of the material or work was condemned by the architects, and as there was no refusal by the appellant to supply a sufficiency of properly skilled workmen or materials, it is not perceived how the fourth and twelfth clauses of the contract above referred to have any application. It remains, therefore, only to consider the first and fifth provisions referred to. These provisions do nothing more than confer upon the contractor, the George A. Fuller Company, the right of inspection.

Where the contract merely reserves the right of inspection, there is no reservation of

the power to control the manner of doing the work. Where a contract provides that the work is to be performed under the direction and to the satisfaction of the architects, acting as agents of the owner, it gives the owner no power to control the contractor in the choice of his servants. Such a clause in the contract does not interfere with the right of the contractor to make his own selection. He who makes choice of an unskillful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or the want of care of the person employed. "The rule of respondeat superior does not apply, if the party employed to do the work, in the course of which the injury occurs, is a contractor pursuing an independent employment, and, by the terms of the contract, is free to exercise his own judgment, and discretion as to the means and appliances that he may see proper to employ to do the work, exclusive of the control and direction in this respect of the party for whom the work is being done." *Deford v. State*, 30 Md. 179; *Smith v. Traders' Exchange*, 91 Wis. 360, 64 N. W. 1041; *Kelly v. Mayor, etc.*, 11 N. Y. 435; *Reedie v. Railway Co.*, 4 Exch. 244; *Hobbit v. Railway Co.*, Id. 254. Where the owner or contractor furnishes the material to be used, and retains direction and control over the details of the work and the men employed, he is liable for negligence of the men employed. *Jefferson v. Jameson & Morse Co.*, 165 Ill. 138, 46 N. E. 272. There is nothing in the written contract between the Fuller Company and the appellant which indicates that the Fuller Company was to have direction and control over the details of the work to be done by the appellant, or over the men employed by the appellant. There is nothing in the terms of the contract which militates against the right of the appellant to select its own men, and to direct their labors, and to discharge them, if negligent in the performance of their work. We are, therefore, of the opinion that the court committed no error in refusing to give the fourth instruction asked by the appellant. It seems to be conceded that there was negligence in unloading the "boat" of tiles, and that such negligence contributed to the injury. The main contention of the appellant is that the Fuller Company, and not itself, was guilty of such negligence. The question in the case is not so much whether negligence was committed, and whether the deceased lost his life by reason of such negligence, as whether the Fuller Company or the appellant was responsible for the same. The instructions fairly submitted it to the jury to determine the question whether or not the appellant was at fault in this matter. Their verdict, and the judgments of the courts below, based upon that verdict, are conclusive of the matter so far as we are concerned. Nor does the contract bear any construction which authorizes a finding that the appellant was not an independent contractor, or that the relation of master and

servant existed between the Fuller Company and the appellant, or the servants of the latter.

It is claimed by the appellant that the court below erred in refusing to allow answers to be made by some of the witnesses to questions put to them in relation to the duty of the Fuller Company to put up gutter guards, and in relation to the erection of a shed in the alley by the appellant, and in relation to the previous falling of material in the alley. Appellant's counsel asked several of the witnesses if pieces of tiling had been falling from the top of the building into the alley previous to the time when the accident occurred. It is said that the Fuller Company failed to put gutter guards on the roof of the building, which would have prevented the tiling from slipping off, and that the appellant had erected a shed in the alley for the purpose of protecting the men from the falling tiles. The trial court refused to admit such offered testimony. The appellant did not propose to show that Hansen, the deceased, had any notice that tiling had theretofore fallen from the roof by reason of any negligent act on the part of appellant's servants; nor was it proposed to be shown that he had any knowledge of the alleged sufficiency of the shed erected to protect him from falling tiles. Indeed, it was his business to guide with a line the ascent of the "boat" or platform containing the tiles to the roof of the house, and it is difficult to see how he could so guide the "boat" or platform if he was under the shed in question. The object of the offered testimony was to show that the occupation of Hansen was a dangerous one, and that he knew of its danger, and that by continuing the work in the alley he assumed all the risks of the occupation in which he was engaged. We are satisfied with what the appellate court, in its opinion, says upon this subject: "If appellant had provided a place of safety, viz. a shed, for the protection of those working in the alley, and if the deceased at the time he was struck by the falling tile might properly, and consistently with the work he had to do, have been in this shed, and knew this, so that his exposure to danger from falling tiles was his voluntary act, and not necessitated by his employment, appellant would not have been liable for an accident to him, if he, despite its care, of his own volition, unnecessarily exposed himself to danger. Appellant did not offer to show this, although it did offer to show that it had erected a shed in the alley." "The law holds no one responsible for exposing himself to a danger of which he knew nothing, and of which he was not under obligation to inform himself. We must use ordinary care and prudence to avoid the ordinary and usual perils that beset us, but we are not bound to guard against those which we have no reason, under the circumstances, to suspect." *Beach, Contrib. Neg.* p. 38, § 12. The judgment of the appellate court is affirmed. Judgment affirmed.

(176 Ill. 635)

NORTH CHICAGO ST. R. CO. v. ANDERSON.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

EVIDENCE—PREPONDERANCE—CREDIBILITY—INSTRUCTIONS.

1. It is proper to instruct that the preponderance of the evidence does not necessarily depend on the greater number of witnesses testifying on the one side or the other.

2. Testimony of an interested witness is not to be discarded by the jury, though they may consider that he is interested, and determine whether or to what extent his interest has affected his testimony.

3. The fact that a witness has told an attorney of one of the parties what he will testify, while not, as matter of law, tending to impeach him, may, in connection with what happened at the interview, be considered by the jury.

4. Modification of an instruction that the fact of promising a witness pay for time lost while attending trial does not tend to impeach his credibility, by addition of the statement that this, together with the other facts in evidence, may be considered in determining the weight of his testimony, is not prejudicial.

Appeal from appellate court, First district.

Action by Rosalie J. Anderson against the North Chicago Street-Railroad Company. Judgment for plaintiff was affirmed by the appellate court (70 Ill. App. 336), and defendant again appeals. Affirmed.

John A. Rose (Francis A. Riddle, of counsel), for appellant. Richard Prendergast and Carleton N. Gary, for appellee.

BOGGS, J. This is an appeal from the judgment of the appellate court for the First district affirming a judgment rendered in the superior court of Cook county on the verdict of a jury in favor of the appellee, against the appellant company, in the sum of \$10,000. The action was in case, and the ground of recovery was alleged negligence on the part of the appellant company in conducting the movements of one of its trains of street cars on North Clark street, in the city of Chicago, whereby appellee sustained personal injuries.

At the close of all the evidence in the case, the court denied the motion of the appellant company to exclude the testimony, and to instruct the jury to return a verdict finding it not guilty. We have read the briefs of counsel for the respective parties, and heard and considered their arguments orally presented to the court, and have consulted the proofs as preserved in the record, and are clearly of the opinion the trial judge properly declined to direct a finding and verdict in favor of the appellant company, as a matter of law. The evidence tended to establish negligence, as charged, upon the part of the company, and that the appellee exercised ordinary care for her own safety on the occasion in question. An issue of fact thereupon arose, which it was the province of the jury to determine. The jury, the trial judge, and the appellate court having determined that

the appellee's case was supported by a preponderance of the evidence; and this court, upon a re-examination of the evidence, having determined that the evidence demanded the submission of the case to a jury, it would seem sufficient we should simply announce such to be our conclusion, without reciting the testimony upon which that conclusion is based.

The alleged improper conduct of counsel for appellee during the hearing in the trial court, and also the language and deportment of counsel during the course of his argument to the jury, are much criticised by counsel for appellant. We have considered these complaints so far as the alleged grounds thereof are disclosed by the record. We find that counsel for both parties were betrayed into the use of intemperate remarks. Counsel who represent the appellant in this court urge that the objectionable observations of their associate counsel in the trial court were indulged in because of the previous irritating conduct of counsel for the appellee, which overcame the patience of said associate counsel, and provoked a heated retort. The rights of parties demand, and the law awards, the largest and most liberal freedom of speech in the trial of causes consistent with justice and fairness and the orderly and decorous administration of the judicial functions of the court. The range of discussion is often necessarily wide, and it is difficult for the court at all times to restrain the zeal of counsel and confine the argument within strictly legitimate bounds. This delicate duty the trial judge who presided upon the hearing of this cause did not in the least seek to avoid, but vigorously and firmly exerted the powers vested in him by law to secure a fair and impartial trial of the cause, and to preserve proper order and decorum in his court. We are here concerned only with regard to the question whether injustice resulted to either of the litigants. The opportunity of the trial court for determining whether the irregularities of counsel for appellee had intervened to prevent the due and proper administration of justice in the cause was much superior to ours; and, upon the motion for new trial, he decided neither party had been thereby prejudiced. Acting upon the lights before us, we are inclined to accept that as the correct view.

The first instruction given on behalf of the appellee is not subject to the criticism preferred against it. The principle it announces is that the preponderance of the evidence is not necessarily to be determined by the greater number of witnesses testifying as to any specified subject of inquiry. The determination as to where the weight or preponderance of the evidence lies is not restricted to a mere enumeration of witnesses. A variety of considerations may be disclosed by the evidence which naturally and properly enter into, and which may lawfully control, the decision of the question.

¹ Rehearing denied December 9, 1898.

The criticism of the third instruction given for the appellee is that it charges the jury they must give to the testimony of the appellee as a witness some weight, notwithstanding she is interested in the result of the suit. We do not so understand the instruction. The direction of the instruction is, in substance, that the jury have no right to refuse to take the testimony of an interested witness into consideration, but that they may consider that such witness is interested, and determine whether or to what extent the testimony of the witness has been affected by his or her interest in the result of the suit. The discussion of this subject by counsel for the appellant leads them to announce the conclusion that the jury have the absolute right to "discard" the testimony of an interested witness. Our statute has removed the disability of interest, and the declared policy of our law is that a party to a suit or a party interested in the result thereof shall be allowed to testify on the hearing of the cause. It follows, a jury may not refuse to consider and weigh the testimony of a party or an interested witness, for that would be to nullify the statute, and deprive such parties or witnesses of a right accorded to them by the law of the land. They are competent witnesses, and their testimony is not to be "discarded" from consideration, but is to be received as other competent testimony. Its weight and value are questions for the jury, and may be found to be entitled to much, little, or no weight, and be treated accordingly.

The appellant company asked this instruction: "The mere fact that the witness has talked to an attorney of a party to this suit, and has told such attorney what the said witness would testify on this trial, does not of itself in any wise tend to impeach or discredit the testimony of such witness." The court refused to give the instruction as asked, but modified it by adding the following: "But such fact may be considered by the jury, together with all the other facts in evidence, in determining the weight of such testimony." For all the purposes of a jury trial, the jury are the sole judges of the credibility of witnesses, and of the weight and value of their testimony. The credibility of a witness, and the weight and value of his testimony, often involve consideration of a variety of facts and circumstances; such as the appearance of the witness, his demeanor while testifying, his frankness or candor, his feeling of hostility to either of the parties, or of undue friendliness to one or the other. His relations to either of the parties, his interest in the result of the suit, not only in a financial point of view, but his interest, if any there be, based upon bias or friendliness to either of the parties, or an undue willingness or desire to assist either of the parties, may be brought into the balance by the jury in their efforts to ascertain and declare the truth. It is perfectly proper for counsel to interview the witnesses in the case; and, while the law has no rule

to that effect, certainly, as a matter of fact, the mere circumstance that the witness had talked to the attorney of one of the parties, and had done no more than tell such attorney what his testimony would be, would not tend to impeach or discredit the testimony of such witness in the judgment of a reasonable juror, yet, as a matter of fact, the relations of a witness to one of the parties or to the counsel for one of the parties might be of such a character as to weaken, in the mind of a reasonable juror, the force of his statements as a witness. It has always been deemed proper to prove that a witness has talked to one of the parties about the case, or about what his testimony in the case would be; and we conceive it would be entirely proper to show that a witness has talked with an attorney representing one of the parties in a case. Whether what occurred during such interviews or in such conversations would tend to affect the weight of the testimony given by the witness is not a matter of law to be declared by the court in an instruction to the jury, but is purely a question of fact for the consideration of the jury, together with all other proof in the case. The modification of the instruction did not prejudice the cause of the appellant.

The same observation holds good as to instruction No. 23 asked by appellant, which was to the effect, "The fact that a witness has been promised pay for time lost while attending the trial of this case does not in any wise tend to impeach his credibility as a witness," and which the court modified by an addition advising the jury they might consider the fact that the witness had been promised pay, together with all the other facts in evidence, in determining the weight of the testimony of the witness.

Seventeen instructions were given on behalf of the appellant company. We have examined them, and find that they fairly and fully advised the jury as to the points of law involved in the case.

Whether the damages are excessive is a question of fact, upon which we are concluded by the judgment of the appellate court. The judgment appealed from is affirmed. Judgment affirmed.

(176 Ill. 288.)

GILBERT v. NATIONAL CASH-REGISTER CO.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

ACKNOWLEDGMENT — VALIDITY — CONDITIONAL SALE — RECORDING — NOTICE — EXECUTION — LIEN.

1. Where the caption of an acknowledgment omits the name of the county, but the officer signs himself as justice of the peace for a certain incorporated town, it is a valid acknowledgment, since the court will take notice of the county in which the town is located, and that the officer is a justice in that county.

2. Under 2 Starr & C. Ann. St. p. 1632, § 2, providing that, when acknowledgment is made

¹ Rehearing denied December 9, 1898.

by a resident, the justice shall certify that the instrument was "entered" by him, it will be presumed, where such certificate is made, that the person acknowledging the instrument was a resident.

3. An instrument was in the form of a letter directing the seller to ship to the buyer certain personalty on a promise to pay part in cash and part in notes. It reserved no lien. There were no words of conveyance. The buyer was to have possession, but the title was to remain in the seller until the notes should be paid. Held to be a conditional sale, and not a chattel mortgage, within 2 Starr & C. Ann. St. p. 1630, § 1, which provides that no conveyance of personalty, having the effect of a mortgage thereon, shall be valid against third persons, unless possession be given or the instrument recorded.

4. The recording of a conditional sale in the manner required for a chattel mortgage is not notice to third persons.

5. The execution creditor of a buyer can hold property taken under his levy from the latter's possession, as against the seller in a conditional sale.

Appeal from appellate court, First district.

Action by the National Cash-Register Company against James H. Gilbert. There was a judgment for complainant, and defendant appeals. Reversed.

This suit was brought by appellee before William S. Everett, a justice of the peace, to recover from appellant the value of a cash register. Appellee, through its agent, took an order for a cash register from one W. H. Luther, which order was dated May 12, 1891, and is as follows: "Chicago, 5/12, 1891. To the National Cash-Register Co., Dayton, Ohio—Gentlemen: Please ship to me at my place of business, No. 106 Twenty-Second street, as soon as practicable, one of your No. 9 registers, as per your illustrated catalogue; said register to be equipped with all the latest improvements; cabinet to be brass B; denominations of keys to be on blank key indicator, 'No Sale.' On the fulfillment of above, I agree to pay you \$175.00, viz. \$25.00 cash, and give notes for the balance, due monthly, in equal sums of \$15.00 each; the undersigned to retain possession of said register until default be made in one or more of said payments, or until you shall feel unsafe or insecure in the premises, in either of which cases, at your option, the whole of said sums shall immediately become due, and you shall be entitled to such possession. In the meantime the title of said register shall remain in you, for the security of said payments, until the full amount is paid; and, in case the undersigned shall default in one or more of said payments, the undersigned hereby agrees to forfeit to said the National Cash-Register Company, as liquidated damages, all payments made on account of said register, and to at once restore to said company possession of said register. You to keep the register in repair for two years gratis. This contract covers all the agreements between the parties. W. H. Luther. [Seal.]" This order was signed May 12th. The register was thereafter built, and delivered June 12th. On June 29th the instrument was acknowledged, the certificate of acknowledgment being as follows: "State of

Illinois, — County—sa.: The mortgage was acknowledged before me by W. H. Luther, and entered by me this 29th day of June, A. D. 1891. Witness my hand and seal. Thomas Bradwell, Justice of the Peace, Town of South Chicago. [Seal.]" On June 30, 1891, this instrument was recorded in the recorder's office of Cook county, Illinois. On November 4, 1891, the cash register in question in this suit, with other property of Luther in his place of business on Twenty-Second street, in the city of Chicago, was levied upon by the appellant, as sheriff, under an execution duly issued out of the circuit court of Cook county upon a judgment recovered by one Matthews against said Luther; and later on, in November, 1891, the sheriff sold the property so levied upon, including the cash register, which brought \$50 at the sale. Appellee contends that said instrument is embraced within the statute as to chattel mortgages, and was recordable under the statute relating thereto, and that, by virtue of such record, appellant had notice of the lien of appellee, and, having seized and sold the register, is liable to appellee for the value thereof. The evidence shows that after the levy was made, and prior to the day of sale, one Kelsey, representing appellee, called upon the deputy sheriff, and informed him that there was a mortgage on the register. One Blood testified on behalf of appellee that on the day of the sale he showed the deputy sheriff and Edelstein, the purchaser at the sheriff's sale, the aforesaid instrument. The deputy sheriff testified that the instrument was not produced or shown to him at any time; that, on the day of sale, Blood said to him that he (Blood) could not produce the mortgage, because it was at appellee's office at Dayton, Ohio. On January 15, 1892, a judgment was rendered by the justice of the peace before whom the case was tried in favor of appellant (defendant below), from which appellee appealed to the circuit court, where, by agreement of the parties, a jury was waived, and the case tried by the court. The finding of the court being in favor of appellee, judgment was entered in favor of it, and against appellant, for \$175 and costs of suit, from which judgment an appeal was prosecuted to the appellate court. The appellate court has affirmed the judgment of the circuit court, and granted a certificate of importance. The present appeal is prosecuted from such judgment of affirmance.

Anson E. Meanor (Perry A. Hull, of counsel), for appellant. Albert H. Meads, for appellee.

MAGRUDER, J. (after stating the facts). This was a suit tried, by agreement, before the judge of the court below without a jury. No propositions were submitted to the court by the appellant to be held as law in the decision of the case. The instrument set forth in the statement of facts preceding this opinion was offered in evidence by the appellee, and was received in evidence by the court over the objection of appellant. The appel-

lant objected to the introduction in evidence of said instrument, and of the notes therein mentioned, "upon the ground that they were incompetent, immaterial, and irrelevant, and upon the ground that the instrument in question was not in any sense a mortgage, under the laws of Illinois, and upon the further ground that such instrument did not appear to have been acknowledged in Cook county." The only question in the case, presented for our consideration, is whether or not the trial court erred in admitting in evidence the instrument in question.

1. If the instrument introduced in evidence was a chattel mortgage, we should have no hesitancy in holding that it was properly acknowledged and recorded in accordance with the statute of this state in relation to chattel mortgages. It is said that the acknowledgment appended to the instrument contains no venue, and no information by which the county in which such acknowledgment was taken can be identified. It is true that the name of the county is omitted from the caption which precedes the acknowledgment. But the justice before whom the acknowledgment was taken signs his name, and designates himself as justice of the peace for the town of South Chicago. Circuit courts in Illinois will take judicial notice of the county in which an incorporated town is located. In *Higgins v. Bullock*, 66 Ill. 37, we decided that the court will take judicial notice of the names of the counties in this state. In *Kille v. Town of Yellowhead*, 80 Ill. 208, it was decided the court will take judicial notice of the number of a township. In *Thompson v. Haskell*, 21 Ill. 214, it was held that the court is presumed to know its own officers, and all public officers in civil affairs within its jurisdiction. In *Shattuck v. People*, 4 Scam. 477, an objection was made to a recognizance, that it did not appear of what county certain officers were justices, and we there said: "The circuit court, as a matter of convenience, takes cognizance of the fact who are justices of the peace for the county in which it is held." *Irving v. Brownell*, 11 Ill. 402; *Stout v. Slatery*, 12 Ill. 162. In *People v. Suppiger*, 103 Ill. 434, we held that this court will take judicial notice of the county in which an incorporated town is situated; saying therein: "This court will take judicial notice the town of Highland is situated in the county of Madison, a county under township organization." In view of these authorities, the court will take judicial notice of the fact that the town of South Chicago is in the county of Cook, and will also take judicial notice of the fact that Thomas Bradwell was a justice of the peace in the county of Cook. Therefore the mere omission of the name of the county in the caption does not invalidate the acknowledgment, because the county in which the acknowledgment was taken can be determined from the signature thereto. In *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 148, it was objected to a certificate of acknowl-

edgment that it was defective because it omitted in the caption the name of the county; but, inasmuch as the certificate of acknowledgment showed that it was taken before a clerk of the county court, who appended thereto his official seal, on which were delineated the words, "Will County Seal," it was held that the latter words were sufficient to indicate that the acknowledgment was taken in Will county.

It is also objected to the acknowledgment that it does not show the residence of W. H. Luther, the party who acknowledged the instrument in question. Section 2 of the chattel mortgage act provides that "such instruments shall be acknowledged before a justice of the peace of the town or precinct where the mortgagor resides." 2 Starr & C. Ann. St. p. 1632. The form of acknowledgment given in the same section provides that when the acknowledgment is made by a resident the justice shall state in his certificate, not only that the instrument was acknowledged before him, but that it was "entered" by him. The entry here referred to is the entry of a memorandum of the acknowledgment in his docket. The insertion of the words, "and entered by me," in the acknowledgment, is prima facie evidence that the proper entry thereof was made in the docket of the justice. *Schroder v. Keller*, 84 Ill. 46. In the acknowledgment in the present case, we find the words, "Acknowledged before me by W. H. Luther, and entered by me this 29th day of June, A. D. 1891." Inasmuch as the words "entered by me" are required to be inserted in the certificate when the acknowledgment is made by a resident, it will be presumed here that the justice did his duty, and that W. H. Luther was a resident of South Chicago, in Illinois. If, therefore, the instrument in question were such an instrument as is required to be recorded, under the chattel mortgage act of this state, it could not be said that it was not properly acknowledged and properly recorded.

2. But the question in the case which has given us most trouble is the question whether or not the instrument now under consideration is a chattel mortgage. Section 1 of the chattel mortgage act provides "that no mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interest of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage." 2 Starr & C. Ann. St. p. 1630. The instrument referred to in section 1 must be a mortgage, trust deed, or other conveyance of personal property which has the effect of

a mortgage or lien upon such property. It cannot be said of the instrument here in question that it is a conveyance of personal property, which has the effect of a mortgage or lien upon such property. By its terms, it reserves no lien. It is a direction to the appellee to ship to the signer of the instrument a certain cash register, and contains a promise that the signer, upon the shipping of the register, will pay a certain amount in cash, and give notes for the balance. There are in the instrument no words of actual transfer or conveyance from Luther to the National Cash-Register Company, but the instrument expressly provides that the title of the register shall remain in appellee until the full amount of the purchase money thereof is paid. It is true that the vendee, or signer of the instrument, was to retain the possession of the register, but the title thereof was to remain in the vendor. It seems to be settled by the weight of authority that "where, by the written contract of the parties, it is expressly provided that the title to the property shall remain in the vendor until the purchase money is fully paid, and there is no reservation of a lien, the transaction is a conditional sale, and not a mortgage." 6 Am. & Eng. Enc. Law (2d Ed.) p. 446. It is often difficult to determine whether a particular transaction constitutes a mortgage or a conditional sale. Ordinarily the question is to be determined by showing what the intention of the parties was in reference to the matter; and, when it is doubtful whether the transaction is a mortgage or a conditional sale, the courts are inclined to solve the doubt in favor of its being a mortgage. 5 Am. & Eng. Enc. Law (2d Ed.) p. 950; 6 Am. & Eng. Enc. Law (2d Ed.) p. 443. But the cases seem to hold that there is no doubt as to the character of the instrument, when by its terms personal property is delivered by the owner to another with the requirement that the title shall remain in the owner until the payment of the purchase price. In such case the transaction is uniformly held to be a conditional sale, and not a mortgage. In *Plummer v. Shirley*, 16 Ind. 380, where an instrument was given upon a sale and delivery of personal property, and provided that the ownership thereof was to remain exclusively vested in the vendor, and not in the vendee, until the latter had fully paid the purchase money, it was held that the parties intended a conditional sale, and not a mortgage. To the same effect are the following cases: *Sumner v. Woods*, 52 Ala. 94; *Bingham v. Vandegrift*, 98 Ala. 283, 9 South. 280; *Jowers v. Blandy*, 58 Ga. 379; *Nichols v. Ashton*, 155 Mass. 205, 29 N. E. 519; *McComb v. Donald's Adm'r*, 82 Va. 903, 5 S. E. 558; *McGinnis v. Savage*, 29 W. Va. 362, 1 S. E. 746; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100; *The Marina*, 19 Fed. 760; *Vasser v. Buxton*, 86 N. C. 335; *Frick v. Hilliard*, 95 N. C. 117. The authorities thus quoted from and referred to

lead us to the conclusion that the instrument here under consideration describes a transaction which is a conditional sale, and not a mortgage.

Inasmuch as the instrument is not a chattel mortgage, the mere fact that it was recorded in the manner in which a chattel mortgage is required to be recorded does not constitute notice to third persons. Even though the instrument was recorded, judgment creditors of W. H. Luther, or purchasers from him while he was in possession of the register, would not be postponed, in the assertion of their rights, to any claim of the appellee under such instrument. Webb, in his work on *Record of Title* (section 249), says "that conditional sales do not come within the general provisions of the recording acts, nor of those requiring the registry of title mortgages." *Manufacturing Co. v. Walker*, 22 Fla. 412, 1 South. 59. The learned author of the article on "Conditional Sales" in the *American and English Encyclopedia of Law* (2d Ed., vol. 6, p. 496), states the general holding of the authorities to be that conditional sales are not within the provisions of the statutes requiring title mortgages to be recorded. In this state it is only the instrument of conveyance, which has the effect of preserving a mortgage or lien on the property, that must be recorded. *Hervey v. Locomotive Works*, 93 U. S. 664. In *W. W. Kimball Co. v. Mellon*, supra, where it was held that a contract for the sale of personal property, in which it was agreed that the title of the property should remain in the vendor, and the possession in the vendee, until payment of the debt, was not a mortgage, but a conditional sale, it was held that such a contract cannot be filed as such, so as to be constructive notice under the recording acts. *McComb v. Donald's Adm'r*, supra. The cash register referred to in the record in this case was levied upon under an execution against W. H. Luther while it was in possession of the latter. We think that such execution creditor was entitled to hold the register under his levy, as against the appellee, claiming under the contract for a conditional sale hereinbefore referred to. In Illinois, "if a person agrees to sell to another a chattel on condition that the price should be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee, so as to clothe him with an apparent ownership, a bona fide purchaser or execution creditor of the latter is entitled to protection, as against the claim of the original vendor." *Harkness v. Russell*, 118 U. S. 678, 7 Sup. Ct. 51; *Brundage v. Camp*, 21 Ill. 330; *McCormick v. Hadden*, 37 Ill. 370; *Murch v. Wright*, 46 Ill. 487; *Railroad Co. v. Phillips*, 60 Ill. 190; *Lucas v. Campbell*, 88 Ill. 447; *Van Duzor v. Allen*, 90 Ill. 499. Whatever may be the rule in other jurisdictions, it is well settled in this state that the owner of personal property will not be permitted to sell it, either absolutely or condi-

tionally, and still continue in possession of it. The party in possession of personal property is presumed to be the owner of it,—possession being one of the strongest evidences of title to personal property. "To suffer, without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons." *Hervey v. Locomotive Works*, supra. In *Van Duzor v. Allen*, supra, we held that a bona fide creditor, who, under a judgment and execution, acquires a lien on property while in the actual possession of a vendee by delivery from the vendor, or taken and held by his consent, occupies the same position in all respects as does a bona fide purchaser from such vendee. The case of *Hooven v. Burdette*, 153 Ill. 672, 39 N. E. 1107, is not opposed to the views herein expressed. In that case it was held that a contract of sale of machinery, reserving the title in the seller until notes given for the purchase money are satisfied, is valid as between parties, although not recorded. Such is undoubtedly the law. 6 Am. & Eng. Enc. Law (2d Ed.) p. 440. The *Burdette Case*, supra, merely held that the assignee of a failing debtor under the assignment act takes the property assigned subject to all equities, liens, or incumbrances which existed against the same in the hands of the insolvent, and that such a contract, being valid as between the vendor and vendee, would also be valid as between the vendor and assignee of the vendee, under the assignment act; the latter taking no greater or different rights than those which the vendee had before the assignment.

For the reasons here stated, we are of the opinion that the trial court erred in admitting the instrument in question in evidence. Accordingly the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views here expressed. Reversed and remanded.

(176 Ill. 130)

CITY OF CHICAGO v. HAYWARD.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

EMINENT DOMAIN—DAMAGES.

An owner whose land was condemned for the opening of a street cannot recover the damages awarded to him if the city dismissed the condemnation proceedings, and abandoned the improvement, before taking possession of the land.

Appeal from appellate court, First district.

Action by Ambrose D. Hayward against the city of Chicago. There was judgment for plaintiff, which was affirmed by the appellate court (60 Ill. App. 582), and defendant appeals. Reversed.

William G. Beale, Corp. Counsel, Byron Boyden, and E. B. Burling, for appellant. Consider H. Willett, for appellee.

PHILLIPS, J. This is assumpsit, commenced January 31, 1895, to recover from the city of Chicago an award of judgment in a condemnation proceeding entered on the 13th day of November, 1893. The condemnation proceedings were instituted by the city of Chicago for the purpose of opening Carpenter street, between Fifty-First and Fifty-Third streets, and the ordinance provided that the costs should be paid by a special assessment on the property benefited thereby. A petition for condemnation was filed in the circuit court of Cook county, and, on hearing, a finding was had as to the compensation to be awarded, and judgment entered thereon for \$1,080. Supplementary proceedings were had, commissioners were appointed, who spread the assessment, and the assessment roll was filed. Subsequently, on December 3, 1894, an ordinance was adopted repealing the ordinance which proposed to open Carpenter street; and on December 26, 1894, an order was entered in the circuit court dismissing all proceedings in the condemnation case. On this action brought in the circuit court of Cook county in assumpsit to recover the amount of that award, a judgment was entered in favor of the plaintiff; and, on appeal by the city to the appellate court for the First district, that judgment was affirmed. This appeal is prosecuted.

A judgment in a condemnation proceeding, finding the compensation to be awarded to the land or lot owner, gives the corporation condemning the right to the land on condition that it first pays for the same. The verdict and judgment only settle the value of the real estate which the party condemning seeks to appropriate. Under such condemnation proceedings the city is under no legal obligation to pay any money whatever, unless it chooses to do so. The proceeding merely fixes the amount to be paid before the property can be lawfully taken. The city has a right to abandon the improvement. *City of Chicago v. Barblian*, 80 Ill. 482; *Railway Co. v. Teters*, 68 Ill. 144; *City of Bloomington v. Miller*, 84 Ill. 621; *Glennon v. Railway Co.*, 79 Ill. 501; *Chicago & N. W. Ry. Co. v. City of Chicago*, 148 Ill. 141, 35 N. E. 881; *Village of Hyde Park v. Dunham*, 85 Ill. 569. The city has a right to abandon the proceedings for condemnation, and, when it does so, it will not be liable for the amount of the judgment in an action of assumpsit. In this case the ordinance authorizing the improvement provided that the cost thereof should be raised by special assessment. If an action of assumpsit could be maintained on that judgment against the city, then the latter could be compelled to pay for the land out of the funds raised by general taxation. The mode of making local improvements, as opening streets and the like, is a matter of discretion with the municipal authorities, and is not subject to judicial control.

¹ Rehearing denied December 9, 1898.

Payments may be made in any mode provided, and may be out of general funds, by special taxation or by special assessment; and the adoption of either mode by an ordinance of the city excludes the idea of payment in any other manner. *People v. Village of Hyde Park*, 117 Ill. 462, 6 N. E. 33. The act provides the manner in which the municipality may acquire lands for the purposes of a street, and that must be by the adoption of an ordinance. It cannot acquire lands for such purpose by private purchase, as such a practice would lead to favoritism and corruption. Where the statute provides a specific manner of acquiring property for such purpose, by a familiar rule of construction it impliedly forbids its being done in any other manner. *Chicago & N. W. Ry. Co. v. City of Chicago*, supra.

The city had the right to acquire land for a street only by the passage of an ordinance and the condemnation proceedings, and had a right to abandon the same without paying the landowner the amount awarded by the verdict. That was done here by the repealing ordinance passed December 3, 1894, which was followed by the order dismissing the proceedings in the condemnation case. By such action by the city, there existed no right on its part to take possession of any land by virtue of the condemnation or retain the possession thereof; and, if it took or acquired possession by reason thereof, the remedy by the landowner would be ejectment, trespass, or by proceedings under paragraph 169 of the city and village act (1 Starr & C. Ann. St. [2d Ed.] p. 778). *Railroad Co. v. Hopkins*, 90 Ill. 316; *Railroad Co. v. Gates*, 120 Ill. 86, 11 N. E. 527. In the latter case it was held that the corporation condemning had no right to the property until damages for the taking had been assessed and paid; and, if it went into possession, it was a trespasser, and the landowner had a right to bring ejectment or trespass, or both, and recover his property and such damages as he may have sustained by the unlawful act; that the proceedings might be dismissed even after taking possession, as such possession was that of a mere trespasser; that there was no vested right in the landowner that the proceeding for condemnation should be carried out. Paragraph 169 of the city and village act (1 Starr & C. Ann. St. 1896, p. 779), after authorizing proceedings by condemnation, provides: "If, however, the court finds that such city or village has taken possession of the land and has not paid therefor, it shall enter an order requiring such city or village to pay the amount of the condemnation judgment, with interest from the time of such taking, within a short day to be fixed by the court, and in default thereof to dismiss the proceedings and enter a several judgment in favor of such land owners for interest from the day of such taking, and direct the issue of a writ of possession in favor of the several owners, or their legal representatives or grantees, respectively; and such dismissal, as aforesaid, shall operate as a bar to further proceedings under such ordinance

against the land affected by such dismissal; and every such cause shall be considered as pending in the court in which the same has been or shall be commenced, until all the lands sought to be taken are paid for, or until the proceedings are dismissed where the lands have not been taken." By this statute the cause is considered as pending for the purpose of giving an aggrieved party complete relief; and it provides a summary remedy for cases where cities have taken possession of land, and not paid therefor. The city cannot, by a mere repeal of an ordinance providing for opening a street in pursuance of law, defeat the manner of obtaining lands for a street prescribed by the statute, and change the manner in which compensation shall be made, and create a liability against the city, subjecting it to an action *ex contractu*; hence assumpsit will not lie. The judgment of the appellate court for the First district, and the judgment of the circuit court of Cook county, are each reversed, and the cause remanded. Reversed and remanded

(176 Ill. 152)

PEARCE v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL CORPORATIONS—CONDEMNATION PROCEEDINGS—OPENING OF STREETS—NONPAYMENT OF AWARD—ABANDONMENT OF PROCEEDINGS.

1. Where condemnation proceedings by a city were dismissed, under paragraph 169 of the city and village act (1 Starr & C. Ann. St. 1896, p. 779), providing that where the city or village has taken possession of the land condemned, and has not paid therefor, an order may be entered requiring payment to be made within a short day to be fixed, and in default thereof the proceedings shall be dismissed, the city was not liable for the amount awarded to the landowner in the condemnation judgment, as such dismissal amounted to an abandonment of such proceedings by the city.

2. The construction of a sewer by a city, along the line of a proposed street, pending condemnation proceedings, did not render the city liable for the amount found as the value of the premises for the purposes of a street, where it acquired no title to such premises, because of the dismissal of the proceedings on motion of the landowner; nor did the landowner become entitled to a sum deposited by the city as part payment of such award.

Appeal from appellate court, First district.

Proceedings by the city of Chicago for the condemnation of certain land, belonging to J. Irving Pearce, for the opening of a street. From a judgment of the appellate court (87 Ill. App. 671) affirming an order requiring the clerk to repay to the city a certain sum of money which it had deposited with him as a part of the award, the landowner, Pearce, appeals. Affirmed.

Mann, Hayes & Miller, for appellant. John D. Adair, for appellee.

PHILLIPS, J. On the 12th of June, 1891, condemnation proceedings were commenced by the city of Chicago for the purpose of acquiring certain lands belonging to appellant,

for opening a street. Appellant contested the prayer of the petition. On hearing in the superior court of Cook county, an award was made for the sum of \$20,000 as compensation, and judgment was entered therefor. Supplementary proceedings for the purpose of paying the damages by special assessment were commenced; commissioners were appointed, who spread the assessment; an assessment roll was filed; and judgment entered. On May 17, 1895, a petition was filed by the city of Chicago in the same proceedings, in which it was alleged that it desired to take immediate possession of appellant's premises condemned, and in that petition it was recited that the sum of \$4,500 was the damages assessed to appellant over and above the amount of the special assessment upon his land as benefits, and being the full amount due the owner, and it asked to pay the sum of \$4,500 into court. Upon that petition that amount was paid into court, to be paid to the owner upon proof of title, and upon the order of the court. On May 27, 1895, the appellant, who had no notice of the proceeding to obtain possession and of the payment of the money into court at the time of filing that petition, entered his motion to set aside the order allowing the payment into court, and authorizing the taking possession of the premises, which motion was supported by an affidavit alleging the award had not been paid, and that appellant had, on April 12, 1895, filed a bill to restrain the South Chicago City Railway Company from taking possession of the land, and showing that the city had issued its voucher for \$15,000, being the amount assessed in the supplementary proceedings. By this motion appellant sought to set aside the order allowing the payment into court of \$4,500 and the order authorizing possession of the land to be taken. This motion was allowed, and the order authorizing the city to take possession of the premises condemned was set aside, and the proceedings ordered to stand as if that order had never been entered. The city entered upon said premises without objection by appellant, and constructed a sewer, which is now in use. On June 7, 1895, the appellant entered his motion that the city of Chicago should, within 10 days, pay the amount of the award, \$20,000, or, in default of such payment, all the proceedings therein should be dismissed. The appellee entered a cross motion, setting up the condemnation proceedings, the spreading of the assessment, the judgment of confirmation on the assessment, the issuing of vouchers to the amount of the assessment, to be paid when collected, and the deposit of the money, and claimed that by such proceedings it was entitled to the possession of the premises, and asked that an order be made for the appellee to take and hold possession of the premises condemned. The motion and cross motion were heard together, and it was ordered and adjudged that the city had not paid the

amount of the condemnation award, and the condemnation proceedings were ordered to be dismissed. This order was entered under paragraph 169 of the city and village act (1 Starr & O. Ann. St. 1890, p. 779), which authorized the entry of such judgment under the facts alleged. The appellant, on July 26, 1895, filed his petition in the proceedings, setting forth the contract for the construction of a sewer on the premises, and alleging the fact of the payment of the sum of \$4,500 into court, which had been paid after proceedings for condemnation and before the order of dismissal of those proceedings, and prayed the court for an order for the payment of the sum of \$4,500 to him. The city filed its cross petition, setting forth the facts and the entry of the order of dismissal on appellant's motion, and asked the court for an order on the clerk to repay the money deposited with him to the city. These motions coming on to be heard, and the court finding that the condemnation proceedings had been dismissed on appellant's motion because of the failure of the city to pay the award, it was ordered that the clerk should pay over to the city the sum of \$4,500 deposited with him under the former proceedings. From that order the appellant prosecuted an appeal to the appellate court for the First district, where the judgment was affirmed. He now prosecutes this appeal.

By paragraph 169 of the city and village act, if the court finds that the city or village has taken possession of the land, and has not paid therefor, an order may be entered requiring payment to be made within a short day to be fixed, and, in default thereof, the proceedings are to be dismissed. By the order entered herein under that statute, the condemnation proceedings were dismissed, so that the city was deprived of all interest in the premises under the condemnation award, and the proceedings stood as if no judgment had ever been entered. That statute authorizes and requires the case to be continued for the express purpose of such orders as were here entered. On failing to pay the amount awarded under the judgment of the court, as made under that section of the statute, the proceedings were dismissed, which amounted to an abandonment by the city of the proceedings for condemnation. Where such proceedings are abandoned by a city, it is not liable for the amount awarded to the landowner in condemnation judgment. *City of Chicago v. Hayward* (Ill. Sup.) 52 N. E. 26, and authorities cited. After the dismissal of the proceedings, the city cannot be compelled to pay the amount of the judgment, and the effect of the order is the same with reference to the liability of the city as if the judgment had never been entered, or as if the city had abandoned the attempt to open the street. It does not appear in this record that the city took possession for the purposes of a street, but it does appear that it constructed a sewer thereon. It had no

right to acquire possession for any purpose except by condemnation proceedings, and would not be liable to an amount found as the value of the premises for purposes of a street because it had constructed a sewer along the line of the proposed street without paying the award. It acquired no title to the premises, because of the dismissal of the proceedings on appellant's motion. Appellant has a full and complete remedy to recover the possession, but would not be entitled to the sum deposited, which was deposited as part payment of the award. The judgment of the appellate court for the First district is affirmed. Judgment affirmed.

(176 Ill. 137)

KIEL v. CITY OF CHICAGO.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

LICENSES—BREWERS—NONRESIDENTS—CITIES—POWERS.

Rev. St. c. 24, art. 5, § 1, cl. 91, conferring on cities power to license brewers, does not give a city power to require a brewer whose brewery is outside the state, but who has a storehouse in the city, to pay a license before making sales of his beer.

Appeal from appellate court, First district.

Action by the city of Chicago against Henry Kiel. From a judgment of the appellate court (69 Ill. App. 685) affirming a judgment for plaintiff, defendant appeals. Reversed.

Fitch & Duha, for appellant. Charles S. Thornton, Corp. Counsel, and Denis E. Sullivan, Asst. Corp. Counsel, for appellee.

PHILLIPS, J. Three separate actions of debt were instituted before a justice of the peace by the city of Chicago against Henry Kiel and others, to recover a penalty for the violation of an ordinance passed by the city council on the 30th of November, 1896, which actions resulted in a judgment in favor of the city. An appeal was prosecuted to the criminal court of Cook county, where, by agreement of counsel, the three cases were consolidated and submitted to the court for trial, without the intervention of a jury, upon stipulated facts. The court found the defendants guilty, and assessed a fine of \$100 against each, and entered judgment on the finding, but suspended the judgment in two cases pending a decision herein; and from that judgment an appeal was prosecuted to the appellate court, where the judgment of the criminal court of Cook county was affirmed. The defendant Henry Kiel appealed to this court.

The Herman Berghoff Brewing Company operates a brewery at Ft. Wayne, Ind., and sold and delivered beer in the city of Chicago, none of which was made or brewed within the corporate limits of the city. The brewing company had no license under the ordinance in question, but had a storehouse in the city of Chicago, from which beer was

sold and delivered. The material parts of the ordinance under which the conviction was had are as follows:

"Section 1. No person, firm or corporation shall carry on the business of a brewer or distiller within the city of Chicago without having first obtained a license for such business, as hereinafter provided, for each brewery and each distillery conducted by such person, firm or corporation. The selling or delivering within said city of any product of a brewery or distillery by or on behalf of the person, firm or corporation conducting or operating such brewery or distillery shall be held to be carrying on the business of a brewer or of a distiller, as the case may be, within the meaning of this ordinance, and to be covered by this ordinance: provided, that the provisions of this ordinance shall not apply to the manufacture or sale of weiss beer.

"Sec. 2. Any person, firm or corporation desiring to carry on the business of brewer or distiller in said city shall file with the city clerk or city collector an application containing the full name of the applicant; the business proposed to be carried on, and whether such business will include brewing or distilling within said city or only disposing within said city of liquors brewed or distilled by the applicant elsewhere; the location of the place or places of business of the applicant, including the location of the brewery or distillery whose product is to be disposed of in said city under the license, and the name of each and every agent within said city representing any such applicant whose business may be carried on in said city through an agency. A separate application shall be made in respect to each brewery or distillery, wherever located."

The contention on the part of the city is that under clauses 46, 66, and 91, § 1, art. 5, c. 24, Rev. St. Ill., the power of the city to enact this ordinance is conferred; while the appellant contends the ordinance is invalid. By clause 46, power to regulate and prohibit the selling or giving away of intoxicating liquors is conferred upon the city by express enactment. By clause 66, power is conferred to regulate the police of the city or village, and to pass and enforce all necessary police ordinances. By clause 91, power is conferred to tax, license, and regulate auctioneers, distillers, brewers, lumber yards, livery stables, public scales, money changers, and brokers. By clause 82, power is conferred on the city council to direct the location and construction of breweries, distilleries, livery stables, blacksmith shops, and foundries within the limits of the city or village. This clause, with its express power, is followed by clause 91, which authorizes the city council to tax, license, and regulate auctioneers, distillers, brewers, lumber yards, livery stables, public scales, money changers, and brokers. The powers conferred by the last two clauses are express powers specifically enumerated; and, by a familiar canon of

¹ Rehearing denied December 9, 1898.

construction, it will be presumed the act in express terms inhibited the licensing of all trades and occupations not contained in the enumeration. The principle is that a power may be fairly implied as to police; but, where a power is expressly enumerated in the charter of a corporation, that is the measure thereof, and the enumeration of such power implies the exclusion of all others. *City of Cairo v. Bross*, 101 Ill. 475; *Huesing v. City of Rock Island*, 128 Ill. 465, 21 N. E. 558. Clause 66, having reference to authority to pass police ordinances, does not extend the express power conferred by the provisions of clause 91. Clause 46, having reference to the power to license, regulate, and prohibit the selling or giving away of intoxicating liquors, has no reference to the question presented by this ordinance. The right to direct the location and regulate the use and construction of breweries, given by clause 82, has reference to the location and regulation of such establishments within the limits of the city or village. The power granted by clause 91 is the power to tax, license, and regulate the various enumerated establishments or businesses therein enumerated. If power exists for the adoption of this ordinance, it must exist by the express power conferred, and not by the definition given by the city council as to what is included in the power.

Section 1 of the ordinance provides that no person, firm, or corporation shall carry on the business of a brewer within the city of Chicago without having obtained license for such business as by the ordinance provided, and then states: "The selling and delivering within such city of any product of a brewery * * * shall be held to be carrying on the business of a brewer," within the meaning of the ordinance. If the sale of a product of a brewery or distillery confers the power to require a license from such distillery or brewery, the driving of a horse and vehicle from a livery stable in another town into the city would confer the power to require a license from such livery stable. If the sale of a single product could be held as conferring the power to require license, then the power, conferred under that provision, to tax, license, and regulate lumber yards would include the power to require a license to be taken out by a lumber yard not in the city, but making a sale of lumber within the city.

The power to pass an ordinance, and impose a penalty for its violation, is to be strictly construed, and is not to be extended, by implication, to persons or things not expressly within the terms of such power. Such power must be reasonably construed. The selling of the product of a brewery, distillery, or lumber yard is one of the purposes of existence of such business; but the sale of a keg of beer, a bottle of alcohol, or lumber to build a house, does not constitute a brewery, a distillery, or a lumber yard. Ample power is conferred on the city to license,

regulate, and prohibit the sale of intoxicating liquors by clause 46, and the sale of the product of breweries and distilleries may be regulated and controlled under the power conferred by that clause. It cannot be held to be within the spirit and meaning of this provision, conferring enumerated powers on city councils, that a city or village may require a license from every distillery in the United States whose product is sold within the city, or its sale be actually restricted. If such power were conferred, then a city, by an ordinance, might provide for the licensing of distilleries within its limits, and prohibit the sale of the products of all other breweries and distilleries because not licensed by them. It would be a restriction in restraint of trade, and a discrimination against such establishments outside of the city, not contemplated by the legislature. Such restriction is not within the power of a municipality, and is not conferred by clause 46. Full power is given city councils to regulate the sale of the product of all distilleries or breweries, and, within the limits of a city, the city council may regulate the location of, and require a license from, such establishments. The sale of the product of a brewery or distillery located without the state of Illinois or outside the limits of the city of Chicago may be regulated under clause 46 by an ordinance applicable to all such products; but the sale of such products does not bring a distillery or brewery within the limits of the city, or place it in such a position that a license can be required before a sale. We hold the ordinance did not require the defendant to have a brewer's license, and it was error to find him guilty. The judgments of the criminal court of Cook county and of the appellate court for the First district are each reversed, and the cause remanded. Reversed and remanded.

(176 Ill. 260)

**WESTERN UNION COLD-STORAGE CO.
v. BANKERS' NAT. BANK.¹**

(Supreme Court of Illinois. Oct. 24, 1898.)

**APPEAL—RECORD — REFERENCE — EXCEPTIONS—
SALES—BONA FIDE PURCHASERS—WARE-
HOUSEMEN—BILLS OF LADING.**

1. In view of the statute making a referee's report a part of the record, such a report is a part of the record, though it is incorporated in the bill of exceptions, where the latter is incorporated in the record by the clerk, and made a part of the record by stipulation of parties.

2. Rev. St. 1893, c. 117, § 1, enabling a party to raise questions of law by exceptions to a referee's report, dispenses with the necessity of submitting propositions of law in cases heard before a referee.

3. Defendant sold turkeys to N., and, before receiving the price, delivered them to a transportation company, which gave a receipt from N., which was delivered to plaintiff, a bank, with defendant's knowledge. N. drew a draft on the consignee of the turkeys for their value, and delivered a bill of lading and the draft to

¹ Rehearing denied December 9, 1898.

plaintiff, which advanced the amount of it to N. Thereafter N. failed to pay defendant for the turkeys; the consignee refused to honor the draft; and defendant rescinded the sale, and replevied the turkeys at the place of consignment. *Held*, that plaintiff was entitled to the turkeys, as it was in the position of a bona fide purchaser acquiring possession from one who had trusted in the personal security of another.

4. The statute relating to warehouse receipts has no application to bills of lading.

Appeal from appellate court, First district.

Action by the Bankers' National Bank against the Western Union Cold-Storage Company. From a judgment of the appellate court (73 Ill. App. 410) affirming a judgment for plaintiff, defendant appeals. Affirmed.

The opinion of the appellate court for the First district, by Mr. Justice Windes, is as follows:

"Appellee brought trover against appellant to recover the value of one hundred and one boxes of turkeys. Appellant pleaded not guilty, and property in defendant. By agreement, the cause was referred to a referee, to take testimony, and report his conclusions of law and fact. The referee reported, in substance, viz.: On the morning of March 21st, L. E. Newman & Son purchased from defendant one hundred and one boxes of turkeys, at 13½ cents per pound, being 20,132 pounds. The turkeys were delivered by defendant about twelve o'clock at the Michigan Central Depot, and a receipt taken, which reads that the turkeys were received from L. E. Newman & Son to be delivered to Conron Bros., New York City, the receipt being made on a blank receipt of the cold-storage company, the name of L. E. Newman being substituted for that of the cold-storage company. This receipt was on the same day delivered to Newman by defendant's messenger, and with its knowledge, at the plaintiff's bank some time between twelve and one o'clock, and that the banks of Chicago close on Saturdays at twelve M. About half past eleven, a draft was drawn by L. E. Newman & Son for \$3,000 on Conron Bros., payable to the order of the plaintiff. Newman offered the drayage receipt as collateral to the draft, which was refused by Mr. Craft, the cashier. Said draft was deposited, with other deposits, to the account of Newman & Son, and then Newman went immediately to the railroad office, and secured a bill of lading, and returned with it to the bank within an hour after the receipt was presented, and the bill of lading was attached to the draft. The consignee's name in the bill of lading was written 'Conron Bros.' with out the addition of the word 'order' or any other condition or limitation. Early the following Monday morning, Newman & Son learned by telegraph that the draft had been turned down, and then drew all the money to their credit out of the bank, amounting to between \$5,000 and \$6,000, before the bank knew the draft was dishonored. During the week ending March 21st, Newman & Son drew out of the defendant's bank \$9,322.18.

The shipment to Conron Bros. was intended to be a partnership deal. Conron Bros. refused to go into the deal, and turned down the draft, which has never been paid. On the afternoon of the day of the sale, defendant presented to Newman & Son, at their place of business, an itemized bill for the turkeys, which was not paid; and they sent a statement of the same the following Monday, which was not paid. That among the conditions of the bill of lading was: 'If the word "order" is written herein immediately before or after the name of the party to whose order the property is consigned, without any condition or limitation other than the name of the party to be notified of the arrival of the property, the surrender of this bill of lading, properly indorsed, shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading.' The Monday following said sale, Newman & Son ceased doing business, and subsequently paid all their creditors, except defendant, twenty-five cents on the dollar. That, on the 23d day of March, appellant sent Newman & Son a letter rescinding the sale. That, when the turkeys arrived in New York, they were replevied by the defendant. That the bank filed its claim of property, and a stipulation was entered into dismissing suit, without prejudice. At the time the turkeys were taken to New York, they were worth fifteen cents per pound, or \$3,019.80, and the cold storage company paid out for freight, etc., \$224.38, leaving the value of the turkeys \$2,794.92. That Newman & Son, for two years prior to March 21st, had been depositors in plaintiff's bank, which cashed many drafts for them of similar nature. At the time of the transaction, Newman & Son made all their deposits with plaintiff. That plaintiff was familiar with the business of Newman & Son, and their methods, in a general way. That the bank at no time made any inquiries as to the ownership of the turkeys. That the bill of lading was not at any time indorsed or assigned to any one by Conron Bros., the consignee, or any one else. Referee believes that, by delivering to Newman & Son the drayage receipt, defendant placed it in their power to deal with it as their own, and enabled them to procure credit; that the fact that Newman appeared anxious to have the receipt sent to the bank should have put defendant on its guard; that the transaction between Newman and the bank was a common one. Recommends a judgment in favor of the plaintiff. Exceptions were filed with the referee, and argued before the court by appellant, and judgment entered for appellee of \$2,867.12 and costs, from which this appeal is prosecuted.

"Appellee contends that if it fails to appear from the abstract that any exception was taken by appellant to the overruling of his exceptions

to the referee's report, to its confirmation, or to the entering of judgment by the court, and that, because the referee's report is made a part of the bill of exceptions, it is not a part of the record, therefore there is no question for this court to consider except to determine whether the pleadings are sufficient to sustain the judgment. The abstract shows, after order overruling defendant's exceptions, and confirming referee's report, and entering judgment on report, 'Exception by defendant.' The record shows one order of the court, as indicated by the abstract, and as part of it the following: 'Thereupon the defendant, having entered its exceptions herein, prays an appeal,' etc. The bill of exceptions is incorporated in the record by the clerk, and made a part of the record, by stipulation of the attorneys of the respective parties. The statute concerning referees also makes the testimony of witnesses taken before the referee, together with all exhibits and papers introduced in evidence and the report of the referee, a part of the record of the cause. We therefore think that, in view of the stipulation and the statute, it can make no difference that the referee's report and evidence is incorporated in a bill of exceptions, instead of the record proper. The bill of exceptions shows that numerous objections in writing were filed with the referee, and overruled by him, and the exceptions to said report were heard by the court, after which they were overruled, to which ruling the defendant excepted; and thereupon the court confirmed the report of the referee, and entered judgment for the plaintiff, to which the defendant excepted. The abstract of the bill of exceptions fails to show the overruling of the defendant's exceptions, and the exception to the entry of the order of judgment; but we think that is sufficiently shown, as above stated, and therefore we are of the opinion that appellee's contentions are not tenable.

"Numerous propositions of law on behalf of appellant were held and refused by the court, but we think it unnecessary to consider the court's action in that regard, because the submission of propositions of law may be dispensed with in cases heard before a referee, under the statute. The parties may raise, by exceptions to the report, any questions of law. *Sanitary Dist. of Chicago v. Cook*, 169 Ill. 184, 48 N. E. 461.

"Also, from a careful examination of the evidence, we are satisfied the referee reported the facts correctly; that his conclusions thereon are in accordance with the law of this case; and there was no error in confirming his report, nor in the entry of judgment in favor of appellee. The sale by appellant to Newman & Son was not shown to be a sale for cash, on delivery of the turkeys; and the circumstances in evidence clearly show a delivery to the transportation company by appellant for Newman & Son, with the knowledge on its part, or knowledge of facts sufficient to cause it to believe, that Newman & Son intended to pledge the turkeys to the ap-

pellee. There was no notice to the bank that Newman & Son were not the owners of the turkeys, nor was there any circumstance in the transaction between it and Newman & Son to put the bank on inquiry as to their ownership. We think the evidence quite clear that the bank was in the position of bona fide purchaser for value, without notice of any rights of appellant; that appellant is to blame for placing Newman & Son in a position to perpetrate a fraud upon it, as is claimed. This case is clearly one for the application of the rule of law that, when one of two innocent persons must suffer from the fraud of a third, the loss shall fall on him who, by his imprudence, enabled such third person to commit the fraud. *Railroad Co. v. Phillips*, 60 Ill. 190, and cases cited; *Railroad Co. v. Wagner*, 65 Ill. 197; *Williams v. Fletcher*, 129 Ill. 356, 21 N. E. 783. We think the *Phillips Case*, supra, is decisive of the case at bar. We have examined the cases of *Stone v. Railway Co.*, 9 Ill. App. 48, *Barnard v. Campbell*, 55 N. Y. 456, *Howland v. Woodruff*, 60 N. Y. 73, and *Bank v. McCrea*, 106 Ill. 281, which seem to be especially relied on by appellant, as well as numerous other cases cited, but are of opinion they are readily distinguishable from the *Phillips Case*, supra, as well as the case at bar. We think the statute relating to warehouse receipts has no application to bills of lading, and therefore the cases cited by appellant on its contention in that regard are not applicable to this case. The judgment is affirmed."

Masterson & Haft, for appellant. H. H. C. Miller and W. S. Oppenheim, for appellee.

PHILLIPS, J. The additional brief filed by appellant objects to the language of the appellate court which holds that the sale to Newman & Son by the appellant is not shown to be a sale for cash on delivery, and to its further holding that "there was no notice to the bank that Newman & Son were not the owners of the turkeys, nor was there any circumstance in the transaction between it and Newman & Son to put the bank on inquiry as to their ownership." In *Railroad Co. v. Phillips*, 60 Ill. 190, it was said (page 195): "The property here, where nothing remained to be done to complete the sale, either to identify the property or ascertain the price, was intrusted to the possession of the purchaser, by the consent of the owner, under the form of a regular sale and delivery, and in the completion of the same; and, by its being thus placed under his control, Ames was enabled to obtain credit by pledging it to an innocent party. The sellers did not see fit to exact payment at the time, as they might and should have done where rights of innocent purchasers might intervene, but trusted to the personal security of Ames until the following morning; and the consequence of this misplaced confidence should be borne by them, rather than that the bank should be the sufferer by it."

Where a bona fide purchaser, for a valuable consideration, without notice, acquires the pos-

session of property from one who has trusted to the personal security of another, the rule of judicial decision of this state is that such bona fide purchaser is protected, because, where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who, by his imprudence, enabled such third person to commit the fraud. The statement of facts in the opinion of the appellate court, and the adjudication of the case by that court, are in accordance with this principle; and we concur in that opinion, and adopt the same. The judgment of the appellate court for the First district is affirmed. Judgment affirmed.

(176 Ill. 113)

ALLEN et al. v. CITY OF CHICAGO.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

CONDEMNATION—RES JUDICATA—COLLATERAL ATTACK—PARTIES—PLEADING—SERVICE—ASSESSMENTS.

1. A condemnation proceeding is not a bar to a second such proceeding for the same land for the same purpose, action under the first having been enjoined, though not at suit of all the defendants in the condemnation proceedings.

2. A party to a condemnation proceeding, who did not therein make objection to the judgment, cannot make such objection in the supplementary proceeding to assess benefits to pay the damages awarded in the condemnation proceeding.

3. Though an owner of land is not served in condemnation proceedings, it is immaterial, he having died, and his heirs having subsequently been served with process, and having appeared.

4. "Marie" G., who appeared, will be presumed to be the person made a defendant as "Maria" G., and not served.

5. One having an easement in a strip of land as a right of way merely is not a necessary party in proceedings to condemn for a street.

6. An affidavit that certain defendants cannot, after diligent search and inquiry, be found within the state, so that the process can be served on them, and that their places of residence are unknown to the deponent, and cannot, after diligent search and inquiry, be ascertained, sufficiently states, as against collateral attack, that they are nonresidents, so as to allow service by publication, under City and Village Act, art. 9, § 6.

7. Objection that certain parties to condemnation proceedings were not served or within the jurisdiction of the court cannot be raised by other parties.

8. It is no objection to proceedings under City and Village Act, art. 9, § 53, to make assessment to pay compensation awarded in proceedings to condemn land for a street, that the city has not acquired title to all the land necessary to be taken.

9. In a proceeding under City and Village Act, art. 9, § 53, supplemental to condemnation proceeding, to make assessment for compensation awarded in the condemnation proceeding, it is not necessary that the petition recite the ordinance, if it be recited in the petition for condemnation.

10. The power of spreading the assessment roll for compensation for property condemned for a street being conferred by the statute on the commissioners under their appointment by the court, & recasting thereof is not authorized by the opinion of witnesses that land omitted therefrom was benefited, but fraud of the commissioners must be shown.

Appeal from circuit court, Cook county; R. W. Clifford, Judge.

Proceedings by the city of Chicago to spread and confirm an assessment. Objections were filed by Ira W. Allen and others, which were overruled; and, from judgment for the city, they appeal. Affirmed.

Hills & McCoy, for appellants. Charles S. Thornton, Corp. Counsel, and John A. May, for appellee.

PHILLIPS, J. This is a supplemental proceeding, brought under section 53 of article 9 of the city and village act, to spread and confirm an assessment to raise the amount required to pay the condemnation awards theretofore made in the same cause for property to be taken or damaged for opening Sixtieth street, from State street to Wentworth avenue, in Chicago. The proceeding was in the circuit court of Cook county. Upon application for confirmation of this assessment, many property owners appeared and objected. When the case was called for trial, a motion in writing, verified by affidavit, to dismiss the supplemental petition and cancel the assessment as to objectors' property, was made prior to the calling of the jury. Much documentary evidence was introduced in support of the motion. After consideration, the court overruled the motion temporarily, with the expressed intention of considering the same later with the motion for a new trial. Counsel for objectors excepted.

By the verified motion to dismiss, and the documentary evidence in support thereof, it appears that, beginning in 1834, and extending down to the present time, there has been a practically continuous effort made by the municipality having control of the locality in question to open Sixtieth street from State street to Wentworth avenue. This effort has manifested itself in three different proceedings, pursuant to separate ordinances, all providing for making the same improvement, in the same way, over the same route, and taking precisely the same property therefor. Pursuant to an ordinance passed in 1834 by the common council of the town of Lake, a municipal corporation having control of streets therein (which municipality has since become annexed to the city of Chicago), proceedings were commenced in the superior court of Cook county for condemnation for purposes of a street. An amendatory ordinance was passed by the town of Lake in 1836. Under these ordinances, condemnation proceedings were had, and judgments entered, in 1836 and in 1839. A supplemental petition was filed; the assessment was spread; and the owners were ruled to file objections; but no judgment of confirmation was entered. On June 7, 1839, Marie Grieshaber filed a bill in the superior court of Cook county asking for an injunction to restrain the town of Lake from taking any further proceedings in that condemnation suit. On July 15, 1839, the petitioner's attorney entered an order dismissing

¹ Rehearing denied December 9, 1898.

the condemnation proceedings. On the same day that this latter order was entered, a decree was entered on the bill for injunction as prayed for, enjoining the town of Lake, and the city of Chicago, its successor, from doing any act or taking further proceedings in the condemnation proceeding.

The city of Chicago having become the corporate successor of the town of Lake, and succeeding to all its rights and duties on July 15, 1880, it, on July 18, 1890, pursuant to an ordinance passed January 27, 1890, commenced condemnation proceedings to open the same street; and judgments were entered in 1892 and in 1893, in the circuit court of Cook county. Certain questions were raised in these proceedings, which were decided by this court in Chicago, R. I. & P. Ry. Co. v. City of Chicago, 143 Ill. 641, 32 N. E. 178, and 148 Ill. 479, 36 N. E. 72. These two cases arose in the second condemnation proceeding. It was there substantially held that a corporation clothed with power to exercise the right of eminent domain cannot be permitted to exercise that right by instituting proceedings for a judicial ascertainment of compensation to be paid, and, if dissatisfied with the amount found, dismiss the proceeding, and, by a new petition, again submit the question to other and successive juries, until a verdict is returned satisfactory to the municipality. That rule was followed in Pearson v. City of Chicago, 162 Ill. 383, 44 N. E. 739, and in Illinois Cent. R. Co. v. City of Champaign, 163 Ill. 524, 45 N. E. 120. In neither of those cases was the decree in the injunction proceeding, and its effect, before the court, and each had reference only to the second condemnation proceeding.

On January 8, 1894, an ordinance was passed by the city of Chicago to open Sixtieth street from State street to Wentworth avenue; and a petition to condemn was filed in the circuit court of Cook county on March 29, 1894; and a judgment of condemnation was had on November 15, 1894. After that judgment of condemnation, this supplemental proceeding was filed, under section 53 of article 9 of the city and village act (Rev. St. p. 240), which is as follows: "Sec. 53. Whenever any city or village shall apply to any court for the purpose of making just compensation for property taken or damaged by such proceedings as are authorized by this act, such city or village may file in the same proceeding a supplemental petition, praying the court to cause that an assessment be made for the purpose of raising the amount necessary to pay the compensation and damages which may be or shall have been awarded for the property taken or damaged, with the costs of the proceeding. The said court shall have power, at any time after any such supplemental petition shall have been filed, to appoint three commissioners to make such assessment, and to ascertain, as near as may be, the costs incurred to the time of such appointment, and the probable fur-

ther costs of the proceedings, including therein the estimated costs of making and collecting such assessment, and shall direct such costs to be included by such commissioners in making said assessment. Like proceedings in making said assessment shall be had, and the assessment shall be made, collected and enforced in the same manner, as near as may be, as is provided in this article in other cases." In pursuance of this section, the court, having estimated the costs already incurred and probable further costs, entered an order appointing three commissioners to determine this question, who, after due investigation, made their report in the form of an assessment roll, which was duly returned and filed. Upon the filing of such assessment roll, about 175 persons appeared and filed objections to such report.

Certain objections of appellants are to the effect that the ordinance of 1894, and the petition thereunder, which are the basis of this supplemental proceeding, are void, because they attempt to treat as a nullity the first condemnation proceeding, and substitute another therefor; that the circuit court had no power to hear and determine this case, because the superior court acquired jurisdiction of the subject-matter, which is still pending in that court, and because the order attempting to dismiss that proceeding was a nullity; that that prior condemnation judgment is in full force and effect, and is a bar to this attempted condemnation; that the condemnation judgment upon which this supplemental proceeding is based is void, because the court was without jurisdiction of the persons of nine named known defendants when it rendered judgment in the condemnation proceeding, which said unserved and nonappearing defendants are James Woodbury, William H. Jeffers, Patrick Britton, Maria Grieshaber, John M. Goodenough, Isabella Mott, Harriet B. Wilson, William H. B. Woods, and Thies J. Lefens, trustee. These constituted the legal objectors. Testimony was heard in reference to these objections, and, among other evidence, appellee offered the decree in the case of Grieshaber against the city of Chicago, to which the appellants objected, and, on their objection being overruled, they excepted.

The appellants offered in evidence the condemnation proceeding had prior to that in the case on trial, and the appellee had the right to have in evidence the decree enjoining further proceedings under the prior proceeding. The fact that appellants were not parties to that decree does not affect the effect of the decree. Its effect was to prevent action on the part of the appellee under that proceeding; and, if action was enjoined thereunder, that proceeding would not be a bar to another and subsequent proceeding by the appellants by the adoption of an ordinance and petition for condemnation. A supplemental proceeding under section 53 is collateral to the condemnation judgment,

which is final and conclusive as to the parties thereto until it is reversed or vacated. *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15; *Gage v. City of Chicago*, 146 Ill. 499, 34 N. E. 1034; *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053; *Harris v. City of Chicago*, 162 Ill. 288, 44 N. E. 437. Appellants, who were parties duly served or appearing to that proceeding for condemnation, must be held to have waived all objections which could have been made to that judgment of condemnation. They cannot be raised in a collateral proceeding by one who was duly served or appeared in the original proceeding. The claim that the judgment of condemnation was a nullity cannot be sustained, as all action under the prior proceeding was enjoined. It was not error to overrule the first three objections.

The fourth objection, that James Woodbury was not served with process and made a party to the petition, is true. Appellants' abstract, however, shows that by an amendment to the petition filed May 9, 1894, Mary A. Woodbury, F. A. Woodbury, and Ella W. True, who were the widow, son, and daughter of James Woodbury, were served with process, and appeared. Patrick Britton was not served, but his son and only heir, he being dead, was made a party by an amendment to the bill, and appeared. Maria Grieshaber was a party defendant to the petition, and not served. Marie Grieshaber appeared. The names are so much the same, she will be presumed to be the person made a party defendant. William H. Jeffers and one Wade were tenants in common in a right of way which was sought to be taken as a street. One holding an easement in a strip of land as a right of way merely sustains no damage in consequence of the taking of the fee for a street. When the fee is taken and maintained as a street by the public authorities, the owner's easement of a way is not impaired, but still exists, as he has all the right of way before enjoyed. No property of his is therefore taken from him, and he is deprived of no interest. *City of Buffalo v. Pratt*, 131 N. Y. 299, 30 N. E. 283; *In re Opening One Hundred and Sixteenth Street* (Sup.) 87 N. Y. Supp. 508. This disposes of all those not served except Goodenough, Mott, Wilson, and Woods.

Section 6 of article 9 of the city and village act provides: "Upon the filing of the petition aforesaid, a summons, which may be made returnable upon any day in term time, shall be issued and served upon the persons made parties defendant as in cases in chancery; and in case any of them are unknown or reside out of this state, the clerk of the court, upon an affidavit being filed showing such fact, shall cause publication to be made." The affidavit of John F. Holland, filed on September 13, 1894, states that he is the attorney for the city of Chicago; that the defendants Goodenough, Mott, Wilson, and Woods cannot, after diligent search and inquiry, be found within the state of Illinois, so that pro-

cess cannot be served on them; and that the places of residence of the said above-named defendants are to said deponent unknown, and cannot, after diligent search and inquiry, be ascertained. The affidavit is in accordance with the act in reference to publication in cases in chancery. In *Van Fleet on Collateral Attack* it is said: "Where there is some notice, although defective, the judgment is not void. If there is notice, although irregular and defective, there is jurisdiction."

* * * The rule with reference to notice by publication is the same as to notice by service of summons. There is, indeed, reason for being more liberal in cases of constructive notice than in cases where the service is by summons, for the defendant in the former class of cases is entitled, as of right, to open the judgment and try the case. It is a mistake to suppose that notice by publication is purely of statutory origin, for it was well known in chancery and at common law. There is therefore no valid reason why the same presumption should not obtain in cases where the notice is by publication as where it is by service of summons, and the weight of authority is to that effect." That principle is sustained in *Quari v. Abbett*, 102 Ind. 233, 1 N. E. 476; *Sweeley v. Van Steenburg* (Iowa) 26 N. W. 78; *Essig v. Lower* (Ind. Sup.) 21 N. E. 1090; and *Hahn v. Kelly*, 34 Cal. 391.

It is urged, however, that the affidavit is not sufficient to authorize publication of notice, as it does not aver the defendants were nonresidents. The affidavit inferentially states the defendants were nonresidents; for, if they had been in this state at all, they could have been served with process unless they concealed themselves, which would not be presumed. If they had any usual place of abode, which they would be presumed to have if they were residents of this state, then the service could be had by copy. The affidavit is, on a collateral attack, sufficient to authorize the publication of notice, however it might be on a direct objection in the original case. *Ogden v. Walters*, 12 Kan. 294; *Reedy v. Camfield*, 159 Ill. 254, 42 N. E. 833. With such attempted service, the court found that due notice of these proceedings has been given, as required by the statute in such case, etc.; that there was, as to these four defendants, sufficient service of notice; that it is not obnoxious to this collateral attack.

The judgment in a condemnation proceeding has, as to several tracts of land, the effect of a several judgment as to each tract or lot of land. *Fitzpatrick v. City of Joliet*, 87 Ill. 53. One land or lot owner cannot take advantage, in a court of review, of an error which does not affect him or his property. *Bowman v. Railway Co.*, 102 Ill. 459. This principle effectually disposes of objections made that certain parties to the condemnation proceeding were not served or within the jurisdiction of the court. Appellants cannot raise that question.

Neither is it necessary, to authorize the sup-

plementary proceeding provided by section 53, as quoted, that the city should by condemnation have secured an easement in all the property necessary for the street. It was said in *Goodwillie v. City of Lake View*, 137 Ill. 64, 27 N. E. 17: "Although it may be found that the city has not procured the right to open the street over and across certain of these lots, and may have to expend further sums of money to acquire such right, it cannot, after having by its supplemental petition confirmed the judgment in the condemnation case, and required the entire benefit to appellants' lots, inuring from the proposed improvement to be assessed against them, again require a further assessment of benefits upon or against the same lots for the same purpose. * * * It cannot be important whether they are required to pay it for acquiring title to a portion only, or to all of the land taken for the proposed improvement. * * * It could not have been within the contemplation of section 53 that it would be any defense, against special benefits assessed for the purpose of paying compensation awarded, that there were other lands not included in such proceeding that might thereafter have to be acquired before a street or avenue could be opened or improvements made. * * * It cannot therefore affect the right of the city to make an assessment for the payment of compensation awarded, that there may be other tracts or lots or other owners whose title has not been acquired or determined by such proceeding. It is also objected that, the city not having acquired title to all of the property necessary to be taken, it is unjust and inequitable to require appellants to pay their assessments before the city acquires the same. That is not a matter proper for consideration here. If it is apprehended that the city cannot or will not acquire title so that the avenue may be opened, and that the special assessment will be expended without corresponding benefit to the public, it cannot be doubted that a court of equity will afford adequate relief." See, also, *National Ry. Co. v. Easton & A. R. Co.*, 36 N. J. Law, 181; *Harris v. City of Chicago*, supra; *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540. The objection taken by these appellants that, by the judgment of condemnation, the city had not acquired property of other defendants before the commencement of the supplemental proceeding, was no bar to this proceeding, and constituted no defense in this case. It was not error to overrule that objection.

It is contended that a different rule is announced in *Ayer v. City of Chicago*, 149 Ill. 262, 37 N. E. 57, and in *Dickey v. City of Chicago*, 152 Ill. 468, 38 N. E. 932. Where the requirements of the law have not been complied with, or attempted to be complied with, in giving notice to a defendant in a condemnation proceeding, and the court is without jurisdiction as to such defendant, out has entered a judgment against him, that judgment may be attacked by him in any

court at any time. In both the *Ayer Case* and the *Dickey Case*, the land or lot owners insisted that the irregularity in the proceedings was such that the court had no jurisdiction as to them as parties, and those cases are on this question distinguishable from this, and are not in conflict with any principle herein announced.

It is insisted that these proceedings should be dismissed, because the supplemental petition does not recite the ordinance. Where an ordinance is passed providing for a special assessment or for special taxation, and in similar cases, and a petition is filed for the purpose of having commissioners appointed to spread the assessment, it is necessary that the petition should recite the ordinance, or the same should be attached or referred to, so as to bring the same before the court, and make it a part of the records. Such petitions are filed under section 22 of article 9 of the city and village act, and that section requires the recital of the ordinance. Section 53 of the same act and article provides for a supplemental proceeding to a proceeding anterior thereto, in which the ordinance has already been recited. It is not necessary to recite the ordinance in a supplemental proceeding under section 53. *Pearson v. City of Chicago*, supra.

Appellants entered a motion to recast the assessment roll, and offered evidence in support of that motion, and sought to show that just north of the proposed street, and within 120 feet of it, a tract of land was omitted from the assessment roll, which was benefited about \$2,500. This evidence was objected to, and the objection was sustained, to which appellants excepted. Commissioners appointed to spread an assessment roll are to exercise their judgment and discretion in so doing. The power of spreading the assessment roll is by the statute conferred on them under their appointment by the court. The presumption will be that they discharged their duty, and exercised a sound judgment and discretion. Where property is omitted from an assessment where it is within certain limits, the presumption will be that the commissioners had some good reason for such omission, arising out of the nature, character, and situation of the property, and not that they acted negligently or improperly. The modification, alteration, or annulling of an assessment, and recasting the same, will not be made merely because a difference of opinion may exist among witnesses as to whether the commissioners exercised a sound judgment in spreading the assessment. Unless the commissioners acted so negligently and improperly in spreading the assessment that, in effect, their acts were fraudulent, the assessment will not be recast. The mere offer of evidence, and its introduction, showing the opinions of witnesses that an assessment omitted certain property which in their judgment was benefited, does not show fraud on the part of the

commissioners. To construe the statute otherwise would make the appointment, action, and report of the commissioners of no avail, and take away from them the exercise of a sound judgment and discretion. This would be true if the assessment must necessarily be recast because, in the opinions of certain witnesses, omitted property was benefited, or property not benefited was assessed. The offered evidence was not broad enough to show fraud on the part of the commissioners, or as tending to show fraud, and was not based on that ground, and hence its exclusion was not error.

Appellants urge that the verdict of the jury on the questions of fact was contrary to the weight of the evidence. The evidence on these questions of fact was the testimony of expert witnesses and documentary evidence. Questions arising on the opinions of witnesses with reference to the extent to which property is benefited, or whether property is benefited at all, are of a character peculiarly within the province of a jury, and their verdict will not be lightly disturbed or disregarded. While there is conflict in the evidence, we are not disposed to hold this verdict erroneous as applied to this evidence, or that a new trial should be awarded.

Appellants insist their motion in arrest of judgment should have been sustained. This motion was based on grounds which are included within the legal objections heretofore discussed, and what we have said with reference to those objections is conclusive of this motion. The judgment of the circuit court of Cook county is affirmed. Judgment affirmed.

(176 Ill. 456)

McDONALD v. STARK et al.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL CORPORATIONS—PLATS—STREETS—DEDICATION — ACCEPTANCE — ENCROACHMENT—SECONDARY EVIDENCE—RES JUDICATA.

1. Objection that the proper foundation for the admission of secondary evidence has not been laid cannot be raised by general objection.

2. Evidence that search has been made in vain by the proper custodians of a city plat, in the vault where such plats were kept and in all other places where it might be found, is sufficient to authorize the introduction of a copy.

3. A city plat designated all except certain streets, not including the one in question, as four rods wide. A resurvey of some of the blocks left the street in question the same as before, and on the plat thereof it was marked as four rods wide. A plat of the city, made 30 years afterwards by the county surveyor, indicated the street as four rods wide. *Held*, that the street was a platted four rod street.

4. Where a street is dedicated as four rods wide, and the city accepts the street and works it, the acceptance is for the full width, although it is worked and improved for only a portion thereof.

5. When a street is designated on a city plat as of a certain width, and parties buy abutting property with knowledge of, and in reliance upon, such plat, they have a right have the street

maintained at such width, whether there has been an acceptance by the city or not.

6. A judgment dismissing a criminal prosecution, brought on the relation of a property owner against one claimed to be encroaching upon and obstructing a street, is not a bar to a private action by such property owner against the same defendant for such encroachment.

7. Where one knowingly encroaches upon a street, and is not misled by abutting property owners as to the width thereof, mere silence and delay in protesting on their part will not estop them from bringing an action for such encroachment.

Appeal from circuit court, Kane county; Henry B. Willis, Judge.

Bill by Martin Stark and another against Duncan McDonald. Decree was for plaintiffs, and defendant appeals. Affirmed.

This was a bill filed at the March term of the circuit court of Dupage county by John Knippin and Martin Stark against Duncan McDonald for obstructing and encroaching upon a portion of South Railroad street, in the city of Wheaton, Dupage county, and also for an injunction against said defendant, McDonald, enjoining him from further obstructing and encroaching upon said street by erecting and completing any structures or buildings thereon. After the filing of the bill the venue was changed to the circuit court of Kane county, where the cause was heard, but before the decree was entered John Knippin, one of the original complainants, died, and, by an amendment of the bill Christine Knippin, the widow, and the children and heirs of John Knippin, were made complainants in the place of John Knippin, deceased. A decree was entered in their favor and that of Martin Stark against appellant, from which decree appellant has appealed to this court.

The bill alleges that on or about the 20th day of June, 1853, Jesse C. Wheaton and others platted certain lands in Wheaton, which plat is known as the "Original Plat of Wheaton," on which plat South Railroad street was designated; that by the certificate annexed to the plat it is stated that all the streets, except North Railroad, Main, and East streets, were one chain in width; that the plat was duly recorded; that afterwards, and about the 2d day of July, 1855, Jesse C. Wheaton and others made a plat known as "Jesse C. Wheaton's Addition to Wheaton," on which South Railroad street was indicated as a four-rod street, and on that plat was block 4, abutting on said South Railroad street between Hale and Bird streets; that all such streets were platted and laid out to the width of four rods; that on or about the 8th day of March, 1864, Martin Stark became the owner of lot 1 in said block, by deed duly recorded, and on the 14th of September, 1878, he obtained a conveyance of a strip three rods wide on the south end of lot 2 in block 4 of said addition; that John Knippin, about the 27th day of December, 1871, became the owner of lot 5 of said addition by a conveyance to him, which

¹ Rehearing denied December 9, 1898.

was duly recorded; that, when complainants purchased their respective properties, said South Railroad street was a platted street on said original plat and addition, of the width of four rods, the entire length of said block 4, and the same was then open and unobstructed to its full width, and used and traveled as a public street of said town of Wheaton; that complainants purchased their respective properties in reference to said said plat, and were informed thereby that South Railroad street, abutting on said block 4, was a four-rod street, and they relied that it should ever remain so; that north of said block 4 and South Railroad street are located the tracks and right of way of the Chicago & Northwestern Railroad Company, which passes through the city of Wheaton in an easterly and westerly direction; that lying between said right of way and said South Railroad street, directly north of said block 4, is a narrow strip of land shown on said plat, but not marked, which was owned by Jesse C. Wheaton when said plats were made; that said Wheaton, about the 10th of July, 1880, conveyed said strip of land to appellant for \$336 by a deed of that date, which was duly recorded about the 13th day of July, in said Dupage county; that soon after receiving said conveyance appellant began to put improvements upon the said premises, and began to encroach on said South Railroad street, to which complainants and other property owners objected, but that appellant, in spite of said objections, willfully and maliciously contrived to encroach upon said street, and to place permanent structures therein, to prevent the public use to the full width of four rods; that in the month of June or July, 1884, certain prosecutions were commenced or threatened against appellant for such encroachments, and thereupon appellant obtained a quitclaim deed from said Jesse C. Wheaton of one rod in width off the north side of said street the entire length of said block 4, which deed was executed about the 11th day of July, 1884, and duly recorded in Dupage county on the 20th day of October, 1884; that said South Railroad street was never vacated by the public authorities, and that complainants never acquiesced in placing such alleged obstructions in the street, but always remonstrated with appellant for so doing, on the claim that it was a four-rod street, and that such obstructions were an injury to the property of complainants; that complainant Martin Stark has upon his said property an hotel building which for a number of years has been run as a public hotel, fronting east on said South Railroad street, and the full width of said street in front thereof is necessary for the approaches to the said hotel, and that on the premises of complainant Knipplin is situated his dwelling house; that appellant, McDonald, has commenced to erect an ice house within the lines of said street, and that complainant Stark, as soon

as appellant commenced to erect said ice house, served him with a written notice protesting against the said threatened encroachment, but said McDonald gave no heed thereto, but proceeded, and is now proceeding, to complete said structure in defiance of the protests of complainants and other property owners on the said street, whose property will be injured and depreciated thereby, and against the protests of the public authorities of said city of Wheaton, who have protested against the said encroachment and the erection of said buildings and structures, but refuse to bring any action to prevent the erection of the same or to have them removed; that complainants are remediless except in a court of equity. The bill prays that said quitclaim deed from Jesse C. Wheaton to appellant be set aside, and the dedication of said South Railroad street, as on the said plat indicated, be declared effectual to constitute the said street a four-rod street as the same was platted, and that appellant be decreed to remove out of said South Railroad street the said building and all obstructions placed thereon by him prior to the commencement of this suit or during the pendency thereof, and that upon a final hearing a perpetual injunction be decreed enjoining and restraining appellant from further obstructing and encroaching upon said street, and from erecting and completing any structures and buildings thereon.

The defendant answered said bill, in which answer he neither admitted nor denied that Jesse C. Wheaton and others laid out and platted the lands mentioned or made the plat known as the original plat of Wheaton, or that any such street as South Railroad street was ever laid out or designated on said plat, and, if it was, it was not one chain in width, and neither admitted nor denied that Jesse C. Wheaton and others made a plat known as "Jesse C. Wheaton's Addition to Wheaton," but called for proof; denied that said South Railroad street was indicated on the said plat, or on any plat, as a four-rod street; denied that when complainants purchased their respective properties said South Railroad street was a platted street of the full width of four rods the entire length of said block 4, and that the same was then open and unobstructed to its full width, and used and traveled as a public street of the town of Wheaton, but that said South Railroad street never was open and unobstructed to the width of four rods, was never used and traveled as a public street of Wheaton to the width of four rods, and never was accepted by the incorporated village of city of Wheaton as a street of the width of four rods, and never accepted or worked by the said village or city, or the authorities thereof, to a greater width than three rods; admitted that on the 10th of July, 1880, Jesse C. Wheaton conveyed to defendant a strip of land described in the bill of complaint, and soon thereafter defendant began putting improvements on said premises, but

denied that he thereby encroached upon said street, or that there was any collusive or wrongful agreement made with Jesse C. Wheaton to deprive the public, or complainants, of the use or approaches of the said street by the execution of the quitclaim deed described in said bill of complaint; denied that the public authorities of Wheaton ever protested against defendant putting his buildings where they now are on any claim that it was a four-rod street, but, on the contrary, the authorities of said village or city of Wheaton have always known and accepted the said street as a three-rod street only, and have refused to bring any action to prevent the erection of defendant's buildings or to have them removed, for the reason that they well knew that the said street was only three rods wide, and that defendant's buildings do not encroach on the street; alleged that on or about the 24th day of August, 1885, the said Martin Stark, one of the complainants, commenced a proceeding in the name of the people of the state of Illinois against defendant, for obstructing said South Railroad street by his said buildings and fences, which suit was tried in the circuit court of Dupage county, at the March term, 1887, in which it was determined by the court that defendant was not guilty of obstructing the said street by his said buildings and fences, and that said South Railroad street had never been accepted as a street by the public authorities either of the village or city of Wheaton to a greater width than three rods, and that it was not a street to a greater width than three rods; averred that whether said street was three or four rods in width, or whether he had obstructed the said street, is *res judicata*, and cannot be litigated again in this proceeding, but is a bar thereto, and claimed the same right of setting up the same as a bar as though he had pleaded to the same; averred that about the year 1880 defendant began putting buildings and making improvements on the strip of land in question, and erected thereon a blacksmith shop, a house, barn, and other improvements, to the value of \$2,500 or \$3,000, with the knowledge and acquiescence of the complainants, and neither of them has ever objected to his putting said buildings and improvements upon the said land, or ever claimed to him that the same, or any of them, were in said South Railroad street, until the 29th of August, 1893, when a written notice was served by complainant Martin Stark upon him objecting to the building of the ice house upon the said premises on the ground that it was in the street; that the bill in this case was not filed until the year 1894, and that, if complainants ever had any right in said strip of land on account of its being a part of the street, they slept upon such rights for a long number of years, and did not seek to enforce them against defendant, and were guilty of laches, and on account of such laches have no right to the relief prayed for, and set up the defense of laches.

A replication was filed to the answer, and upon the hearing on the pleadings and evidence the court rendered a decree finding that said South Railroad street was platted and originally laid out four rods wide, and that it was used and traveled as a public street of the town of Wheaton to the full width of four rods; that complainants purchased their land relying that South Railroad street would always remain of the width of four rods; that defendant encroached with his improvements and buildings on said street, and obstructed the same therewith, and the municipal authorities of the said town of Wheaton notified and ordered defendant to remove the obstruction from said street; that the property of complainants was impaired and injured, and its convenient use destroyed, by the buildings and improvements of defendant; that said South Railroad street opposite block 4, for the entire length of the block, was four rods wide; that defendant remove, or cause to be removed, all the buildings and structures erected by him, and that on a failure to do so a writ or writs be issued on the decree to carry the same into effect, at the costs of the defendant.

Charles Wheaton, for appellant. Botsford, Wayne & Botsford (L. E. De Woolf, of counsel), for appellees.

CRAIG, J. (after stating the facts). The first question to be determined is, was South Railroad street laid out and platted by Jesse C. Wheaton as a street four rods wide opposite block 4? The original plat of the town of Wheaton is dated June 20, 1853, and is acknowledged and recorded on the same day and year in Dupage county. July 2, 1855, Jesse C. Wheaton platted and acknowledged an addition known as "Jesse C. Wheaton's Addition to Wheaton," which was duly recorded July 7, 1855. The original plat of the town of Wheaton and the original plat of Jesse C. Wheaton's addition to the town of Wheaton appear to have been lost, and copies of the original plats were introduced in evidence, which were testified to by abstracters, and persons who had the custody of the original plats before they were lost, as being true and correct copies of the originals. Surveyors who were familiar with the plats, and who made actual surveys, found the record of these plats, and the recitals thereof, to be correct.

Appellant insists that there was not sufficient preliminary proof of the loss of the original plats to allow copies of the same to be introduced in evidence. The objection made by appellant was a general objection. If the proper foundation had not been laid for the introduction of copies of the original plats, specific objection should have been made, so that appellees could have had opportunity to supply the wanting proof. *Gillespie v. Gillespie*, 159 Ill. 84, 42 N. E. 305; *Weber v. Mick*, 131 Ill. 520, 23 N. E. 646. An examina-

tion, however, of the record shows that proper search was made by the proper custodians of the original plats, in the vault where they were kept and in all places where they would likely be found, but they could not be found. The trial court then properly admitted secondary evidence or copies of the original plats.

On the question of the platted width of South Railroad street, we find that the premises of appellees in the original plat of Wheaton are included in block 10, and, while no width of South Railroad street is indicated by figures within the lines of the street, the certificate to the plat recites: "The streets in said town, with the exception of North Railroad street, Main street, and East street, are all one chain in width." South Railroad street, not being mentioned among the exceptions, is one chain, or four rods, in width. In the plat of Wheaton's addition South Railroad street is left the same as in the original plat of the town of Wheaton. By referring to the plat in the record, we find that, at the intersection of South Railroad street with West street, the figures "100" are marked as showing the width of South Railroad street. The certificate to the plat states: "The distances and chains and links will be found designated in figures of this plat." This shows that one hundred links, or four rods, was the platted width of the street. The certificate also shows the plat of Jesse C. Wheaton's addition to the town of Wheaton to be "a resurvey of blocks 9 and 10 of the original town of Wheaton," and also that "the size of all streets and alleys, lots and blocks, in this survey can be seen by reference to the annexed plat." A plat made February 25, 1884, by James M. Vallette, county surveyor of Dupage county, for the city council of Wheaton, shows the width of South Railroad street to be one chain, and shows the buildings of the appellant project twenty-five links, or one rod, within the line of the street. An examination of these plats and the descriptive parts of the plats satisfies us that South Railroad street was platted a four-rod street.

It is contended by appellant that the authorities of Wheaton have never worked or accepted the street to a greater width than three rods. South Railroad street was accepted by the public authorities, and was worked and improved opposite block 4, where appellees' property was situated, and three rods of the street has never been obstructed, but has been used by the public since it was platted. In *Board v. Holly*, 169 Ill. 9, 48 N. E. 149, this court said (page 16, 169 Ill., and page 151, 48 N. E.): "The appeal concerns only the portion obstructed by appellant, and in its behalf it is argued that there was only an acceptance of those parts of the alley where work was done by putting in the culvert and tile and filling the road, which was on another part. The road was a single, direct strip, and the public could not be required to make repairs where not needed, for

the purpose of accepting the whole. The acceptance cannot be confined to the particular spots where the work was done, and the public be deprived of the remainder." Neither in the case at bar can the acceptance of South Railroad street be confined to the three rods improved, but must be held to be an acceptance of its entire width of four rods, as originally platted.

But, even if the municipal authorities of Wheaton only worked or improved three rods of this street, this cannot affect appellees, whose lots abut on South Railroad street. In *Zearing v. Raber*, 74 Ill. 409, it was said (page 411): "It is unimportant whether the public have so far accepted the dedication as to be bound to keep the street in repair, since the question involved is simply one of private right. * * *. If appellee is entitled to have the street kept open for use, it will be sufficient." We also in that case approved of the principle laid down in *Smith's Leading Cases*, and cited from it, as follows: "If one owning land exhibit a map of it, on which a street is defined, though not as yet opened, and building lots be sold by him with reference to a front or rear on that street, or lots be conveyed being described as by streets (*Schenley v. Com.*, 36 Pa. St. 62), this is an immediate dedication of that street, and the purchasers of lots have a right to have that street thrown open forever." In the case of *Marsh v. Village of Fairbury*, 163 Ill. 401, 45 N. E. 236, it was said (page 407, 163 Ill., and page 238, 45 N. E.): "But, in connection with these public rights, those who purchase lots fronting on this park took with reference to the plat, and had an appurtenant right therein, which was their own property as a right appurtenant, and that was to have the streets and block 10 remain open for public use. The vendor or those privy to his title would, by his acts in platting and selling lots by this plat, be estopped from inclosing block 10 as a private ground. Such being the case, the question as to whether or not the village authorities accepted the dedication of that block would not defeat the right of individual purchasers from asserting their rights to have the same open forever for the use of the public." *Earl v. City of Chicago*, 136 Ill. 277, 26 N. E. 370. The evidence shows that appellees purchased their respective lots relying on the plat as to the width of said street, and that it should always remain of the width of four rods.

Appellant argues that this case has been adjudicated once, because one of the appellees, in 1885, made a complaint against the appellant, and a warrant issued in the name of the people, for obstructing this north one rod of South Railroad street, and the circuit court dismissed the prosecution on appeal. To make a former action *res judicata*, there must be identity in the thing sued for, identity of the cause of action, and identity of persons and parties to the action. The criminal action was in the name of the people of

the state of Illinois, and not in the name of appellee Stark, as an individual. There was no identity to the action, and it cannot be a bar to this action.

Appellant insists, also, that appellees are not entitled to relief, because they were guilty of laches, and acquiesced in appellant's use of the street, and therefore are estopped from asserting that appellant's buildings are in the street. The proof shows appellees did not acquiesce in appellant's use of the north one rod of said South Railroad street. Martin Stark, one of the appellees, made the complaint in the criminal proceedings in the name of the people against appellant for obstructing the street. A notice was also served by Stark on appellant, McDonald, August 29, 1893, notifying him to refrain from erecting an ice house within the lines of South Railroad street, and another notice was served by John Knippin and Stark on April 18, 1895, protesting, as property owners, against McDonald erecting any building on the north side of the street that would obstruct or encroach upon the street at a less width than four rods. These notices, instead of showing acquiescence on the part of appellees, expressly show that appellees remonstrated against appellant obstructing the street, and that appellant knowingly persisted in erecting buildings within the line of said street. The deed received by appellant, July 10, 1880, from Jesse C. Wheaton, was notice to him that the land conveyed abutted on a four-rod street, and his subsequent procurement of a quitclaim deed of the north one rod of the street from Wheaton, who had platted it and had sold lots to others abutting on said street, shows an attempt on appellant's part to knowingly continue his trespass.

In the case of *Village of Wayzata v. Great Northern Ry. Co.* (Minn.) 49 N. W. 205, the court said: "One who enters upon and possesses land of another, without right,—a mere trespasser, and knowing he is such,—cannot, no matter to what use he may put it nor how much he may improve or expend upon it, claim that the owner is estopped, by mere delay in ousting him, to seek a remedy, legal or equitable, appropriate to the case. In such case, so long as the latter remains the owner such remedies are open to him, unless barred by the statute."

In the case of *Mullaney v. Duffy*, 145 Ill. 569, 33 N. E. 750, this court said (page 565, 145 Ill., and page 751, 33 N. E.): "If it is intended to insist that appellee is estopped by conduct from asserting his right, and if it be conceded that such defense is available at law, the effect of the estoppel being to prevent showing the truth, the rule is that it must be strictly made out. Where the estoppel is sought to be established from the silence of the party who, in equity and good conscience, should have spoken, as it is here, if there be any ground of estoppel it is essential that the party should have had knowl-

edge of the facts and the other party have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence. *Smith v. Newton*, 38 Ill. 230; *Insurance Co. v. Ives*, 56 Ill. 402; *Noble v. Chrisman*, 88 Ill. 186; *Hill v. Blackwelder*, 113 Ill. 283. The facts which would have led to accurate knowledge of the boundary between the lots were open equally to the parties, and could be availed of by one as readily as the other. Appellant at no time sought information from appellee as to the boundary, nor did appellee at any time do or say anything the effect of which would be to mislead appellant in respect of the same."

Appellees, having an easement in the street, have a right to have the same kept open its entire width. The evidence shows a statutory plat of the original town of Wheaton, and of Jesse C. Wheaton's addition to the town of Wheaton, and that South Railroad street was platted four rods in width. The north one rod has been obstructed by appellant. As was said in *Zearing v. Raber*, 74 Ill., on page 412: "If the owner of land * * * exhibits a plan of the town, with various plats of spare ground, * * * and sells the lots with clear reference to that plan, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege, and advantage which the plan represents as belonging to them as a part of the town, or to their owners as citizens of the town. * * * The sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers that the streets and other public places, indicated as such upon the plan, shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use." *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 210.

The evidence shows that appellees are entitled to the relief prayed for in the bill, irrespective of the rights of the city of Wheaton. The evidence also shows the obstructions are a nuisance, and threaten to become permanent, and are injurious to the property of appellees, which is a well-recognized ground for equitable interposition. The decree of the circuit court is affirmed. Decree affirmed.

(176 Ill. 94)

NORWEGIAN OLD PEOPLE'S HOME SOC.
et al. v. WILLSON et al.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

BENEFICIAL ASSOCIATIONS—BENEFICIARIES—CAPACITY TO TAKE—"HEIRS AT LAW."

1. Under the charter of a benefit association, stating its object to be "the relief of the distressed, injured, sick, or disabled members of the association and their immediate families," an old people's home society is incompetent to take as a beneficiary, notwithstanding the stat-

¹ Rehearing denied December 9, 1898.

ute, in the absence of such charter limitation, would have permitted it to take.

2. Under the charter of a benefit association, stating its object to be the relief of the distressed, injured, sick, or disabled members of the association, and "their immediate families," and a constitutional provision that, when any beneficiary shall be unable to take, then such beneficiary fund shall be payable to the heirs at law of the deceased, according to the laws of descent, where the beneficiary was incompetent to take the benefit the only child of deceased (his wife being divorced, for her fault) should be paid the fund, in preference to deceased's brother, who lived in deceased's household.

Appeal from appellate court, First district.

Bill by Dalsey E. Willson and another against the Norwegian Old People's Home Society and another. A decree for complainants was affirmed by the appellate court (73 Ill. App. 287), and defendants appeal. **Affirmed.**

Chytraus & Deneen and Olaf E. Ray, for appellants. Samuel J. Howe, for appellee Dalsey Edna Willson.

CARTER, C. J. This was a bill in chancery, filed by Dalsey E. Willson in the circuit court of Cook county, by which she sought to set aside as fraudulent and void the cancellation of a benefit certificate issued to her father, Elef Danielson, by the Policemen's Benevolent Association of Chicago, in which she was named as beneficiary, and to have another certificate, in which the appellants were named as beneficiaries, issued in lieu of the former, canceled and annulled; also asking that the association be decreed to pay her the money due under the former certificate, and that it be enjoined from paying any money to appellants on account of such second certificate. The bill charged that the proper formalities had not been observed in making the surrender of the first certificate, and that the change in beneficiaries had been procured by undue means, and while her father was mentally incapable of transacting business. A cross bill was filed by appellants, in which they asked that the money be decreed to be paid to them. The association answered the cross bill, and alleged that appellants were incompetent to take as beneficiaries, that the certificate issued making them such was void, and that the proceeds should revert to the association. Appellee Willson, in her answer to the cross bill, set up the same matters alleged in her original bill, and alleged that appellants were incompetent to take as beneficiaries, and that, under the constitution and by-laws of the association and the laws of this state, the proceeds of the benefit certificate were payable to her. Issues were made on the original and cross bills, and the court found that the first certificate was properly surrendered, and the changes in the beneficiaries made with the full knowledge and consent of Elef Danielson, who was fully competent, but also found that the appellant the Norwegian Old People's Home Society was incompetent to take under the certificate and laws of the association, that P. J. Danielson was a member of the Imme-

diate family of his brother Elef, and decreed that the association pay one half of the proceeds of the benefit certificate to said P. J. Danielson, as the beneficiary appointed therein, and that the other half be paid to appellee Dalsey E. Willson, as the only heir at law and next of kin of Elef Danielson, and a member of his family, within the meaning of the certificate and laws of the association. On appeal to the appellate court by appellants, the decree was affirmed, and they have further appealed to this court.

It is contended by appellants that the appellee Dalsey E. Willson is not competent to take any benefit under the certificate and laws governing the association, and that, if it be held that the Norwegian Old People's Home Society is also incompetent to take, the whole fund should go to P. J. Danielson, while it is strongly urged that, the contract having been fully executed on the part of Elef Danielson, it is now too late to raise the question of the incompetency of the Norwegian Old People's Home Society as a beneficiary, and that only the association itself could raise any question in that regard. The whole question as to who may be made beneficiaries must be settled, in the first place, by reference to the certificate of incorporation of the Policemen's Benevolent Association. The object of the association is stated to be: "To create a fund and provide means for the relief of the distressed, injured, sick, or disabled members of the association and their immediate families." This object is repeated in almost the identical words in article 2 of the constitution of the association. Article 11 of this constitution is entitled "Payment of Beneficiary," and provides, among other things, as follows: "Sec. 3. When any beneficiary named in this certificate of any deceased member, by reason of death, operation of law or otherwise, is unable to take the beneficiary fund of such deceased member, then such beneficiary fund shall be payable to the heirs-at-law of such deceased member in accordance with the statutes of Illinois regarding descent."

There can be no question that the Norwegian Old People's Home Society was incompetent to take under the terms of the certificate of incorporation of the association. It could not in any way be held to be a member of the deceased's immediate family, and only such persons were competent to take. It is no answer to say that the statute of the state under which the association was organized was broad enough to permit such society to take. The incorporators of the association chose to restrict the objects of its benevolence to the immediate family of the member, and the courts must construe the contract as they find it. *Rockhold v. Benevolent Soc.*, 129 Ill. 440, 21 N. E. 794. This court said in *Alexander v. Parker*, 144 Ill. 355, on page 363, 33 N. E. 183: "Where the statute under which a benevolent corporation is organized, and its charter adopted in pursuance of such statute, designate certain classes of persons as those for whom a benefit fund

is to be accumulated, a person not belonging to either or any of such classes is not entitled to take the fund. The corporation has no authority to create a fund for other persons than the classes specified in the law, nor can a member direct the fund to be paid to a person outside of such classes. Neither the act of a member in naming a person who is not within the classes to be benefited, nor the act of the corporation in making the certificate which it issues payable to such person, can deprive the beneficiaries designated by the law of their right to or interest in the fund." There is no question as to the liability of the corporation issuing the benefit certificate. The only question is, to whom does the fund belong? *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412.

It does not change or alter the principle announced in the above cases that they arose on certificates issued by the Royal Arcanum, —an order operating under the laws of Massachusetts. The laws of Massachusetts specifying the classes of persons who may become beneficiaries were applied in both cases, and it was held that such laws must govern. The Policemen's Benevolent Association is an Illinois corporation, which has voluntarily chosen to restrict its benevolences to the immediate families of its members, and we must apply the restrictions found in the statement of the object of the association as specified in the certificate of incorporation, and not the statute itself in its broadest scope. It is obvious that there is nothing illegal or against public policy in the action of the association in narrowing the scope of its beneficial action. In *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, this court said (page 406, 126 Ill., and page 661, 18 N. E.): "It is clear, however, that the statute, by empowering a member to name as his beneficiary his legatee or devisee, without restriction, proceeds upon a policy much broader than do those statutes which limit the benefits to accrue upon the death of the member to his relatives or those in some way dependent upon him." In that case the constitution of the society followed the broad language of the statute, and we expressly discriminated between such language and that used limiting the benefits to the relatives or families of the deceased member, as is done in this case. The case of *Association v. Blue*, 120 Ill. 121, 11 N. E. 331, is similar in nearly all respects to the case last cited. In that case the beneficiary, Blue, brought suit against the benefit association, and the association, among other defenses, interposed that of ultra vires. On the same line of reasoning as that adopted in *Martin v. Stubbings*, supra,—namely, that the language of the statute naming devisees and legatees as possible beneficiaries was broad enough to cover any person who could have been appointed such devisee or legatee by will, though appointed directly by the member in his benefit certificate,—this court held that Blue was entitled to the fund, and that the association was estopped to plead ultra vires. *Rockhold v.*

Benevolent Sec., supra. There was an attempt in the *Blue Case*, by the association, to evade payment of the benefit secured by its certificate, and this court held that such payment could not be avoided. In the case at bar we hold to the same doctrine,—that the Policemen's Benevolent Association cannot evade payment of the benefit secured by its certificate; but, the contest in this case being between different claimants to the benefit of the certificate, it is the duty of the court to determine to whom it should be paid.

The question arises as to the meaning to be given to the words "immediate family," appearing in the statement of the object of the association. We think a reference to other portions of its constitution will show what meaning the framers of the same attached to it. The section quoted above from article 11 seems to indicate that the heirs at law of the deceased member were deemed to be his "immediate family." The word "family" is used in various significations, some more restricted, others more extended; the general scope and purview of the statute or of the will having to be considered in each case. It is used to indicate—First, the whole body of persons who form one household, thus including also servants; second, the parents with their children, whether they dwell together or not; and, third, the whole group of persons closely related by blood. *Cent. Dict.* It "may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children excluding his wife; or, in the absence of wife and children, it may mean his brothers and sisters or next of kin; or it may mean the genealogical stock from which he may have sprung." 2 *Story, Eq. Jur.* (13th Ed.) § 1065b. Appellant P. J. Danielson, a brother living in the household of Elef Danielson, would be a member of his family by virtue of his residence and relationship; while appellee Daisey E. Willson, the only child of Elef Danielson, would be a member of his family by virtue of such relationship. The term "immediate" seems to offer some difficulty, its signification generally being "not separated from its object by any medium; directly related; nearest." Taking into consideration the section of article 11 quoted above, we think appellee Willson, who was his next of kin and only heir at law, was within the designation "immediate family."

The appointment to P. J. Danielson of one half of the proceeds of the benefit certificate must be sustained, and the appointment of the Norwegian Old People's Home Society to the other half must be held to be inoperative, as not being allowable by the terms of the certificate and constitution of the association. This appointment having failed, we must seek for the beneficiary of one-half of the fund according to the terms of section 3 of article 11 of the constitution of the appellee association, which provides that, when the beneficiary named by operation of law is unable to take,

then such fund shall be payable to the heirs at law of such deceased member in accordance with the statutes of this state regarding descent. Elef Danielson was divorced from his wife for her fault, and, when he died, he left, him surviving, the appellee Dalsey E. Willson, as his only child, and therefore his heir at law; and, as such, she is clearly entitled to the remaining one-half of the proceeds of the benefit certificate. The judgment of the appellate court is affirmed. Judgment affirmed.

(176 Ill. 340)

GUNDLING v. CITY OF CHICAGO.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

CIGARETTES—REGULATING SALE—ORDINANCES— QUESTION ON APPEAL.

1. Power given cities by Rev. St. c. 24, art. 5, § 1, par. 50, to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, does not authorize regulation of the sale of tobacco.

2. Power to require license for sale of cigarettes is given cities by Rev. St. c. 24, art. 5, § 1, pars. 53, 66, 78, authorizing them to regulate inspection of tobacco, to pass all necessary police ordinances, and make regulations for promotion of health.

3. An ordinance requiring a license for sale of cigarettes, declaring that none shall be issued for their sale within 200 feet of a school house, and declaring a penalty, does not deprive one of liberty and property without due process of law.

4. There is no delegation of the power of a city council to the mayor by an ordinance which requires a license for sale of cigarettes, declares the amount to be paid therefor, and the districts within which sale may be made, though it gives the mayor a discretion to determine whether a license shall be issued.

5. One who, on prosecution for selling cigarettes without a license, in violation of an ordinance, merely denied the power of the city to adopt such ordinance, cannot on appeal raise the point that the ordinance was void, because delegating to the mayor a discretion to determine whether a license should be issued.

Appeal from criminal court, Cook county; William G. Ewing, Judge.

Harry Gundling was convicted of violating an ordinance of the city of Chicago, and appeals. Affirmed.

Charles H. Aldrich (Lee D. Mathias, of counsel), for appellant. Howard S. Taylor, City Pros., and George McA. Miller, Asst. City Pros., for appellee.

PHILLIPS, J. This case was tried on an agreed statement of facts, which showed that the city of Chicago, by its city council, adopted an ordinance which provides, by section 1, that the mayor shall, from time to time, grant licenses authorizing the sale of cigarettes. It further provides what formalities shall be observed by the applicant in making his application, such as a bond to obey the laws, affidavit of good character and reputation, etc., and gives to the mayor a discretion to determine whether a license shall be issued. Section 2 provides for a license fee

of \$100 per year, and that no license shall be granted to sell cigarettes within 200 feet of a school house. Section 3 provides that every license granted shall be at the rate of \$100 per year. Section 4 grants the power to the mayor to revoke any license for cause. Sections 5 and 6 provide the manner of selling cigarettes. Section 7 makes the commissioner of health the general supervisor and inspector to see that the sale of cigarettes is carried on according to law. Section 8 prescribes the penalty for the violation of the terms of the ordinance. Section 9 is that the ordinance shall be in force after its due passage and publication. The statement further shows that appellant, on or about the 31st day of December, 1897, while said ordinance was in force, and after the same had been duly published, did have, keep and expose for sale, and offer to sell, cigarettes within the city of Chicago, without having first procured a license, as required by said ordinance. The defendant was convicted before a justice of the peace, and a fine of \$50 and costs entered against him, from which he prosecuted an appeal to the criminal court of Cook county, where, on trial on the foregoing statement of facts, he was found guilty, and a fine of \$50 assessed against him. Motions for a new trial and in arrest of judgment were overruled, to which he excepted, and judgment was entered against him.

The defense was based on the ground that the ordinance in question, as enacted by the city council, was not within the powers delegated to the city by the legislature, and hence was null and void, and that the ordinance and judgment of the court deprived the appellant of liberty and property without due process of law, in violation of the constitution of the state of Illinois and of the fourteenth amendment of the constitution of the United States, which latter in part provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The contention of appellee is the power to enact this ordinance is expressly granted by paragraph 50, § 1, art. 5, c. 24, of our Revised Statutes, which provides the common councils of cities shall have power "to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables and all other provisions, and to provide for place and manner of selling the same." The power to license and regulate the sale of cigarettes, it is contended, is included within that paragraph, and that the term "all other provisions" includes tobacco in the list of enumerated articles by the language as used.

The articles—meats, poultry, fish, butter, cheese, and lard—which are expressly enumerated in the above paragraph, and the

¹ Rehearing denied December 9, 1898.

power expressly given therein to regulate the sale thereof, are articles of food for man, and include, by the express enumeration of articles, only provisions to be used for man. The term "other provisions," by a familiar canon of construction, can extend only to articles of the same character as those specifically enumerated. When general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated. In re Swigert, 119 Ill. 83, 6 N. E. 469; Cecil v. Green, 161 Ill. 265, 43 N. E. 1105; Emmons v. City of Lewistown, 132 Ill. 380, 24 N. E. 58. Lexicographers have given to the term "provisions" a broader meaning than that of food for man. The meaning of general terms used in a statute, or in one section thereof, may be often determined from the connection in which the language is used and the purpose to be subserved. Paragraph 50, above, providing for the regulation of the sale of certain enumerated articles of food for man of daily consumption, followed by the general term "all other provisions," cannot be held to include in the term "all other provisions" such an article as tobacco in any of its various forms. Although it may be an article of frequent use, yet it is not included within the meaning of the term "food for man." The contention of appellant is that no express power is given to regulate the sale of tobacco by the provisions of paragraph 50. We hold that contention of appellant must be sustained, and that by paragraph 50 no power is given to the city council to regulate the sale of tobacco.

It is insisted by appellee that if no express authority for licensing the sale of cigarettes is given under paragraph 50, above quoted, the power exists as an implied power under paragraphs 53, 66, and 78 of said section 1, which provide as follows: "Fifty-Third. To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions." "Sixty-Sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances." "Seventy-Eighth. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." An ordinance may derive its validity from several different grants of power, and not depend solely upon any single section or clause of a statute. Kinsley v. City of Chicago, 124 Ill. 359, 16 N. E. 260. An implied power of a municipal corporation is a power necessarily incident to the exercise of those powers expressly granted and directly and immediately appropriate to their exercise. People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798; Chicago & N. W. Ry. Co. v. City of Chicago, 148 Ill. 141, 35 N. E. 881; Mather v. City of Ottawa, 114 Ill. 659, 3 N. E. 216. The power to regulate the sale of an article includes the power to require a license

to authorize the sale thereof. Farwell v. City of Chicago, 71 Ill. 269; Chicago Packing Co. v. City of Chicago, 88 Ill. 221; Kinsley v. City of Chicago, supra. The licensing of a sale of an article is a legitimate means of regulating its sale. Chicago Packing Co. v. City of Chicago, supra. By the paragraphs above quoted, power is expressly given the city to provide for and regulate the inspection of various enumerated articles, including tobacco, and this would include the various forms in which that product is prepared and used. The purpose of conferring this power of providing for and regulating the inspection of those various enumerated articles is to subserve the public welfare and protect the public health. The measure has relation to the public health, and is required in that interest. With this object evidently in view, the legislature passed an act, approved June 15, 1887, in force July 1, 1887, entitled "An act to prohibit selling, giving or furnishing tobacco, in any of its forms, to minors, and providing a penalty therefor." Section 1 of said act provides: "That hereafter no person or persons in this state shall sell, buy for or furnish any cigar or cigarette, or tobacco in any of its forms, to any minor under sixteen years of age, unless upon the written order of parent or guardian." Section 2 provides that, if any person or persons shall violate the provisions of section 1, he, she, or they shall, on conviction thereof, forfeit and pay for each offense the sum of \$20. The object and purpose of this enactment were to subserve and protect the health and welfare of the class of persons to whom the act refers, and to whom a sale is forbidden. The consensus of opinion in reference to the use of cigarettes is that they are injurious to the young with immature minds, and common observation causes us to know that tobacco in the form of cigarettes is more largely used by those of young and immature minds than by any other class.

It is urged by appellant that the city council has no right to single out a particular form of manufactured tobacco, and provide for its regulation, and require a license for its sale, without making the requirement apply to all the forms in which tobacco may be used. It being well known that young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form, a legislative body may properly provide for the regulation and sale of that article in the form in which it is likely to be most deleterious and injurious, and may restrict the sales of that particular form of tobacco. Paragraph 66, before quoted, expressly authorizes the adoption of ordinances necessary to police power; and paragraph 78 is an express authorization of the city council to make all regulations necessary or expedient for the promotion of health or the suppression of disease. Under these two provisions, express authority is granted the municipality to pass all ordinances or require-

ments tending to promote the public health, morals, security, comfort, and welfare of the community. Such legislation is included within the provision authorizing the enactment of police regulations. The most important of police powers is that of caring for the health of the community, and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporation. *Ferguson v. City of Selma*, 43 Ala. 400.

The regulation of the police power is hardly susceptible of exact definition, as the exigencies of each case are varying, and the cases are innumerable where the health of the inhabitants of the municipality may be in some degree endangered. When the city council considers some occupation or thing dangerous to the health of the community, and, in the exercise of its discretion, passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other. The necessity for action is often more urgent, and the consequences of neglect are more detrimental to the public good, in this than in any other form of local evil. It being clear that the public health and welfare of a large class in the community would be subserved and protected by ordinances regulating the sale of tobacco in one of its manufactured forms, an ordinance directed to the protection of the health or welfare of that particular class of the community would be a police regulation within the power of a city to enact under the power expressly granted by paragraphs 66 and 78. An ordinance of this character is not in conflict with any principle of the common law, or with any public or general statute, and infringes no private right not necessarily infringed in the interests of good government. It subserves the public welfare, protects the health of the community, and is included within the express powers granted the city council. The ordinance was not void.

Neither did the ordinance and the judgment of the court deprive the appellant of liberty or property without due process of law. The city having the authority to enact the ordinance and provide a penalty for its violation, which ordinance applies to all citizens within the community, no principle of the constitution of the state of Illinois or of the United States, or the amendments thereto, was violated.

Appellant insists that the ordinance is void because it delegates to the mayor the power to determine whether the license should be granted. In *Swarth v. People*, 109 Ill. 621, it was said (page 626): "It is true, the ordinance prescribing the duties of the mayor in issuing licenses says that he shall, under certain circumstances, 'grant' licenses to certain

persons, while the statute authority to 'grant' such licenses is given only to the city council; but the substance of the ordinance is that the city council grants licenses to a certain class of persons upon certain conditions, by authorizing the mayor to 'grant,'—that is, to issue or cause license to be issued, when the conditions are complied with. This is not a delegation to the mayor of the power of the council. We see no objection to the form in which this power of the council is exercised, or the mode in which the license was issued." The ordinance, by its terms, fixes the rate per annum to be charged for a license, and regulates the price and object of sale of the particular article to which it refers, all of which is enacted by the city council. That license is to be granted or issued by the mayor, and thus carrying out the express will of the city council as to issuing the license is not exercising a power conferred on the city council, but is a method by which the council exercises its power as to the manner in which the license is to be issued. In this there is no delegation to the mayor of the power of the city council. The appellant, however, is not in a position to raise this question, from the facts appearing in this record. He was not an applicant for a license, which had been refused him, but was before the court admitting that he had violated an ordinance of the city of Chicago duly passed and published, and denying the right of the city to adopt such ordinance regulating the sale of cigarettes. He is not in a position to invoke the judgment of this court as to his right to a license, nor is that question before us. We are of the opinion that the ordinance was within the express powers granted to the city council, and the judgment of the court was not violative of any provision of the state or federal constitution. The judgment of the criminal court of Cook county is affirmed. Judgment affirmed.

(176 Ill. 180.)

LENNING v. LENNING.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

DIVORCE—CRUELTY—EVIDENCE—ADULTERY—
APPEAL—HARMLESS ERROR.

1. The question whether two or more acts of physical violence constitute cruelty sufficient to justify a divorce depends on their character, the manner of the person committing them, and the surrounding circumstances, and hence is for the jury.

2. On an issue of a husband's cruelty to his wife, a letter written by him, stating that he has committed adultery, not intended for her, and not seen by her until after they have separated, is inadmissible.

3. Where adultery is charged as a ground of divorce, and, by answer, as a defense to a cross bill for divorce because of complainant's adultery, a withdrawal of the charge as a ground of divorce does not withdraw it as a defense to the cross bill.

4. Where an application for divorce for adultery is resisted because of petitioner's adultery, a letter written by him, confessing the commission of such acts, though not signed or delivered to any person, is admissible.

¹ Rehearing denied December 9, 1898.

5. In divorce proceedings, adultery need only be proved by a preponderance of the evidence.

6. A charge that adultery need only be established by a preponderance of the evidence, and to acquit if the facts relied on are equally consistent with guilt and innocence, because it must be clearly established by a preponderance, is inconsistent.

7. Where respondent in proceedings for divorce because of adultery establishes petitioner's adultery as a defense, an erroneous instruction on the issue of respondent's adultery is not reversible error.

8. On appeal from a dismissal of his cross bill alleging adultery, defendant cannot assign error in the admission of evidence on the issue of his cruelty to complainant, which was determined in his favor.

Appeal from appellate court, First district.

Bill by Addie Lenning against William F. Lenning for divorce. From a judgment of the appellate court (73 Ill. App. 224) affirming a dismissal of complainant's bill and defendant's cross bill, defendant appeals, and complainant assigns cross error. Affirmed.

A. A. Thomas and Wm. J. Ammen, for appellant. William H. Slack and John C. Wilson, for appellee.

BOGGS, J. We have considered the briefs of counsel, and in connection therewith consulted the record in this cause, and have reached the conclusion that the judgment of the appellate court affirming the decree rendered by the superior court is correct, and should be, and is, affirmed. The opinion of Mr. Justice Windes, of the appellate court, is adopted as the opinion of this court. In that court the appellant here was the plaintiff in error. The opinion is as follows:

"Defendant in error on March 26, 1897, filed her sworn bill against plaintiff in error in the circuit court, charging him with cruelty, generally, since their marriage, without alleging any specific time or place; also, with habitual drunkenness for two years last past, and adultery, at divers times and places since the marriage, with divers lewd women, but fixed no specific time, place, or person with whom the adultery was committed,—and asking for a divorce from plaintiff in error. Plaintiff in error answered, denying the cruelty, drunkenness, and adultery, and alleging that all said charges were known to be false by defendant in error, and that they were made by her to compel him to let her alone in her adulterous life, and to allow her to retain certain property described in her bill, and that she knew before her bill was filed that he was preparing to file such a bill against her. The answer also contains a demurrer to that portion of the bill charging him with cruelty and adultery, the cause of demurrer assigned being that there was not sufficient averment of time and place as to those charges. The cause was transferred to the superior court by agreement, and on June 5, 1897, plaintiff in error filed his cross bill, alleging that on December 6, 1897, he discovered the unchastity of defendant in error, charging her with adultery with one Frank Marvin, and also

with one Johnson and other men, alleging times and places as to the adultery with Marvin, and asking for a divorce from her. She answered, denying all the charges of adultery against her, and later, by leave of court, filed an amended bill, and an amended answer to the cross bill. The amended bill, which is sworn to by her, charges plaintiff in error with striking her, and violently and angrily pushing and forcing her through a window, etc., calling her vile names, and falsely charging her with being unchaste and lewd on December 1, 1896, and on many occasions immediately preceding and following said date; also, that he had committed adultery on occasions before and after December 1, 1896, with a woman named Anna, her other name and identity being unknown to defendant in error. The answer to the original bill was ordered to stand to the amended bill. The amended answer to the cross bill alleges that plaintiff in error has for a considerable time past given himself over to adulterous practices; that at divers times and places since said marriage the cross complainant has committed adultery with various lewd women, whose names are to this defendant unknown. The replications to the respective answers were filed, and the cause tried before the court and a jury, which was called on motion of defendant in error. Three issues of fact were submitted to the jury, viz.: (1) Has the defendant, William F. Lenning, since his marriage to the complainant, been guilty of extreme and repeated cruelty to said complainant, as charged in the amended bill? (2) Has the said defendant, William F. Lenning, since his marriage to complainant, Addie Lenning, been guilty of adultery, as charged in the amended bill? (3) Did said Addie Lenning commit adultery, as charged in the said cross bill? At the commencement of the trial, after the jury were sworn to try the issues, counsel stated, in behalf of defendant in error, that he withdrew the issue of adultery, as charged in the amended bill, and the trial was had on the first and third issues submitted. The verdict was that plaintiff in error was not guilty of cruelty, and that defendant in error was not guilty of adultery. Both parties moved for a new trial. Their motions were overruled, and the court dismissed both the bill and cross bill for want of equity.

"Plaintiff in error contends that the court erred in admitting in evidence a certain writing, Exhibit A; that the verdict on the issue of adultery of his wife is against the clear weight of the evidence; that the court erred in admitting evidence on the charges of cruelty, and also erred in giving and refusing certain instructions. Defendant in error, under cross errors assigned, contends that her first instruction, which was refused, should have been given. This instruction is, viz.: '(1) The court instructs the jury that if they believe from the evidence that the defendant, William F. Lenning, has been guilty of two or more acts of physical violence to the per-

son of the complainant, Addie Lenning, he is guilty of extreme and repeated cruelty, as charged in the complainant's amended bill; and in considering such acts of violence, if any have appeared from the evidence, they may properly consider any abusive or indecent language used by the defendant, William F. Lenning, to or in the presence of complainant, as tending to characterize such acts of violence, if you further find from the evidence that any such abusive or indecent language was used.'

"It is elementary that the court should not assume the province of the jury, and tell them that physical violence is necessarily cruelty, as is done in this instruction. Whether two or more acts of physical violence to a person is cruelty, depends on the character of the violence, the manner of the person committing it, and all the circumstances attending such acts, as well as many other matters which could be enumerated that might have a bearing in determining whether the particular violence is cruelty or not.

"The writing, Exhibit A, which the court admitted in evidence, is too vile and obscene to be copied. In substance, it is a statement that plaintiff in error had been guilty of adultery with one or more women. Three witnesses testified that the handwriting was that of plaintiff in error, and he did not deny it, except as to the date, December 29, 1896, 5 p. m., and the address, 'Dear Mary.' The writing is not signed by him. It does not appear that the writing was ever seen by defendant in error until about six weeks after she had left home, and then it was found by a friend who went with her to aid her in getting some of her goods from the house occupied by plaintiff in error, their former home, and during his absence. He had previously changed the locks on the house, and it does not appear how she gained admission, though presumably through a window. It is contended that admission of this writing was error, because it did not tend to prove any issue submitted to the jury, and was calculated to seriously prejudice plaintiff in error. Strictly speaking, this is true. Certainly it was not admissible to prove cruelty, as it was not given to her; nor, so far as the evidence shows, was it intended by Lenning that it should be seen by his wife. The amended answer to the cross bill alleged that Lenning 'had for a considerable time past given himself over to adulterous practices; that at divers times and places since said marriage the cross complainant committed adultery with various lewd women, whose names are to this defendant unknown.' This allegation was not withdrawn by Mrs. Lenning, and, if true, was a complete defense to the cross bill. The writing was competent and material proof on this defense. Mr. Bishop, in his work on Marriage and Divorce (volume 2, § 350), says: 'By all opin-

ions, a man who is guilty of adultery cannot have a divorce for adultery committed by the other; and it makes no difference which was the earlier offense, or even that the plaintiff's followed a separation which took place on discovery of the defendant's.' The text is sustained by authority. *Smith v. Smith*, 4 Paige, 436; *Bast v. Bast*, 82 Ill. 584. The real issue was whether Lenning was entitled to a divorce from his wife on the charge of adultery, and the court might very properly have instructed the jury, in view of this writing, that if they believed, from the evidence, he was guilty of adultery, then their verdict, as to her, should be, 'Not guilty;' that is to say, though she might be guilty of adultery, if he was also guilty of the same offense that fact was a complete answer to the charge against her, and a bar to his suit. The Revised Statutes (chapter 40, § 7) provide that 'either party shall have the right to have the cause tried by a jury.' When the case is tried by a jury, the trial has all the incidents of a trial at common law, and the verdict is not merely advisory to the court, but has the force and effect of a verdict at common law. *Razor v. Razor*, 42 Ill. App. 504. The whole issue made by the cross bill and answer to it was tried by the jury, and this writing, being material on the recriminating defense of adultery by Lenning, made by the answer, was properly admitted in evidence.

"The court gave, at request of defendant in error, an instruction, viz.: 'The court instructs the jury that the act of adultery cannot be presumed, but must be alleged, and clearly established by a preponderance of all the evidence; and in this case, if you believe the facts and circumstances relied upon to prove the complainant, Addie Lenning, to have been guilty of adultery, are as well consistent with her innocence as with her guilt, then it is your duty to find her not guilty of adultery.' This, we think, was error, in that it tells the jury that adultery must be clearly established by a preponderance of all the evidence, and is in conflict with instruction numbered 1, given for plaintiff in error, in which the jury were told it was not necessary to prove the charge of adultery or cruelty beyond a reasonable doubt, but that it was sufficient in either case if the jury believe that such charges, respectively, were proven by the preponderance of the evidence. The latter instruction states the law correctly. *Crabtree v. Reed*, 50 Ill. 206; *McDeed v. McDeed*, 67 Ill. 546. In these cases it was held that instructions which required a plaintiff to make out his case by a clear preponderance of the evidence were erroneous. The language of the fourteenth instruction is, 'clearly established by a preponderance of all the evidence,' and means the same as 'clear preponderance of the evidence.' We do not think this reversible error, however, in this case. If the jury had found Mrs. Lenning guilty of adultery, we think the court should have set aside the

verdict, because the writing, Exhibit A, is a plain statement, in his own handwriting, that defendant was guilty of adultery. He was examined about it, and testified that certain words in the writing were not his handwriting, but was not asked whether the statements in the writing were true or not. We must assume that they were true, when he failed to deny them, though called to the stand three times after this writing was admitted in evidence.

"We have carefully examined the whole evidence, and are of opinion that it justifies the whole verdict of the jury, and think that on the evidence the court did not err in dismissing both the bill and cross bill.

"The contention that the court erred in admitting any evidence of Lenning's cruelty is not tenable, because he is found not guilty of cruelty, and besides it was admissible under the allegation of the amended bill. We cannot see, after a thorough examination of the whole case, that he was in any way prejudiced by that evidence.

"From a particular examination of all the other instructions given, refused, and modified, of which complaint has been made, we find no reversible error in any of them, and the decree of the superior court is therefore affirmed."

We may add, we held in *Davis v. Davis*, 19 Ill. 334, that the charge of adultery in a bill for divorce may be defeated by the recriminatory defense that the complainant in the bill had committed adultery, and, furthermore, that under the operation of section 10 of chapter 40 of the Revised Statutes, entitled "Divorce," a decree of divorce on the charge of adultery should not be granted a complainant shown to be guilty of the same offense. The general doctrine that recrimination may be availed of to defeat the complainant in a bill for divorce is reasserted in *Dubenstein v. Dubenstein*, 171 Ill. 133. 49 N. E. 316. The judgment of the appellate court is affirmed. Judgment affirmed.

(176 Ill. 194)

COMMERCIAL MUT. ACC. CO. v. BATES.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

ACCIDENT INSURANCE—WARRANTIES BY APPLICANT—BREACH—PAROL REPRESENTATIONS—EFFECT—APPEAL—REVIEW.

1. Where the applicant for accident insurance, in answer to an interrogatory asking him to state what other insurance he has, with the companies' names, stated, "Atlas, \$5,000; Star, \$10,000, comb.," the word "comb." is not responsive to any part of the answer, and is surplusage; and the fact that his policy was not of that character will not affect the validity of the insurance.

2. Where the applicant for insurance, after stating in the application the present amount carried by him, agrees to drop part of it at a future time, such promise is not a warranty, and a failure to comply therewith will not render the contract nugatory.

3. Deceased applied to defendant for an accident policy, stating in the application the

amount he already held, and that part of it would be canceled at a future time. Defendant issued a policy, and instructed its agent not to deliver the same until the amount agreed to be canceled was canceled. Deceased falsely informed the agent that it was canceled, and received the policy. *Held*, that the written application constituted the contract, and such parol statement could not be shown to defeat the policy.

4. The judgment of the appellate court affirming a judgment of the trial court on a question of fact is conclusive.

Appeal from appellate court, Second district.

Assumpsit by Mary Hall Bates against the Commercial Mutual Accident Company. From a judgment in favor of plaintiff, affirmed in the appellate court (74 Ill. App. 335), defendant appeals. Affirmed.

St. John & Merriam and H. D. McBurney, for appellant. A. J. Hopkins, F. H. Thatcher, and F. A. Dolph, for appellee.

CRAIG, J. This was an action of assumpsit, brought by the appellee, Mary Hall Bates, in the circuit court of Kane county, against the appellant, upon an accident insurance policy issued by it to her brother, Erasmus W. Hall, in which she was named as beneficiary. To the declaration the defendant pleaded the general issue, and also filed seven special pleas. To these pleas the plaintiff interposed a general demurrer, which the court sustained. On October 1st, after the demurrer was sustained to the seven pleas, the defendant obtained leave to file an additional plea, to which a demurrer was also sustained. On October 4th another additional plea was filed, and the court sustained a demurrer to it. On October 7th still another additional plea was filed, to which the court also sustained a demurrer. A trial was then had before a jury, resulting in a verdict and judgment in favor of the plaintiff for the amount of the policy and interest thereon. To reverse the judgment, the insurance company appealed to the appellate court, where the judgment was affirmed.

The principal question, and, indeed, the only question of any importance, presented by the record, is whether the court ruled correctly in overruling the demurrers to the special pleas filed by the insurance company. We will consider first the ruling of the court on defendant's first special plea.

It is set up in the plea that, before the issuing and delivery of the certificate of accident insurance set out in the declaration, the said Erasmus W. Hall executed and delivered to the defendant his application in writing, wherein and whereby he warranted the statements therein to be full and complete; that Hall agreed to accept the certificate of membership to be issued on his application subject to all its conditions and limitations; that said application was accepted by the defendant, and it thereupon issued and delivered to said Hall its certificate or policy of accident insurance in said plaintiff's declaration set forth, the warranties and agreements contained in the application of said Hall for membership being,

¹ Rehearing denied December 9, 1898.

by the terms of said certificate, incorporated into and made a part of said contract or certificate of accident insurance in said plaintiff's declaration mentioned; that in the application made by said Hall and delivered to this defendant, among other things contained therein and made a part thereof, appears the following interrogatory: "(13) Have you any other accident insurance? If so, name amount and companies;" that the said Hall, in his said application, then and there made written answer to said interrogatory, as follows: "Atlas, \$5,000; Star, \$10,000, comb.; will drop Star July 15, '96;" that the word "comb.," as appearing in said Hall's answer to said last-mentioned question in said application incorporated, was and is a common abbreviation for the word "combination," thereby meaning a policy or certificate of accident insurance providing for double benefits in the event of external, accidental violence causing disability or death; that at the time of the making and delivery of said application as aforesaid, and at the time said defendant so issued and delivered its said contract or certificate of accident insurance in said plaintiff's declaration set forth, said Hall did not have \$10,000 combination accident insurance in said Star Accident Company, and had no combination accident insurance in same; that the answer of said Hall to said interrogatories was not then and there full and complete, and was not true; that by reason of said Hall's false answer to said interrogatories in said application contained, so executed and delivered by the said Hall as aforesaid, and by reason of said answers not being then and there full and complete, the said policy or contract of accident insurance in said plaintiff's declaration set forth became and was absolutely null and void, etc.

Although a policy of insurance refers to and makes the application a part of the policy, yet it is well settled that only such statements as are made strictly in answer to the inquiries contained in the application can be regarded as warranties. *Wood, Ins. §§ 144-160; Fland. Ins. (2d Ed.) 236, 237; Insurance Co. v. Boomer, 52 Ill. 442; Insurance Co. v. Cornick, 24 Ill. 455.* Here the plea, in substance, merely sets out the thirteenth interrogatory and answer, and then avers that the deceased did not have a certain form of policy, which it designates as a combination policy. This is the substance of the plea. It contains no allegation that the deceased did not have \$5,000 in the Atlas, and \$10,000 in the Star, nor does it allege that part of the deceased's answer which is responsive to the question propounded to him is untrue. Referring to the thirteenth interrogatory and answer, upon which the plea is predicated, it will be seen that the only information sought was whether the deceased had any other accident insurance, and, if he had, then he was required to name the amount and the company. There were but two subjects upon which he was required to answer. If, then, the assured truthfully stated

whether he had other accident insurance, and the amount and companies, he answered everything required of him, and the policy cannot be forfeited. If the answer required by the interrogatory of the company was true, deceased has complied with the requirements of the company's question, and it must be held liable under its policy. If the company deemed it important to obtain any other information from the deceased relating to the subject, it had the right to propound other questions before issuing the policy; and, in the absence of any further demand for information by the company, it will be presumed that further information was not deemed material. Whatever the assured may have answered in addition to making full and complete answer to the interrogatory propounded was mere surplusage, which cannot be availed of by the company for the purpose of defeating its policy. The deceased, in answer to the interrogatory, said that he had \$5,000 in the Atlas Insurance Company, and \$10,000 in the Star. This was a full and complete answer to the interrogatory, and it is not charged in the plea that the answer is untrue. The word "comb.," included in the answer, was not responsive to any part of the question, and may be regarded as surplusage. What may have been intended by the use of the word "comb." in the answer is not entirely clear, but, as that part of the answer may be regarded as surplusage, it is immaterial what the intention was. We think the plea was bad, and the court could not have done otherwise than sustain the demurrer to it.

The second special plea to which the court sustained a demurrer was substantially like the first, and what has been said in regard to the first plea disposes of the second.

The third special plea contains substantially the same allegations as to the making of the application, the statement of the warranties contained therein, their incorporation into the contract, the same question and answer, the allegation as to the making and delivery of the policy, the explanation of the words "Star" and "comb.," and then alleges as a breach of warranty that the said Hall did not drop his \$10,000 of insurance in the Star Accident Company in accordance with the warranty, but kept the same in force until his death, whereby the said policy became and was absolutely null and void. This plea is liable to the same objection that exists to the two preceding ones. The question propounded contained nothing which required a promise on the part of the deceased in regard to the dropping of the Star. That part of the answer in which the deceased said, "will drop Star July 15, '96," was not responsive to anything contained in the interrogatory, and was therefore mere surplusage.

There is another fatal objection to the plea. The allegation is that deceased stated that he had \$10,000 in the Star Insurance Company, which he promised to drop on the 15th day of July, 1896, and that he failed to do

so. He did have the amount of insurance in the Star stated, so that part of the statement was true. The only part of the statement relied upon as false is that he agreed to drop the insurance at a certain time, and failed to do so. In other words, the deceased promised to do a certain act in the future, and failed to live up to his promise. In a case of this character, a breach of warranty cannot be predicated upon a promise to do something in the future or upon an unexecuted intention. In *People v. Ellis*, 128 Ill. 9, 20 N. E. 692, it was held that a promise to perform an act, though accompanied with an intention not to perform, is not such a representation as can be made the ground of an action at law, as for fraud. In the discussion of a similar question in *Gage v. Lewis*, 68 Ill. 604, it was said (page 615): "It cannot be said that these representations and promises were false when made, for until the proper time arrived, and plaintiff refused to comply with them, it could not positively be known that they would not be performed. Even if, at the time they were made, it was not intended to comply with them, it was but an unexecuted intention, which has never been held, of itself, to constitute fraud. If they legally amount to anything, they constitute a contract. 'As distinguished from the false representation of a fact, the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law.'" So, in *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024, it was held that a promise to perform an act or to pay for goods when the price is due, though accompanied with an intention not to perform, is not such a fraudulent representation as can be made the basis of an action of law for deceit; that such a promise is not false when made. If the deceased failed to drop the insurance in the Star, as he agreed to do, it may be that an appropriate action might be maintained for a breach of the agreement. But such is not this case.

It is claimed that the agreement was a warranty on the part of the deceased, a breach of which rendered the policy void. We do not concur in that view. As was well said by the appellate court: "The agreement could in no sense be regarded as a warranty of any existing fact, but a mere promise to do a particular thing in the future, which, if unperformed, subjected the promisor to such liability as might follow the breach of any other ordinary promise, but would not have the effect of rendering the entire contract nugatory."

The fourth, fifth, and sixth pleas do not differ substantially from the first, second, and third; and, as the demurrer was properly sustained to the latter pleas, for the same reason it was properly sustained to the former.

The seventh plea is not relied upon in the argument so far as the alleged rejection of

Hall's application by any other insurance company is concerned, but is only relied upon as setting up a defense based on the fraud Hall practiced on the defendant in obtaining the policy. The seventh plea may properly be considered with the three additional pleas, filed October 1st, 4th, and 7th, as they all rest substantially on the same principle.

In the first additional plea it is in substance alleged that on July 10, 1896, Hall called at the office of Lincoln, the agent of the defendant company in Chicago, and inquired if he represented an accident company that had no pro rata clause in its policies, and was informed that defendant's policies contained no such clause; that Hall obtained one of defendant's blank applications; that on the 14th of July, 1896, he returned to the agent's office with the application filled out, and had written, in answer to the inquiry therein as to other accident insurance, as follows: "Atlas, \$5,000; Star, \$10,000, comb.;" that defendant's agent told Hall it would be useless to send the application to the defendant company, as they would not write him while he was carrying so large an amount of accident insurance; that Hall replied that he was going to drop the Star insurance, as it had a pro rata clause in it, and he would not have that kind of insurance; that Lincoln then told him he had better write that into the application, and Hall did so, by writing after the above quoted words, "will drop Star July 15, '96;" that he then delivered the application to the agent, with a request that it be forwarded to defendant's home office; that a policy was written on this application, and forwarded to the agent Lincoln, with instructions not to deliver it or receive the premium until he had been assured by Hall that the Star insurance had been dropped and canceled, as per statement of his application; that subsequently, upon the return of Hall to the agent's office, the agent told him of the receipt of the policy, and of the instructions of defendant to him, as above set forth, and Hall thereupon told the agent that he had dropped the same, and that it was canceled; that, relying upon the truth of this statement, the agent delivered the policy in question to Hall, and received the premium therefor; alleges the statement of Hall that he had dropped his Star insurance was a material fact; that the defendant would not have delivered this policy to the said Hall had he not stated to the agent that he had already dropped his Star insurance. The plea then alleges that at the time said Hall made the above statements, and at the time he made the application and the policy was delivered to him, he had the two other policies in the Star Accident Insurance Company mentioned in the pleas hereinbefore set forth; that the statements to the agent that he had dropped this insurance, and that the same was canceled, were false and fraudulent; that thereby the policy became null and void, etc.

Where a written application is required to be signed by the assured, and is so signed, and a policy of insurance is issued upon the application, as was the case here, the application and the policy constitute a written contract by and between the assured and the insurance company; and, where a controversy arises in regard to what the contract is between the parties, that controversy must be determined by the application and the policy. But here the insurance company, by the pleas under consideration, is not willing to have the matter in dispute settled by the terms of the application and policy issued upon it, but it desires to resort to parol evidence to establish an agreement different from the one established by the application and the policy. That cannot be done. A contract of that character cannot rest partly in writing and partly in parol. It cannot be varied, explained, or added to by parol evidence. "Parol evidence of what passed at the time of making a policy is not admissible to restrain the effect of the same. * * * No usage of an insurance company, nor even the express agreement of the parties, whether made previous to or at the time of the execution of the policy, can be admitted to explain, modify, or control the written contract." May, Ins. (3d Ed.) § 579. Biddle, in his work on Insurance (section 523), says: "When the contract of insurance is reduced to writing, the prior negotiations of the party in respect of it are deemed to be merged in the document, which in law is conceived to be the evidence of the agreement they finally fix upon, and parol evidence is inadmissible to vary its terms. The rule just stated does not depend upon any rule of evidence, in the opinion of the writer; but it is submitted the real ground is that, by a fundamental rule of substantive law, an agreement reduced to writing is supposed to contain the parties' meaning, and therefore parol evidence cannot be admitted to vary it." The same doctrine is announced in Bliss, Ins. p. 653.

Here the contract was reduced to writing. It is found in the application and the policy, and in that contract will be found the statement that Hall had \$5,000 insurance in the Atlas Insurance Company, and \$10,000 in the Star. But the defendant undertakes to change that written contract by proving that the deceased, before the policy was delivered, said he had only \$5,000 in the Atlas, and none in the Star; that he had dropped the insurance in the Star. The admission of such evidence would be in direct conflict with the rule of law declared in the authorities cited. When Hall disclosed the fact, by his application in writing, that he had \$5,000 in the Atlas and \$10,000 in the Star, if his application was not satisfactory it was the plain duty of defendant to reject the application. If the company was willing to insure Hall in case he would drop the Star, it was its duty to notify Hall that it could not insure him under the application he had submitted, but that

if he would drop the insurance in the Star, and, after it was dropped, make a new application to the company, showing that the only insurance which he then had was \$5,000 in the Atlas, it would then issue a policy to him. The company would then have been protected. This course, however, was not pursued; but the company, after being notified by the application that Hall had \$10,000 in the Star, undertook to rely on a side agreement, resting in parol, to the effect that Hall would in the future drop the insurance which he had in the Star. Such an agreement cannot be pleaded as a defense to an action on the policy in a case of this character. We think the pleas were bad, and the demurrer was properly sustained.

It is also claimed that the proof failed to show that Hall was injured by accidental violence, or that his death was the result of external, violent, and accidental means. The sufficiency of the evidence was a question of fact for the jury, and the judgment of the appellate court affirming the judgment of the circuit court is conclusive on questions of fact. The judgment will be affirmed. Judgment affirmed.

(176 Ill. 224)

CHICAGO TIP & TIRE CO. et al. v. CHICAGO NAT. BANK.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

CORPORATION — AUTHORITY OF OFFICER — EXECUTION OF JUDGMENT NOTE.

Where a corporation, by a course of dealing, has held out its treasurer to the public, and those dealing with it, as clothed with full powers of a general financial agent, such officer has implied authority to execute on its behalf a judgment note, with warrant of attorney.

Appeal from appellate court, First district.

Suit by the Chicago Tip & Tire Company and others against the Chicago National Bank. The judgment of the county court of Cook county, dismissing plaintiffs' petition, was affirmed by the appellate court (74 Ill. App. 439), and plaintiffs appeal. Affirmed.

Wickersham & Hayner, for appellants. R. L. Tatham, for appellee.

CARTER, C. J. This is an appeal from a judgment of the appellate court affirming a judgment of the county court of Cook county dismissing the petition of appellants brought to have the lien of a judgment by confession entered in favor of appellee against the March-Davis Cycle Company set aside. The March-Davis Cycle Company, a corporation, was indebted to the Chicago National Bank on two promissory notes,—one for the sum of \$10,000, due May 29, 1896, and the other for \$5,000, due June 24, 1896. On May 29, 1896, a judgment note for \$15,000, with warrant of attorney to confess judgment at any time thereafter, was given to the appellee,

¹ Rehearing denied December 9, 1898.

the Chicago National Bank, as collateral security, which note was signed: "March-Davis Cycle Co., by C. C. Murray, Treas." On June 1, 1896, the appellee caused judgment to be entered on this note for \$14,177.60, and an execution was issued and levied on all the personal property of the cycle company. On the same day, and shortly after the levy, the cycle company made a general assignment for the benefit of its creditors, and on June 9th the property levied on was ordered by the court to be turned over to the assignee, subject to the prior rights, liens, and equities of the appellee upon the same. A petition was filed by appellants in the county court, alleging that they were creditors of the cycle company; that the said judgment note was given in collusion with appellee, for the purpose of allowing appellee to obtain a preference over the other creditors; that the note and warrant of attorney were not under seal of the company, and were executed by its treasurer without any authority from the board of directors, and that he had no authority, by virtue of his office, to execute the same; and praying that the lien of the appellee, as recognized by the former order of the county court, be set aside, and distribution of the assets of the insolvent company be made pro rata. The appellee denied collusion with the company's officers, and also denied that the treasurer was without authority to execute the judgment note, but alleged that he was the chief financial officer of the cycle company, and had full power and authority to make the same, and denied the jurisdiction of the county court to set aside the judgment or the lien. On the hearing no collusion or fraud was shown, and appellants have abandoned the position that the judgment should be set aside as a fraudulent preference, but they insist the warrant of attorney was not authorized by the company, and that the judgment entered on it was therefore void, and that the lien of appellee must fall. It was held in *McDonald v. Chisholm*, 131 Ill. 273, 23 N. E. 596, and *Atwater v. Bank*, 152 Ill. 605, 38 N. E. 1017, that the authority of an officer of a corporation to execute its judgment notes might appear from all the facts and circumstances surrounding the transaction; in other words, that the authority might be implied, although there was no express action of the corporation conferring it. See, also, *Burch v. West*, 134 Ill. 258, 25 N. E. 658. It was said in *Snyder Bros. v. Bailey*, 165 Ill. 447, 46 N. E. 452, that "the principle upon which an officer of a corporation can bind it by making its promissory notes, with or without a warrant of attorney to confess judgment, is that of agency." It was further held in the latter case that a warrant of attorney executed by the proper officers of the corporation was prima facie valid, though not under the corporate seal. The question is one of authority. In the case at bar it seems to be conceded

that there was no resolution of the board of directors of the cycle company authorizing the making of the judgment note, but whether there was any by-law on the subject was not shown. The question then remains, was the treasurer impliedly, by force of the circumstances surrounding the transaction and the course of his dealings with appellee, or by virtue of his office, authorized to execute this judgment note? In *Atwater v. Bank*, 152 Ill. 605, 38 N. E. 1017, it was charged the judgment note was executed by the treasurer of the corporation without express authority from the board of directors, and this court found that the evidence showed that the treasurer was the business and financial manager of the corporation; that the corporation deposited with the bank and borrowed money from it and did business with it through its treasurer; that he was held out to the bank as having the right to represent it; that the bank had no notice of any by-law which limited or restricted his authority; that the debt for which the note was given was a bona fide debt due for money borrowed, and that the directors knew of the note given by the treasurer, and at one of their subsequent meetings impliedly recognized it as binding, and this court said that the judgment could not be attacked upon the ground stated. The proof of the acts of the treasurer of the cycle company, in the present case, is not as full and explicit as in the case just cited, still it was admitted that he acted as the general financial officer of the company, and transacted all its business with the bank, and had executed all the notes taken by the bank from the company, thereby including the ones for which this judgment note was given. It was, however, also admitted that this judgment note was the only judgment note ever given by the cycle company. It is not simply by virtue of his office that an officer of a corporation may execute a warrant of attorney to confess judgment. Such power is not inherent in, or incident to, the office from either usage or necessity. But when, by a course of dealing, the corporation has held out such officer to the public and those dealing with it as clothed with full powers of a general financial agent, the authority to execute the judgment note may be implied from the circumstances surrounding the transaction. In the *Atwater Case* a direct issue was formed between the bank holding the judgment by confession and the insolvent corporation as to the authority of its treasurer to execute the warrant of attorney, with the result as stated above. In the case at bar no pleading or admission of the insolvent corporation is in the case, and the question arises between the creditor holding the judgment by confession and other creditors. No proof of fraud or collusion is made, and we think the circumstances in this case fall within the rule laid down in the *Atwater Case*, and hold that

there existed sufficient authority in the treasurer to execute the warrant of attorney to sustain the judgment. This disposes of the whole question, for, unless the judgment is absolutely void or fraud or collusion is shown in its procurement, like other judgments, it cannot be attacked collaterally. The judgment of the appellate court is affirmed. Judgment affirmed.

(176 Ill. 207)

LUSK et al. v. CITY OF CHICAGO.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

**MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS
—INVALID ORDINANCE.**

An ordinance for the paving of a street which provides that the curbstones shall be bedded upon flat stones, without stating the kind of flat stones, fails to specify sufficiently the nature, character, and description of the improvements, and is void.

Appeal from Cook county court; W. T. Hodson, Judge.

Petition by the city of Chicago for an assessment for a local improvement. Charles D. Lusk and another filed objections to the confirmation of the assessment roll. From a judgment confirming the assessment, Lusk and the other objector appeal. Reversed.

Gage & Deming, for appellants. Charles S. Thornton, Corp. Counsel, and John A. May, for appellee.

CRAIG, J. This is an appeal from a judgment of confirmation entered in the county court of Cook county, April 20, 1898, confirming an assessment levied for the purpose of defraying the expenses of paving Bonney avenue from Ogden avenue to Douglas Park boulevard. The objections to the confirmation were filed by Charles D. Lusk and Henry H. Gage, and among others was the following: "That the ordinance providing for the making of said improvement does not specify the nature, character, locality, and description of the proposed improvement." Other objections were filed, but, in the view we take of the case, it will only be necessary to consider this one.

Section 1 of the ordinance provides that the roadway of Bonney avenue, 30 feet in width, from the north line of Ogden avenue to the south line of Douglas Park boulevard, together with wings of all intersecting streets and alleys between the lines of said Ogden avenue projected across said intersecting streets and alleys, be improved as follows: "Curbstones shall be set on each side of the roadway of said Bonney avenue between the roadway lines of all intersecting streets and alleys, with returns at the wings thereof to the lines of said Bonney avenue projected, the face of which curb upon Bonney avenue shall be fifteen feet from the center of the roadway. Said curbstones to be of the best quality of limestone, to be not less than four (4)

feet long, three (3) feet deep, and five (5) inches in thickness, with the upper outside corner rounded to a radius of three (3) inches, each stone to have a straight base the whole length, and to be firmly bedded upon flat stones, each stone to be machine dressed and set at the established grade of said Bonney avenue between the points named."

It will be observed that the flat stones upon which the curbstones are to be bedded are not described in the ordinance, and upon this ground it is claimed that the ordinance fails to specify sufficiently the nature, character, and description of the improvement. This court has held in a number of cases that an ordinance is invalid which fails to describe the nature, character, and locality of the improvement. In *Otis v. City of Chicago*, 161 Ill. 199, 43 N. E. 715, an objection like the one interposed here was made to an ordinance for the erection of lamp posts, and in deciding the question it was said (page 200, 161 Ill., and page 715, 43 N. E.): "An ordinance for a local improvement to be paid for by special assessment must specify the nature, character, locality, and description of the improvement. The provision of the statute to this effect is mandatory. Without such specification in the ordinance the commissioners could not make an intelligent estimate of the cost of the improvement. An ordinance which does not specify the nature, character, locality, and description of the improvement is without authority of law, and therefore invalid. *City of Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212; *Levy v. City of Chicago*, 113 Ill. 650; *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471. It is evident that the present ordinance does not meet the requirement of the statute. It does not state whether the lamp posts are to be of wood or iron, or for light with oil or gas or electricity." In *Cass v. People*, 166 Ill. 126, 46 N. E. 729, a similar question was raised, and the ordinance held invalid. It is there said (page 127, 166 Ill., and page 730, 46 N. E.): "The ordinance here is of a precisely similar character [referring to the ordinance in the *Otis Case*, supra]. It directs that a water-service pipe be laid from each of the lots, but does not specify whether these pipes are to be of wood or iron or tile, nor in any way indicate their size or dimensions. It is evident that no intelligent estimate can be made of their cost from the description in the ordinance."

It is not mentioned in the ordinance here what kind of stones the flat stones shall be upon which the curbstones are to be bedded. Whether they are to be granite, sandstone, limestone, or of some other quality is not disclosed by the ordinance, nor is there any specification of the size or shape, except that they are to be flat and machine dressed. No intelligent estimate could be made by the commissioners of the cost of the stones unless the length, width, thickness, and kind or quality were disclosed by the ordinance. As to the curbstones, the ordinance provides that

¹ Rehearing denied December 9, 1898.

they shall be of the best quality of limestone, to be not less than four feet long, three feet deep, and five inches in thickness, but as to the flat stones nothing is said in regard to their nature or character. We think the ordinance is invalid, and the court erred in confirming the assessment. The judgment of confirmation as to the property of appellants will be reversed, and the cause will be remanded. Reversed and remanded.

(176 Ill. 359)

FORSYTH v. VEHMEYER.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

JUDGMENTS—BURNED RECORDS—PAROL EVIDENCE—FRAUD—ACTIONS EX DELICTO—SCIENTER—QUESTIONS FOR COURT—BANKRUPTCY—DISCHARGE OF BANKRUPT—MERGER OF FRAUD IN JUDGMENT—COSTS.

1. In an action to revive a judgment, where it is shown that the records in which such judgment was entered have been destroyed by fire, parol evidence is admissible to prove the contents of the record.

2. Evidence of one who had examined the record of a judgment before its destruction by fire, and of an abstract maker that the entries which he produced had been compared with the record, and found correct, is sufficient to prove the existence of the record of the judgment.

3. A declaration alleged that defendant, in order to induce plaintiff to make him a loan, fraudulently represented that he had a certain amount of wood in another state, ready to be shipped, which he had contracted to sell at a specified price, and that, if plaintiff would advance to him a specified proportion of the contracted price, he would immediately ship the wood; that defendant shipped only a small part of the wood, from which plaintiff received from the purchaser a certain sum; that defendant did not have, and never had, in said other state or elsewhere, the amount of wood ready for shipment, but only had the amount of wood actually shipped. The prayer was for damages for the fraud and deceit. *Held* a declaration in tort, and not in assumpsit.

4. An allegation that representations were false and fraudulent implies that the person making them knew of their falsity.

5. The omission to allege the scienter of a fraudulent representation—conceding such allegation to be necessary—is cured by a verdict.

6. The question whether a judgment sought to be enforced against a discharged bankrupt was rendered for fraud committed by defendant must be determined by the court from the record.

7. A judgment recovered on the ground of fraudulent representations by defendant as to his ownership of a specified amount of wood, which induced plaintiff to loan him a certain sum thereon, is for fraud, within Bankruptcy Act 1867, § 33, providing that such debts shall not be discharged by bankruptcy proceedings.

8. A judgment for fraud against one subsequently declared a bankrupt is not discharged because it is provable in the bankruptcy proceedings, since Bankruptcy Act 1867, § 33, provides that the judgment may be proved, even though it has been proved in bankruptcy, and the creditor has obtained a dividend less than the amount thereof.

9. A judgment based on the fraud of defendant is conclusive as to the fraud on an issue whether the debt was discharged by subsequent bankruptcy proceedings.

10. The fraud on which a judgment is based is not merged in the judgment, but still exists,

within Bankruptcy Act 1867, § 33, providing that "no debt created by fraud" shall be discharged by bankruptcy proceedings.

11. The failure to object in the trial court to an amended declaration for want of an ad damnum, or to make a motion in arrest of judgment on such ground, waives the objection.

12. A party cannot recover costs of appeal on the ground of an excessive judgment, where such question is first urged on appeal.

Appeal from appellate court, First district.

Action by Henry F. T. Vehmeyer against Jacob Forsyth to revive a judgment. From a judgment of the appellate court (75 Ill. App. 308) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Thomas J. Merrifield and Robert G. Hall, for appellant. M. W. Robinson, for appellee.

PER CURIAM. This case is brought by appeal from the appellate court for the First district. The opinion of that court, by ADAMS, P. J., is as follows:

"This is an appeal from the judgment rendered in an action of debt on a judgment. The declaration is in the usual form in such cases, and alleges that at the July term, 1871, of the superior court of Cook county, the plaintiff (appellee) recovered a judgment against the defendant (appellant) for the sum of \$833.35, damages and costs, the costs amounting to \$6.75; that the record of the said judgment was destroyed by fire in October, 1871, and was not in existence at the time of the commencement of this suit. The appellant pleaded a discharge in bankruptcy in December, 1890, to which plea the plaintiff replied, in substance, as follows: That the action in which the judgment sued on was rendered was brought to recover damages sustained by the plaintiff by fraud of defendant, by which plaintiff was induced to pay to defendant about \$1,200 by false and fraudulent representations of defendant that he owned and had in his possession, ready for delivery, about 600 cords of wood in Lake county, Ind.; that said action was founded solely upon fraud of defendant; that issue was joined in said action upon allegations made by the plaintiff in this declaration, and, there being a jury trial, a verdict was returned in favor of the plaintiff, and against the defendant, for \$833.35, as plaintiff's damages by reason of said fraud of defendant; that the judgment sued on was rendered upon said verdict, and was founded solely upon fraud. To this replication defendant filed a rejoinder substantially traversing all of its material allegations. The case was tried by the court, by agreement of the parties, without a jury.

"The appellee called as a witness James Frake, an attorney, who testified that he brought the suit in which the judgment sued on was rendered, and drew the declaration to which the defendant pleaded not guilty; that he kept a docket, which he still had, in which he made entries of all steps taken in the case; that the suit was brought July 10th, and the declaration, of which he had not preserved a

¹ Rehearing denied December 9, 1898.

copy, was filed July 21, 1870; that the verdict was rendered May 9, 1871; and that the judgment was rendered July 29, 1871. The witness further testified that there was a formal verdict of guilty, assessing the plaintiff's damages at the sum of \$833.35, signed by the foreman, and also that there was the usual judgment on such verdict, giving the form, and that, about a month after the verdict was rendered, he examined the records in the case, including the record of the judgment, and that the same were burned by the Chicago fire of October 8, 1871.

"Appellant's counsel contended, on the trial, that it was not competent to prove by parol the contents of the burned record; that it was incumbent on appellant to restore the record in the manner prescribed by the statute; and the admission of the oral testimony to prove the record is assigned as error; but, as they have not urged this objection in argument, we might consider it waived. On a former appeal in this case the court held against the contention that such proof is incompetent. *Forsyth v. Vehmeyer*, 55 Ill. App. 223. See, also, *Black, Judgm.* § 969, and cases cited; *Freem. Judgm.* § 407; 1 *Greenl. Ev.* § 509; *Mandeville v. Reynolds*, 68 N. Y. 528; *Ashley v. Johnson*, 74 Ill. 392. Numerous other authorities might be cited to the same effect. The rule that the record, or an exemplified or sworn copy thereof, must be produced, is limited to cases in which it is within the power of the party relying on the record to produce such evidence. 1 *Greenl. Ev.* § 86; 2 *Jones, Ev.* § 641. In *Church v. Hubbard*, 2 *Cranch*, 187, *Marshall, C. J.*, delivering the opinion, says: 'The principle that the best testimony shall be required which the nature of the thing admits, or, in other words, that no testimony shall be received which presupposes better testimony attainable by the party who offers it, applies to foreign laws as it does to all other facts.' The statutory method of proving statutory records does not preclude proof by parol. *Mobley v. Watts*, 98 N. C. 284, 3 S. E. 677; *Clifton v. Fort*, 98 N. C. 173, 3 S. E. 726. In *Weatherhead's Lessee v. Baskerville*, 11 *How.* 329, the court said: 'A rule in respect to judicial records is that, before inferior evidence can be received of their contents, the loss of their existence must be clearly accounted for. It must be shown that there was such a record; that it has been lost or destroyed, or is otherwise incapable of being produced, or that its mutilation from time or accident has made it illegible.'

"It is objected that, even though the evidence was competent, it was insufficient to prove the record of the judgment. In addition to the testimony of the witness Frake that he saw and examined the record of the judgment, *R. R. Stevens*, formerly in the employ of *Chase Bros. & Co.*, abstract makers, being called as a witness, produced a book in which he had made entries of all proceedings in the suit in which the judgment sued on was rendered. He testified that the facts

were taken from the original files and records, and were correct. These entries showed the title of the suit, the name of the action ('trespass on the case'), when the suit was commenced, and the date and amount (\$833.35) of the verdict, a motion for a new trial, the overruling of the motion July 29, 1871, and judgment on the verdict, etc. The witness further testified that he obtained the entry of the judgment in the first place from the clerk's minute book, and subsequently compared it with the record. He also testified that the originals from which the entries were made were destroyed by the great fire of October, 1871. A paper was admitted in evidence, by agreement of counsel, showing the entries made by the witness, which will be better understood by an examination of the record than as printed in the abstract. We think the evidence sufficient to prove the former existence of the record of the judgment, and that it was destroyed by fire in October, 1871.

"Appellant claims that by his discharge in bankruptcy, which was put in evidence, he was discharged from the judgment sued on. His contentions under this claim are—First, that the action in which judgment was rendered was assumpsit; secondly, if it was an action in tort for fraud, the declaration was defective in not alleging knowledge on his part of the falsity of the representations alleged to have been made by him; thirdly, that, even though the gist of the action was fraud, the fraud was merged in the judgment, and his discharge in bankruptcy operated to discharge him from the judgment.

"The witness Frake testified, as before stated, that the original declaration was destroyed by the October fire of 1871; that he had no copy of it; that it contained only one count; that he knew the substance of it; and that before the former trial of this case, in the fall of 1893, he drafted what was a substantial copy of it, which he then had in court. The witness then testified that the declaration, in substance, was as follows: 'Superior Court of Cook County. To the July Term, or of the August Term, 1870. County of Cook and State of Illinois. *Henry F. T. Vehmeyer* (by *Buschnell & Frake*, his attorneys), complainant, complains of *Jacob Forsyth*, defendant, summoned, etc., in a trespass on the case, for that whereas, heretofore, to wit, on the 10th day of August, 1868, in order to induce plaintiff to advance him a large amount of money, to wit, the sum of \$1,500 (I think the declaration would say \$1,200), falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cordwood, to wit, two hundred cords, cut and piled up near the Pittsburgh and Ft. Wayne, in the county of Lake and state of Indiana, ready to be shipped to Chicago; that said wood was contracted, or rather, perhaps, one *Eldridge* had contracted to purchase said wood at \$6 per cord in the city of Chicago, when shipped; and that if *Vehmeyer*, the plaintiff, would advance

to him at the rate of \$5 per cord for the two hundred cords of wood, he, the defendant, would immediately,—well, the defendant would immediately ship said cordwood to the city of Chicago. That the plaintiff, Vehmeyer, relying upon the representation being true, advanced to the defendant the said sum of (I think the declaration said the sum of \$1,200 or \$1,000). That the defendant shipped only the sum of forty cords of wood to the said Eldridge, from which he, the said Vehmeyer, received the sum of \$6 per cord. (I don't know whether it is right or not.) That the representations of the defendant, falsely, were false and fraudulent. That he did not have, nor never did have, in the county of Lake and state of Indiana, two hundred cords of birch cordwood piled up and ready for shipment to the city of Chicago to said Eldridge, but only had—neither in the county of Lake nor anywhere else—the sum of forty cords of birch cordwood, which was shipped by the said defendant to the said Eldridge. Wherefore the plaintiff asks damages to the extent of (\$1,500 was the amount that was alleged in the declaration), and hence he brings this action of fraud and deceit against the defendant.' The witness was not allowed to read from the paper which he had prepared before the former trial, and which he said was a substantial copy of the written declaration, and was frequently interrupted in testifying as to the declaration.

"The declaration testified to is too plainly in tort for false and fraudulent representations to require argument. The allegation that the representations were false and fraudulent implies that appellant knew of their falsity. The same objection was made in *Merwin v. Arbuckle*, 81 Ill. 501, and *Nolte v. Reishelm*, 96 Ill. 425, with reference to instructions, and the court in the latter case says: 'It is next contended that appellee's instructions 2 and 3 are erroneous, for the reason that they do not inform the jury that the false representation must have been knowingly made.' The instructions in express terms informed the jury that the representations, to be actionable, must have been fraudulently made. The same objection was urged to an instruction in *Merwin v. Arbuckle*, 81 Ill. 501, and it is there said: 'As the scienter enters into and is necessary to a fraudulent representation, the instruction virtually informed the jury that the representations must have been made knowing them to be false. Then, when they were informed that they must have been fraudulent, they were, in substance, told they must have been not only false, but plaintiff in error knew it.' But, even though an express allegation of the scienter were necessary, its omission would be cured by the verdict. *Gerke v. Fancher*, 158 Ill. 375, 41 N. E. 982; *Dana v. Koltman*, decided at the October term of this court, Gen. No. 6,887; *Railroad Co. v. Simmons*, 38 Ill. 242, and other cases.

"The bankruptcy act, under which appellant's discharge was granted, provided: 'No

debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.' Bump, Bankr. (10th Ed.) p. 741. Whether the judgment sued on was for fraud is a question to be determined from the record. *Flanagan v. Pearson*, 14 N. B. R. 37, 42 Tex. 1. We think it clear that the judgment in question was recovered for fraud of appellee, and that his discharge in bankruptcy did not discharge him therefrom. Bump, Bankr. (10th Ed.) pp. 741-743, and cases cited; *Eden, Bankr. Law*, 110; *Horner v. Spelman*, 78 Ill. 206; *Warner v. Cronkhite*, 6 Biss. 453, Fed. Cas. No. 17,180; *In re Devoe*, 2 N. B. R. 27, Fed. Cas. No. 3,843; *Hughes v. Oliver*, 8 Pa. St. 426.

"Appellant urges that, the judgment being provable, it is discharged. This contention is untenable, because the same section of the statute which excepts a debt created by fraud from the discharge provides that it may be proved even though appellee had proved his judgment in bankruptcy, and obtained a dividend less than the amount thereof. This would not operate to discharge appellant from the unpaid balance. *Stokes v. Mason*, 12 N. B. R. 498, 10 R. I. 261. The evidence is that no part of the judgment has been paid.

"Appellant's counsel objects to the exclusion of evidence tending to prove that there was no fraud in the transaction in respect of which the judgment was recovered. Such evidence is incompetent, and it is properly excluded. *Forsyth v. Vehmeyer*, and *Flanagan v. Pearson*, supra. There was only one count in the declaration, and it was held in the last case that whether the judgment was rendered for fraud is not a question for the jury, but must be determined from the record. The suit having been a case of fraud, and the declaration having been framed accordingly, the judgment is conclusive as to the fraud, and the fraud is not, as contended by appellant's counsel, merged in the judgment. *Schuman v. Strauss*, 52 N. Y. 404, 408.

"Appellant assigns as error the sustaining a demurrer to his additional plea and demurrer, assigning especially that the plea is double, which it is, and is otherwise defective. The demurrer was properly sustained.

"It is objected that the amended declaration contains no *ad damnum*. The original declaration concludes with an *ad damnum*, and we are inclined to the opinion that the amended declaration may be regarded as an additional count, and the *ad damnum* in the original as applying to the latter declaration. No specific objection is made to the amended declaration for want of an *ad damnum* in the trial court, nor was any motion made in arrest of judgment, and the objection therefore cannot be availed of here. *Barnes v. Brook-*

man, 107 Ill. 817; *Utter v. Jaffray*, 15 Ill. App. 236.

"Lastly, it is objected that the damages are excessive. The court found the issues for the plaintiff, and found the debt to be \$833.35, and assessed the plaintiff's damages in the sum of \$2,076.90. The evidence was that the interest due at the date of the judgment was \$1,242.74, and the damages should have been assessed at the latter amount only. The court, in assessing the damages, evidently included the amount of the debt, \$833.35, in the damages, and judgment was entered accordingly. Deducting from \$2,076.90, the amount assessed as damages, \$833.35, the remainder is \$1,243.55. Appellee has filed a remittitur of all damages in excess of \$1,242.74, the amount of the interest. A remittitur of \$834.16 from the amount of damages, \$2,076.90, will be entered here, so from that the judgment will be for \$833.35 debt and \$1,242.74 damages; and the judgment will be affirmed, with directions to the trial court to enter a like remittitur in that court. Appellant not having specifically called the attention of the trial court to the excess of damages, he will not recover the costs of this court."

From a careful examination of the facts presented by the abstract in this case, and of the briefs herein, we have reached the same conclusion as was reached by the appellate court in its judgment, and we concur with the appellate court in its opinion, and adopt the same as the opinion of this court. The judgment of the appellate court for the First district is affirmed. Judgment affirmed.

(176 Ill. 478)

POPE v. DAPRAY et al.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

CONSTRUCTIVE TRUSTS—STATUTE OF FRAUDS—CONFIDENTIAL RELATIONS—PARENT AND CHILD.

Pending a divorce proceeding against her husband, complainant, who was the owner of a tract of land incumbered by a trust deed, and who desired to divest her husband of his dower interest therein, under advice of counsel, refused a substantial offer for her equity of redemption, permitted the interest on such incumbrance to become delinquent, and procured her father, who also had advised such course, to purchase the land for her at the trustee's sale, which he verbally agreed to do, with the understanding that he would reconvey to her, on the rendition of her decree of divorce and the repayment of the money so advanced by him. He purchased the land at such sale, paying his own money therefor, and taking the title in his own name. Complainant in the meantime rented the land, making the rent payable to her father, most of which he collected, though he permitted her to collect a portion thereof. Some time thereafter, he executed an agreement in writing, signed also by complainant, providing for the conveyance of such land by him to her, on payment of a specified sum. *Held*, that the entire transaction, and the confidential relation existing between the parties, created a constructive trust in favor of complainant, within the exception of section 9 of

the statute of frauds, "that resulting trusts, or trusts created by construction, implication, or operation of law, need not be in writing, and the same may be proved by parol."

Error to circuit court, Macon county; Edward P. Vail, Judge.

Bill in chancery by Eugenia Pope against Francis Dapray and wife to declare and enforce a constructive trust. From a decree dismissing the bill, complainant prosecutes error. Reversed.

This was a bill in chancery filed by Eugenia Pope, against her father and mother, Francis and Rosina Dapray, in the circuit court of Macon county, to declare a constructive trust, and compel the conveyance of 160 acres of land in Carroll county, Mo. About the year 1885, plaintiff in error was the owner of 140 acres of this land; and her husband, Jules Ogle, was the owner of 20 acres additional. It was incumbered with a trust deed for \$1,500. About the year 1887, trouble having arisen between the plaintiff in error and her husband, divorce proceedings were instituted by her. She was desirous of procuring the title to this land in her own name, free and clear of all right of dower of her husband. She was advised not to pay the interest on the trust deed, and thus let a foreclosure result, and have some one whom she could trust buy it in for her, so that, after the rendition of her decree for divorce, it might again be reconveyed to her. She requested her father, Francis Dapray, residing in Macon county, Ill., to furnish the money and buy in the land at the trustee's sale. Shortly before the rendition of the decree for divorce, her husband proposed to give her \$1,000 for her equity of redemption in the land, and take a conveyance from her. She corresponded with her father, and he wrote, or caused to be written, a letter to one Pierson, in Carrollton, Mo., which was read to plaintiff in error, in which she was advised not to take the \$1,000, as he would furnish the money and buy the land, thus protecting her interest. This letter was written in French, and it is admitted was not signed by him, nor does the letter appear in evidence. The father furnished his own money at her request, with the verbal understanding, as stated by plaintiff in error, he would reconvey to her upon the payment of the amount expended, and interest, which conveyance should be made to her after the rendition of her decree of divorce. The testimony of a number of witnesses shows that, shortly before this time, Francis Dapray had stated to parties to whom he applied to borrow money that he intended to use it for the plaintiff in error, and buy in the land in Missouri for her. The consideration paid by him at the trustee's sale was \$1,910. He insisted that the land was purchased by him for the use of the children of his daughter, then Mrs. Ogle, but since intermarried with one Pope. At the time of the sale and purchase by him, the land was worth considerably more than the amount paid at the trustee's sale, and it is apparent plaintiff in

¹ Rehearing denied December 13, 1898.

error could have secured at least \$1,000 for her equity of redemption. At the time of the filing of this bill, the land was worth from \$4,000 to \$5,000. After the purchase of the land by Dapray, plaintiff in error, with her children, returned to his home, in Macon county, Ill., and continued to reside there for several years, until she again married. The land in question meanwhile was rented for \$400 per year, most of which was collected by Dapray. One \$400 note given for rent, being for the first year after the purchase by Dapray, was by him indorsed to plaintiff in error, and she made the contract with the tenant for renting the land, making it payable to her father upon his advice and that of her counsel. Plaintiff in error importuned and made many demands on him to convey the land to her; and finally, in June, 1888, he executed an agreement, signed also by her, which, in substance, provided for the execution of a deed from him at any time within five years, upon the payment of \$2,000.

The record, taken as a whole, convinces us the agreement between father and daughter, at the time he bought this land, was that he should act for her. It is perfectly apparent she trusted in him as a daughter would in a father, and did not permit him to purchase the land, of which her equity of redemption was valuable, without the understanding, as alleged by her and corroborated by other witnesses, it should be reconveyed to her after the granting of her divorce and the repayment by her of the amount expended. No memorandum in writing, however, of the agreement or understanding between these parties was made or signed prior to or at the time of the transaction. The cause was referred by the court to the master, to take testimony and report conclusions. Various sums of money had been expended by Dapray for his daughter in and about her divorce case, and some other litigation which had arisen in Missouri regarding the land, and a considerable amount had been received by him as rents from the land. The master reported finding that Dapray held the land as trustee for the plaintiff in error, and also stated an account between the parties, finding there was due to Dapray on June 1, 1896, \$1,056.47, and finding also that, on the payment of that amount, he should convey to plaintiff in error. Exceptions were filed by both parties to this report. Plaintiff in error excepted to some amounts with which she was charged as expenses connected with the litigation above mentioned. The court sustained the exceptions of defendants in error, holding no trust under the statute of frauds existed, and dismissed the bill for want of equity. From such decree, this writ of error is prosecuted to this court.

W. C. Johns, for plaintiff. I. A. Buckingham, for defendants.

PHILLIPS, J. (after stating the facts). Plaintiff in error seeks a reversal of the decree of the circuit court dismissing her bill, alleg-

ing as a reason therefor that the promise made by her father to buy in this land for and make conveyance to her after she had secured a divorce created a constructive trust, which, by the statute of frauds, is expressly excepted from its action. Section 9 of the statute is as follows: "All declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of no effect: provided, that resulting trusts, or trusts created by construction, implication or operation of law, need not be in writing, and the same may be proved by parol." If it be true, as contended, that the facts presented show a constructive trust, such may be proved and established by parol. A constructive trust is one that arises where a person clothed with some fiduciary character, by fraud or otherwise, gains something for himself. *Perry, Trusts*, § 27; *Reed v. Reed*, 135 Ill. 482, 25 N. E. 1095. It is also further defined as where "a person obtains the legal title to property by virtue of a confidential relation and influence, under such circumstances that he ought not, according to the rule of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interests of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust, by construction, out of such circumstances or relations; and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it or execute the trust in such manner as to protect the rights of the defrauded party, and promote the safety and interests of society." *Perry, Trusts*, § 166. This rule has been by this court quoted with approval in the cases of *Beach v. Dyer*, 93 Ill. 295, and *Allen v. Jackson*, 122 Ill. 567, 13 N. E. 840.

As a general rule, one of two elements is necessary on which to base or establish a constructive trust. There must be some element of fraud, either positive or constructive, which existed at the time of the transaction, and which influenced the cestui que trust; or there must exist a confidential relation and influence, by virtue of which one has obtained the legal title to property which he ought not, according to the rules of equity and good conscience, to hold and enjoy. The rule is thus well laid down in *Perry, Trusts*, § 168, as follows: "Constructive trusts may be divided into three classes, to be determined according to the circumstances under which they arise: First. Trusts that arise from actual fraud practiced by one man upon another. Second. Trusts that arise from constructive fraud. In this second class the conduct may not be actually tainted with moral fraud or evil intention, but it may be contrary to some rule established by public policy, for the protection of society. Thus, a purchase made by a guard-

ian of his ward, or by a trustee of his cestui que trust, or by an attorney of his client, may be in good faith and as beneficial to all parties as any other transaction in life, and yet the inconvenience and danger of allowing contracts to be entered into by parties holding such relations to each other are so great that courts of equity construe such contracts prima facie to be fraudulent, and they construe a trust to arise from them. Third. Trusts that arise from some equitable principle, independent of the existence of any fraud; as, where an estate has been purchased, and the consideration money paid, but the deed is not taken, equity will raise a trust, by construction, for the purchaser."

The rule is well established, also, that courts of equity carefully scrutinize contracts between parent and children, by which the property of the parent is conveyed to children. The position and influence of a parent over a child are so controlling that the transaction should be carefully examined, and sales by child to parent must appear to be fair and reasonable. In this case, plaintiff in error, being the owner of this land, and with a family of her own, would not, in reason, have been supposed to make a voluntary sale of it to her father for no consideration whatever. The law would presume, if she desired to dispose of it, she would do so to the best advantage to herself. She could have sold her equity of redemption for \$1,000. By the advice of her father, she declined to do so, and entered into another arrangement whereby he took the title of the land, she receiving nothing except the promise that, when her divorce was secured, a reconveyance would be made to her. The trustee's sale, under which Francis Dapray purchased, practically amounted to a sale from the plaintiff in error. She voluntarily, upon the advice of her counsel, permitted the interest to become delinquent, so this foreclosure might occur, and it was with her approval the land was sold under the trust deed. Where, under such circumstances, a conveyance of property is made from or by the direction of a child to a parent for a consideration much less than its true value, a court of equity will carefully scrutinize the transaction, and ascertain whether or not the parent, by reason of his relation and influence and the confidence reposed in him by the child, has not procured an undue advantage.

The cases of *Perry v. McHenry*, 13 Ill. 227, and *Stephenson v. Thompson*, Id. 186, are not analogous to this, nor do they come within the rule as heretofore stated in *Perry on Trusts*, and sanctioned by this court. The rule is well settled in this state that a verbal agreement to purchase land for the benefit of another is void under the statute of frauds, and cannot be enforced against a purchaser who, in the absence of fraud, has paid for the land with his own money, and taken a conveyance in his own name. Such is the rule where no fiduciary relation exists, or no confidential re-

lation, such as that of parent and child. In both the cases last above cited, the purchaser of the land (the party against whom it was sought to establish a trust) occupied no such relation to the party seeking relief, but, at the instigation and request of such party, had taken title to the lands, and furnished the purchase money thereof. The rule is well stated in *Lantry v. Lantry*, 51 Ill. 458, as follows (page 465): "If A. voluntarily conveys land to B., the latter having taken no measures to procure the conveyance, but accepting it, and verbally promising to hold the property in trust for C., the case falls within the statute, and chancery will not enforce the parol promise. But if A. was intending to convey the land directly to C., and B. interposed and advised A. not to convey directly to C., but to convey to him, promising, if A. would do so, he, B., would hold the land in trust for C., chancery will lend its aid to enforce the trust, upon the ground that B. obtained the title by fraud and imposition upon A. The distinction may seem nice, but it is well established. In the one case B. has had no agency in procuring the conveyance to himself; in the other, he has had an active and fraudulent agency." In this case plaintiff in error was about to dispose of her equity of redemption to other parties, when she was advised by her father not to do so, and that he would furnish the money to buy it in. In addition, there also existed the fiduciary relation of parent and child, and the trust and confidence which the law presumes the latter reposed in the former.

Counsel for defendants in error rely upon the case of *Davis v. Stambaugh*, 163 Ill. 557, 45 N. E. 170. In that case we held that the evidence did not show a constructive trust, and that the mere refusal of a trustee to execute an express trust, or the denial of the existence of a trust by the trustee, does not constitute such fraud as takes the case out of the statute. What is further said in that case is not in conflict with the views herein expressed,—that as between parent and child, or those occupying a position of trust or confidence, the fraud may be constructive, and may be shown by such facts and circumstances as demand equitable relief. Moreover, in this case it is not apparent why the plaintiff in error should not have the relief asked for in her bill. She is re-invested with the title of her land, and the defendant in error, Francis Dapray, is repaid all moneys expended by him, with interest, after deducting amounts received.

As to the agreement introduced in evidence providing for a deed from Dapray to his daughter, executed in 1888, we do not consider it material, except in so far as it tends to corroborate the evidence of plaintiff in error that the land was purchased for her, and refutes the assertion made by Dapray that he bought it for her children, and for no other purpose. The indorsement on the first rental note is also corroborative of the fact

that he recognized she had some interest in this land after the conveyance to him. Taking the record as a whole, we hold it presents a case clearly within the exception to the statute of frauds. The entire transaction, and the confidential relations existing between the parties, create a constructive trust in favor of plaintiff in error.

Objections are made by plaintiff in error to the amount charged against her by the master in stating the account, for different sums of money allowed the father in connection with her divorce case and other litigation affecting the land in Missouri. We are not inclined, from our view of this case, to disturb the account as reported by the master. It was error, however, for the circuit court to dismiss the bill of plaintiff in error for want of equity. The decree will be reversed, and the cause remanded to the circuit court of Macon county, with directions to enter a decree sustaining the material allegations of complainant's bill, and finding that the defendants in error hold the land in question in trust for plaintiff in error, Eugenia Pope, and that a conveyance thereof be made to her upon the payment of the amount found due by the master, together with legal interest from the date of such report. Reversed and remanded.

(176 Ill. 162)

CUPPY et al. v. ALLEN et al.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

SPECIFIC PERFORMANCE—VERBAL CONTRACT—
ABANDONMENT.

1. Specific performance of a verbal contract will not be decreed where the contract is not clearly established.

2. Where a contract has been abandoned by the parties thereto, it will not be specifically enforced.

Error to circuit court, Sangamon county; James A. Creighton, Judge.

Bill by Mary Cuppy and others against Frances E. W. Allen and others. There was a decree dismissing the bill, and plaintiffs bring error. Affirmed.

McGuire & Salzenstein, for plaintiffs. Geo. W. Murray and Colby & Lanphier, for defendants.

CARTER, C. J. This is a writ of error brought to reverse a decree dismissing for want of equity a bill for specific performance. James A. Barger, a bachelor, the uncle of the complainants, owned certain premises in the village of Loami, in Sangamon county, consisting of four lots, upon which he had a small dwelling house. The value of the premises was about \$500, and their rental value was upward of \$5 per month. Letha Cuppy, his niece and the mother of the complainants, lived with her husband and her said two daughters in the same village, on premises belonging to her, of about the same rental value. The evi-

dence tended to prove that in April, 1887, Barger made a verbal contract with Letha Cuppy, whereby she and her family were to live in his house free of rent, and furnish him board, lodging, and washing, for which, beside the rent, he would pay her \$5 per month, and at his death she was to have the property. He was 62 years old, and was a man of some wealth. Letha Cuppy, with her family, occupied the premises of Barger, in pursuance of the contract, and performed it according to its terms until her death, in August, 1888. The evidence further tended to prove that, after the death of Mrs. Cuppy, Barger said to the daughters, the complainants, that, if they would stay there and keep house for him, he would do for them what he had agreed to do for their mother, and they should have the property at his death. He remained and boarded with them until June 20, 1894, when, as it appears, he left at the instigation of defendant in error Frances E. Allen, and made his home with another niece. He became sick a month before, and was waited on by Mrs. Allen, who seemed to have more influence over him than any one else. He was then indebted to the complainants for more than two years' board, their bill as presented being upward of \$160, which included damages to carpet, etc. He insisted it was too much, and a final settlement was effected by his attorney while he was sick at Mrs. Brash's house, whence he had removed from his own house, as before stated. The terms of the settlement were that he paid complainants \$147.75 in full of all demands, and they were to remain in the premises until October 1, 1894, when they were to vacate. In the settlement, the rent of the house from the date of the settlement until October 1st was reckoned at \$10, and nothing was said by the complainants about their right to have the property at Barger's death. They surrendered possession, and removed to their former home, in accordance with the settlement. Barger died February 4, 1895, and complainants filed their bill for the specific performance of the contract on May 24, 1895. On July 24, 1894, Barger made a deed conveying the property in question to defendant in error Allen, then Mrs. Waterman, for the expressed consideration of \$500, but in fact for no, or only a nominal, consideration; and, pending the suit, Mrs. Allen conveyed to the other defendant in error the same premises, for only a nominal consideration. Other facts were shown, some of which tended to rebut the proof that the contract was that complainants were to have the property at Barger's death, and it appeared that from \$2.50 to \$3 per week was a reasonable price in the village for the accommodations received by Barger; and defendants in error contend that the rent of the premises and the \$5 per month fully paid for all he received, and that the proof is insufficient to establish the alleged verbal contract that the complainants were to have the property at Barger's death, and,

¹ Rehearing denied December 28, 1898.

even if sufficient, that the contract was abandoned by both parties.

The evidence, much of which we regard as unnecessary to a correct decision of the case, does not tend to satisfy the mind that the complainants were fairly dealt with by defendant in error Mrs. Allen, or even by Barger. Still, we have no doubt that the learned chancellor decided correctly in dismissing the bill. Specific performance will not be decreed except in a clear case. It rests in the sound judicial discretion, and will not be granted in a doubtful case. Even if it were clearly established that the contract was as alleged by complainants, still it could not be specifically enforced for one reason, if for none other, and that is that it was abandoned by all parties. We think the evidence shows a voluntary surrender of the premises at the time agreed upon, and a payment of rent for about two months before such surrender, and that the complainants did not then claim that they had any interest in the property or right of possession of the same, but, on the contrary, gave Barger a receipt in full of all demands, and surrendered the property to him without reservation. A contract which has been abandoned by the parties will not be specifically enforced. *Hale v. Bryant*, 109 Ill. 34. The decree must be affirmed. Decree affirmed.

(176 Ill. 397)

SNYDER v. CITY OF MT. PULASKI.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL CORPORATIONS—POWERS—ENCROACHMENT ON STREET—ESTOPPEL.

1. A municipality has no power to confer on a person the right to maintain a permanent encroachment on a street, exclusively for private use.

2. The fact that an ordinance granting the right to maintain a permanent encroachment on a street, for private use, was an inducement to the acceptance of a franchise from the city, and a part of the contract with it, does not make the ordinance binding on the city, since it had no power to grant such right.

3. There can be no estoppel against a municipality which has granted, without authority of law, the right to maintain a permanent encroachment on a street, for private use, from requiring the street to be opened in its entirety, since no estoppel can arise from an act done by a municipality without authority of law.

Appeal from circuit court, Logan county; George W. Herdman, Judge.

Bill by Isaac H. Snyder against the city of Mt. Pulaski for an injunction. A decree dissolving a temporary injunction and dismissing the bill was affirmed by the appellate court (69 Ill. App. 474), and plaintiff appeals. Affirmed.

On March 24, 1891, the appellant was granted, by ordinance, the right to erect and operate an incandescent electric light plant in the village of Mt. Pulaski for the term of 20 years. On the 18th of April of the same year he pur-

chased a lot on which a flour mill formerly stood, which, when in operation, had been supplied with water from a well in Green street, near its intersection with Spring street, in the village. This well was dug by the operators of the flour mill with the consent of the village authorities, and was connected with the lot by means of pipes laid underground. Afterwards, on June 23d of the same year, by an ordinance duly passed and approved, appellant was allowed to use of the well for the period of 20 years; the same to be maintained at his own expense, and to be so kept as to be safe to the traveling public. In October following, by another ordinance, he was granted the right to put in upon the streets of the village the necessary appliances for an arc system of electric lighting, with a contract for street lights for 5 years. In the erection of the incandescent plant he expended, in round numbers, \$9,000, and for the arc system about \$10,000 more. When the right to use the well was given him, he found that the Peoria, Decatur & Evansville Railway Company was using it to supply its engines; and he entered into a contract with it to supply it with water, using the railway company's pump until the following spring. In the spring of 1892 he discovered the water supply to be insufficient, and dug a well immediately adjoining the old one, inserting what is known as a "Cook's point" to connect the two. Later on he made contracts with various parties (among others, the Illinois Central Railroad Company and a flour mill) to furnish them water, and continued his business without interruption until November 25, 1895, when he was served with a notice, signed by the street commissioner, ordering him to remove the "Cook's point" and all other attachments placed in Green street by him, and the pump and attachments in this second well. The pump in it not being suitable to be placed in the old well; on December 13, 1895, he purchased a new one, with necessary pipe and apparatus, for the purpose of placing the same in the old well, the cost of which was about \$500. In order to lift the pump out of the new well, he erected a derrick, and was proceeding with the work of taking out the pump and appliances and putting the new pump in the old well, when the events transpired which gave rise to this suit. On December 21, 1895, the city council (the village organization having been changed to that of a city organization) repealed the ordinance granting the appellant the use of the old well; and thereafter, while he was at work making the changes above mentioned, he was served with a notice, signed by the city attorney, stating that the city objected to the deepening of the old well, and to the placing of any appliances therein which would enable him to draw water from a deeper level than the bottom of the well as it was originally constructed. He was also notified at the same time, verbally, by both the city marshal and the city attorney, to stop work, which he refused to do. While the work was going on,

¹ Rehearing denied December 13, 1898.

the street commissioner and others tore down the derrick, and filled up the pipe he was placing in the old well with brickbats and other materials, and also proceeded to fill up the well with dirt and rubbish. Thereupon he obtained an injunction restraining the city from interfering with and obstructing him in the work, and proceeded to clean out the old well and put down in it a new 8-inch pipe, driving the same about 30 feet below the bottom of the well. He then covered the well with a platform made of 4-inch oak plank, and filled up the new well. The evidence shows that, prior to this trouble, appellant maintained the well in a dangerous condition; that he permitted steam to escape into it in a manner calculated to frighten horses on the street, and kept it insecurely covered. The temporary injunction granted was, on the hearing, dissolved, and his bill dismissed. An appeal was taken to the appellate court for the Third district, where the decree of the circuit court was affirmed, and the case is brought here by this further appeal.

A. G. Jones and Blinn & Harris, for appellant. F. L. Tomlinson and Beach & Hoddnett, for appellee.

PHILLIPS, J. (after stating the facts). The streets of a city are dedicated for public use, and for these purposes the city council may improve and control them, and adopt needful rules for their management and use. But that body has no power to alien or otherwise incumber such streets, so long as they are public streets, but must hold them in trust for public uses only; and hence no easement or right therein not of a public character can be granted by a municipality, or acquired by any individual or corporation, for exclusive private use, to the exclusion of the public. *Field v. Barling*, 149 Ill. 556, 37 N. E. 850; *Hibbard, Spencer, Bartlett & Co. v. City of Chicago*, 173 Ill. 91, 50 N. E. 256. A permanent encroachment upon public streets for a private use is a purpresture, and is in law a nuisance. *Driggs v. Phillips*, 103 N. Y. 77, 8 N. E. 514; *Smith v. State*, 23 N. J. Law, 712; *Attorney General v. Helshon*, 18 N. J. Eq. 410; *State v. Woodward*, 23 Vt. 92; *Chamberlain v. Enfield*, 43 N. H. 356; *Com. v. King*, 13 Metc. (Mass.) 115; *Hibbard, Spencer, Bartlett & Co. v. City of Chicago*, supra. In the case last cited it was said (page 98, 173 Ill., and page 256, 50 N. E.): "Where the city has authorized a temporary use which causes a temporary obstruction, one having been licensed to exercise such temporary use would not be liable for a penalty, under the ordinances, for obstructing the street, as it was permitted as a matter of grace or favor. That such permission was given may be implied from circumstances." *Gridley v. City of Bloomington*, 68 Ill. 47. But, when the city demands the removal of

such a structure, it, if permitted to remain thereafter, becomes a nuisance."

The claim of the appellant that the second ordinance, which granted him the privilege of using the well, is part of the whole contract, and that without it he would not have accepted the franchise or erected the plant, in no way affects the question of law. He claims that the right to use the well was part of the consideration upon which he acted, and was intended as an inducement to him to accept the franchise and build the works. He must have acted with full knowledge of the fact that the municipality had no right or power to confer on him a right to a private use of the street, giving him a right to a permanent encroachment thereon, and allowing him to create a purpresture. There being no power in the city to make a discrimination in the use of the streets in favor of appellant, and permit him to have a permanent private use of the same, or to part thereof, if it has done so, the most that can be said is that it amounted to a mere license that would not render him amenable to punishment for a violation of an ordinance of the city in obstructing the street. Such permission to so use the street is not binding upon the city, and is not irrevocable. The municipality having no power to grant such permanent use, there can be no estoppel against it from requiring the street to be open in its entirety, because no estoppel can arise from an act of the municipal authorities done without authority of law. *Seeger v. Mueller*, 133 Ill. 86, 24 N. E. 513; *Pettis v. Johnson*, 56 Ind. 139; *Stevens v. Training School*, 144 Ill. 336, 32 N. E. 962; *Day v. Green*, 4 Cush. 433.

There was power in the city council to pass the ordinance repealing the former ordinance granting the right to appellant to use the street; for such former ordinance, being without authority of law, might well be rescinded. Appellant acquired no right under the former ordinance against the public, nor did he acquire any right against the municipality by estoppel, nor by any right conferred by the ordinance, because the right conferred was a mere private use, and that private use created a purpresture. This fact it was the duty of appellant to know; hence a right existed in the city council to repeal the ordinance theretofore enacted granting the right to appellant to have and use this well in the public streets of the city.

It was not error in the circuit court of Logan county to dismiss appellant's bill, nor in the appellate court for the Third district to affirm its decree. The judgment of the appellate court for the Third district is affirmed. Judgment affirmed.

BOGGS, J., took no part in the decision of this case.

(176 Ill. 318)

PELLS et al. v. CITY OF PAXTON.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

PUBLIC IMPROVEMENTS—ASSESSMENTS.

Under City and Village Act, art. 9, § 50, providing that contracts for public improvements, to be paid for by special assessment, shall be let to the lowest bidder, in the manner to be prescribed by ordinance, there can be no assessment for a pavement 53 feet wide; the contract therefor, under which it was constructed, having been made, and work having been begun, before the passage of the ordinance authorizing it, and while there was an ordinance merely authorizing a pavement 61 feet wide.

Error to Ford county court; Alexander McElroy, Judge.

Proceedings by the city of Paxton for a special tax for improvements. Objections by Edgar Z. Pells and others to confirmation thereof were overruled, and they bring error. Reversed.

This is a proceeding in the county court of Ford county to collect a special tax for the pavement of a portion of Market street, in the city of Paxton, in that county. Upon application for confirmation of the special tax, the plaintiffs in error, Edgar Z. Pells, Hannah W. Bogardus, W. A. McCulloch, and Calvin H. Frew, filed objections to said confirmation. The nature of the objections appears from the statements made in the opinion. The objections were overruled by the county court, and judgment was rendered by said court confirming the special tax against the property of the plaintiffs in error. The present writ of error is prosecuted from such judgment of confirmation.

Gray & Beach and M. H. Cloud, for plaintiffs in error. C. H. Frew, in pro. per. M. L. McQuilston and A. E. De Mange, for defendant in error.

MAGRUDER, J. (after stating the facts). The question of the validity of a former proceeding in reference to the same improvement involved in the present suit was before this court at a former term; and the decision of this court in relation thereto is reported in the case of *Pells v. People*, 159 Ill. 580, 42 N. E. 784. By reference to that case it will be seen that an ordinance was passed by the city council of Paxton on March 13, 1893, amended on April 10, 1893, and again on May 10, 1893, for the construction of a brick pavement 61 feet wide along a portion of Market street, in the city of Paxton. The judgment and order of sale entered by the county court, and reviewed in *Pells v. People*, supra, were there reversed upon the ground that the property owners were assessed for making a larger improvement than was contracted for by the city, and for a larger improvement than was actually constructed. It was shown by the proceedings and evidence in that case that, although the property owners were specially taxed for a pavement 61

feet wide, the pavement which the contractors agreed to construct was only 53 feet wide. It will also appear by reference to the case of *Pells v. People*, supra, that, after a contract was made for the construction of a pavement 53 feet wide, to wit, on September 16, 1893, an ordinance was passed amending the original ordinance of March 13, 1893, by providing that the width of the pavement should only be 53 feet between curbs, except within the intersection of cross streets. After the former judgment was reversed by this court, the city council of Paxton on September 3, 1896, adopted the following resolution, to wit: "Whereas, in the suit of Edgar Z. Pells and Hannah W. Bogardus v. The People ex rel. Oscar V. Hohngrain, County Collector, the supreme court of Illinois, in an opinion filed on the 17th day of January, 1896, reversed the judgment of the county court of Ford county ordering the sale of certain tracts of real estate specially taxed for the construction of the brick pavement on Market street under an ordinance of this city passed March 13, 1893, amended April 10, 1893, amended May 10, 1893, amended September 16, 1893; and whereas, the effect of such judgment of reversal by the supreme court is the annulment of the confirmation by the county court of Ford county of all the special taxes assessed for the construction of said pavement; and whereas, the pavement described in said ordinance and its various amendments has been constructed by the contractor in accordance with the terms and provisions of his written contract with the city of Paxton; and whereas, the city of Paxton has accepted said pavement, described in said ordinance and its amendments, and paid for the construction of all that part thereof lying within the limits of intersecting streets; and whereas, Edgar Z. Pells and Hannah W. Bogardus, owners of numerous tracts of real estate abutting upon the line of said improvement, have paid none of the special taxes assessed and confirmed by the county court against said tracts of real estate; and whereas, the owners of other tracts of real estate abutting upon said improvement have paid all or a part of the installments of the special taxes assessed upon their said tracts of real estate: Therefore, be it resolved by this council that all special taxes assessed for the construction of said improvement under the ordinance and its said several amendments herein above mentioned be, and the same are hereby, annulled. Resolved, further, that C. H. Yeomans, J. W. Reed, and J. H. Nelson be, and they are hereby, appointed to make an estimate of the cost of said improvement provided for and described in said above-mentioned ordinance and its several amendments, including labor, materials, and all other expenses attending the same, and the cost of making and levying the special taxes to pay therefor, except for that portion of said improvement lying within the limits of

¹ Rehearing denied December 13, 1898.

cross streets intersecting said Market street, described in said original ordinance and its said amendments, and report the same to the next meeting of this council." Afterwards, on December 7, 1896, the above resolution was amended so as to recite an omitted amendment of the original ordinance made October 4, 1893. On December 7, 1896, the committee appointed to make an estimate of the cost of the construction of said pavement, etc., made report of their estimate to the city council, which report was approved on the same day, to wit, December 7, 1896. On said last-named date the city council passed a resolution instructing the city attorney to file a petition in the county court for the appointment of commissioners to make an assessment based upon the estimate so reported. The petition herein was so filed on December 8, 1896, and commissioners were appointed, who filed an assessment roll on December 23, 1896. The objections filed by the plaintiffs in error to such assessment roll were overruled.

It is evident from the above recital that the present proceeding has for its object the levy and collection of a special tax to pay for an improvement already constructed before the resolution above recited was passed. It is claimed by the defendant in error that the pavement 53 feet wide was constructed under and in pursuance of the amendment of September 16, 1893, to the original ordinance of March 13, 1893. The amendment of September 16, 1893, having provided for a pavement 53 feet wide, instead of the pavement 61 feet wide described in the ordinance of March 13, 1893, the resolution of September 3, 1896, was passed for the purpose of having an estimate made of the cost of constructing such pavement 53 feet wide. It is urged that the resolution thus cures the defect in the original proceeding, which required an estimate to be made of the cost of constructing a pavement 61 feet wide, when a pavement only 53 feet wide was actually constructed.

A fatal objection exists to the validity of the resolution of September 3, 1896, and to all the proceedings based thereupon. This court has decided over and over again that a valid ordinance lies at the foundation of the proceeding to construct a public improvement by special assessment or special taxation; that the first step to be taken in making such an improvement is the passage of an ordinance specifying its nature, character, locality, and description; and that the improvement cannot be paid for by special taxation or special assessment, unless an ordinance has been passed which authorizes it. *Pells v. People*, supra, and cases there referred to. In the present case the city council of Paxton passed an ordinance on March 13, 1893, providing for a pavement 61 feet wide, and appointed a committee to estimate its cost, and approved a report of said committee, and ordered a petition to be filed in the county court for the making of an assessment based upon

such report. It confirmed an assessment roll providing for the levying of a special tax to make a pavement 61 feet wide. On July 13, 1893, it advertised for bids for the construction of a pavement 61 feet wide, as directed by the original ordinance of March 13, 1893. Two bids were made for the construction of the pavement 61 feet wide,—one by one Mayfield and the other by one Barnes. The advertisement for these bids required that each bid should be accompanied by a bond in the sum of \$5,000, with sufficient sureties that the bidder would furnish the material and perform the work as provided by the ordinance of March 13, 1893, on or before October 13, 1893. By the terms of the advertisement, all bids were to be delivered to the chairman of the committee on streets and alleys on or before August 7, 1893. Although, as we read the evidence, the bid made by Mayfield was lower than the bid made by Barnes, and although Mayfield's bid was accompanied by a bond for \$5,000, and the bid of Barnes was not accompanied by any bond, yet on August 15, 1893, a committee of the city council was instructed to contract with Barnes in accordance with his bid. No contract, however, was made with him in accordance with his bid. On the contrary, on August 21, 1893, a contract was entered into between Barnes and the city of Paxton which recites the passing of the ordinance of March 13, 1893, and the amendments thereto of April 10 and May 10, 1893, and also recites the awarding of the contract by resolution of the city council to Barnes at certain figures, the work to be done, "as modified by a certain contract, of the width of fifty-three feet, instead of sixty-one feet, as required by the ordinance," and which also recites that the contract of August 21, 1893, was signed by a majority of the property owners abutting on said improvement, and the signatures of the balance of said property owners were to be secured by the city, if possible, and, if not, then the city should protect Barnes against any loss by reason of refusal on the part of said parties to sign said agreement. By the terms of said agreement, Barnes was to begin the work on or before September 1, 1893, and complete it on or before December 1, 1893, instead of October 30, 1893, as stated in the advertisement for bids. The resolution of September 3, 1896, recites that the pavement "has been constructed by the contractor in accordance with the terms and provisions of his written contract with the city of Paxton." If the pavement was constructed in accordance with the terms of the contract of August 21, 1893, then its construction began on September 1, 1893. As the ordinance changing the width of the pavement from 61 feet to 53 feet was not passed until September 16, 1893, the contract for constructing a pavement 53 feet wide was entered into 26 days before any ordinance was passed authorizing the construction of a pavement 53 feet wide; and such construction was actually begun

some 15 days before the passage of any ordinance providing for the construction of a pavement 53 feet wide. The facts thus stated bring the case within the doctrine of this court laid down in the cases of *City of Carlyle v. Clinton Co.*, 140 Ill. 512, 30 N. E. 782, and *City of East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934. A city council has no right to make an improvement, and then, after the improvement is made, pass an ordinance providing for the making of the improvement. The passage of the ordinance must precede the making of the improvement, and the making of the improvement and all steps thereafter are absolutely void, unless preceded by a valid ordinance. It is true that much of the work done by the contractor, Barnes, in constructing the pavement 53 feet wide, may have been done after the amendment of September 16, 1893, was passed; but he did not construct such pavement by virtue of and under the amended ordinance of September 16, 1893. He constructed the improvement under and by virtue of the contract made with the city on August 21, 1893. That contract was wholly illegal. It was not made in pursuance of an advertisement for bids made as required by statute. Section 50 of article 9 of the city and village act provides that "all contracts for the making of any public improvement, to be paid for in whole or in part by a special assessment, and any work or other public improvement, when the expense thereof shall exceed \$500.00, shall be let to the lowest responsible bidder, in the manner to be prescribed by ordinance—such contracts to be approved by the mayor or president of the board of trustees." 1 Starr & C. Ann. St. p. 505. The work done by Barnes in the construction of the pavement 53 feet wide exceeded \$500 in cost, but it was not let to the lowest responsible bidder. Barnes put in no bid for the construction of a pavement 53 feet wide. The contract with Barnes was not let in the manner prescribed by ordinance, because there was no ordinance prescribing the manner of letting the contract to construct a pavement 53 feet wide. The ordinance of March 13, 1893, contained a provision for advertising for bids for the construction of a pavement 61 feet wide only, and not 53 feet wide.

The fact that some of the work may have been done after the amendment of September 16, 1893, was passed, does not relieve the transaction of the objectionable feature that no ordinance authorizing a pavement 53 feet wide had been passed when the contract was entered into on August 21, 1893, and when the making of the improvement was begun on September 1, 1893. If the law forbids the making of the entire improvement without the precedent passage of an ordinance, it equally forbids the construction of a part of the improvement without the passage of a precedent ordinance. Municipalities and contractors cannot get together and contract for the making of an improvement, and commence the making

of it, and then, afterwards, in order to justify their illegal conduct, procure from a city council the passage of an ordinance under which such illegal conduct is sought to be justified. "The city officers have no authority, after the bids have been opened, to alter the contract materially, and then award it to one of the original bidders, without a new advertisement." 15 Am. & Eng. Enc. Law, p. 1093. This is exactly what the city officers of Paxton did in the present case. After the bids for the construction of a pavement 61 feet wide were opened, they made a contract with Barnes to construct a pavement 53 feet wide, without a new advertisement; Barnes being one of the original bidders.

The precise question here involved was presented in *City of East St. Louis v. Albrecht*, supra. We there said (page 510, 150 Ill., and page 936, 37 N. E.): "The question presented, then, is, can a city council, under our statute authorizing the making of local improvements by special assessment or special taxation, by accepting and adopting improvements made without being authorized by ordinance, compel property owners to pay for them?" In answering this question the court quotes from *City of Carlyle v. Clinton Co.*, supra, and says: "That case is decisive of this. Here, as there, an ordinance is passed, not to make an improvement, but to pay for one already made. One of the controlling reasons for requiring an ordinance to be passed prior to making the improvement is that, from the nature, character, locality, and description of the same, which the statute requires every such ordinance to specify, an intelligent estimate of the cost of the material, labor, etc., may be made, both as a protection to owners of property, and as a restraint upon the municipal authorities." In the *Albrecht Case* the court affirmed a judgment of the county court refusing to confirm the assessment in that case, upon the ground that the improvement, for the payment of which it was made, was never authorized by ordinance. The subsequent or amendatory ordinance in the *Albrecht Case* contained a similar provision to that contained in the resolution of September 3, 1896, in this case, to the effect that the local improvement in question had been constructed, and its completion was adopted, accepted, and ratified by the city. It is there further said, "To say that the city adopted and accepted the work, or ratified what had been done, was an idle ceremony, and amounted to no more than approving its own act." In several cases this court has held that, when an originally valid ordinance had been passed, but an assessment made under it had been set aside because of some defect in the mode of making the assessment, a new assessment might be made under the original ordinance to pay for the improvement already constructed. These cases proceed upon the idea that the ordinance existed when the work was done, although a part or section of the ordinance may have been invalid as to the mode prescribed for levying or collecting the

assessment. In such case the valid portion of the original ordinance may be the basis of the reassessment. *Davis v. City of Litchfield*, 155 Ill. 384, 40 N. E. 354; *Freeport St. Ry. Co. v. City of Freeport*, 151 Ill. 451, 38 N. E. 137; *Village of Morgan Park v. Gahan*, 136 Ill. 515, 26 N. E. 1085. Thus, in *Freeport St. Ry. Co. v. City of Freeport*, supra, it was said "that when it becomes necessary to make a reassessment, not because of any irregularity in the passage of the ordinance, or because it fails to sufficiently describe the improvement, but solely because, in a distinct section, it attempts to levy the assessment in an illegal mode, we see no reason why the valid portions of the ordinance may not be treated as still in force, and made the basis of a proceeding for a new levy." In the case at bar the reassessment is not made because an attempt was made to levy the original assessment in an illegal mode. Here the original ordinance failed to sufficiently describe the improvement, as it described the pavement to be 61 feet wide, instead of a pavement 53 feet wide.

It is contended by counsel for plaintiffs in error that the action taken by the city council on September 3, 1896, appointing a committee to estimate the cost of the improvement, was invalid, because it was in the form of a resolution not signed by the mayor, instead of being in the form of an ordinance passed in the regular way. We do not deem it necessary to discuss the question, whether the common council had the power to appoint the committee to make the estimate by a resolution, or whether it was necessary for them to make such appointment by ordinance, and we pass no opinion upon this question. It is sufficient to say that the proceedings beginning with September 3, 1896, are invalid, because the contract with Barnes was made, and the construction of the pavement was begun, without any precedent action by the common council, either in the form of an ordinance or of a resolution. For the reasons above stated, the judgment of the county court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views here expressed. Reversed and remanded.

(176 Ill. 192)

PEOPLE ex rel. CHIPERFIELD, State's Attorney, v. COMSTOCK.

(Supreme Court of Illinois. Dec. 3, 1898.)

DISBARMENT OF ATTORNEY — SUFFICIENCY OF PETITION.

1. An application for leave to file an information against an attorney for disbarment, charging that he had made affidavit to the law commissioners that he had studied three years with a licensed attorney, and was thereupon admitted, and alleging that the attorney had not so studied law, and that the affidavit was false, in that the person with whom he had studied was not a duly-licensed attorney at the beginning of the three years, was insufficient, where it does not state that the applicant for admission knew that his statement was untrue.

2. Where an indictment is pending against an attorney for subornation of perjury, the su-

preme court will not on that charge proceed to disbar him until he has been convicted thereunder.

Proceedings for disbarment by the people, on the relation of B. M. Chipperfield, state's attorney, against Frank I. Comstock. Relator asks leave to file an information. Refused.

CARTER, C. J. (orally). The state's attorney of Fulton county asks leave to file an information against Frank I. Comstock, an attorney of that county, for rule to show cause why his license should not be revoked, and his name stricken from the roll of attorneys of this court. We have examined the petition and showing made, and have reached the conclusion that it is not sufficient. The information charges that Comstock made an affidavit, and presented it to the board of law examiners, stating that he had studied law 3 years, of 36 weeks each (which is the rule of this court), with a licensed attorney, — a Mr. Breckenridge, of Lewistown. Upon that showing he was admitted to examination by the board, passed the examination, and received a certificate of qualification, which was presented to this court, acted upon by us, and a license issued. The information charges that Comstock did not, as stated in his affidavit, study law for three years with a licensed attorney, and states, as evidence, or as a reason for the charge, that the affidavit was false, that Breckenridge, with whom he stated he had studied law for three years, was not a duly-licensed attorney of this court at the beginning of that three years, but that he was admitted to practice and received his license in June, 1895, when the affidavit stated that he began his study with Breckenridge in February preceding. The information does not state that the applicant knew that his statement was untrue, nor does it state that Breckenridge had not been licensed as an attorney, but only shows that he was not admitted to practice here until in June, several months after; but whether he had actually been practicing without right under a foreign license we cannot know. There being no statement in the information that he fraudulently made this affidavit, knowing it was untrue, the allegation is insufficient. The information should have shown that he knew it was false. It may be that Breckenridge was in fact practicing as an attorney, and this young man had studied with him the three years without any knowledge that he had not been duly licensed by this court, and we think that part of the information is not sufficient upon which to base an order revoking his license.

There is another charge in the information, that this respondent, Comstock, is guilty of an attempt to suborn a witness to commit perjury; that he gave some person whom he desired to become a witness five dollars, in order to get him to swear to a particular state of facts in a case then pending

in the Fulton county court. The information goes on to state that he has been indicted by the grand jury of Fulton county for this crime, and that indictment is now pending in the circuit court for trial. We do not desire to anticipate the result of the trial of the case in Fulton county. The proper place for the investigation of that question, inasmuch as he has been indicted, is in that court; and we have thought it better practice to await the final determination of that cause in that court, where it can be more readily ascertained whether he is guilty or not. It may turn out on a full trial there that he is innocent, or it may turn out that he is guilty. At all events, we think we should take no action in the premises before that case is determined. We have reached the conclusion that the leave to file this information should be refused, and an order will be entered accordingly.

(176 Ill. 302)

HENDERSON et al. v. HARNESS.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

DEVISE—FREEHOLD—LIABILITY FOR DEBT—EXECUTION.

1. One to whom a life estate is devised if he shall occupy or take possession of the real estate, and who does take possession, has a freehold interest, which, under Rev. St. c. 77, §§ 3, 10, is subject to execution.

2. Provision in a will, giving a life estate, that the life tenant shall not sell or encumber the real estate, and that, in case he does, his estate shall terminate, does not prevent sale of his interest on execution.

3. Except by intervention of trustees, property cannot be devised, so as to give one a life estate free from sale for his debts.

Appeal from circuit court, McLean county; Thomas F. Tipton, Judge.

Bill by Milton Harness against F. R. Henderson and others. Decree for complainant. Defendants appeal. Reversed.

This was a bill in equity, brought by Milton Harness, against the appellants, to construe the will of his father, Isaac Harness, and to set aside certain sales of the lands described in clause 6 of the will, wherein the appellants became the purchasers under executions issued on judgments rendered against the appellee. The cause was heard upon bill, answer, replication, and report of the master, and a decree rendered in favor of the appellee. The will of Isaac Harness was probated in the county court of McLean county on February 25, 1895. Clauses 6 and 10 are as follows: "Sixth. I give, devise, and bequeath to my son Milton Harness, during his natural life, the following described real estate, situated in McLean county, Illinois, to wit: The southwest quarter of section thirty (30), excepting 24.75 acres off of the north end of said quarter section, by this will bequeathed to Caroline Kennedy and the heirs of her body, leaving 220 acres remaining in said quarter section, and the north half of lot

three (3) of the northwest quarter of section thirty-one (31), containing 80 acres, all in township twenty-five (25) north, range four (4) east, third principal meridian; also, beginning on the half-section line running east and west through the center of section eight (8), in township 25 north, range 4 east, third principal meridian, at the east line of the Lexington and Pleasant Hill road as now laid out and traveled, and running from thence south, along the east line of said highway, to the south line of said section eight (8); thence east, on said section line, twenty (20) rods; thence north, to the half-section line running east and west through the center of said section eight (8); thence west twenty (20) rods, to the place of beginning,—containing 20 acres, more or less. My said son, Milton Harness, to have and to hold the same during his natural life, he to have the full use and occupation of the same if he desires it, provided he shall pay all taxes and assessments levied against said land before sale for taxes, and that he shall not sell nor in any way encumber said realty during his lifetime. After the death of my said son, Milton Harness, it is my will that the real estate in this item of my will mentioned and described shall be equally divided between all the heirs of the body of my said son, Milton Harness, and their legal representatives, in accordance with the statutes of the state of Illinois in relation to descent, share and share alike, to have and to hold the same, to them and to their heirs and assigns, forever. In case my son Milton Harness, during his lifetime, shall permit said real estate to be sold for taxes, or shall sell or in any way encumber the same, that his life estate therein shall terminate, and the heirs of his body, in whom the title to said realty is vested, may take possession of said real estate, and use and possess the same, as if a life estate to Milton Harness had not been given therein. In case my said son, Milton Harness, shall not occupy or take possession of said real estate, then Almaron J. Moon, of Lexington, Illinois, who is hereby appointed trustee for my son Milton Harness, shall have full power to control and lease the same to the best advantage of all concerned, and, after payment of all taxes, repairs, and necessary expense of management, he shall annually pay over the residue of the rents and income from said real estate to my son Milton Harness, in person, only, and it shall not be paid on any written order or other assignment of his interest in my estate; and, at the death of my said son, all rents unpaid and accruing shall be equally divided among all the heirs of the body of said Milton Harness." "Tenth. It is my will that no portion of the land in this will bequeathed shall be sold or otherwise disposed of during the lifetime of my child to whom is given a life interest therein; and in the event of the termination of the life estate of either of my said children, otherwise than by death, I direct that

¹ Rehearing denied December 14, 1898.

the heirs of their respective bodies shall not sell or otherwise dispose of any part of the land in this will bequeathed to them, until after the death of the parent through whom they derived the inheritance." In 1874 a judgment was rendered against Milton Harness, in favor of one Terrell, which judgment was afterwards assigned to F. R. Henderson, one of the defendants in this bill. In the same year, another judgment, in favor of F. Oberkoetter & Sons, the other defendant in this bill, was obtained against the same parties. After the death of Isaac Harness and probate of his will, executions were sued out on these two judgments, and levied on the lands so devised to Milton Harness. Sales were made under the executions; and F. R. Henderson became the purchaser of a portion of the three hundred and odd acres of land under his execution sale, and F. Oberkoetter & Sons became the purchaser of the remainder of the lands under its execution sale.

Frank R. Henderson and E. E. Donnelly (Wm. E. Hughes, of counsel), for appellants. Rowell, Neville & Lindley, for appellee.

PHILLIPS, J. (after stating the facts). The primary question to be determined in this case is whether the interest of Milton Harness in the lands devised to him by his father, Isaac Harness, was such an interest as could be sold under executions upon judgments against Milton Harness, rendered before the death of Isaac Harness. This must be determined by the construction of the will of the latter. The particular clauses which have reference to the interest of appellee are the sixth and tenth, hereinbefore set forth. In determining the construction of the will, the intention of the testator is not to be sought for in what might possibly have existed in his mind, but must be determined from the instrument itself, which must prevail unless inconsistent with the rules of law, and the construction is to be made from the language of the will. Reference may be made to surrounding circumstances for the purpose of ascertaining the object of the testator's bounty or the subject of disposition, and for the purpose of placing the court in a position of interpreting the language used from the standpoint of the testator at the time he employed it; but surrounding circumstances cannot be resorted to for the purpose of including in the will any intention not expressed therein. The language used must be carefully considered in arriving at the testator's intention, and, if clear and unambiguous, effect should be given to it in its general and popular sense. A cardinal rule in the construction of a will is to discover the intention of the testator. *Finlay v. King's Lessee*, 3 Pet. 346; *Bingel v. Volz*, 142 Ill. 214, 31 N. E. 13.

In the clause containing the devise, the testator declares: "I give, devise, and be-

queath to my son, Milton Harness, during his natural life, the following described real estate, situated in McLean county, Illinois: [Then follows a description of the land devised.] My said son, Milton Harness, to have and to hold the same during his natural life, he to have full use and occupation of the same if he desires it, provided he shall pay all taxes and assessments levied against the said land before sale for taxes, and that he shall not sell nor in any way incur said real estate during his lifetime. After the death of my said son, Milton Harness, it is my will that the real estate in this item of my will mentioned and described shall be equally divided between all the heirs of the body of my said son, Milton Harness, and their legal representatives, in accordance with the statutes of the state of Illinois in relation to descent, share and share alike, to have and to hold the same, to them and their heirs and assigns, forever. In case my said son, Milton Harness, during his lifetime, shall permit said real estate to be sold for taxes, or shall sell or in any way incur the same, that his life estate therein shall terminate." The ninth clause, referring to Milton Harness and his other children, is as follows: "I have given the use and income from the same during their natural lives, being fully convinced, after long experience and observation, that no better investment can be made than McLean county land; and the limitations and restrictions under which I have placed the same will, in my opinion, be for their best interests in preserving the estates to them severally bequeathed for themselves and their respective children." The tenth clause reads: "It is my will that no portion of the land in this will bequeathed shall be sold or otherwise disposed of during the lifetime of my children to whom is given a life interest therein." By the sixth clause, a life estate was devised and bequeathed to Milton Harness during his natural life, if he should occupy or take possession of said real estate. It is apparent from the averments of his bill that he did take possession of the said real estate, and by said sixth clause the life estate fully vested in him. A provision is therein made for a contingency, dependent on the devisee's acts, by the happening of which his life estate might be terminated by the remainder-men, who thereupon could enter into possession of the lands to the same extent as if the life estate had not been given to Milton Harness. That contingency depended on the act of Milton Harness in contravention of the terms of the will, and not on the act of others.

Section 3 of chapter 77 of the Revised Statutes provides as follows: "The term 'real estate,' when used in this act, shall include lands, tenements, hereditaments, and all legal and equitable rights and interests therein and thereto, including estates for the life of the debtor or of another, and estates for years and leasehold estates when the

unexpired term exceeds five years." Section 10 of the same act provides: "All and singular the lands, tenements, real estate, goods and chattels * * * of every person against whom any judgment has been or shall be thereafter obtained in any court of record, for any debt, damages, costs or other sum of money, shall be liable to be sold upon execution, to be issued upon such judgment." Under the above statute, a freehold interest in lands is subject to execution. *Newman v. Willetts*, 52 Ill. 98. The interest of Milton Harness in this land was a freehold estate. It was not an equitable right, but a legal estate. Where there is, by express terms, a grant in fee simple, and an immediate vesting of title, with no conditions subsequent or limitation over to defeat the estate, an attempt to prevent consequences of the ownership from attaching thereto cannot avail. In a devise of land in fee simple, a condition against alienation is void, because it is repugnant to the estate devised. *Potter v. Couch*, 141 U. S. 315, 11 Sup. Ct. 1005; *McDonough v. Murdock*, 15 How. 367; *Jones v. Thresher Co.*, 171 Ill. 502, 49 N. E. 700, and authorities cited. The rule is uniform that a restriction by way of condition or devise over, or against alienation of an estate in fee, is void, as repugnant to an estate devised to the first taker, by depriving him during that time of the inherent power of alienation. *Jones v. Thresher Co.*, supra. While this is the rule with reference to an estate in fee, there is some conflict in the decisions of courts with reference to whether the same rule applies to life estates. Whether an estate is granted by deed or devised in fee simple, or whether, under the same character of instruments, an estate for life is created to vest immediately, depending on no contingency or limitation, the estate is absolute in each case. If an estate in fee simple or an estate for life may be created by deed or devise as an absolute estate, vesting in the first taker without contingency or limitation, there would be no difference in the two estates, except as to their extent and tenure, and both would be absolute estates.

Where an estate for life is created to vest without contingency or limitation, a restriction on the power of alienation is repugnant to an estate devised to the first taker, because depriving him, during the time he holds the estate, of the inherent power of alienation. There is no difference in these two estates with reference to this feature, and with reference to this power attaching thereto as an inherent right and power. If the power to alienate either a fee-simple estate or an estate for life has been restricted, then neither exists as an absolute estate. 2 Jarm. Wills (5th Ed.) 538; 1 Perry, Trusts, § 386; *Bank v. Davis*, 21 Pick. 42; *Deering v. Tucker*, 55 Me. 284; *Keyser's Appeal*, 57 Pa. St. 236; *Harvesting Machine Co. v. Gates* (Iowa) 39 N. W. 657; *McCleary v. Ellis*, 54 Iowa, 311, 6 N. W. 571. The rule would be different

where the legal title to the property has been vested in a trustee for the use of the beneficiary under specific conditions. That is the most appropriate, if not the only, way, of accomplishing the protection of the subject of a devise from creditors. *Steib v. Whitehead*, 111 Ill. 247. The estate having vested in the first taker under this devise, it cannot be divested except on the contingency happening literally in accordance with the instrument creating the estate of the first taker. *Rop. Leg.* 619; *Loan Co. v. Bonner*, 75 Ill. 315. There is a broad distinction between alienation by the voluntary act of the owner of an interest in land and the involuntary assignment made by compulsion of law. *Medinah Temple Co. v. Currey*, 162 Ill. 441, 44 N. E. 839. The clause of the will by which appellee, during his lifetime, was not to permit such real estate to be sold for taxes, or to sell or in any way encumber the same, and providing that, if he did, his estate therein was terminated, and the heirs of his body, in whom the title was vested as remainder-men, might take possession, use and possess the same, as if the life estate had not been given, did not effect a restriction on the power of involuntary alienation, except to the extent of allowing the remainder-men to declare a forfeiture for the voluntary alienation. The limitation made by the devise as a restriction on the power of alienation is to be construed in the same manner as a condition in a lease against assignment, and it is well settled that an assignment by operation of law is not a breach of such a condition. 4 Kent, Comm. 124. The seizure of property under judicial process would not work a forfeiture; neither would a judgment or other incumbrance in invitum violate a covenant against incumbrance or a covenant not to incumber. By placing this estate devised to Milton Harness in the hands of trustees, as in *Steib v. Whitehead*, supra, and applying the rents therefrom which should be paid to the appellee, the testator could have accomplished the ends which it is insisted by appellee it was the intention to accomplish. The intervention of trustees was not sought by the testator, nor used; and no principle of public policy or of stare decisis establishes a rule in this state that the testator may, without the intervention of a trustee, vest an estate in fee or for life in the first taker, with a restriction thereon repugnant to an estate, and which would prevent alienation of the same or seizure under process of law. Recognizing and adhering to the fullest extent to the principle announced in *Steib v. Whitehead*, supra, we are not disposed to extend the principle there announced to cases not within the rule as there stated. Except by the intervention of trustees, an estate cannot be devised for the benefit of the legatee in such a manner that it cannot be seized for the debts of one having a life estate therein, as our statute authorizes the sale of such estate under

execution, unless the statute with reference to exemptions applies thereto, which is not involved in this record. It is unnecessary to refer to that part of the will by which Moon, the trustee, was to have power to control and lease the real estate in the event appellee did not occupy or take possession of the same, as that contingency did not occur. We are of the opinion that the circuit court erred in entering a decree in favor of appellee on his bill, and that decree is reversed, and the cause is remanded. Reversed and remanded.

(176 Ill. 448)

PETEFISH v. BECKER.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

TESTAMENTARY CAPACITY—EVIDENCE—CROSS-EXAMINATION—INSTRUCTIONS—REVIEW.

1. Verdict that testator had not testamentary capacity will not be disturbed on appeal, the evidence of either party being such as to sustain a verdict for him, and the chancellor having denied a new trial.

2. A witness who had expressed an opinion that testator was of sound mind may, on cross-examination, be asked relative to testator's treatment of his family; if he did not jump on them and abuse them without cause.

3. A witness for contestant, who has testified to conversations with and declarations of testator, and of his actions towards his family, cannot, on cross-examination, be asked what the habit of testator was as to industry and attending to business, it not relating to anything brought out in chief.

4. After witness had stated that on one occasion testator, after turning into his gate, "was making faces, and slapping himself, and making maneuvers," he was asked whether there was anything else, up to a certain time, "that was strange and unusual in his conduct," and, after answering this, he expressed the opinion that, from all the actions and conduct observed by him, testator was not of sound mind. *Held*, that the question was proper, as requesting a statement of any other strange or unusual conduct of testator observed by witness from which he formed an opinion as to his mental condition.

5. Proponent being permitted to cover a period long before and after execution of the will, in his evidence as to the condition of testator's mind, it was not error to allow contestant to introduce evidence covering the same period.

6. There is no error in modification, by words in brackets, of the instruction: "To sustain the allegation that" testator "was laboring under an insane delusion in regard to the legitimacy of his son. * * * it is not sufficient to show that he had a suspicion to that effect or that his suspicion was not well founded. Although he may have had groundless and unjust distrust of his wife's fidelity, yet such doubt does not establish a condition of lunacy or a lack of testamentary capacity, [unless it appears, from a preponderance of the evidence, that such distrust caused him to execute a will he would not otherwise have made],—as, if testator, utterly expressing distrust of the fidelity of his wife, doubted the paternity of his son, and from that cause alone disinherited him, when he was one of the natural objects of his bounty, he may be said not to have known who were the natural objects of his bounty.

7. Ability to transact business is not the sole test of testamentary capacity.

8. Instruction that if the jury believe from a preponderance of the evidence that, at the

time of executing the paper in evidence, testator was not of sound mind and memory, they should find that it was not his will, is proper in a case in which the question is testamentary capacity.

Appeal from circuit court, Cass county; Harry Higbee, Judge.

Bill by Henry Becker against Elizabeth Petefish and another. Decree for complainant. Defendant Petefish appeals. Affirmed.

Morrison & Worthington, for appellant. Mills & McClure, for appellee.

PHILLIPS, J. On September 29, 1882, Conrad Becker made his last will and testament, by which he disposed of all his estate. He bequeathed to his daughter, the appellant, \$3,000, and the residue of his estate he devised to his wife for life, with a right to a home to the appellant, and remainder to her and the heirs of her body. The testator died in March, 1896, leaving surviving him his widow, his son, the appellee, and his daughter, the appellant. Subsequently the widow died. The will was duly admitted to probate. The son, the appellee, filed his bill to the October term, 1897, of the Cass county circuit court, under section 7 of chapter 148 of the Revised Statutes, to contest the validity of the will, and made the appellant and her only child, Rowena Petefish, defendants thereto. The appellant was sole administratrix with the will annexed. The bill alleges that at the time of the execution of the instrument, and for a long time prior thereto, the said Conrad Becker was not of sound mind and memory, and was possessed of, and controlled by, various insane delusions. Answers were filed, and issue out of chancery made, and trial before a jury had, in pursuance of the statute, and a verdict was returned finding the instrument was not the will of Conrad Becker, deceased. A motion for a new trial was made, and a decree entered setting aside the will. The proponent prosecutes this appeal.

Conrad Becker was a German by birth, and came to this country about 1847. In 1859 he engaged in farming, and bought, raised, and sold stock. He was prosperous in business, and accumulated a considerable amount of money. Prior to 1859 he was married to a woman with one child (a son), and as issue of their marriage there were born a son and two daughters in lawful wedlock. One of the daughters died without issue.

The proponent called about 20 witnesses, one of them a brother, another the family physician, numerous persons who had worked for the testator at various times or who had been tenants of his, persons who had been trading with him in buying and selling stock, others who had borrowed money of him, and others who had transactions of various kinds with him. These witnesses testified as to his condition of mind covering a period long prior to the execution of the will, and to a period long subsequent thereto, and from their acquaintance and business transactions with him they

¹ Rehearing denied December 14, 1898.

testified that he was thoroughly competent to transact business, entirely capable, and, in their opinion, of sound mind. The contestant called an equal number of witnesses, among them a brother and a sister, others who had business transactions with him or proposed to have business transactions with him, and others who were tenants or had worked for him in various capacities, and who knew him well, who all testified that at times he was morose, sullen, cross, and abusive; that when things went wrong on the farm or in business his conduct was exceedingly abusive and violent towards his wife and son, he frequently denying the paternity of the latter and at other times praising him; that prior to the execution of the will the son, having arrived at manhood, paid attention to a young woman to whom the testator objected, and on the son marrying her he became exceedingly indignant, and very much angered towards the son, and frequently denounced him and denied his paternity. These witnesses called by the contestant, from their intercourse with the testator, their observation of his conduct and manner, and their business transactions with him, testified that on frequent occasions when they saw him he was not of sound and disposing mind.

Where there is such conflict in the testimony as here, the question of whether the testator was of sound and disposing mind is one peculiarly within the province of the jury. The evidence in favor of the proponent of the will and the evidence of the contestant alike would sustain a verdict, when standing alone, in favor of either. In such case, the verdict of the jury and the action of the chancellor in overruling the motion for a new trial, where the jury and chancellor have had an opportunity to observe the witnesses and their manner and conduct on the stand, are entitled to great weight, and the verdict in such case will not, on the facts, be disturbed by an appellate tribunal. *Long v. Long*, 107 Ill. 210; *Society v. Price*, 115 Ill. 623, 5 N. E. 126; *Hill v. Bahrus*, 158 Ill. 314, 41 N. E. 912; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113.

A witness called by the proponent was interrogated, on cross-examination by counsel for appellee, as to the treatment by the testator of his family, and was asked, "Is it not true that he jumped on them and abused them without any cause whatever?" This question was objected to, and the objection overruled, to which appellant excepted. The witness answered: "It seems that when anything went wrong about the machine he would take his spite out on his own children, when it was not their fault. He would curse them and call them bad names." The witness ran a threshing machine, made settlements, and transacted business with the testator, and expressed the opinion that he was of sound mind. On cross-examination the contestant had a right to call for any conduct or action of the testator, observed by the witness, that the jury might properly determine

the value of the opinion of the witness as to the testator being of sound mind. It was not error to overrule this objection.

Contestant called as a witness a brother-in-law of the testator, who testified in chief to conversations had with, and declarations made by, the testator, and of his actions towards his family. On cross-examination this question was asked: "What was the habit of the old man as to industry and attending to his business?" To this the contestant objected, which objection was sustained, and the proponent excepted. It was not a proper cross-examination of any matter brought out in chief, and it was not error to sustain the objection thereto.

A witness called by the contestant was being examined in chief, and the witness stated that at one time he and some others were returning from town with the testator, and when they reached the testator's gate the testator went in, and some one laughingly called the attention of the witness to the testator, who, he says, "was making faces and slapping himself and making maneuvers," etc. The witness was then asked in chief, "I want you to state whether or not there was anything else, up to 1880, that was strange and unusual in his conduct." To this proponent objected, but the objection was overruled and proponent excepted. The question was answered by the witness detailing other actions and conduct of the testator, and from all the actions and conduct observed by the witness he expressed the opinion the testator was not of sound mind. The actions of the testator, detailed by the witness just before the question objected to was asked, excited in the mind of the witness doubt as to the sanity of the testator, and he, having detailed what was to him apparently strange and unusual conduct, was in that connection asked the question which was objected to. In the connection in which it was asked it was therefore a request for a statement of any other strange or unusual conduct on the part of the testator observed by the witness from which he formed an opinion as to his mental condition. It was not error to overrule the objection.

Objection was made to a question asked by appellee of a witness who testified to a conversation had within four or five years of the time of the trial, to which proponent objected. The objection was overruled, and the witness allowed to answer. The utmost latitude was allowed proponent in her examination and cross-examination of witnesses, and the period covered by the witnesses, when interrogated as to the condition of mind of testator, embraced the time long prior to the execution of the will and up to a period shortly before his death. The witnesses for the contestant covered the same period of time. Such evidence of the condition of the mind of the testator before and subsequent to the making of the will was proper to be submitted to a jury to enable them to determine his condi-

tion of mind at the time of its execution. The question for the jury was, was the testator of sound and disposing mind at the time of the execution of the will? The proponent being permitted to introduce evidence covering the period before and long subsequent to the execution of the will, it was not error to allow contestant to introduce evidence covering the same period.

It is urged by the proponent that the court erred in modifying the third instruction given at her request. That instruction is as follows: "You are further instructed that, to sustain the allegation that Conrad Becker was laboring under an insane delusion in regard to the legitimacy of his son Henry, it is not sufficient to show that he had a suspicion to that effect or that his suspicion was not well founded. Although he may have had groundless and unjust distrust of his wife's fidelity, yet such doubt does not establish a condition of lunacy or a lack of testamentary capacity, [unless it appears, from a preponderance of the evidence, that such distrust caused him to execute a will he would not otherwise have made.] The right of the testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own, and, if there be no defect of testamentary capacity, the law gives effect to his will, though its provisions are unreasonable or unjust." The modification is inclosed in brackets. There is no evidence in this record tending to prove that the testator distrusted his wife or suspected her of infidelity to him. He cohabited with her up to the time of his death, and left her for life the greater portion of his property, and, as asked, the instruction might well have been refused. If the testator, utterly without cause or reason, and without expressing distrust of the fidelity of his wife, doubted the paternity of his son, and from that cause alone disinherited him, when he was one of the natural objects of his bounty, it might well be said that he did not then know who were the natural objects of his bounty; and if he was in such condition of mind that he did not know the natural objects of his bounty, and such condition caused him to make a will he would not have otherwise made, then he was not of sound and disposing mind. *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361; *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620; *Rutherford v. Morris*, 77 Ill. 397; *Trish v. Newell*, 62 Ill. 196; *Burkhart v. Gladish*, 123 Ind. 338, 24 N. E. 118. Instructions should have reference to, and must be construed in view of, the issues to be tried and the truths in support thereof. *Martin v. People*, 13 Ill. 341; *Railroad Co. v. Dillon*, 123 Ill. 570, 15 N. E. 181. The modification was not error.

Proponent insists that the refusal of instruction No. 5 asked by her was error. It, in substance, is that if the jury believe that Becker executed the paper in question in the pres-

ence of the two subscribing witnesses, said witnesses subscribing the paper in his presence as such witnesses, and that at that time he was mad at his son Henry, and often stated the said Henry was not his son, and that he repudiated his relationship with his brothers and sisters, and that said statements were in fact untrue, and that he abused his wife and was ill-natured to his family and all others, yet if they further believe that at the time he executed said paper and caused the same to be attested by the subscribing witnesses he was capable of attending to his ordinary business (if he did transact such business), then he was capable of making a valid last will, and the fact (if it is a fact) that he made such statements or expressed such opinions, and that the said statements were untrue and his opinions unfounded, does not, in law, amount to insane delusions such as would destroy his mental capacity to make a valid last will. This instruction did not take into consideration the requirement of the law that the testator must have sufficient intelligence to appreciate his relations to those having natural claims upon his bounty, and was in this regard vicious. *Craig v. Southard*, supra; *Rutherford v. Morris*, supra. It also sought to take away from the jury the right to consider evidence relating to insane delusions, and to make the sole test of testamentary capacity the ability to transact business. *Nicewander v. Nicewander*, 151 Ill. 156, 37 N. E. 698; *Brace v. Black*, 125 Ill. 33, 17 N. E. 66; *Society v. Price*, 115 Ill. 623, 5 N. E. 126.

Proponent urges it was error to give the fourth instruction asked by the contestant. It was: "If the jury believe, from a preponderance of the evidence in this case, that at the time of executing the paper in evidence Conrad Becker was not of sound mind and memory, then the jury should find the paper in question is not his will." This instruction is substantially in the language of the statute, and it was not error to give it. *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740; *Town of Fox v. Town of Kendall*, 97 Ill. 72. We find no error in the record, and the decree of the circuit court of Cass county is affirmed. Decree affirmed.

(176 Ill. 507)

CRAMER et al. v. CITY OF CHARLESTON.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

STREET IMPROVEMENT—ORDINANCE—SUFFICIENCY OF—APPORTIONMENT OF TAXES—GRADE OF STREET—ASSESSMENT—LEVY.

1. An ordinance providing that a street shall be paved 15 feet each way from its center between designated streets, and that the same shall be paid for by special taxation, except at street crossings and opposite property owned by the city, is not objectionable, as giving no rule of apportionment of the assessment, since its terms are a declaration that the improvement shall be paid for according to frontage.

¹ Rehearing denied December 14, 1898.

2. An ordinance for the improvement of a street, providing that the portion to be so improved shall be excavated along the center and side lines to a certain depth below the established street grade, by referring to the established grade, sufficiently fixes the street grade.

3. A committee was appointed, and estimated the cost of a street improvement pursuant to an ordinance providing that all expenses of the improvement should be paid by special taxation on land contiguous to and abutting such street on both sides, except at street intersections and opposite property owned by the city. Commissioners were appointed to spread the assessment, notice of which was given as prescribed by statute. *Held* a sufficient designation of the property to be levied on, and the amount to be levied against each piece.

4. A report of a committee appointed to estimate the cost of a contemplated street improvement is not invalid because it includes items of contingencies, for contractor's margin for curbing and profits on same, and for collection, since such items are reasonably to be taken into consideration in determining the estimated cost.

5. An assessment roll did not show that the property assessed for a street improvement was contiguous to the line of improvement; but the ordinance directing such improvement imposed the burden on property contiguous to the street, and an order of the county court on a petition for confirmation of the assessment directed the assessment to be made as specified in the petition and the ordinance. *Held* sufficient to show that the assessment was made on property contiguous to the improvement.

Error to Coles county court; S. S. Anderson, Judge.

Petition by the city of Charleston for the confirmation of special taxes upon contiguous property for street improvement. From a judgment confirming the assessment, Nicholas Cramer and others, property owners, bring error. Affirmed.

J. H. Marshall and Hughes & Hayes, for plaintiffs in error. W. E. Adams, H. A. Neal, and F. K. Dunn, for defendant in error.

PHILLIPS, J. The city of Charleston passed an ordinance providing for the paving of Sixth street, in that city, to be paid for by special taxation. A committee was appointed, who made the estimate of cost, and reported the same to the city council, by whom it was approved, and a resolution adopted directing the city clerk to file in the county court a petition for the confirmation of the assessment. On the filing of that petition, commissioners were appointed to spread the assessment, who gave notice and published the same in pursuance of the statute. Judgment of confirmation was entered. Certain property owners sued out this writ of error, and have assigned errors questioning the validity of the ordinance, the report of the committee to make estimate of cost, and the proceedings of the commissioners to spread the assessment.

It is objected, first, that the ordinance provides no rule of apportionment by which the tax may be assessed against the contiguous property. The ordinance provides the street shall be paved 15 feet each way from the

center thereof, between designated points, which constitute the termini of the improvement, and provides that the same shall be paid for by special taxation, except at street crossings and opposite property owned by the city. The total length of the improvement being determined, and the width of the street intersections and of property owned by the city being found, and being deducted from the total length, leaves the residue, under the ordinance, as the amount that is to be paid by special taxation on contiguous property. The ordinance, by its own terms, giving the data by which the length of the improvement to be paid for by special taxation is to be found, and by its terms providing the same shall be paid for by contiguous property, is a declaration that it shall be paid for according to frontage. The ordinance therefore provides a rule of apportionment by which the tax is to be assessed against contiguous property.

The second objection is that the ordinance does not give a sufficient designation of the nature, locality, and description of the proposed improvement. The only point made under this objection is that the grade of the street is not given in the ordinance, and that there is a failure to fix the grade or refer to any other ordinance, profile, or monument establishing such grade. By section 3 of the ordinance it is provided: "That said excavating, grading, graveling, curbing, paving and guttering shall be made and done according to the following plans and specifications: That said portion of said street for a distance of fifteen feet on each side of the center line of said street shall be excavated; that said excavation along the center line of said street shall be made to a depth of twelve inches below the established street grade, and the side lines of such excavations to the depth of sixteen inches below the established street grade." This provision of the ordinance specially refers to an established street grade, and is sufficient in this respect.

The third objection is that the ordinance makes no levy. Section 2 of the ordinance provides: "Said improvement is declared to be a local improvement, the cost thereof and all expenses therewith connected to be paid for by special taxation of the lots, parts of lots, parcels of lands contiguous to and abutting upon said street on both sides thereof, except the cost and expenses of so much of said improvements as may be made at street and alley intersections or crossings, or lots, parts of lots or parcels of ground owned by said city." This, in connection with the report of the committee, is a sufficient designation of the property against which the levy was to be made, the amount of the levy being made on contiguous property, less certain exceptions, and the amount against each piece to be spread on the assessment roll.

It is contended that the report of the estimating committee is invalid, because, it is

alleged, it includes items for contingencies, for contractor's margin for curbing, and profit on same, and for collection. The report of the committee recites: "Your committee appointed * * * to make an estimate of the cost of labor, materials, and all other expenses and costs attending the same, and the costs of proceedings in court, being for the assessing and collecting and all other expenses connected with such an assessment, * * * do hereby report the costs thereof, and all expenses attending the same local improvement, to be so estimated by us at the sum of \$27,754.15." Then follows the estimate of the cost per square yard, in which the items objected to are included. It is very easy to determine the cost per square yard by taking the total amount determined by the committee as the cost of the improvement, and dividing it by the number of square yards as found by that committee. The various items of cost to which objections are made are reasonable items to be taken into consideration in determining the estimate and cost of levying and collecting the special tax.

It is objected that the certificate of publication of notice is not sufficient, being signed by the "Plain Dealer Printing Company." While a certificate of publication of notice is made by the Plain Dealer Printing Company, such as is required by the statute, it appears that, by the judgment of the court, it was expressly found as follows: "And it further appearing to the court from the certificate of H. B. Glasscoe, publisher of the Charleston Plain Dealer, that such notice was published in the Charleston Plain Dealer, a daily newspaper published in the city of Charleston, for more than five successive days, the first insertion being on Friday, April 24, 1896, and the last insertion on May 2, 1896, and that such notice was in the form prescribed in paragraph 27 of article 9 of chapter 24 of the Revised Statutes of Illinois." From this it is apparent that evidence was presented, and that the court expressly found the publication was properly made. The bill of exceptions does not show any facts that convince as the court erred in so finding.

It is then objected that the assessment roll is insufficient. It is true the assessment roll does not show how the commissioners arrived at the manner of assessment, or whether the same is by frontage, or by value, or area. It is apparent the ordinance contemplates an assessment by frontage, and there is nothing in this record to show that it was not thus made. It is true, the assessment roll does not show the property assessed is contiguous to the line of the proposed improvement; but the ordinance imposes the burden upon the property contiguous to the street, except such as is to be paid by the city. The ordinance and order of the court direct the assessment to be made as specified in the petition and ordinance. It cannot be held that the assessment was not made on the property contiguous

ous to the improvement. It appears the street and alley intersections, and so much of the cost of the improvement as exceeds the benefits to abutting property owners, were assessed against the city, and this was in accordance with the ordinance, and in compliance with the law.

In the absence of a bill of exceptions in this case, and from a consideration of the entire record, we are disposed to hold that this special tax was assessed in pursuance of law; and the judgment of the county court of Coles county is affirmed. Judgment affirmed.

(172 Mass. 217)

MEIGS v. DEXTER et al.

(Supreme Judicial Court of Massachusetts.
Plymouth. Nov. 23, 1898.)

DEEDS—ACCEPTANCE—VALIDITY—INSANE DELUSIONS—UNDUE INFLUENCE—EVIDENCE
—INSTRUCTIONS—APPEAL.

1. To constitute a delivery of a deed, there must be an acceptance by the grantee, or by some one authorized to represent him, or one who assumes to do so, and whose act of acceptance is afterwards ratified.

2. In an action to set aside a deed for undue influence, where petitioner introduced evidence that the relations of herself and her son with the husband of the grantor, who was petitioner's sister, had always been friendly, evidence that the grantor's husband had cursed the son, and expressed a wish that he would "keep away," is admissible, though neither the son nor petitioner was present at the time.

3. If evidence introduced by petitioner was immaterial, evidence in contradiction is not ground for exception.

4. The fact that a grantor labored under an insane delusion is insufficient to avoid the deed, if he was not moved by the delusion into making it.

5. An instruction that it is sufficient to avoid a deed if the grantor "had an insane delusion upon one subject, and, acting under the influence of that one delusion, made the deed," is properly modified, to prevent a misunderstanding, by a statement that "the question is whether that insane delusion, if a person has it, is a moving cause to some act which would not have been done except for that delusion. * * * If the act is not inspired, moved by that particular delusion, it don't affect other transactions; nor would it affect a deed."

Exceptions from superior court, Plymouth county.

Petition by Mary Meigs against Mary J. Dexter and others for partition of several parcels of land. The parties were the heirs at law and next of kin of Hannah Hall, deceased. None of the respondents resisted the petition save Mary J. Dexter, who resisted partition of one parcel, claiming to be the owner of it by virtue of a deed from Hannah Hall. Petitioner claimed that the deed was invalid on the ground that it was made under the influence of an insane delusion, and through the undue influence and fraud of respondent, and that it was never delivered. Petitioner introduced evidence that her relations with the grantor, who was her sister, were always friendly until a year after the death of the grantor's husband, when,

for some unknown reason, the grantor became unfriendly to her. On rebuttal, respondent called a witness, and asked the witness (Joshua L. Macomber) if he ever had any talk with Larnet Hall, husband of Hannah Hall, in his last sickness; he having died in 1885. It did not appear that Joseph Meigs, petitioner's son, or the petitioner, or said Hannah Hall, were present at the time, and the petitioner objected to the admission of such testimony as to what was said by Larnet Hall. The court admitted such testimony, and the petitioner duly excepted thereto, and the witness testified that at that time he had taken some hops to Larnet Hall to enable him to sleep; that he did not have any particular difficulty in talking; he seemed to be very tired; that at that time Larnet Hall spoke about Mr. Meigs, and said "that damned Joe Loring had been there, and he wished he would keep away." The witness further testified that Meigs' name was Joseph Loring Meigs, and he had always heard him called Joseph Loring. There was a verdict in favor of respondent, and petitioner brings exceptions. Sustained.

L. Le B. Holmes and F. M. Sparrow, for petitioner. Crapo, Clifford & Clifford, for respondent.

KNOWLTON, J. On the question whether there was a delivery of the deed the judge instructed the jury that if Hannah Hall, "after signing the deed, placed it upon the table, or placed it in Captain Macomber's hands, with the intention that it should become effective or operative, then there was a good delivery of the deed." The petitioner excepted to this instruction. The testimony tended to show that Capt. Macomber was merely a scrivener before whom the deed was laid upon the table after it was signed, and that he went away, and left it there, not representing the grantee in any way. We are of opinion that the instruction was erroneous in omitting to embody the requirement that there should be an acceptance of the deed by some one representing the grantee. It is well settled in this commonwealth that the delivery of a deed is not complete and effectual without an acceptance by the grantee, or by some one authorized to represent him, or who assumes to represent him, and whose act of acceptance is afterwards ratified. *Hawkes v. Pike*, 105 Mass. 560; *Com. v. Cutler*, 153 Mass. 252, 26 N. E. 855; *Barnes v. Barnes*, 161 Mass. 381, 37 N. E. 379. Although in another part of the charge the general rule was correctly stated, we construe the bill of exceptions as showing that this particular instruction was given to the jury. The counsel on both sides agree in the same construction, and the exceptions must therefore be sustained.

The testimony of the witness Macomber was rightly admitted. The petitioner had

introduced evidence tending to show that her relations and the relations of her son, Joseph, with Larnet Hall, the husband of the grantor in the deed, had always been friendly. The expression of Larnet Hall, in his last sickness, in regard to her son, Joseph, was a manifestation of his feelings, which had some tendency to contradict the petitioner's evidence.

If the relations of Larnet Hall to the son of the grantor were immaterial, it is not a ground of exception that testimony was admitted to contradict the petitioner's evidence on this point. The remaining exception is to this portion of the charge: "I am requested to give you this instruction, which, not without some modification, can I do: 'It is not necessary that a person should be insane upon all subjects. It is sufficient, to avoid her deed, if it appears that she had an insane delusion upon one subject, and, acting under the influence of that one delusion, made the deed.' I do not think that goes quite far enough. A person may have an insane delusion, I think, on one subject,—as on the subject of religion; of politics, even, to make it a little more practical,—and yet not be insane on other subjects, and have good mental capacity to do business. The question is whether that insane delusion, if a person has it, is a moving cause to some act which would not have been done except for that delusion, and which renders the person of unsound mind in respect to that thing. As I say, people may have notions on religion and politics that others think are insane, delusive; but that don't make them so; that don't render all their business acts void. I dare say, you may know men you think are deluded on some subjects, and yet they may be good business men, perhaps. If the act is not inspired, moved by that particular delusion, it don't affect their transactions; nor would it affect a deed." As we understand the request and the instruction, this exception should be overruled. If the words in the request, "acting under the influence of that one delusion, made the deed," are to be interpreted as meaning made a deed into which the effect of the delusion entered, the request was correct; but if it means made a deed, while under the influence of the delusion, which was unaffected by the delusion, it was erroneous. We think the judge stated the distinction rightly when he said: "The question is whether that insane delusion, if a person has it, is a moving cause to some act which would not have been done except for that delusion. * * * If the act is not inspired, moved by that particular delusion, it don't affect other transactions; nor would it affect a deed." The modification of the instruction requested seems to have been for the purpose of preventing a misunderstanding which would have been probable, or possible, if it had been given without explanation. Exceptions sustained.

(172 Mass. 248)

COMMONWEALTH v. O'BRIEN.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 29, 1898.)FALSE PRETENSES—INDICTMENT—EVIDENCE—
INSTRUCTIONS.

1. An indictment alleging that defendant falsely pretended to K. that certain property was owned by him solely; that there was no incumbrance on it; that he was free from debt; that he intended to organize a corporation, and become an owner of stock in it, by turning over the property to it in exchange for the stock; that defendant executed and delivered to K. an instrument, by which he promised to convey 20 shares of the stock to K. for \$2,000; and that K. was induced by the false pretenses to deliver, and did deliver, a check for \$2,000, to defendant, upon the execution and delivery of said instrument,—sufficiently alleges that the delivery was made the condition of the payment, and that the condition was performed and accepted as performed by K., and need not be required to show acceptance also of the proposal in the instrument.

2. Said indictment also sufficiently shows how defendant obtained the money.

3. An indictment for obtaining a check of K. by false pretenses, where defendant falsely pretended that he was the owner of certain property, that it was unincumbered, and that he intended to organize a corporation, and become an owner of stock in it by turning in the property, and executed and delivered to K. an instrument promising to convey 20 shares of the stock to K. for \$2,000, whereupon K. delivered to defendant a check for \$2,000, need not allege an intent to make the bargain which was made, or to obtain the specific check or amount obtained, but it is enough to allege that defendant received and obtained the money by means of the representations with intent to defraud K. of the money.

4. The words "then and there," in an indictment, used in connection with allegations of false representations, delivery of an instrument, and reliance on the representations by the defrauded person, need not be referred to the place where the property was located, as the nearest antecedent, though the name thereof immediately precedes such words, where, on a reading of the whole paragraph, it is plain that they refer to the time and place of the representations, previously specified in the paragraph.

5. One may be convicted of obtaining money of K. by false pretenses, though in the scheme by which it is obtained he enters with K. into an agreement which has an element of technical illegality on the part of K., in that he agrees to vote with the latter, at the first meeting of a corporation which it is represented to be formed, to employ K. as its agent.

6. An indictment alleging that defendant falsely pretended to K. that he owned certain property, and that he intended to organize a corporation, and become an owner of stock in it by turning over the property to it in exchange for the stock; that he executed and delivered to K. an instrument, by which he promised to convey 20 shares of the stock to K. for \$2,000; and that K. was induced by the false pretenses to deliver, and did deliver, a check for \$2,000, to defendant, upon the execution and delivery of said instrument,—need not allege said instrument to have been falsely made.

7. An indictment for obtaining money by false pretenses, which alleges several pretenses, all forming part of the scheme, need negative only enough to show that the scheme was fraudulent.

8. Testimony of the defrauded person, on a trial for obtaining a check by false pretenses, that the representations alleged satisfied him,

and induced him to give defendant the check, and that he would not have parted with it but for them, is not objectionable in form.

9. A charge, on trial for obtaining money by false pretenses, that it was not necessary to discuss the law of cases of crimes begun in one state and finished in another, being coupled with the statement that a conviction must be had on pretenses made in the state, and not in another state, could not prejudice defendant.

10. Where defendant represented to K. that he owned certain property, that there was no incumbrance on it, that he was free from debt, and that he intended to organize a corporation, and become an owner of stock in it by turning over the property to it in exchange for the stock, and thereupon defendant executed and delivered to K. an instrument promising to convey 20 shares, and K., relying on his pretenses, gave him a check for \$2,000, a conviction can be had without regard to whether he intended to form a corporation and exchange the property; the other pretenses being false.

11. There being evidence of the falsity of enough of the representations forming part of a scheme to obtain money to show that the scheme was fraudulent, the jury are warranted in finding the pretenses false throughout.

12. There being a statute making the offense charged a crime, there is no error in refusing to charge that at common law it was not.

13. Where one knows that his representations are false, and intends to deceive by them, and by the help of the motives thus created to get the property of another, it is immaterial, on the question of his guilt, that he did not know he was violating a law.

Exceptions from superior court, Bristol county; Robert R. Bishop, Judge.

Edward F. O'Brien was convicted of obtaining money by false pretenses, and excepts. Exceptions overruled.

The indictment on which he was tried is as follows:

"At the superior court begun and holden at New Bedford, within and for the county of Bristol, on the first Monday of June, in the year of our Lord 1897, the jurors for the commonwealth of Massachusetts on their oath present: That Edward F. O'Brien, of Newport, in the state of Rhode Island, on the 31st day of October, in the year of our Lord 1894, at Taunton, in the county of Bristol, being a person of an evil disposition, and devising and intending by unlawful ways and means to obtain and get into his hands and possession the goods, merchandise, chattels, and effects of the honest and good citizens of this commonwealth, and with intent to cheat and defraud one Lawrence A. Kearns, did then and there unlawfully, knowingly, and designedly falsely pretend and represent to said Kearns that certain property, to wit, certain looms and machinery situated in said Newport, which he, the said O'Brien, then and there had in his possession, and with which said looms and machinery he, the said O'Brien, was then at said Newport manufacturing webbing and elastic goods, were then and there the property of him, the said O'Brien, and were then and there solely owned by him, the said O'Brien; that upon said looms and machinery there was no incumbrance; that he, the said O'Brien, did not then owe a dollar to any one; and that he, the said O'Brien, did then

and there propose and intend to organize, with others, on or before the 1st day of December, A. D. 1894, a certain corporation, to wit, the Newport Web Company, and become a large owner of stock of said company by turning over, selling, and delivering said property in payment and exchange therefor to said company. And the said O'Brien did then and there execute and deliver to the said Kearns a written instrument of the tenor following,—that is to say: 'Know all men by these presents, that I, Edward F. O'Brien, of the city and county of Newport, in the state of Rhode Island, etc., in consideration of two thousand (\$2,000) dollars and other good and valuable considerations to me paid by Lawrence A. Kearns, of the city of Taunton, in the commonwealth of Massachusetts, do hereby agree that on the incorporation of the Newport Web Company, a corporation which is proposed and intended to be organized by me, with others, or on or before December first next hereafter, I will convey unto him, the said Kearns, twenty shares of the preferred capital stock of said corporation, of the par value of one hundred dollars each, carrying seven per cent. interest; and I agree to vote with the said Kearns at the first meeting of the members of said corporation to employ him as the agent thereof in the city of Boston, in said Massachusetts, for the purpose of making sales of the product of said Newport Web Company, and generally in connection with the business thereof in said Boston, at a salary of nine hundred dollars per year, payable monthly, with an additional remuneration of five per centum of the net returns of all sales made by him. And at any time before the whole of the amount of the preferred stock of said corporation is disposed of (said preferred stock to be in all five hundred shares) I will, on payment of the par value of said stock, convey to him, the said Kearns, an additional twenty shares thereof. The business of said Newport Web Company is intended to be the manufacture of elastic webbing in said Newport. Witness my hand and seal at said Newport this — day of October, 1894. In addition to the foregoing agreement I hereby transfer my life insurance policy to the amount of \$5,000 in the New York Life Insurance Company of New York, as Mr. Lawrence A. Kearns' interest may appear. Taunton, Mass., October 31st, 1894. Edward F. O'Brien, [Seal.] Secretary and Treasurer Newport Web Company. Witnessed by Eleanor B. W. Kearns.' And the said Kearns, then and there believing the false pretenses and representations so made as aforesaid by the said O'Brien, and being deceived thereby, was induced by reason of the false pretenses and representations so made as aforesaid to deliver, and did then and there deliver, to the said O'Brien, upon the execution and delivery to him, said Kearns, by the said O'Brien, of the written agreement aforesaid, a check and order for the payment of money of the amount and of the value of

two thousand dollars of the proper goods, merchandise, chattels, moneys, and effects of the said Kearns. And the said O'Brien did then and there receive and obtain the said goods, merchandise, chattels, moneys, and effects of the said Kearns by means of the false pretenses and representations aforesaid, and with intent to cheat and defraud the said Kearns of the same goods and merchandise, chattels, moneys, and effects. Whereas, in truth and in fact the said looms and machinery in the possession of and used by the said O'Brien at said Newport, in manufacturing webbing and elastic goods as aforesaid, were not then and there the property of said O'Brien, and were not then and there solely owned by said O'Brien, and said looms and machinery were not then and there free from incumbrance, and said O'Brien did then owe large sums of money to divers persons, and that said O'Brien did not then propose and intend to organize as a corporation the Newport Web Company on or before December 1, A. D. 1894, and convey to said Kearns twenty shares of the preferred capital stock of said corporation, of the par value of one hundred dollars each, carrying seven per cent. interest, and did not then propose and intend at the first meeting of the members of said corporation to vote with said Kearns to employ him, said Kearns, as the agent of said corporation in the city of Boston, in Massachusetts, for the purpose of making sales of the products of said Newport Web Company, and generally in connection with the business thereof in said Boston, at a salary of nine hundred dollars per year, payable monthly, with an additional remuneration of five per centum on the net returns of all sales made by said Kearns, and did not then propose and intend at any time before the whole of the amount of the preferred stock of said corporation was disposed of (said preferred stock to be in all five hundred shares), on payment of the par value of said stock, to convey to said Kearns an additional twenty shares thereof, and that the business of the Newport Web Company was not intended to be the manufacturing of elastic webbing in said Newport, or in any other place whatever, all of which the said O'Brien then and there well knew. And so the jurors aforesaid, upon their oath aforesaid, do say that the said O'Brien, by means of the false pretenses aforesaid, on the said 31st day of October, in the year of our Lord 1894, at Taunton aforesaid, unlawfully, knowingly, and designedly did receive and obtain from said Kearns the said goods, merchandise, chattels, moneys, and effects of the proper goods, merchandise, moneys, and effects of the said Kearns, with intent to defraud the said Kearns of the same.

"A true bill."

A. J. Jennings, for the Commonwealth. J. W. & C. R. Cummings, for defendant.

HOLMES, J. This is an indictment for obtaining money by false pretenses. The

trial of the case was obscured by an excessive number of objections, and requests for rulings. We shall confine ourselves to disposing of the points insisted on in the argument. *Com. v. Devlin*, 141 Mass. 423, 432, 6 N. E. 64.

1. The motion to quash, and the accompanying motion to strike out certain passages from the indictment, which, for the sake of the argument, we treat as offering further reasons for the motion to quash, were properly overruled. The indictment alleges false pretenses that certain property was owned by the defendant solely, that there was no incumbrance upon it, that the defendant did not owe a dollar to any one, and that he intended to organize a corporation, and become an owner of stock in it by turning over the property to the proposed company in exchange for stock. It then alleges that the defendant executed and delivered to the defrauded party—one Kearns—an instrument, which is set out, and which promises to convey 20 shares of the corporation to Kearns in consideration of \$2,000. It then alleges that Kearns was induced by the false pretenses to deliver, and did deliver, a check for \$2,000 to the defendant upon the execution and delivery of the above-mentioned instrument.

The first objection is that it is not alleged whether the \$2,000 were obtained by sale or how otherwise, and that it does not appear that Kearns accepted the instrument. It is alleged that Kearns was induced to and did hand over the check "upon" the execution and delivery to him of the instrument, and that the instrument was delivered to him. This is a sufficient allegation that the delivery was made the condition of the payment, and that the condition was performed and accepted as performed by Kearns. In *Com. v. Dunleay*, 153 Mass. 330, 28 N. E. 870, in order to complete the fraud, it was necessary to show, not only that a forged application for insurance had been delivered to the defrauded insurance company, but that the company had assented to the application, and so supposed itself to have a contract. The decision does not mean that an instrument can be delivered without being accepted, but that the proposal in the instrument also should have been shown to have been accepted. Here, acceptance of the instrument was all that was needed. As to its not appearing whether the money was obtained by sale or how otherwise, all the elements of fact in the transaction are stated within the requirements of *Com. v. Strain*, 10 Metc. (Mass.) 521, 523, and it is unnecessary to give them a legal name. The connection between the representations and the result is sufficiently plain. It is true—to turn to another matter—that the intent alleged is not an intent to make the bargain which was made, or to obtain the specific check or amount which is alleged to have been obtained. But this is not like the case where the purpose of the fraud is to sell or to obtain a specific object, and the representations are made concerning the object, and to that

end, as in *Com. v. Goddard*, 4 Allen, 312; *Com. v. Lannan*, 1 Allen, 590. The defendant's intent at the time of the representations may have been, and presumably was, merely to get what he could in exchange for what he could induce Kearns to take; but that would be enough. See *Com. v. Howe*, 132 Mass. 250. It is alleged that he received and obtained the money by means of the representations with intent to defraud Kearns of the money.

Next it is said that, as the representation was that the property was at Newport, in Rhode Island, the allegations following the word "Newport," to the effect that the defendant represented that the property was "then and there" owned by the defendant, that he "then and there" delivered the instrument, and that Kearns, "then and there" believing, etc., was induced, etc., must be referred to Newport as the nearest antecedent, and so the crime was not completed in this state. But, upon reading the whole paragraph, it is plain that the "then and there" in each instance refers to the time and place of the representation, which was at Taunton. *Jeffries v. Com.*, 12 Allen, 145, 151, 152. See *Com. v. Call*, 21 Pick. 515, 521. There is no real uncertainty as to the meaning of the words, as in *Com. v. Wheeler*, 162 Mass. 429, 38 N. E. 1115; and *Jeffries v. Com.* is in point.

The next objection is that the agreement set forth contained an illegal undertaking to vote with Kearns to employ Kearns as agent of the company, and that this takes away the criminal character of the fraud, as the money was parted with for an unlawful purpose. *McCord v. People*, 46 N. Y. 470; *State v. Crowley*, 41 Wis. 271, 281, 282. If we assume that the promise was not merely not enforceable, but illegal, as may result from a comparison of *Guernsey v. Cook*, 120 Mass. 501, and *Woodruff v. Wentworth*, 133 Mass. 309, 314, with *Bishop v. Palmer*, 146 Mass. 469, 474, 16 N. E. 299, the question remains whether the conclusion follows. As is pointed out by Peckham, J., in his dissent in 46 N. Y. 475, the criminal law has a public end in view, namely, to deter people from swindling. With the greatest respect for the New York and Wisconsin courts, we think this end is more effectually reached if we do not read into the absolute words of the statute (Pub. St. c. 203, § 59) an implied exception which allows a knave to cheat any one out of his money if the knave can succeed in persuading his victim into a scheme which has any technical element of illegality on the victim's side. The question of allowing the latter a personal remedy is essentially different. See *Com. v. Smith*, 129 Mass. 104, 111; *Com. v. Morrill*, 8 Cush. 571; *Com. v. Langley*, 169 Mass. 80, 90, 92, 47 N. E. 511; *Com. v. Henry*, 22 Pa. St. 253; 2 Bish. Cr. Law (8th Ed.) §§ 468, 469.

2. In support of the second motion above mentioned it is urged that the instrument is not alleged to have been falsely made, and

that some of the alleged pretenses are not negatived. There was no need of the former allegation. The instrument made, no doubt, the contract which it affected to make. As to the pretenses, they all formed part of one single scheme of getting Kearns to take stock in the corporation supposed to be projected. Enough are negatived clearly and sufficiently to show that the scheme was fraudulent. *Com. v. Morrill*, 8 Cush. 571; *Com. v. Parmenter*, 121 Mass. 354; *Com. v. Stevenson*, 127 Mass. 446.

Exception was taken to the admission of Kearns' testimony that the representations alleged satisfied him, and induced him to give the defendant the check, and that he would not have parted with the check but for them. The testimony went directly to one of the issues, and was admissible. The verbal criticisms on the form do not impress us. *Com. v. Drew*, 153 Mass. 588, 592, 595, 27 N. E. 593.

3. The charge is excepted to because it told the jury that it was not necessary to discuss the law of cases of crimes begun in one state and finished in another, as if it had told the jury to disregard evidence of what happened in Rhode Island. The instruction was wholly in favor of the defendant, and was coupled with the statement that a conviction here must be had upon pretenses made here, and not in Rhode Island.

4. Thirty-seven rulings were asked. Exceptions were saved as to those numbered 3, 4, 5, 6, 7, 9, 10, 11, 14, 19, 23, 24, 25, 28, 29, 30, 31, 33, 35, and 37. The third was to the effect that there was no evidence that O'Brien did propose and intend to become a large owner of stock in the company by turning over the property in exchange for it. This seems a strange request to come from the defendant. It rests on an oversight or a misinterpretation of the indictment, which does not allege that the defendant proposed and intended, but that he pretended that he proposed and intended. Whether true or false, this pretense was equally consistent with his scheme, and, indeed, to make it was a necessary part of the scheme. It is true that Kearns did not testify to an express statement of such an intent by O'Brien. But the statements which were testified to—that O'Brien intended to form a corporation, and would deliver stock to the witness—imported it as plainly as if it had been stated in terms.

The fourth request required the jury to acquit unless they found the last-mentioned pretense false. But, if it had been true that O'Brien intended to form a corporation, and exchange this property for stock,—as very likely it was,—still, if the pretenses as to his ownership, his freedom from debt, and the freedom of the property from incumbrance were false, his ability to perform his contract for which Kearns gave his check was impaired to that extent, and the check was obtained by fraud. *Com. v. Lee*, 149

Mass. 179, 184, 21 N. E. 299. We may add, with reference to the seventh request, viz. that there was no evidence that O'Brien falsely pretended that he proposed to form a corporation, etc., that, in view of the evidence that Kearns' money was obtained by a fraudulent scheme, the jury were warranted in finding that the pretenses were false throughout, as they did find that the most material among them were. Furthermore, the judge instructed the jury that the government did not ask a conviction upon the allegations in the indictment that the defendant [pretended that he] intended to form a corporation, etc. We do not think that the fifth, sixth, and twenty-ninth requests need further remark.

The eleventh and fourteenth rulings asked were that the jury should disregard the allegation "that upon the looms and machinery there was no incumbrance" (we presume the allegation that the defendant made pretenses to that effect was meant), "because it is not properly * * * negatived," etc., and that there was no evidence that the property was incumbered on the date when the representations were made. The judge instructed the jury that there was no such evidence, and that the government's position was not that the defendant owned the property, and that it was heavily incumbered, but that he did not own it at all, and never had owned it.

The twenty-fourth ruling asked—that by the common law of Massachusetts the offense charged was not a crime—was immaterial, as there was a statute which made it one. Still more immaterial is the twenty-third, as to the common law of Rhode Island, and we can perceive no bearing of any proper sort which it could have upon the case. This disposes also of the nineteenth request. It is suggested that, if his conduct was lawful under the law of Rhode Island, it has a bearing upon the defendant's criminal intent. It is perfectly immaterial whether his intent was consciously directed to lawbreaking. His ignorance of the law would have made no difference in his liability. If he knew that his representations were false, and if he intended to deceive by them, and, by the help of the motives thus created, to get Kearns' property, he had the only criminal intent which the statute requires.

The twenty-fifth request was to direct a verdict for the defendant. This does not need special discussion. It was proved that the defendant pretended to own the property, and did not. It was a natural inference that this pretense led, or helped to lead, Kearns to part with his money on receiving the contract set out.

The twenty-eighth ruling asked was that the jury might find the false pretenses as to the defendant's ownership and freedom from debt immaterial. The judge instructed the jury, as we have said, that these were the representations upon which the government

relled. He also instructed them that, if the inducement to Kearns was complete in Rhode Island, where the first conversation took place, and the representations made in Taunton were not the inducement and operative cause to Kearns to part with his money, then the defendant should be acquitted, although he repeated the false representations to Kearns at Taunton before the check was delivered. This was sufficiently favorable to the defendant.

The thirtieth ruling asked turns on the illegality of the agreement, and has been disposed of in dealing with the motion to quash. The thirty-seventh was covered by the instruction just mentioned under the head of the twenty-eighth request.

No other exceptions were argued.

• Exceptions overruled.

(172 Mass. 257)

AINSWORTH v. MT. MORIAH LODGE, A. F. & A. M., et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Dec. 9, 1898.)

LANDLORD AND TENANT—TERMINATION OF LEASE.

Where one leased, during the life of a building, the third story thereof, covenanting to repair, the lease is terminated when a fire substantially destroys the demised part, and renders it impracticable to rebuild the same except by rebuilding other important parts not demised.

Exceptions from superior court, Hampden county; Elisha B. Maynard, Judge.

Action of tort by Harry L. Ainsworth against Mt. Moriah Lodge of Ancient Free and Accepted Masons and others. From a judgment in favor of plaintiff against Olin C. Towle and others, as trustees of said lodge, they bring exceptions. Exceptions sustained.

J. B. Carroll, W. H. McClintock, and J. F. Stapleton, Jr., for plaintiff. H. W. Ely and A. S. Kneil, for defendants.

HAMMOND, J. In order to hold Towle, Waterman, and Cook, hereinafter called the defendants, it was necessary for the plaintiff to show that, at the time the wall fell, the defendants had an interest in the building; and on this point his only claim was that they, as successors of the lessees named in the lease from Horton and others to Lewis and others, were at that time the holders of the leasehold estate thereby created, and that the estate was then outstanding. One of the answers made by the defendants to this claim was that the leasehold estate was terminated by the ravages of the fire, and consequently was not outstanding at the time the wall fell. If the defendants were right in this, they could not be held. Considerable evidence as to the condition of the building after the fire was introduced. At the close of the evidence, the defendants asked the court to rule that "the life of the building had been terminated prior to the time the wall fell, and that the life of

the building had been terminated by fire." The court declined so to rule, and upon this point instructed the jury as follows: "Up to the time this structure commenced to fall, where was the life of the building? Was it extinct, or was it not? If the building was still alive in the sense it is used here, then the tenants, the trustees, would be the persons liable; but if, on the other hand, the life of the building had become extinct before that time, it would be the owners who would be liable." To the refusal of the court to give the instruction as requested, and to the instructions actually given, the defendants excepted. We think the instruction should have been given. The leasehold estate was to exist only during "the life of the building," and the real question is whether the evidence was sufficient to warrant a finding that, within the meaning of the lease, the "life of the building" had not terminated. The building was three stories in height, and had brick walls. The premises described in the lease were "all that part of the brick building known as 'Masonic Block,' situated on the corner of Elm and Arnold streets, in said Westfield, above and including the third floor of said building, together with the stairs and stairway leading from the second to the third floor of said building, to their sole use; also the hall upon the second floor, the front and rear stairways leading to the same, and the front and rear entrances, and halls leading to said stairways, to be used and occupied by said party of the second part in common with the parties owning and occupying the other portions of said building, and their heirs and assigns." We understand the hall upon the second floor to be not a room, but simply an entry to and from which stairways led. The lease also contained the following: "And the party of the first part doth also lease, demise, and let unto the party of the second part the box or cupboard in the northwest corner of said building, and in the second story, to be used in connection with the third story, in substantially the same manner and to the same extent as now used by said lodge, and also the water pipes leading from the tank through the first and second stories of said building, to the drain leading to the brook, with the right to use and enjoy the same in the same manner and to the same extent that the party of the first part is entitled under said agreement between said Gillett and said party of the first part. It is also agreed that the party of the second part shall have, exercise, and enjoy all the rights and privileges to which the party of the first part is entitled, under said agreement last mentioned, subject to the restrictions and liabilities therein contained, and shall also have the right and privilege at all reasonable times, whenever necessary, to enter upon the portion of said building not herein demised, and the premises upon which the same is situated, for the purposes of examination and repair of said pipes leading from said tank, and the drain or pipe leading from the cellar, and of the box or cupboard in the second story be-

fore mentioned, and the gas pipes for the use of the third story, and for the purpose of rebuilding or replacing said pipes, drain, and cupboard and gas pipes, whenever, during the life of said building, the same shall become ruinous and decayed." The lessees hired the premises for a Masonic hall, and the lease was upon the condition that, if the premises should cease to be used and occupied as such, the lessors might enter and repossess the same as of their former estate. The lessees entered into several covenants, among which were the covenants to pay "all taxes and other duties levied, or to be levied, on all that part of said building above the third floor, and to keep the same, including the third floor and the stairs and stairway leading from the second to the third floor, in good and substantial repair, during the life of said building"; and they also agreed "to pay one-quarter part of all the expense of keeping in repair all such portions of said building as are to be used in common with the owners, and occupiers of the other portions, as before provided in this agreement." There were also other covenants and agreements, not material to the question under consideration. The lessors made no covenant as to repairs. At the time of the execution of the lease, the lessors were the owners of the land and building, except that Gillett, who was not a party to the lease, was the owner of the south half below the third floor; and, subject to the lease, the title so continued in them or their heirs (some of the lessors having meanwhile died) up to the time the wall fell. Here, then, is a lease of all of the building above and including the third floor, with such rights in entries and stairways leading to the street as are incidental to the reasonable enjoyment of that part of the building; the lessors owning the north half of the lower part of the building, and the land under the whole building, and Gillett, a third party, owning the other half of such lower part. And this lease is to continue during the life of the building, the lessees agreeing to repair, and the lessors not agreeing to repair, either the demised premises, or any other part of the building. The covenant to repair bound the lessees to rebuild in case of fire, unless the term of the lease had expired. *Leavitt v. Fletcher*, 10 Allen, 119, and cases therein cited.

In these circumstances, what is the reasonable interpretation of the phrase "life of the building"? Shall it be so interpreted as to mean that the building is alive so long as there is standing any part of it which can be used as a building? If so, then, if all above the second floor is destroyed,—walls and all,—but the first floor can be occupied, it is the duty of the lessees to erect in the air, as best they can, that part of the building demised by the lease. This does not seem to us a reasonable interpretation. We think the life of the building may be said to have terminated, within the meaning of this lease, when the building has been injured by fire or other cause to such an extent as substantially to destroy the part de-

mised, and to render it impracticable for the lessees to perform the covenant, to rebuild such part except by rebuilding other important parts of the building not covered by the lease. Upon this interpretation of the phrase, there can be no doubt that, as matter of law, upon the evidence, the life of the building was terminated by the fire.

It was not in dispute that after the fire, and before the injury to the plaintiff's property, the roof was entirely gone; and so, also, was the third floor, except a "little corner" near the north wall, upon which the safe stood. The evidence, especially that given by the plaintiff and his witnesses, clearly showed that the second floor was much burned and practically useless, and that the walls were bulging out in places, and in parts were in such a weakened condition as to fall by reason of wind of no "greater violence than defendants ought reasonably to have anticipated." We have examined also the photographs used at the trial. Without reciting herein the evidence in detail, it is sufficient to say that it clearly and indisputably shows that, after the fire, the part demised was substantially destroyed, and that it was impracticable to rebuild the same except by rebuilding other important parts of the building not demised. Without considering, therefore, whether the contention of the defendants that they were not the successors of the lessees above named is open to them on the bill of exceptions, or the other points presented, we are of the opinion, for reasons above stated, that the entry should be, exceptions sustained.

(152 Ind. 326)

ELLIS v. STATE.¹

(Supreme Court of Indiana. Nov. 23, 1898.)

HOMICIDE — EVIDENCE — QUESTION FOR JURY — CROSS-EXAMINATION AS TO PRIOR OFFENSE—THREATS.

1. Evidence showed that deceased came to the door of a house where defendant boarded about 10 p. m., and, on defendant's receiving him at the door, he expressed a desire to stay all night; stating that the woman with whom the defendant boarded had told him that she was going to keep boarders. Defendant then went back into the house, and returned and told deceased the woman could not keep him. The deceased insisted on staying. Defendant then asked deceased if he was not sent there, and, not getting a satisfactory answer, again asked him, to which deceased replied, "No." Defendant closed the door, and, as he did so, deceased threw a beer bottle, striking the house about three feet from the door. Defendant immediately went to his bedroom, and, securing his revolver, went to the front door, opened it, and fired at once at the deceased, who was on the outside of the closed front gate about 15 feet away. There was evidence that the defendant had caused his landlady's husband to procure a divorce from her, and she testified that she and the defendant had discussed the probability of her former husband sending some one to her house to find out how they were living. There was no evidence that the deceased attempted to enter the house, but the defendant claimed that he made a movement as if to shoot or throw at him when he opened the door, and that on this he fired the fatal shot. *Held*, that

¹ Rehearing denied.

it was for the jury to determine whether defendant had reasonable ground to apprehend that his life was in danger, or that he was in danger of great bodily harm from deceased.

2. An accused may be cross-examined as to prosecutions against him for offenses committed by him prior to the one for which he is being tried.

3. Where an accused is cross-examined as to a prosecution against him for an offense committed by him prior to the one for which he is being tried, he is not entitled to testify to matters in extenuation of his acts on which the prosecution had been based.

4. Evidence of a threat by deceased is inadmissible, where it is not shown to have been communicated to the defendant before the homicide.

5. Evidence of a threat made by deceased is immaterial, where there was no evidence to show an attack on defendant.

Appeal from circuit court, Putnam county; S. M. McGregor, Judge.

Fred Ellis was convicted of murder, and he appeals. Affirmed.

C. C. Matson, for appellant. W. A. Ketcham, Merrill Moores, A. W. Knight, and John M. Rawley, Pros. Atty., for the State.

MCCABE, J. The appellant was indicted in the Clay circuit court for murder in the first degree, in the killing of John F. Krack. The venue was changed to the Putnam circuit court, where a trial resulted in a verdict and judgment of guilty of murder in the second degree; the circuit court having overruled appellant's motion for a new trial. The action of the court in overruling the motion for a new trial is called in question by the assignment of errors as the sole ground upon which a reversal of the judgment is sought.

The first contention of appellant is that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law. There were but two witnesses, besides the defendant, to the transaction. These two witnesses were Mrs. Brewer, the woman with whom appellant was living or boarding, and her daughter, about 14 years of age. The defendant was a single man, about 30 years of age. The state's evidence consisted alone of the testimony of this family, and the statement made by the defendant to the prosecuting attorney the next day after the death of Krack, and his statement at the coroner's inquest. The evidence showed that defendant, about 15 years prior, had purchased a 44-caliber Remington revolver and a belt of a cowboy, and had been fined for carrying the same concealed about his person, and had been prosecuted and convicted of shooting at James Ragland, and shortly after he was again fined for an assault on said Ragland with a revolver, and a little later he shot John Ragland in the shoulder while the two were engaged in a controversy. He frequently carried his revolver in a belt while at his work. About two years before he moved to Clay county from Putnam county, and began boarding with a Mrs. Brewer, who lived at Center Point, in Clay county.

Afterwards Brewer moved to a farm about a mile from there, and appellant went with them, and boarded for about a year. At the request of Mr. Brewer, appellant quit boarding at his house, but he continued to visit the house. A separation between Brewer and his wife ensued, and a divorce was granted to Brewer. Mrs. Brewer moved to Brazil, and appellant assisted her in the removal, and in a few weeks became a boarder in her house. There was some evidence that the character of Krack was not good. The witnesses to that effect were but three, though he had lived there many years. On the night of March 9, 1898, appellant attended a Salvation Army meeting with Mrs. Brewer, and they returned home about 10 o'clock, or a little later. Mrs. Brewer and her daughter had retired for the night, while appellant was left sitting in the front room, reading, when some one knocked at the front door; and the evidence tended to show that appellant went to the door, and asked who was there. The answer came that it was Fred Krack, and thereupon appellant opened the door. Krack then asked if Mrs. Brewer lived there, and, when told she did, Krack said he desired to stay all night. Appellant replied that that was not a lodging house. Krack said that Mrs. Brewer had told him some time before that she was going to keep boarders, and that, at any time he was in town, to come around and get his meals, and stay over night. Appellant responded that he would ask Mrs. Brewer, and went back into the house; and, after talking with her, he returned to the front door, and told Krack that Mrs. Brewer said she could not keep him. Then Krack said he had the money to pay for his night's lodging, and insisted on staying overnight. Appellant then asked Krack if he was not sent there, and, getting no satisfactory answer, appellant asked him a second time, "Now, was not you sent here?" and Krack said, "No." A few words of a similar character were spoken, and then appellant closed the door; and, just as he closed the door and started to go back into the room, Krack threw something, which struck the house about three feet from the door, which turned out to be a beer bottle. Appellant then went through the sitting room, and into Mrs. Brewer's bedroom, to his trunk, took the key from his pocket, unlocked his trunk, got his 44-caliber Remington revolver; and, as he started to the front door, Mrs. Brewer said to him, "For God's sake, Fred, don't go out there and go to shooting," and appellant replied, "Do you suppose I am going to allow a man to throw or shoot at me? No." Appellant then went to the front door, opened it, and fired at once; the ball striking the deceased in the abdomen, penetrating a vital part, from which he shortly afterwards died. Appellant, without knowing whether the ball took effect, went into the sitting room and resumed his reading. When the shot was fired, Krack

was at the front gate, on the outside, and the gate shut, about 15 feet from the front door. Appellant testified that deceased had started towards the gate when appellant closed the door, and, just as he closed the door, Krack threw and struck the house. There is no evidence that Krack ever at any time attempted to enter the house. Mrs. Brewer testified that she and appellant had discussed the probability of Mr. Brewer, her former husband, sending some one to her house some time to find out how they were living, and that Ellis had said that she might depend upon it that he would do something of that kind. Appellant claims that, when he opened the door, Krack made a movement as if to shoot or throw at him, and, upon this appearance of things, he fired the fatal shot. But appellant testified that Krack had his arm down at his side from the time he opened the door until he fired the shot, and, from this appearance of things, he thought Krack was going to either shoot or throw something at him. At another time, appellant testified that Krack "was in a position as though he was going to throw something at me, or trying to get something out of his hip pocket," and again he testifies that he never saw him put his hand back to his hip pocket. Both he and Mrs. Brewer and her daughter testify that he fired as soon as he got the door open. From this evidence it was the exclusive province of the jury to determine whether the circumstances afforded reasonable grounds for appellant to apprehend that his life was in danger, or that he was in danger of great bodily harm, from Krack. Without such reasonable apprehension, appellant was not justified in firing the fatal shot. By their verdict the jury has decided that the evidence furnishes no reasonable ground for such apprehension when appellant shot the deceased. It is not our province to reweigh the evidence, if that part of it tending to support the verdict is legally sufficient to justify the finding of the jury. We are of opinion that it was.

The appellant contends that his motion for a new trial ought to have been sustained because the court erred in permitting the prosecuting attorney to ask the defendant, on cross-examination, as to certain prosecutions against him for criminal offenses committed by him previous to the offense here charged, for the purpose of discrediting his testimony. That such rulings are not erroneous is well settled in this state. *Parker v. State*, 136 Ind. 284, 35 S. E. 1105; *Bessette v. State*, 101 Ind. 88; *Blough v. Parry*, 144 Ind. 481, 40 N. E. 70, 43 N. E. 560.

Appellant also complains that the court erred in refusing him the right to testify to matters in excuse and extenuation of his acts on which the prosecution had been based. There was no error in such refusal, because that would have involved the trial of several other issues collateral to the issue the jury had been sworn to try, and thereby endanger-

ing the loss of the sight of the issue on trial. Accordingly, Judge Gillett, in his work on *Indirect and Collateral Evidence*, says, "A witness who admits his conviction of an offense cannot be permitted to state that he was not guilty."

It is further complained by appellant, under the motion for a new trial, that the court erred in excluding the testimony of the witness Cox to the effect that the deceased, Krack, had said to him on the afternoon of the day of, and before, the homicide, while he was on his way to Brazil, that he was going to Brazil to have trouble with Ellis. It is true that, in a case of homicide, previous threats by the deceased are admissible, especially if they have been communicated to the defendant before the homicide. *Wood v. State*, 92 Ind. 269. To the same effect is *Leverich v. State*, 105 Ind. 280, 4 N. E. 852. But there was no proof that such statement had been so communicated to the defendant before the homicide. Some courts hold threats are admissible without having been previously communicated to the defendant. Conceding, however, without deciding, that the offered evidence amounted to a threat against the defendant, we think it was immaterial, and therefore inadmissible. The evidence fails to show an attack on the defendant by the deceased. Even if throwing the beer bottle against the house could be construed into an attack on the defendant, which we by no means concede, still, that was all over, passed, and gone, and the deceased had started away, and got outside of the gate, and had it closed, when the defendant went to the front door the second time, and fired immediately on opening the door, taking time only to say, "You had better get away from here now." When he made this remark, Krack closed the gate, and had started down the sidewalk, and was a few feet from the gate; and the deceased turned around, with his face towards the defendant, on hearing defendant's remark, and was instantly shot. The evidence fails to show that the deceased said anything worse towards the defendant than to "ask him if I did not knock at the door, like a gentleman," in response to defendant's order, "You had better get away from here now." In *Leverich v. State*, supra, this court quoted section 757 of *Wharton's Criminal Evidence*, as correctly expressive of the law. The latter part of that section is peculiarly pertinent to the question here involved. It reads thus: "The question whether A. (the defendant) or B. (the deceased) was the aggressor in the fatal collision is to be determined; and if, in such case, A.'s threats are admissible to prove that A. was the aggressor, B.'s threats, by the same reasoning, are admissible to prove that B. was the aggressor. For the purpose, therefore, in cases of doubt, of showing that the deceased made the attack,—if so, with what motive,—his prior declarations, uncommunicated to the defendant, that he intended to attack the defendant, are proper

evidence. And so it has been frequently held. They are, however, inadmissible, unless proof be first given that there was an overt act of attack, and that the defendant at the time of the collision was in apparent imminent danger." The evidence makes it too clear for reasonable controversy that at the time the fatal shot was fired there was no attack on the defendant, and that he was in no danger, either real or apparent; it appearing therefrom that deceased was wholly unarmed. There was no error in rejecting the offered evidence, nor was there any error in overruling appellant's motion for a new trial. The judgment is affirmed.

(31 Ind. App. 444)

HENCH et al. v. EACOCK.¹

(Appellate Court of Indiana. Nov. 30, 1898.)

CONDITIONAL SALE—RE-SALE—BONA FIDE PURCHASER.

Under one contract of sale, providing that the title should not pass until payment of the price, property was sold for resale, and delivered at different times, and part payments were made from time to time. One general account was kept, and the part payments were credited thereon, and not on any particular goods. Before full payment of the price, the vendee resold it in payment of a pre-existing debt. *Held*, that the title remained in the original vendor, the purchase for a pre-existing debt not being a purchase for value in due course of business.

Appeal from circuit court, Tippecanoe county; William C. L. Taylor, Judge.

Replevin by S. Nevin Hensch and another against George J. Eacock, trustee. There was a judgment for defendant, and plaintiffs appeal. Reversed.

Haywood & Burnett, for appellants. John F. McHugh, for appellee.

ROBINSON, J. Appellants brought suit in replevin to recover the possession of certain personal property, of the value of \$750. A trial resulted in a judgment in appellee's favor. The only error assigned is overruling appellants' motion for a new trial. A new trial was asked on the ground that the decision was contrary to law, and was not sustained by sufficient evidence. The property in dispute was sold by appellants to the M. E. Sears Implement Company. Certain mortgagees of the M. E. Sears Company purchased the company's property for \$13,600, and included in it was the property in dispute. The above amount was the amount due on the mortgages, and, when purchased by the mortgagees, the mortgages and notes were surrendered. The mortgagees took possession, and put appellee in possession of the same as their trustee.

It is argued by counsel for appellee that appellants failed to show that they had title to the property in question. It appears from the evidence that, by the one contract of sale, appellants sold the Sears Implement Company 25 15-tooth lever harrows, 200 17-tooth harrows, 12 6-tooth cultivators, and 100 seats.

The property sought to be recovered in this action is a part of the above, and consists of 50 17-tooth harrows and 10 15-tooth harrows. Mr. Bryant testified that he was a member and stockholder of the Sears Implement Company, and that he purchased the property in controversy from appellants' agent; that the goods were purchased for the purpose of resale; that there was about \$1,400 yet due on the contract; that the particular property in suit was sold to the mortgagees; that most of the harrows in question were received in January and March; most of them were received in January, in the first shipment; payments were made along during January, February, March, April, May, and June, 1896. Mr. Dromgold, one of the appellants, testified that appellants had never received pay for the property in suit; that one general account was kept for the whole bill of goods, and that when payments were made the account was credited with the amount received; that all the money due on the contract had been paid, except \$1,400; that, when payments were made by the Sears Company, they were not applied to any particular part of the property, but were applied as a credit to the entire account. It is not denied that the property in suit is a part of the property purchased under the contract of sale, the title to which was to remain in the vendor until paid for. Taking all the evidence together, we think it shows title to the property in question in appellants.

The property in controversy was sold by appellants to the M. E. Sears Company under a written contract, which is set out in the record. The agreement between the parties was a conditional sale, as appears from the language of the contract, which, among other things, provides "that the title and ownership of the goods, of whatever kind, that may be shipped as hereinafter provided, shall remain in, and their proceeds in case of sale shall be the property of, Hensch & Dromgold, and subject to their order, until full payment shall have been made of the same by the undersigned, to the acceptance of Hensch & Dromgold; but nothing in this clause to release the undersigned from making payment as aforesaid. All cash or notes received from the sale of the herein or hereafter ordered goods must be forwarded to Hensch & Dromgold immediately when received. All notes and accounts must be guaranteed by the undersigned. It is understood that all notes given under this contract are not accepted as payment for the goods, but simply an acknowledgment of the debt." That there may be a legal and valid conditional sale of personal property has often been recognized by the courts of this state. In such cases there must be a plain and express stipulation to that effect, for the reason that the vendee has been clothed with all the indicia of ownership, and is apparently the owner. In the case at bar that portion of the contract above set out makes a sale thereunder a conditional sale, unless some other portion of the contract neutralizes that

¹ Rehearing denied.

provision. Another clause of the contract of sale reads as follows: "To handle no other make of goods of the same class herein ordered, nor any part of Hensch & Dromgold's goods except those furnished by Hensch & Dromgold, during the time this contract is in force, and to sell the hereinafter named goods at retail and in the ordinary course of business only in the territory hereinafter mentioned. It is mutually agreed that this contract is intended to cover the sale and to give territory privileges for only the styles of goods specified specifically ordered in the following lists at date of this contract, and for no other." Counsel for appellee cite and rely upon the case of *Manufacturing Co. v. Carman*, 109 Ind. 31, 9 N. E. 707. In that case the court recognizes the doctrine of conditional sales of personal property, and says: "But where, as here, it appears that a manufacturer and wholesale vendor of articles of personal property sells upon credit, and delivers a lot of such articles to a retail dealer therein, for the apparent or implied purpose of resale by such vendee, it is clear, we think, that the doctrine in relation to conditional sales cannot apply to or govern such a sale, in a controversy as to such articles between the original vendor and the purchasers thereof from the original vendee; for in such a case the purposes for which the possession of the property was delivered to the original vendee are inconsistent with the continual ownership thereof by the original vendor, and for this reason the condition upon which the sale and delivery were made must be deemed fraudulent and void as against purchasers from the original vendee of the property." Recognizing the rule as above declared, we cannot say that it is controlling in the case at bar, unless we extend its application, and this we cannot do. We cannot say that purchasing property in bulk under a chattel mortgage given to secure a pre-existing debt is a sale of such property "at retail and in the ordinary course of business,"—the manner in which the contract provides the property may be sold. Under the authority of the above case, the reservation of title in appellants would be fraudulent and void as to the purchasers from the vendee at retail and in the ordinary course of business. But the facts in the case at bar do not bring the case within the rule. It is conceded that the notes, to secure which the mortgages were given, represented pre-existing indebtedness. We know of no authority extending the doctrine declared in the *Carman* case. In *Steele v. Aspy*, 128 Ind. 367, 27 N. E. 739, the court said: "In the case of *Manufacturing Co. v. Carman*, it was held that where a sale of goods was made to one who, as in this case, was to retail them, an express stipulation that the sale was conditional, and the title should not pass until the goods were paid for, was void as to creditors of the vendee." In the case of *Pratt v. Burhans*, 84 Mich. 487, 47 N. W. 1064, appellant agreed to

sell and deliver a firm certain goods; title to be retained in seller until paid for or sold. Appellee had indorsed for said firm for a large sum. Appellant shipped the goods to the firm, and, shortly after, the firm turned over all their stock, including the goods furnished by appellant, to appellee, and gave him a bill of sale thereof, which appellee claimed was a bona fide purchase in consideration of his indorsements. In the opinion in that case the court said: "The defendant did not buy them in the due course of trade, and therefore, if such a contract was made, the plaintiffs were entitled to recover. Such a contract is valid, under the repeated decisions of this court, and we are not concerned with the decisions of other courts upon the subject. Those who purchased in the usual course of trade would take good title. Those who did not purchase in the usual course of trade could not rely upon the bare possession of their vendor as conclusive evidence of title." See *Burbank v. Crooker*, 7 Gray, 158, 66 Am. Dec. 470; *Standard Implement Co. v. Parlin & Orendorff Co.*, 51 Kan. 544, 33 Pac. 360; *Benj. Sales* (1 Am. Ed.) 271 et seq. Appellee, representing the mortgagees, can have no better title than the vendee under the original contract of sale. And while he could have sold the goods at retail and in the ordinary course of business, and have given such a purchaser a good title as against the original vendor, yet he had no power to divest the original vendor's title by a sale of the property in bulk to mortgagees in satisfaction of pre-existing indebtedness. The motion for a new trial should have been sustained. Judgment reversed.

(21 Ind. App. 211)

C. AULTMAN & CO. v. RICHARDSON et al.
(Appellate Court of Indiana. Nov. 30, 1898.)

REPLEVIN—SALES—BREACH OF WARRANTY — NOTICE—WAIVER—PRINCIPAL AND AGENT
—SPECIAL VERDICT.

1. In replevin by a buyer for machinery seized by the seller for default in payment of the price, evidence of a breach of warranty in the sale, without a showing of damages therefrom, does not justify a verdict for plaintiff.

2. Special findings of the jury, which are merely conclusions of law, are disregarded.

3. Where a seller warranting machinery was notified of defects, and on his promise to remedy them the buyer executed notes for the price, he cannot, on failing to remedy, complain that the notice of defects was not given, nor the machinery returned, in the time or manner stipulated for, nor insist that the use by the buyer thereafter was a ratification of the sale, though it was stipulated that it should be.

4. Acceptance by a seller of notes given his agent by the buyer, on the agent's promise to remedy defects in the property sold, is a ratification of the promise.

Appeal from superior court, Madison county; Henry C. Ryan, Judge.

Replevin by Simeon Richardson and others against C. Aultman & Co. There was a judgment for plaintiffs, and the company appeals. Reversed.

Chipman, Keltner & Hendee, for appellant. Kirkpatrick, Morrison & McReynolds and Kittinger & Ballard, for appellees.

COMSTOCK, J. This is an action in replevin brought by appellees against appellant to recover possession of a traction engine, a separator, and a straw-stacker. This is the second appeal. The former appeal and decision are reported as *C. Aultman & Co. v. Richardson*, 10 Ind. App. 413, 38 N. E. 532. After the reversal, an amended complaint was filed in three paragraphs, not differing essentially from the original complaint. Appellant's counsel do not discuss the sufficiency of the complaint, and we do not deem it necessary to set out either paragraph. The defendant answered in two paragraphs: (1) The general denial. (2) That on the — day of —, 1891, plaintiffs ordered of defendant, by a written order, the property described in the complaint, which was purchased under and subject to the written and printed warranty, and under the terms and conditions of the written order, a copy of which is set out in this paragraph of answer. It further avers that, "according to the conditions provided in the warranty, if, inside of five days from the time of its first use, the machinery should fail to fulfill said warranty, that written notice must be given immediately to C. Aultman & Co. by registered letter, and written notice also to the local agent from whom the same was purchased, stating wherein it failed to fulfill the warranty. * * * And, if the machinery could not be made to fill the warranty, that the one which failed, either separator or engine, should be returned to the place where received, and another furnished, which should perform the work, or the money and notes given for the same be returned, and no other claim be made on C. Aultman & Co." It was further provided that the use of the machinery after the expiration of the time named should be evidence of the fulfillment of the warranty and full satisfaction of the plaintiffs, who agreed to make no further claim on C. Aultman & Co.; that if the machinery, or any part thereof, should be delivered to the plaintiffs, and settlement made for the same, the plaintiffs waived all claims under the warranty. It avers, further, that the machinery was delivered to the plaintiffs under the terms of the warranty; that they used the same for more than five days after receiving it, and before making settlement, and, after having used it for five days, gave the notes for part of the purchase money, delivered property for part of the purchase money, and gave a chattel mortgage to secure the payment of the remainder; that the mortgage was duly acknowledged and recorded, and, upon failure to pay notes when matured, defendants, by virtue of said mortgage, took possession of the property, and, according to the terms of the mortgage, ad-

vertised it for sale, and sold it, at public auction, to the highest bidder, defendant's agent being the purchaser. A copy of said order and warranty and of said chattel mortgage are made exhibits and filed with the answer. A demurrer, for want of sufficient facts to constitute a defense to plaintiff's cause of action, was overruled to this answer. Upon request of defendant (appellant), the jury returned a special verdict consisting of interrogatories and answers thereto. Each party moved for judgment upon the special verdict. Appellees' was sustained, and appellant's overruled, and exceptions duly reserved. Appellant's motion for a new trial was overruled, and exception taken, and the court thereupon rendered judgment on the special verdict in favor of appellees for \$160.

The fourth, fifth, and sixth specifications of the assignment of errors only are discussed. They allege, respectively, that the court erred in overruling appellant's motion for judgment in its favor on the answers of the jury to the interrogatories, in sustaining plaintiff's motion for judgment on the verdict, and in overruling appellant's motion for a new trial. Upon the former appeal the judgment of the lower court was reversed because there was no evidence of the damages on account of the breach of warranty. Counsel for appellant claim that the special verdict shows no finding of any damages for breach of warranty, and that, the absence of such finding being equivalent to a finding against the plaintiffs upon the question, judgment should have been rendered in its favor. It is conceded by counsel for appellees that no one interrogatory and answer thereto finds the amount of damages on account of a breach of warranty, but they claim that the special verdict, taken as a whole, conclusively warrants that there was a breach of warranty. The position of appellees' learned counsel is that the debt which the mortgage was given to secure was really not in existence; that at the time this action was instituted it had been wiped out by the breach of warranty; that, the mortgage being only an incident to the debt, all rights under it ceased when the debt became extinguished.

In the decision of this case upon the former appeal, Lotz, J., in speaking for the court, said: "There was evidence to the effect that the engine was of the value of \$200 at the time the appellant took possession of it, but there is no evidence of its value at the time it was sold to appellees. Nor is there any evidence as to its value had it been as warranted, nor was there any evidence of fraud. As there was no evidence of the damages on account of the breach of warranty, appellant's right to possession under the mortgage was not overthrown by the evidence in rebuttal, and the verdict is not sustained by the evidence." The facts found upon this appeal must take the place of the evidence before the court in the former. We have

carefully read the 168 interrogatories and answers thereto constituting the special verdict. There are findings showing the machine to be defective. There is no finding of the value of the engine at the time it was sold to appellees, nor is there any finding as to its value had it been as warranted. The jury, in answer to an interrogatory as to the value of the engine in question for furnishing steam power for threshing, sawing, or plowing, or for any other purpose, where steam was required, on the 24th day of June, 1891, stated that there was no evidence. The verdict not showing damages for breach of warranty, the judgment must be reversed.

Counsel for appellant further contend that the court should have rendered judgment in favor of appellant for the reason that the verdict found that the engine, separator, and straw-stacker were not unlawfully taken or detained from the appellees. These findings, however, were merely conclusions of law, and are therefore to be disregarded.

They further contend that the judgment should not have been rendered for appellees because: (1) As found by the verdict, the warranty provided that, if the machinery could not be made to fill the warranty, "that part which failed, be it separator or engine, should be returned by appellees to the place where received, and another furnished, which would perform the work, or the money and notes given for the same returned, and no further claim made on C. Aultman & Co.," and that the engine was never returned to the place where it was received. (2) That if, inside of five days from the date of its first use, said machinery, except belting and levers, should fail to fill said warranty, written notice should be given of the defect to the local agent from whom the machinery was purchased, and notice by registered letter given to C. Aultman & Co. at Canton, Ohio, and that they did not give notice to the agents from whom it was purchased, and did not notify C. Aultman & Co. by registered letter. (3) That the use of the machinery, at the expiration of the time (five days) mentioned in the warranty, should be evidence of the fulfillment of the warranty and full satisfaction of the appellees, who agreed thereafter to make no further claim on C. Aultman & Co., and that they continued to use said engine after said time. (4) That, if the machinery was delivered before settlement was made for it, appellees waived all claims under the warranty, and that the property was delivered before settlement was made; and for these reasons, and each of them, that, if there had been a breach of the warranty, appellees, having failed to comply with the terms and conditions of the warranty, were in no condition to ask that appellant should do so.

We think it is a sufficient answer to this claim, and the separate grounds upon which it is made, that the special verdict also found that,

within five days from the first use of the engine, they reported by letter its defects to C. Aultman & Co., at Canton, Ohio; that said letter was received, and that the agent of appellant for the state of Indiana called upon appellees; was told of and saw the defects, and promised and agreed that, if appellees would execute the notes and mortgage in question, the company would send some one to remedy the defects; that the notes and mortgage were executed because of that promise, and that no one was sent to remedy the defects. The acceptance of the notes and mortgage was a ratification of the agreement of the agent. Appellant acted upon the written notice, although the letter was not registered, and thus waived and registering. *Thresher Co. v. Kennedy*, 7 Ind. App. 507, 34 N. E. 856; *Bank v. Dunn*, 106 Ind. 110, 6 N. E. 131; *Gaar, Scott & Co. v. Rose*, 3 Ind. App. 269, 29 N. E. 616. The engine was retained, and settlement was made under the promise to remedy the defects after appellant had notice of the defects. In such case the purchaser does not lose his rights under the warranty. *Thresher Co. v. Kennedy*, 7 Ind. App. 512, 34 N. E. 856; *Machine Co. v. Gray*, 100 Ind. 285; *Brown v. Russell*, 105 Ind. 43, 4 N. E. 428. Believing that justice will be best subserved by another hearing, the judgment is reversed, with instructions to sustain appellant's motion for a new trial.

HENLEY, C. J. (concurring). The conclusion reached by the majority of the court in reversing this cause meets with my approval, but I am strongly of the opinion that the lower court should, in this cause, be directed to sustain the motion of appellant for judgment upon the special verdict. The special verdict fails to show that appellee was in any way damaged by the alleged breach of warranty, and upon this ground it is held that the verdict is insufficient to sustain a judgment for any amount in favor of appellees, and for the same reason I think the motion for judgment upon the special verdict in favor of appellant ought to have been sustained. It seems to me that the correct practice, in all cases where a special verdict is returned, would insure to one party or to the other to the action a judgment upon the facts found, unless the verdict was so defective as to be subject to attack by a motion for a venire de novo. This being the second appeal to this court in this cause, and it being the policy of the courts of last resort to end litigation, and the facts being before the court upon which a final judgment could be ordered, I am of the opinion that it is the duty of this court to end the litigation by directing a judgment in appellant's favor. *Keir v. Hall*, 117 Ind. 405, 20 N. E. 279; *Meeker v. Shanks*, 112 Ind. 207, 13 N. E. 712; *Stix v. Sadler*, 109 Ind. 254, 9 N. E. 905; *Railway Co. v. Gaines*, 104 Ind. 526, 4 N. E. 34, and 5 N. E. 746.

(21 Ind. App. 708)

NORDYKE v. McCREERY et al.

(Appellate Court of Indiana. Nov. 30, 1898.)

BILL OF EXCEPTIONS—REVIEW—EVIDENCE.

Where the bill of exceptions was not filed in the clerk's office after being signed by the trial judge, questions depending on the evidence cannot be considered.

Appeal from circuit court, Marion county; Henry Clay Allen, Judge.

Action between Addison H. Nordyke and Charles B. McCreery and others. From a judgment of the circuit court affirming a judgment of a justice of the peace, Nordyke appeals. Affirmed.

W. V. Rooker, for appellant. Ewbank & Watson, for appellees.

HENLEY, J. This cause originated before a justice of the peace. On appeal to the circuit court the judgment of the justice was sustained. It is assigned as error to this court (1) that the lower court erred in overruling the motion of appellant to dismiss the appeal; (2) that the lower court erred in overruling the motion of appellant to strike out and disregard the evidence relating to the title to real estate; (3) that the lower court erred in overruling appellant's motion for a new trial. There was no attempt in this cause to bring the evidence into the record, and no question depending upon the evidence can be considered. The bill of exceptions by which it is attempted to bring the various motions and the rulings of the lower court thereon into the record was never filed in the clerk's office after it was signed by the trial judge. The record presents no questions to the court for decision. Judgment affirmed.

(21 Ind. App. 218)

STEWART et al. v. CLEVELAND, C., C. & ST. L. RY. CO.

(Appellate Court of Indiana. Nov. 30, 1898.)

CARRIERS—LIMITATION OF LIABILITY—CONTRACTS—VALIDITY—MISTAKE—CONSIDERATION—EVIDENCE—ACTIONS.

1. Where the owners of live stock, on shipping it, sign a contract limiting the carrier's liability, and there is no fraud or misrepresentation by the latter, and the owners are given an opportunity to read it, but neglect to do so, they cannot avoid it for mistake or fraud.

2. A written contract limiting the liability of a carrier, signed by the parties several hours after the shipment, merges all prior agreements, and, in the absence of fraud or mistake, cannot be explained or added to by parol.

3. A contract limiting a carrier's liability to plaintiff expressed a consideration of a reduced rate. The carrier had but one form of contract, but also had bills of lading. In plaintiff's prior shipments he had always paid the reduced rate, although he had not always signed such a contract. The evidence showed that the carrier did not require all shippers to sign such a contract, but did not show what rates such shippers received; and it also showed that the regulation requiring a higher rate in the absence of such contract was "not practiced." *Held*, that the contract was for a valid consideration.

4. Where an action is brought for an alleged breach of a carrier's implied contract, and the goods are shown to have been shipped under a special written contract, the plaintiff cannot recover.

Appeal from circuit court, Delaware county; G. H. Koons, Judge.

Action by Daniel W. Stewart and another against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for breach of an implied contract for the shipment of hogs. Judgment for defendant, and plaintiffs appeal. Affirmed.

Wagner, Bingham & Long, for appellants. Ryan & Thompson, for appellee.

BLACK, C. J. In an action brought by the appellants against the appellee, the court below rendered judgment for the latter upon a special verdict. The question as to which party was entitled to judgment upon the verdict is alone presented for determination. The verdict showed that the appellants were partners in the business of buying and shipping live stock, and had been so engaged for four years, at Daleville, Ind., between which place and Cleveland, Ohio, and East Buffalo, N. Y., the appellee was a common carrier; that on the 19th of September, 1895, the appellants delivered to the appellee, at Daleville, a car load of live stock, including 66 hogs, to be transported to East Buffalo consigned to certain commission merchants there, who were to act for the appellants in selling the stock. The verdict showed loss suffered by the appellants upon the hogs. The only question for our consideration being as to whether or not the shipment should be regarded as having been made under a certain written shipper's contract signed by both parties, by which the appellee's common-law liability as a common carrier was limited, we need not recite more than those parts of the verdict which relate to that subject. On the evening of Wednesday, September 18, 1895, the appellants asked the appellee's agent at Daleville if they could get a car to ship a load of stock to East Buffalo for Saturday's market. The agent answered: "I will try. I think I can." Nothing was said about the price or rate of freight to be paid for carrying the stock. The agent caused a car to be placed on the side track by the chute of the stock pens at Daleville, and then notified the appellants about half past 2 o'clock in the afternoon of September 19, 1895, that, if they could load the stock at once, he could start them on a through freight train then just leaving Anderson, when the train should pass Daleville; and the appellants immediately loaded said stock, or caused it to be loaded, in said car, the agent knowing that they were doing so. The train arrived at Daleville about 3 o'clock on said September 19th, and the agent caused the car containing said stock of the appellants to be placed in said train, and the stock started in said train, en route for East Buffalo, at about a quarter past

3 o'clock in the afternoon of the same day. About 15 or 20 minutes after the train had started, Hoppls (one of the two appellants), in connection with the shipment in controversy, signed their firm name to the shipper's contract in question. Besides the signatures at the foot of the contract, the appellants' firm name was also subscribed upon the back thereof, under a heading setting forth the name of the appellee, and the words "Live-Stock Contract." Both of the appellants could read and write, and they had an opportunity to read the contract before signing it, but neither of them read it or knew its contents. The agent did nothing to prevent Hoppls from seeing and reading the contract, which, after signing, he voluntarily left with the agent, who never refused to give a copy thereof to the appellants; and, three or four days after Hoppls signed the contract, he procured a copy thereof from said agent at Daleville. It was found that the through freight rate charged the appellants by the appellee for shipping said stock was 16 cents per 100 pounds (which rate was stipulated in the contract, and stated therein to be a reduced rate), and that at the time of this shipment the rate of freight on live stock from Daleville to East Buffalo was 16 cents when the shipper signed a shipper's contract. It was also found by the jury that when the shipper did not sign a shipper's contract the rate was 20 per cent. higher, "but was not practiced." The appellants had been shipping stock at the average rate of about one car load a week from Daleville to East Buffalo, through the summer, and immediately prior to this shipment, and 16 cents per 100 pounds was the rate charged on all their prior shipments. When they made their prior shipments, they signed, at the time of shipping, what is called the "shipper's contract," not "only part of the time," but "most of the time." It was found that the appellants did not know that the appellee required persons shipping live stock at the rate of 16 cents per 100 pounds from Daleville to East Buffalo to sign a written "contract or bill of lading" limiting the liability of the appellee as a common carrier. Being asked if the appellee had any form of contract or bill of lading for the shipment of live stock from Daleville to East Buffalo, other than the one presented to the appellants and signed by them, the jury answered: "As to contract, no; but bill of lading, yes." It was also found that the appellee did not require all shippers of live stock from Daleville to East Buffalo to sign the same kind of contract or bill of lading as that signed in this instance.

The jury, by answers to a number of interrogatories, indicated that they regarded the shipment as not having been made under a shipper's contract, unless it was signed by the shipper before the car left the station, and that they considered and concluded (and some of their answers were to the effect) that in the present instance the contract under which

the stock was shipped was an "implied agreement," arising out of what had taken place prior to the departure of the train from the station, and not under the written shipper's contract signed immediately after the train had started. The writing in question was not a bill of lading or receipt, or mere memorandum, but was a contract signed by both parties. The case does not seem to call for a determination of the question as to the proper effect to be given to evidence of the mere acceptance by the shipper of a bill of lading alone, or receipt signed by the carrier, either at the delivery of the goods, or after the shipment thereof; the shipper being ignorant of the contents of the writing. There is no room here for denying the shipper's assent to the terms of the written contract. The rule that a person who signs a contract without reading it or having it read to him cannot avoid it, in the absence of fraud, misrepresentation, or mistake, on the ground of ignorance of its contents, applies to such shippers' contracts as the one here in question. *Railway Co. v. Harwell*, 91 Ala. 840, 8 South. 649. In *Black v. Railroad Co.*, 111 Ill. 351, it was said: "When a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off his guard, deliberately signs a written agreement without informing himself as to the nature of its contents, he will nevertheless be bound; for in such case the law will not permit him to allege, as matter of defense, his ignorance of what it was his duty to know, particularly where the means of information are within his immediate reach, and he neglects to avail himself of them." In *Kellerman v. Railroad Co.* (Mo. Sup.) 34 S. W. 41, it was said that where a shipper, in the absence of fraud or deceit, signs a contract of shipment, he is conclusively presumed to know its contents, terms, and conditions, and to have assented thereto. See, also, 5 Am. & Eng. Enc. Law (2d Ed.) 300, 301. In *Bostwick v. Railroad Co.*, 45 N. Y. 712, it was said: "If the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made, and under which he had parted with his property. But after the verbal agreement had been consummated, and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was, under which the goods had been shipped." In *Coles v. Railroad Co.*, 41 Ill. App. 607, it was said that, where the limitation of the liability of a railroad company as a common carrier is made by a condition in a bill of lading made as a receipt by the carrier, notice of the condition and assent to it by the shipper is a question of fact to be determined from the evidence; but, where the limitation is contained in a contract signed by the shipper, the contract is to be construed

by the court; its terms are binding so far as the carrier may contract in limitation of his duties; and a shipper signing such contract cannot relieve himself from its terms by reason of ignorance of the same, unless there be fraud and misrepresentation in the execution thereof. The live stock in question was the property of the appellants when they signed the contract. The consignee was their agent to dispose of the property for them at East Buffalo. The appellants had power to bind themselves by their contract relating to the property. Their suit proceeds upon the theory and the express averment of the complaint, that they were the owners of the hogs. There does not appear to have been any mistake of fact, or any fraudulent practice, or any imposition of any kind upon the appellants. No advantage appears to have been sought or obtained by and through the time and manner of executing the contract. The appellants must be treated as chargeable with knowledge of the contract which they voluntarily signed, and must be regarded as assenting to its terms.

A contract, whether signed by the shipper, or a bill of lading assented to by him, expressing the terms and conditions upon which the property is to be transported, is to be regarded as merging all prior and contemporaneous agreements of the parties; and, in the absence of fraud, concealment, or mistake, its terms or legal import, when free from any ambiguity, cannot be explained or added to by parol. *Railroad Co. v. Wilson*, 119 Ind. 352, 21 N. E. 341; *Pennsylvania Co. v. Clark*, 2 Ind. App. 146, 27 N. E. 586. It is true, the rule that all prior and contemporaneous oral negotiations are merged in a written contract is not applicable where the oral negotiations in question are other than such as relate to the contract which is reduced to writing, and lead up to it. But a complete and operative oral contract may be superseded for the future by a substituted written contract, or a written contract may be changed or abrogated by an oral agreement. *Railroad Co. v. Levy*, 127 Ind. 168, 26 N. E. 773; *Railroad Co. v. Craycraft*, 12 Ind. App. 203, 39 N. E. 523, and cases cited. The cancellation of a prior oral contract is sufficient consideration for a substituted written one. *Leonard v. Railroad Co.*, 54 Mo. App. 293. But in the case before us the contract seems to us to have been signed by the appellants in due course of business; the signature being the concluding act on their part, towards which all that had gone before led up. The property to be shipped was not of such character that it could be delivered by the shipper in the carrier's depot, to be loaded by the carrier. It was in stock pens, and was loaded by the shippers in a car, which was attached to a train in anticipation of the arrival of which the car was loaded; and the train departed within a short time after its arrival, and within as short a time thereafter the contract was signed. The question is not one as to what would have

been the effect if the shippers had refused to sign the contract, but it was one of voluntary agreement to the terms of the written contract, made substantially at the time of the shipment, and all the oral negotiations being merged therein. The idea of a suggestion to the contrary would seem to have been an afterthought.

A contract limiting the common-law liability of the carrier must be supported by a consideration, and there is not a sufficient consideration for a stipulation so exempting the carrier, where the services rendered by the carrier and the charges for carriage are in no respect different from what they would be if there were no special contract. Whatever may be the correct rule as to the burden of proof in relation to the consideration, in the case before us it affirmatively appears that the rate of freight which was specified in the contract assented to by the shipper was a reduced rate. It appears that, while the carrier had in use but one form of shipper's contract, it also had bills of lading. It is found that in most of the prior shipments of stock by the appellants they had signed the shipper's contract, but in some cases (for what reason does not appear) had not done so, though they always paid the same rate of freight. It was also found that the carrier did not require all shippers of live stock to sign the same kind of contract as that here in question, but it does not appear upon what terms or at what rates the other shippers here referred to contracted with the carrier. It was also found that the regulation that when the shipper did not sign a shipper's contract the rate was 20 per cent. higher was "not practiced." These vague findings are not necessarily inconsistent with the fact that the carrier, consistently with its reasonable regulations, shown to exist, might have charged a higher rate than that stipulated in the contract of appellants, if they had not signed that contract, and had contracted for the transportation of their stock by the appellee without any limitation of its common-law liability. In *Schaller v. Railway Co. (Wis.)* 71 N. W. 1044, it was said, "If the rates for the carriage of freight were fixed by a general rule of the company, with reference to exemption from some common-law liabilities, the fact that in some or many cases receipts containing such exemption were not given is not material."

The appellants did not base their complaint upon a written contract. When the action is upon a contract not in writing, and the contract appears on trial to be a written one, there can be no recovery. "Parol evidence must have been excluded because of the written, and the written because not sued on." *Railroad Co. v. Remmy*, 13 Ind. 519. It is the established rule in this state that where the action is upon an implied contract, or for an alleged breach of the carrier's common-law duty, and it is found on the trial that the goods were shipped under a special written contract limiting the common-law liability, the plaintiff cannot recover. *Railroad Co. v. Bennett*, 89 Ind.

457; *Hall v. Pennsylvania Co.*, 90 Ind. 459; *Bartlett v. Railway Co.*, 94 Ind. 281; *Snow v. Railroad Co.*, 109 Ind. 422, 9 N. E. 702; *Railroad Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. 1138; *Railroad Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106. The judgment is affirmed.

(21 Ind. App. 227)

COLLINS v. WILLIAMS.

(Appellate Court of Indiana. Nov. 30, 1898.)

PARENT AND CHILD—SERVICES—PRESUMPTIONS—APPEAL—INSTRUCTIONS—HARMLESS ERROR.

1. The presumption that father and daughter, living together as a common family, did not intend that either should receive pay for services or board and comforts furnished the other, may be rebutted by an express contract to pay, or by facts and circumstances excluding the intention that the services or things furnished were gratuitous.

2. A charge will not be reviewed where no injury resulted from it to appellant.

3. That the court read the different pleadings to the jury in connection with his charge is not reversible error, though the instructions were requested to be in writing.

4. Although instructions were requested to be in writing, the court's error in verbally stating to the jury that certain charges were given at plaintiff's, and certain at defendant's, request, and in stating where the charge given for each ended, was harmless, since this was not informing the jury as to the merits, or announcing any principle of law, nor an attempt to prejudice the jury.

Appeal from circuit court, Wabash county; M. H. Kidd, Special Judge.

Action by Allena Williams against William R. Collins. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Slick & Hunter and W. G. Sayre, for appellant. Pettit & Stitt and Plummer & King, for appellee.

HENLEY, J. Appellee began this action against appellant. The first paragraph of complaint is based upon a promissory note executed by appellant to her, and which she alleges had been lost or mislaid, and was at the time of the commencement of the action due and unpaid. In another paragraph of complaint, appellee avers that appellant is further indebted to her for services rendered to said appellant, which services consisted of work and labor done for appellant, in washing, ironing, caring for, and boarding him, and for nursing and care bestowed upon appellant's wife, all of which it is alleged was done at the special instance and request of appellant. To the first paragraph of complaint, which declared upon the note, appellant, in addition to a general denial which was directed to all the paragraphs of complaint, answered payment; and to the other paragraphs of complaint appellant answered, pleading payment and set-off, and special answers alleging that the relationship between appellant and appellee was that of father and daughter, and that the services rendered by appellee, and for which she was seeking to recover, were rendered only as a

member of appellant's family, and while appellee was living in appellant's household as a member of his family, and was receiving from him reciprocal acts of kindness, care, and protection, such as are mutually done and furnished when the family relation exists. Appellant's answer of set-off consisted of items of money furnished appellee, real estate conveyed to her, and for board and lodging furnished her. To appellant's answers, appellee replied in denial, and an affirmative reply of set-off, amounting to more than \$3,000, for services alleged to have been rendered to appellant, in the way of housework, prior to the time of the alleged services charged in the complaint. Upon the issues thus formed the cause was submitted to a jury, which returned a verdict for appellee in the sum of \$1,796.66, and at the same time returned the following interrogatories and answers submitted by appellee, viz.: "(1) What sum do you allow and find for plaintiff, principal and interest, upon the note sued upon in the complaint? A. Eleven hundred and six dollars and sixty-six cents. (2) What sum do you allow and find for plaintiff for attorney's fees in the collection of said note? A. One hundred and fifteen dollars. (3) What sum do you allow and find for plaintiff upon the account sued for in the complaint? A. Five hundred and seventy-five dollars." Appellant moved for a new trial, assigning therein nine reasons why the same should be granted. Pending the ruling on the motion for a new trial, appellee filed a remittitur of \$67, and the court overruled appellant's motion, and rendered judgment for appellee in the sum of \$1,729.66. The only error assigned to this court is the action of the lower court in overruling appellant's motion for a new trial. Waiving all the objections presented as to the condition of the record in this cause, we will take up and pass upon all the various reasons urged by counsel for appellant why the lower court should have sustained his motion for a new trial.

Appellant's counsel contend that the court erred in giving to the jury instruction numbered 5, which was as follows: "In the fourth paragraph of the answer, defendant says the parties were father and child, and lived together and performed the services as members of the same family, and under such circumstances that the law will not allow a recovery. The court instructs you that when near relatives, by blood or marriage, reside together as one common family,—the one furnishing the board, lodging, clothing, or other necessities or comforts of life, and the other in return renders services,—a presumption arises that neither party intended to receive or to pay a compensation for the board or other necessities or comforts furnished on the one hand, or services rendered on the other; that these were intended as mutual acts of kindness furnished and done gratuitously, and that this presumption may arise between father and child; that the presumption may be strong or weak, owing to the degree of relationship and intimacy between

the parties, and the manner of living, and the mutuality of the kindnesses and benefits rendered and furnished by one to the other. This presumption may, however, be rebutted by an express contract to pay, and a recovery may be had upon the contract, or it may be rebutted by facts and circumstances which exclude the intention upon the part of such persons that the things furnished or the services rendered were gratuitous, and raise an inference that compensation was intended, and in justice and fairness, under the circumstances, they ought to have made a contract to pay. Under such circumstances the law will imply a contract." Counsel vigorously assail this instruction, but, we think, without good reason. The law as announced therein has been often declared by the courts of this state. In the case of *Hill v. Hill*, 121 Ind. 255, 23 N. E. 87, what is termed by the court as the "true rule" is announced in practically the same words as are used in the instruction complained of. It was also held by this court in the case of *McCormick v. McCormick*, 1 Ind. App. 594, 28 N. E. 122, that when a child, after reaching majority, resides with the parent as a member of the family, and rendering services for the parent, the law will not imply an obligation to pay for such services; on the contrary, the presumption is that no compensation, as wages, is intended; but an express contract to pay will render the parent liable, and an obligation to pay a reasonable compensation may be inferred from circumstances shown which tend to rebut the presumption which arises from such a relation. To the same effect, see *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. 808, and 34 N. E. 611; *Fuller v. Fuller's Estate* (Ind. App.; decided Oct. 12, 1898) 51 N. E. 373; *James v. Gillen*, 3 Ind. App. 472, 30 N. E. 7; *Hilbish v. Hilbish*, 71 Ind. 27; *Botts v. Fultz*, 70 Ind. 396.

It affirmatively appears from the record that appellant was not injured by the giving of instruction numbered 11, complained of by appellant, and it is not necessary that we examine it.

Appellant, before the commencement of the argument to the jury, requested the court to give all of its instructions in writing. It is contended that the court failed to do this. It appears from the record that the court, before beginning to read his instructions, said to the jury: "That you may have the issues fresh in your recollection before giving its charge, the court will read the pleadings in the case." The court then read the pleadings to the jury, and orally stated which paragraph or paragraphs of the complaint or answer the answer and reply were intended to meet." We also find from the record that appellant had prepared one instruction, which he had submitted to the court, and asked that it be given to the jury. Before reading said instruction, the court read from his written charge the following: "The court, at the request of the defendant, gives you the following charge for your guidance." Having finished reading the

charge so asked by appellant, the court orally said to the jury: "This is the end of the charge asked by the defendant." It also appears that, before reading instruction numbered 6 of the written instructions given by the court, he read from his written charge these words: "The plaintiff requests the court to give in this connection the following instruction, which it does." Having finished reading the instruction, the court said to the jury orally: "This is the end of the instructions asked by the plaintiff." The supreme court of this state have recognized the right of parties to an action to have the instructions in writing, as an important and valuable right,—so important and valuable a right, in fact, that they have held that the court was not required to analyze and examine with particularity the exception taken by the complaining party in the lower court, in order to support the action of the court below in violating and depriving the party of that right. *Sutherland v. Venard*, 34 Ind. 390. It is well settled that the reading of the different pleadings to the jury by the court in the course of his instructions was not reversible error. In the case of *Clouser v. Ruckman*, 104 Ind. 589, 4 N. E. 202, the supreme court say: "We cannot reverse the judgment on the grounds that the court read the appellant's complaint to the jury in the course of the instructions, for the pleading are, in contemplation of law, always before the jury." What the court said orally in delivering his written instructions to the jury in this cause was not an instruction, within the meaning of our statute. There was no attempt to inform the jury as to the merits of the cause, or to announce any principle of law applicable to the evidence or otherwise, and no attempt to prejudice the jury for or against appellant. The words spoken orally by the court were unnecessary and uncalled for, but harmless, and hence not reversible error. *Herron v. State*, 17 Ind. App. 161, 46 N. E. 540; *Lehman v. Hawks*, 121 Ind. 541, 23 N. E. 670; *Dodd v. Moore*, 91 Ind. 522.

We find no reversible error in the record. Judgment affirmed.

(21 Ind. App. 241)

REAM v. GOSLEE.

(Appellate Court of Indiana. Nov. 30, 1898.)

COVENANTS—DELIVERY OF POSSESSION — BREACH.

1. A covenant to deliver possession may include possession by a tenant bound to pay rent to the vendee.

2. Where the vendee contracted for the purchase of premises with knowledge of their possession by a tenant, and paid the price, and accepted the deed, knowing of the continuance of such tenancy, there was no breach of a covenant to deliver possession; and this even though the nature and extent of the tenancy were unknown to him, since, having knowledge thereof, he was chargeable with knowledge of its extent.

Appeal from circuit court, White county; T. F. Palmer, Judge.

Action by Mathias Ream against Albert Goslee. From a judgment for defendant on a demurrer to the complaint, plaintiff appeals. Affirmed.

Carr & Carr, for appellant. Sellers & Uhl, for appellee.

BLACK, C. J. A demurrer to the appellant's complaint for want of sufficient facts was sustained, and that ruling is presented for the consideration of this court. The complaint showed that on the 29th of January, 1896, the appellee was the owner in fee simple of certain real estate described in White county; that on that day he sold it to the appellant for \$1,250, and agreed with the appellant that he (the appellee) would execute a warranty deed, his wife joining him therein, conveying the real estate to the appellant, and that the appellee would place the deed in the hands of one Edwin R. Price, to be by him delivered to the appellant, upon the payment by him, on or before the 10th of March, 1896, to the appellee, of \$400, a part of the purchase price of the real estate; that it was further agreed by the parties that the appellant would execute certain promissory notes payable to the appellee, the amounts of the several notes being stated, aggregating \$1,250, as evidence of the whole amount of the purchase money, and that he would execute a mortgage on the real estate, his wife joining him therein, to secure the payment of the last three of the notes at maturity, which notes and mortgage were to be placed in the hands of said Price, to be by him delivered to the appellee upon the delivery of said deed to the appellant as aforesaid. The complaint contained averments showing performance of these stipulations concerning the deed, notes, and mortgage, and the deed and mortgage were made exhibits. It was further alleged that, contemporaneously with the execution of the deed, notes, and mortgage, the appellant and the appellee entered into a written memorandum and agreement, as follows:

"Chalmers, Indiana, 1-29, 1896. This deed is left in the hands of E. R. Price, to be delivered to the grantee therein named on the payment of four hundred dollars, on or before the 10th day of March, 1896. On the consummation of this contract, the grantee is to have possession of the property specified in deed. A. Goslee. Mathias Ream.

"The mortgage given to secure the payment of the purchase money for the realty described in the deed herewith is left in the hands of E. R. Price, to be delivered to Albert Goslee, when the said deed is delivered as aforesaid. A. Goslee. Mathias Ream."

It was alleged that said written memorandum and agreement was, by the appellant and appellee, put into an envelope with said deed, notes, and mortgage, and placed in the hands of said Price, and that the deed and mortgage therein referred to were the same

that were executed as aforesaid; that, by the terms of said written memorandum and agreement, the appellee promised the appellant that, upon the consummation of said agreement, the latter should have the possession of said real estate. It was next alleged that said agreement was fully consummated on the 10th of March, 1896, when the appellant paid the appellee, and the latter received and accepted from the former, the sum of \$400, and thereupon caused to be delivered to the appellant, and the appellant received and accepted from said Price, said deed, and the appellant caused to be delivered to the appellee, who received and accepted from said Price, said notes and mortgage. It was further alleged that at the time the appellant purchased the real estate, and when said written memorandum and contract and the deed and mortgage were executed, one S. D. Sluyter was in possession of said premises as a tenant of the appellee under a written lease; that he occupied a brick store building thereon, under and by virtue of a lease or agreement with the appellee, and under said written lease; that the appellant had full knowledge of the existence of said tenancy, at and before said deed and mortgage were executed, but the exact terms of said lease or agreement and the nature and extent of said tenancy were to the appellant unknown at that time; that said written agreement was made by the appellee with full knowledge by him of the existence of said tenancy, and the nature and extent thereof; that the appellant, relying upon the promise of the appellee to deliver him possession of the premises, fully consummated his said agreement with the appellee as aforesaid, and fully performed all the conditions thereof on his part to be performed; that upon the consummation of the contract, on the 10th of March, 1896, and at divers times thereafter, appellant demanded of the appellee the possession of said premises, but the appellee wholly failed and refused to deliver the possession of the same to the appellant; that said Sluyter remained continuously in the possession of said brick store building, and of said premises, from the date of the purchase of the real estate by the appellant, under and by virtue of said lease or agreement with the appellee, and with the full knowledge and consent of the appellee, until the 25th of February, 1897; that the appellant was thereby deprived of the use, occupation, and employment of said building, and the possession of said premises, and the rents and profits thereof, during all of said time; that, by reason thereof, the appellant had been damaged in the sum of \$500, which was due and wholly unpaid; wherefore, etc.

Usually the possession of a tenant for years is deemed to be the possession of the grantee in the deed of conveyance, and the existence of the term is no breach of the covenant of warranty, the rent being ap-

portioned at the time of the conveyance. In *Lake v. Dean*, 28 Beav. 607, the plaintiff agreed to sell the defendant an orchard described in the written agreement as "now in the occupation of" a third person, and it was agreed that the purchaser should complete on a certain day "when he shall have possession." The defendant refused to complete his purchase unless the plaintiff would undertake to admit the former into actual and corporeal possession at once, which the plaintiff admitted he was unable to do, as the premises at the date of the agreement were, and they had since been, in the tenancy and occupation of said third person. It was held that there was a broad distinction between "possession" and "occupation," and a decree for specific performance was made against the defendant. In *Sugden on Vendors* (page 8), referring to *Lake v. Dean*, supra, it was said: "If a purchaser intends to stipulate for a vacant possession, he should be careful to do so; for where, upon a sale of an orchard 'now in the occupation of L. P.,' the purchaser was to complete on a day named, 'when he shall have possession,' it was held that the purchaser was not entitled to the occupation of the orchard, or, in other words, he must take subject to L. P.'s occupation; yet the purchaser no doubt meant to stipulate for an actual delivery of a vacant possession." See 1 *Dart, Vend.* (6th Ed.) 145. In *Demars v. Koehler* (N. J. Sup.) 38 Atl. 808, the syllabus by the court is as follows: "When the grantee in a conveyance of lands and premises in fee simple, which contains a covenant against incumbrances, before he enters into negotiations for the purchase, and before the execution and delivery of the deed of conveyance, has actual knowledge of the existence of a lease of said lands made between the grantor in said conveyance and the tenant in which the rent is reserved to the grantor and his assigns, the tenant being in actual possession of the premises, the grantee cannot maintain against his grantor an action for the breach of the covenant." In that case the grantee had knowledge of the terms of letting. A conveyance by a landlord is valid without attornment of the tenant, under the statute. In *Lindley v. Dakin*, 13 Ind. 388 (an action on covenants in a deed of conveyance of real estate), it was held that the possession of the tenant is the possession of the landlord; that occupancy by a tenant at the time of sale, where the fact and the title of the tenant are known at that time to the purchaser, is not a breach of the covenant of possession; and that, if no special contract is made, the occupant becomes tenant of the purchaser. It was further held that, if a parol contract be made between the purchaser and the seller relating to possession, a suit in relation to possession would rest upon a breach of such parol contract, and not upon the covenants of the deed of conveyance. In *Page v. Lashley*, 15 Ind. 152, a suit on a note for purchase money of land,

it was held that, while it is a general rule of law that the covenants in a deed cannot be controlled in their legal effect by evidence of contemporaneous parol agreements, yet, where land conveyed with full covenants is at the time in possession of a tenant, a parol agreement may be valid to accept the deed and the tenant's possession as the possession of the purchaser; and that such an agreement will be inferred, nothing appearing to the contrary, where the purchaser, at the time he accepts the deed, has full knowledge of the right of the tenant; and that in such case the seller is entitled to the rents due, and the purchaser to future rents. *Kellum v. Insurance Co.*, 101 Ind. 455, was an action for breach of covenants in a deed, the alleged breach being that part of the land was in possession of the grantor's tenant, who detained possession for a year after the execution of the deed. The grantee, before the purchase, had talked with the tenant, and knew of the terms of his lease. It was held that, as the deed transferred the possession to the vendee, such occupancy did not constitute a breach of the covenants of the deed. The sale of the leased property does not add to or take from the tenancy, and the lessor's grantee may terminate the tenancy as the grantor might have done if he had not conveyed. *Swope v. Hopkins*, 119 Ind. 125, 21 N. E. 462. Where the grantor agrees to give the grantee immediate possession under and through an arrangement between the grantor and his tenant in possession, whereby the tenant is to vacate, and the grantee purchases in reliance upon this agreement, he does not waive the right of actual possession as against the grantor, from whom he may recover his expenses in obtaining possession. *Williams v. Frybarger*, 9 Ind. App. 558, 37 N. E. 302. Where the deed of conveyance contained a provision that the grantee should have possession at a future date specified, and the grantor did not give the grantee possession at that time, but authorized a third person to take and retain possession, the grantor thus retaining possession through another, it was held that there was a breach of the covenants of the deed, for which the grantee might recover from the grantor. *Gibbs v. Ely*, 13 Ind. App. 130, 41 N. E. 351. In *Sugden on Vendors* (8th Am. Ed. p. 7) it is said: "Where it is stated upon a sale, even at auction, that the estate is in lease, and there is no misrepresentation, the purchaser will not be entitled to compensation, although there are covenants in the lease contrary to the custom of the country, because whoever buys with notice of a lease is held conscious of its contents; but there must be no misrepresentation. This rule has been carried too far; but no person having notice of any lease, or that the estate is in the occupation of tenants, should sign a contract for purchase of the estate without first seeing the leases, unless the vendor will stipulate that they contain

such covenants only as are justified by the custom of the country." In *James v. Lichfield*, L. R. 9 Eq. 51, it was held that, where the purchaser knew that the premises were in the occupation of a tenant, the former, as between him and his vendor, was bound to inquire as to the interest of the tenant in the land. It was said: "The purchaser bound himself by contract. He must be taken to have had present to his mind all those things of which he had notice, and those things which necessarily followed from, and were incidental to, that notice. He knew that Allen was tenant of this land. He was bound to inquire what the tenancy was, unless he was willing to be bound by the tenancy whatever it was." Where one purchasing land from another has knowledge that it is in possession of a third person, the purchaser is put upon inquiry as to the right by which such third person claims and holds the possession. *Wilson v. Campbell*, 119 Ind. 286, 21 N. E. 893; *Smith v. Schweigerer*, 129 Ind. 363, 28 N. E. 696.

It is alleged in the complaint that the appellant, the purchaser, had full knowledge of the existence of the tenancy, at and before the execution of the deed and mortgage, but that the exact terms of the lease were unknown to him at that time. It is not stated whether or not he knew the terms of the lease when he paid a part of the purchase money and the sale was consummated, the tenant still being in possession. Nor does the complaint state what were the terms of the lease, or what was the nature or the extent of the tenancy, though it is stated that the tenant continued till a certain date in possession under and by virtue of the lease. No fraud or mistake is shown.

Having knowledge of the tenancy, the appellant was chargeable with knowledge of its extent. If the tenant had a right to continue in possession, he did so as the tenant of the appellant, after the consummation of the sale by the delivery of the deed. The appellee could not then deliver the actual or vacant possession, and the appellant must be regarded as having signed the memorandum relating to possession, and as having paid part of the purchase money, and as having accepted the deed with knowledge that vacant possession could not be given by the appellee, but could be obtained only at the expiration of the lease unless sooner yielded by the tenant. Although it is alleged that the appellant demanded possession of the appellee when the purchase money was paid and the deed and mortgage were delivered, yet he must be regarded as then and at all times knowing or being chargeable with knowledge that such a demand could not be complied with; and yet he went on and consummated the purchase. The "possession" mentioned in the written memorandum might be understood by the parties to mean possession through and by the occupation of a tenant bound to pay rent to the appel-

lant. In view of the actual knowledge of both parties, and the knowledge with which the appellant was chargeable, the having of which at the time of the consummation of the sale is not denied, and in consideration of the conduct of the parties, the agreement for possession cannot by the court be held to have been broken. Judgment affirmed.

(22 Ind. App. 43)

GALVIN v. SYFERS et al.¹

(Appellate Court of Indiana. Nov. 30, 1898.)

APPEAL—REVIEW—GENERAL FINDING—RECORD—WAIVER—BILLS AND NOTES—INNOCENT PURCHASER—DEFENSE.

1. A special finding, not signed by the judge, nor made a part of the record by a special order, nor incorporated in a bill of exceptions, is regarded as a mere general finding.

2. Questions relating to the sufficiency of evidence cannot be considered, where the evidence is not in the record, and no attempt was made to bring it in.

3. An objection to the overruling of a demurrer is waived by appellant's failure to discuss it.

4. Where the maker of a negotiable note placed it in the hands of her husband, to be delivered on certain conditions, and he delivered it unconditionally, it is no defense to an action on the note by an innocent purchaser for value before maturity.

Appeal from superior court, Marion county; John L. McMaster, Judge.

Action by Rufus K. Syfers and others against Mary K. Galvin. From a judgment for plaintiffs, defendant appeals. Affirmed.

Geo. W. Galvin, for appellant. D. W. Howe, for appellees.

WILEY, J. Appellees sued appellant upon a promissory note dated March 1, 1895, due in one year, and payable at a bank within this state. The note was payable to one F. G. Cross, and the complaint avers that it was indorsed to appellees before maturity, and for a valuable consideration. Appellant answered in three paragraphs, to the second of which a demurrer for want of facts was sustained. To the first paragraph of answer the appellees replied in three paragraphs, to the second and third of which appellant demurred. To the third paragraph of answer the appellees replied in two paragraphs, and, while counsel for appellant discusses the overruling of her demurrer to the second paragraph of appellees' reply to the third paragraph of her answer, we are unable to find from the record that said paragraph of reply was challenged by a demurrer. In any event, there is no assignment of error that raises the question. Appellant's demurrer to the second paragraph of appellees' reply to the first paragraph of answer was sustained, and overruled as to the third paragraph of reply to the first paragraph of answer. The cause was tried by the court, and at the request of appellees the court made a special finding of facts, and stated its conclusions of law thereon. Upon the facts found the court stated its conclusions of law, that appellees were entitled to

¹ Rehearing denied.

recover the amount due on the note, and rendered judgment accordingly. Appellant's motion for a new trial was overruled, and she has assigned error as follows: (1) The court erred in sustaining the demurrer to the second paragraph of answer; (2) the court erred in overruling the demurrer to the third paragraph of reply to the first paragraph of answer; (3) the court erred in its conclusions of law; (4) the court erred in overruling the motion for a new trial.

Neither the third nor the fourth specifications of the assignment of error present any questions for decision. Neither the special finding of facts nor the conclusions of law are signed by the trial judge, nor are they brought into the record by bill of exceptions; and, under the rule in this state, the special finding must be regarded as a general finding. In *Service v. Gambrel*, 110 Ind. 349, 11 N. E. 240, it was said: "The appellees contend that the special finding is not properly a part of the record. This contention must prevail. There is neither a bill of exceptions, nor a special order making the finding a part of the record, nor is the finding signed by the judge who tried the case, and it cannot be regarded as anything more than a general finding." See, also, *Conwell v. Clifford*, 45 Ind. 392; *Branch v. Faust*, 115 Ind. 464, 17 N. E. 898; *McCray v. Humes*, 116 Ind. 103, 18 N. E. 500; *Roberts v. Smith*, 34 Ind. 550. The motion for a new trial rests upon the alleged insufficiency of the evidence to sustain the special findings, and that the decision of the court is contrary to the law and the evidence. The evidence is not in the record, and no attempt has been made to bring it in; hence we cannot consider the questions thus presented. *Smith v. Davidson*, 45 Ind. 396; *Shane v. Lowry*, 48 Ind. 205; *Smith v. Johnson*, 69 Ind. 55; *McClellan v. Board*, 92 Ind. 424; *Conner v. Town of Marlon*, 112 Ind. 517, 14 N. E. 488; *Branch v. Faust*, 115 Ind. 464, 17 N. E. 898.

This leaves but two debatable questions in the record: (1) The action of the court in sustaining the demurrer to the second paragraph of answer; and (2) in overruling the demurrer to the third paragraph of reply to the first paragraph of answer. As to the latter question, appellant has waived it by her failure to discuss it, and hence we need not incur this opinion by setting out the facts averred in the third paragraph of reply to the first paragraph of answer, which are very lengthy. There is therefore but one question for our decision, to wit, Did the court err in sustaining appellees' demurrer to the second paragraph of appellant's answer? The material averments of the answer are that the note sued on is the second of two notes signed by her to the same payee; that the first of said notes was returned to her as not being satisfactory to appellees; that she was solicited by the agents of appellees, Cross and Matthews and Odell, to sign the note sued on; that she declined to do so, as having no other

or different interest in the signing thereof than to accommodate the said Odell in a business transaction personal to himself; that thereupon the said Odell agreed and undertook to have executed to her the bond and mortgage of his uncle, a man of large property interests, to secure her harmless from liability on said note, if she would execute the same; that she thereupon signed the note, and placed it in the hands of her husband, G. W. Galvin, to be handed to said Odell when the said bond and mortgage were duly executed to her satisfaction; that the note in suit was obtained from the custody and possession of her said husband without the execution of said securities, or any securities, by said Odell, and wholly without her knowledge and consent; and that she never executed said note. This paragraph of answer is verified. The answer is a plea of non est factum, in which the pleader has stated the facts upon which it rests. The sum and substance of the answer is that appellant did not execute the note in suit, because she did not deliver it. It is true, ordinarily, that the delivery of a note is as requisite to its validity as the signing of it; for it is a part of its execution, and it is not a valid obligation until it is fully executed. In this case, however, the answer does not aver that appellees had knowledge of the fact that it was not duly delivered, or that they were not innocent purchasers for value. It appears from the answer that appellant delivered the note to her husband, as her agent, to be delivered on condition that a certain indemnity should be obtained. She thus placed the note in the hands of one who had the power and ability to deliver it, even without the indemnity, and this he did. He, as her agent, thus put a negotiable instrument, governed by the law merchant, into circulation; and in the course of business it passed to the appellees, for value, and without notice of any infirmity. There was nothing on the face of the note calculated to put them upon inquiry, and they had a right to take it as a negotiable instrument in the ordinary course of business. Daniel on Negotiable Instruments says: "But there is a distinction between negotiable and sealed instruments. If the custodian of the former betrays his trust, and passes off the negotiable instrument to a bona fide holder before maturity, and without notice, all parties are bound; but, if the instrument is sealed, the rule is otherwise." 1 Daniel, Neg. Inst. (3d Ed.) §§ 68, 856. See, also, *Rand. Com. Pap.* § 230. It is a familiar rule that, where one of two parties must suffer by reason of fraud or misconduct of a third person, the loss must fall upon the one who put it in the power of such third person to perpetrate the fraud or be guilty of the misconduct. *Bank v. Gibbons*, 7 Ind. App. 629, 35 N. E. 31. The demurrer to the second paragraph of appellant's answer was properly sustained. We find no available error in the record. Judgment affirmed.

(172 Mass. 263)

CAPPER v. CAPPER.(Supreme Judicial Court of Massachusetts.
Suffolk. Dec. 13, 1898.)**NEW TRIAL — RULINGS AT TRIAL — DISCRETION —
WILLS — UNDUE INFLUENCE — EVIDENCE
— SUFFICIENCY.**

1. A party against whom a finding by the jury was made, and who did not request the presiding justice at the trial to rule on the sufficiency of the evidence, cannot, as a matter of right, require the justice, on a motion for new trial, to rule on that subject.

2. The presiding justice may, if he chooses, in deciding a motion for new trial, report the evidence to the full court, to determine the sufficiency thereof to support a certain finding of the jury, though the party against whom the finding was made did not request a determination of such question at the trial.

3. Contestant and proponent were testator's sons. Contestant testified that proponent had told testator that he would kill contestant if he left any property to him, and that proponent on a later occasion told contestant that he had things fixed. Five other witnesses testified that testator had much affection for contestant, or that he had stated that proponent had threatened him, and urged him to make a will in his favor. Proponent denied making any threats, and testified that testator had said that he could not depend on contestant in business matters. Four witnesses testified that testator had said that he intended to leave his property to proponent, or that to leave it to contestant would be like throwing it away. *Held* sufficient evidence that the will was executed through undue influence.

Appeal from supreme judicial court, Suffolk county.

In the matter of the estate of Thomas Henry Capper, deceased, Frederick H. Capper petitioned for the probate of a will in which he was appointed executor. From a decree probating the will, Porter F. Capper appealed to the supreme judicial court, where, after trial by a jury, a decree was rendered reversing the probate of the will; and from the decree of reversal, and an order denying a motion for a new trial, proponent appeals to the full court. Affirmed.

The following is the evidence at the trial: "Porter F. Capper, the appellant, testified that he was a plumber, and learned his trade with his father; that his brother, Fred H. Capper, had suffered constantly with mental trouble, so that he had to be sent away for treatment; that the relations between Porter and his father and mother were pleasant; that he was waiting upon a girl, and Fred talked about it, and brought up troubles about it at the table. After the marriage, Fred said that Porter's wife 'was a God-damned stinking Catholic bitch.' Fred threatened his father if he should leave any money to Porter, and said he would have his life. The father was on excellent terms with Porter's wife after the marriage, and used to visit Porter at the latter's home, in Malden, about four to six times during the summer time. He said he was afraid to let Fred know he visited Porter; it riled him up so. After Porter's marriage, while he was working in Littleton, N. H., he was sick

once, and his mother came up to see him, and wanted him to come home. He went home, and his father received him affectionately. The affectionate relation between Porter and his father continued to his death. He heard his brother, Fred, threaten the father three or four times that, if he left him (Porter) anything in his will, he would do him violence. Once Fred came to Porter with a paper in Fred's handwriting, in the form of a will, containing the same bequests contained in the will offered for probate, and said, 'I have got things fixed; put that in your pipe, and smoke it.' Porter afterwards showed it to his father, and spoke to him about it. The father said that he did not mean anything; that he only did it to pacify his brother. He said there would not be any division like that made; that it should be equally divided; and that there was plenty of property for both. The paper in question was dated 27th of October, 1890, and the will was made December 14, 1890. Porter once asked his father how he was going to leave things, and the father said Fred was at him all the time to get things his way. His mother died August 29, 1890. After the mother's death, he noticed a change in his father, in his memory and ability to grasp things. His father was 72 at his death. Mary F. Brooks testified, on behalf of the appellant, that she knew Thomas H. Capper for 16 years, and met him often. After the death of his wife, she met him, and had a conversation with him. He said that he was very much broken up after the long sickness and death of his wife; that Fred was troubling him about the property; that it was a wrong thing to make a will and give the property to one son; that Fred threatened him often, every day, about making the property over to him; also, that Fred would give him a good deal of trouble; and that he wished he was dead. Mrs. Margaret T. Capper testified that she was the wife of Porter F. Capper; that she had called at the father's house before and after his wife's death. Thomas H. Capper used to come to see her while she was living in Malden. He came a short time after his wife's death, and said to her that he had to steal away to come over to her house, and that he did not want his son to know about his visiting her. He spoke about his son making so much bother about the property that he wished he was out of the way and dead. He said that Fred was urging him to make a will, but he said he would never do it; that it belonged as much to Porter as it did to Fred. Once when he came to her house, he said he was going to Bass Point, and that time he brought a lunch with him. She offered him a bouquet of nasturtiums to take home, but he said he would not take it home because he was afraid of Fred. Once when she was in the father's house, she was playing the piano; and Fred told the old gentleman to close the piano, as he did not wish her to be

there, and the old gentleman closed it immediately. Frank F. Fay testified, on behalf of the appellant, that he was a plumber, and worked for Thomas H. Capper for eight years. He was working there when Mrs. Capper died. After the death of Mrs. Capper, he heard conversations between Thomas H. Capper and Fred Capper. Fred said to his father that he should have all the property, or he would have his (Porter Capper's) blood. This was six or eight months after the wife's death. The father said to Fred that he should divide it equal among the boys. He said, 'Fred, there is enough for both of you.' Fred used to become violent. Thomas H. Capper told him he was getting tired of business, and he felt like closing up the doors, and giving up the business; that he was tired of life. The father said that he was troubled by Fred. Fred wanted to get all the property after the wife's death. Porter Capper and his father were on the best of terms just before his death. He was in Thomas H. Capper's employ at the time. He never heard Mr. Thomas H. Capper say anything in regard to his property or either of his sons before his wife's death. He heard Mr. Capper say that Porter was his favorite son; that he had done the work there; and that he should have part of it. He said this to Fred Capper. He had seen Fred Capper violent, so that he jumped at him, and tried to throw him over. This was while Fred was in charge of a nurse. He heard Fred say that he wanted the property, and heard him say it every time he was in there for a week,—once or twice a day. Helen Ray testified, on behalf of the appellant, that she knew Thomas H. Capper for 15 years, and lived in his house for 3 or 4 years. Mr. Capper regarded his son Porter well. After Mrs. Capper's death, Mr. Capper did not appear as usual. He did not have any interest in anything. He told her that he was completely used up. She noticed when she asked him about many of the things that she needed that he was not the same. Fred Capper was always picking on Porter about money affairs. She used to hear him. Fred used to complain of the girl Porter was going with, and she heard him say that Porter should never get a dollar of the money if he could help it. This was said in the father's presence, and both before and after the mother died. The father visited Porter after the death of his wife. Fred said that he did not want Porter to have the money on account of the wife. James C. Bates testified, on behalf of the appellant, that he knew Thomas H. Capper very well; that, after the death of Mrs. Capper, he often talked with him about his sons; that he spoke very affectionately of Porter, calling him 'his baby'; that he said Fred was giving him lots of trouble, that he was obliged to be up nights with him frequently.

"Fred Henry Capper, the respondent, testified that his father had said he could not de-

pend on Porter in business matters; that he could never take a job and depend on Porter to help him finish it, as he was liable to leave him in the lurch at any time; that the draft of the will, dated the 27th October, 1890, had been drawn up by him at his father's dictation; that, after it was drawn, he had put it in his desk, from whence some one had taken it; that he had never shown the paper to Porter, and had never spoken to him in regard to it; that he did not go to Mr. Welch's office with his father; that he had never said in his father's presence that he would kill him or have the property, as was testified to by Fay; that he had never said in his father's presence that Porter would never get a dollar, as testified to by Mrs. Ray. William H. Brown testified, on behalf of the executor, that he had been an intimate friend of Thomas H. Capper for 25 years prior to his death; that the elder Capper, about the time of his wife's death, had told him he should leave his property to Fred; that he (Brown) remonstrated with him, and told him that Porter should have something, but that Mr. Capper would not hear of it. Mitchell A. Dearborn testified on behalf of the executor that he had been an intimate friend of the Capper family for 38 years; that he once, in the autumn of 1894, accompanied the elder Capper on a visit he made to his son Porter's house in Somerville; that, on leaving, Mr. Capper said to leave money to Porter would be like throwing it away. Mrs. Ida Baldwin Capper testified she was the wife of Fred H. Capper; that Thomas H. Capper had told her during his life that he could not trust Porter in business matters, that it was a waste of money to let Porter have any. Charles A. Welch, Esq., an attorney of this court for some 50 years, testified that Thomas H. Capper came to him alone 6 months before the will was drawn, and told him how he wished it made, saying he was going to leave his property mostly to his son Fred. Witness had known Mr. Capper for many years, and so asked him why he left it to one son, and did not divide it equally between both. Mr. Capper, in reply, said Fred was an excellent and very kind son to him, and that Porter was a fine mechanic. As Mr. Welch knew him to be a man of more than average intelligence, but very reticent in regard to his affairs, he asked no further questions. Later, when the will was executed, Mr. Capper came to the office of the witness alone. The witness never saw the paper dated October 27, 1890, until the hearing in the probate court, after the death of the testator.

"Evidence agreed to."

Shepard, Stebbins & Storer, for appellant F. H. Capper. Gargan & Keating and S. C. Brackett, for appellee.

FIELD, C. J. On issues to a jury tried before a justice of this court, the jury found

that the execution of the alleged will was procured "through the undue influence of" Frederick H. Capper, a son of the testator. The jury also found that the alleged will was executed in due form, and that the testator was of sound mind at the time of the execution. No exception was taken to any ruling of the presiding justice at the trial. The executor filed a motion for a new trial upon the issue of undue influence, which was the third issue, on the ground that the finding of the jury was "against the law and the evidence and the weight of the evidence," and he also asked that this issue to the jury be discharged. This motion was overruled, and the executor appealed to the full court. The presiding justice has reported all the evidence introduced at the trial on the issue of undue influence. The report recites: "The sole question which the executor seeks to raise being whether the evidence was sufficient to warrant a finding that the execution of the alleged will was procured by the undue influence of Frederick H. Capper." The report also recites that "the contestant contends that, as the executor took no exception at the trial, and asked for no ruling, and as the motion filed after the trial was overruled, the question sought to be raised by the executor is not now open to him." This question also is reported to the full court.

A motion for a new trial, on the ground that the verdict is against the law and the evidence, is usually addressed to the discretion of the presiding justice. If an aggrieved party could have required the presiding justice at the trial to rule upon the sufficiency of the evidence to warrant the jury in finding affirmatively a particular issue, and neglected to do so, he cannot, as of right, require the presiding justice, on a motion for a new trial, to make a ruling on the subject, or to report the evidence. New trials often are granted on the ground that the verdict is against the evidence, even when there was some evidence to support the verdict, proper to be submitted to the jury. Unless, on the hearing of such a motion, the facts in some proper way are separated from the law, there is no question of law arising from the decision on the motion which can be carried to the full court. But the presiding justice may, if he chooses, in deciding such a motion, report the evidence to the full court; and, if he does so, there may be a question of law which the full court can consider. Without deciding in the present case whether the presiding justice intended to report any question of law if the executor had no right to raise the question, we deem it best to say that we have read the evidence reported, and are of opinion that it is sufficient to warrant the verdict of the jury on the third issue. There is no question of law or fact before us on the appeal from the decree of the single justice disallowing the will, and that decree must be affirmed. The order overruling the motion of the executor for a new trial upon the third issue must also be affirmed. So ordered.

(21 Ind. App. 250)

BOCKMAN v. RITTER.

(Appellate Court of Indiana. Nov. 30, 1898.)

ALIENATING WIFE'S AFFECTIONS — LIMITATIONS — PLEADING — VERDICT — VENIRE DE NOVO — JUDGMENT.

1. In an action for alienating a wife's affections, the complaint need not set forth what was said by defendant to the wife, or the character of the statements whereby her affections were alienated.

2. A complaint for alienating a wife's affections, stating that, four years before, defendant began to poison the wife's mind, does not show that it is barred by the two-years limitation, when it appears that the wife did not leave her husband, and declare she would no longer live with him, until two weeks before suit commenced.

3. Failure, in a complaint for alienating a wife's affections, to aver that defendant knew she was plaintiff's wife, is obviated by averment that defendant knowingly, purposely, and maliciously alienated the affections of plaintiff's wife from him, and broke up his family.

4. Where special findings were so ambiguous as to justify a venire de novo on motion of one party, a judgment on the verdict for the other was properly refused.

Appeal from circuit court, Kosciusko county; H. S. Biggs, Judge.

Action by Hiram B. Ritter against John F. Bockman. There was a judgment for plaintiff, and defendant appeals. Affirmed.

E. Haymond, L. R. Stookey, and A. F. Biggs, for appellant. Frazer & Oldfather and John D. Widaman, for appellee.

BLACK, C. J. In the appellee's complaint against the appellant it was shown that the appellee and one Julia F. Thorn were married on the 4th of January, 1879, and that they lived together as husband and wife from that date until the 12th of September, 1896; that four children were born to them, one of whom had died, and two girls and a boy still survive; that during that period he provided his said wife with all necessary food and clothing, and furnished her with a good and comfortable home; that he treated her kindly, and was a good and "dutiful husband"; "that, about four years ago, the defendant began to poison the mind of his said wife against the plaintiff, and caused her to dislike him, by maliciously making to her false statements regarding this plaintiff, and, by showing her numerous marks of kindness and affection, his said wife became in love with said defendant. And the plaintiff avers that on discovering the condition of mind of his said wife towards him, and that she was in love with the said defendant, he tried to reason with her, and to induce her to have nothing more to do with the said defendant, and he forbade the said defendant to have anything to do with his said wife. And the plaintiff avers that the defendant herein persisted in his attentions to his said wife; that he would visit her at the house of this plaintiff when the plaintiff was away from home, both in the daytime and at night, and that, after the death of defendant's wife, his at-

tentions to plaintiff's wife became more numerous, and his visits more frequent, until plaintiff's wife informed this plaintiff that she cared nothing for him, and would not live with him longer, that she had more regard and affection for the defendant than she had for this plaintiff; and on the said 12th day of September, 1896, she finally left the plaintiff, left her home, and declared that she would live with him no longer. And the plaintiff avers that the defendant has alienated the affections of his said wife from this plaintiff, and broken up plaintiff's family; that he has done so knowingly, purposely, and maliciously; and that thereby he has deprived this plaintiff of his said wife, and her aid, comfort, and love." Wherefore, etc.

It is contended that upon a motion of the appellant, which was overruled, the court should have compelled the appellee to make the complaint more specific, by stating therein what false and malicious statements the appellant made to appellee's wife, stating the language used, and when and where the statements were made. We think the court did not err in this refusal. The gist of such an action is the plaintiff's loss of the society, comfort, and assistance of his wife. In an action on the case for inducing the plaintiff's wife to continue absent, it was held sufficient to state that the defendant unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent, by means of which persuasion she did continue absent, etc., whereby the plaintiff lost her society, without setting forth the means of persuasion used by the defendant. *Winsmore v. Greenbank*, Willes, 577; 1 Chit. Pl. 405. See *Wales v. Miner*, 89 Ind. 118; *Highman v. Vanosdol*, 101 Ind. 160. In passing upon the action of the court upon the motion to make more specific, it is sufficient to say that it is not necessary in such a complaint to set forth what was said by the defendant to the plaintiff's wife, or even to state the character of any statement made by him to her, whereby her affection was alienated, and she was induced to separate herself from her husband.

In discussing the action of the court in overruling a demurrer to the complaint for want of sufficient facts, it is claimed that the complaint shows that the cause of action was barred by the statute of limitations; that it appears from the complaint that whatever damage was done was accomplished more than two years before the commencement of the action. This claim in argument is based upon the statement in the complaint that "about four years ago the defendant began to poison the mind" of the appellee's wife. But it appears from the complaint that the injurious consequence of the appellant's wrongful conduct, for which the appellee sought damages, was not fully accomplished until the wife left her home and the appellee, and declared that she would not live with him longer. This was on the 12th day of September, 1896, which was less than two

weeks before the commencement of the action. That it required four years of wrong to accomplish this result cannot operate to the benefit of the wrongdoer. We are not required to determine whether it should not emphasize the injured husband's loss.

It is further objected that the complaint is bad for want of an averment that the appellant had knowledge of the marital relation between the appellee and his wife. The averment that the appellant had knowingly, purposely, and maliciously alienated the affection of the appellee's wife from him, and broken up his family, taken in connection with the preceding averments of the complaint, fully obviates any objection to the pleading upon such ground.

There were two trials of the cause, and it is assigned that the court erred upon the first trial in overruling the appellant's motion for judgment in his favor upon the special verdict rendered by the jury at that trial; also, that it erred in sustaining appellee's motion after the first trial for a venire de novo. The special verdict on the first trial, consisting of interrogatories and answers, was defective. It contained much evidence against the appellant, with some inconsistencies. It was so ambiguous and uncertain that we think it was not error to grant a venire de novo. If we are right in this conclusion, there could be no error in refusing judgment for the appellant upon the special verdict.

Counsel for appellant has criticised one of the instructions to the jury. When considered in connection with the other instructions and the findings of the jury in answer to interrogatories returned with the general verdict, the instruction in question cannot be regarded as so incomplete or defective as to render the giving thereof available error, and the discussion of the matter would not be useful. The judgment is affirmed.

(21 Ind. App. 254)

MILLER et ux. v. FULLER.

(Appellate Court of Indiana. Nov. 30, 1898.)

PLEADING—DEMURRER—VERDICT—APPEAL AND ERROR—BILL OF EXCEPTIONS—CONTRACTS.

1. An averment that defendants entered into a contract made a part of the pleading is good on demurrer, though the name of one defendant does not appear in the body of the contract, but is signed thereto.

2. After special verdict, a defective averment becomes immaterial.

3. An objection to a ruling, to be availing, must be made in time to give the court opportunity to change it.

4. A statement in a bill of exceptions "that this was all the testimony given in the cause" is defective, "testimony" and "evidence" not being synonymous.

Appeal from circuit court, Ripley county; Willard New, Judge.

Action by William H. Fuller against Reuben H. Miller and Lizzie Miller, his wife. There was a judgment for plaintiff, and defendants appeal. Affirmed.

John B. Rebuck and Nicholas Cornett, for appellants. Jones & Jones, for appellee.

OOMSTOCK, J. Appellee instituted this action against appellants to recover damages for the breach of an executory contract for the conveyance of real estate, and sale of drugs, fixtures, and medical practice, of appellant Reuben H. Miller, who was a practicing physician, and Lizzie Miller, his wife, residing on the premises described in the contract, at the village of Cross Plains, Ripley county, Ind. Appellee was a physician residing near the home of appellants. The contract is made a part of the complaint as an exhibit. Appellants demurred separately to the complaint, which demurrers were overruled, and exceptions duly reserved. The cause was put at issue by general denial and special answer.

No question is raised on any of the pleadings but the amended second paragraph of complaint, on which the cause was put at issue and tried, and we need therefore refer only to it. At the request of appellants, the jury trying the cause returned a special verdict, upon which both parties moved for judgment. The court overruled that of appellants, sustained that of appellee, and rendered judgment in his favor for \$1,000. Appellants' several motions for a venire de novo and for a new trial were overruled, and exceptions taken. The errors assigned are: (1) The court erred in overruling the separate demurrer of Reuben H. Miller to the amended second paragraph of complaint. (2) In overruling the separate demurrer of appellant Lizzie Miller to the amended second paragraph of complaint. (3) In overruling appellants' motion for a venire de novo. (4) In its statements of law. (5) In overruling appellants' motion for judgment on the special verdict of the jury. (6) In overruling the appellants' motion for a new trial. (7) In overruling Reuben H. Miller's motion for a new trial. (8) In overruling Lizzie Miller's motion for a new trial.

The first, third, and fourth specifications in the assignment of errors are not discussed, and are therefore, under the familiar rule, waived. Under the second specification, appellants' counsel contend that no cause of action is shown against appellant Lizzie Miller. The complaint avers that the plaintiff and defendants entered into the written agreement upon which it is based, and which is made a part thereof. Her name does not appear in the body of the instrument, but her name is signed thereto. She is thus sufficiently connected therewith. Besides, a special verdict having been returned, even if this allegation was defective, it becomes immaterial. At most, it could only be a defective averment, not the entire omission of a fact essential to a cause of action. *Woodward v. Mitchell*, 140 Ind. 406, 39 N. E. 437; *Assurance Co. v. McCarty*, 18 Ind. App. 453, 48 N. E. 265; *Rau v. Manufacturing Co.* (Ind. App.) 51 N. E. 945; *Assurance Co. v. Koonts*, 17

Ind. App. 54, 46 N. E. 95. In addition, the jury, in answer to a proper interrogatory, found that she entered into the contract in suit.

The argument of appellants' counsel in support of the fifth specification of error is chiefly based upon the findings of the special verdict. They contend that each of many of the interrogatories submitted to the jury calls for more than one fact; that there are others which state the evidence, and not facts; and still others that call for mere legal conclusions. The objections made apply to some of the interrogatories named, but the record does not disclose that appellants at any time objected or excepted to them. Having failed to do this, it is now too late. An objection to any ruling of the court, to be availing, must be made in time to give the trial court an opportunity to change its ruling.

The questions sought to be presented by the sixth, seventh, and eighth specifications cannot be considered unless the evidence is in the record. Appellee's counsel insist that, as it is stated in the bill of exceptions that "this was all the testimony given in the cause," and as there is no statement that "this was all the evidence given in the cause," the evidence is not in the record. As was said by Elliott, J., in *Kleyla v. State*, 112 Ind. 146, 18 N. E. 255: "The authorities require us to yield to this contention. The word 'testimony' is not synonymous with the word 'evidence.'" *Harvey v. Smith*, 17 Ind. 272; *Brickley v. Weghorn*, 71 Ind. 497; *Sessengut v. Posey*, 67 Ind. 408; *Sandford Tool & Fork Co. v. Mullen*, 1 Ind. App. 207, 27 N. E. 448; *McDonald v. Elfes*, 61 Ind. 279; *Printing Co. v. Morse*, 60 Ind. 153; *Ingel v. Scott*, 86 Ind. 518; *Barley v. Dunn*, 85 Ind. 338; *Mattinger v. Railway Co.*, 117 Ind. 136, 19 N. E. 733; *Ehrisman v. Scott*, 5 Ind. App. 596, 32 N. E. 867. Admitting that there are interrogatories forming part of the special verdict which the trial court might properly have rejected had timely objection been made, we cannot say, in view of the entire verdict, that the trial court erred in its judgment rendered thereon. Judgment affirmed.

(21 Ind. App. 267)

SHELBURN COAL-MIN. CO. v. DELASHMUTT.

(Appellate Court of Indiana. Nov. 30, 1898.)

JUDGMENT—RES JUDICATA.

Through proceedings in an action in which a receiver was appointed, a mortgagee acquired title to the property. On the trial of his exceptions to the receiver's report, a laborer was adjudged to have a lien on the property for services performed for the receiver. *Held*, in an action by the laborer to foreclose the lien, that the mortgagee's grantee could not question the validity of the lien.

Appeal from circuit court, Sullivan county; W. W. Moffett, Judge.

Action by Frank Delashmutt against the

Shelburn Coal-Mining Company to foreclose a lien on defendant's property for services performed for a receiver who had had charge of the property. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

John T. Hays, for appellant. Buff & Nesbit, for appellee.

HENLEY, J. This cause presents but one question for our decision, viz. is the complaint sufficient to withstand a demurrer for want of facts? The allegations of the complaint are substantially as follows: That appellant is a corporation engaged in the operation of a coal mine at Shelburn, in Sullivan county, Ind., which coal mine is particularly described, as to location, and a particular description is given of all the real estate. It is further averred: That on the 14th day of June, 1893, the Shelburn Coal Company executed a mortgage upon said described property to one C. C. Heisen, which mortgage was duly recorded in the recorder's office of Sullivan county, Ind., on the 22d day of June, 1893, in Mortgage Record 27, on page 524; and on the 14th day of June, 1893, the said Shelburn Coal Company executed to said Heisen a chattel mortgage upon the personal property connected with and used about said described mine, which chattel mortgage was recorded on the 22d day of July in the recorder's office of said county and state, in Mortgage Record 28, on page 52. That after the execution of said mortgages as aforesaid an action was commenced in the circuit court of Sullivan county by one Mary McClure against one Richards and others, involving and affecting said mine so described, and such proceedings were had in said action as that one Frank Binz was by the court appointed receiver for the said Shelburn Coal Company; and the said Heisen filed a cross complaint in said action, and foreclosed his mortgage, and obtained thereunder the ownership of all the real estate, and the personal property was turned over to the said Heisen, under the conditions of the chattel mortgage. That said Heisen became the owner of all of said property mortgaged to him by the Shelburn Coal Company, subject to all valid claims and liens for labor done under the said Binz as receiver. That in April, 1895, the said receiver filed his report of his said trust in the Sullivan circuit court, in which report the said receiver reported appellee's claim as a valid claim for work and labor done in and about said mine under said receiver, in the sum of \$136. On the 6th day of April, 1895, the said Heisen filed exceptions to the report of the receiver; claiming in said exceptions that the receiver was not legally acting, and that all debts and contracts made by him were unauthorized, and that all claims for labor done in and about said mines under

the authority of said receiver were not a charge or lien against the property. That appellee's claim was one of the claims so objected to by said Heisen. That issues were joined upon said exceptions, a trial had in said court, and a finding and judgment to the effect that the claims for work and labor as reported by said receiver were correct in amount, and were a lien upon said property. A copy of the finding and judgment is made a part of the complaint. It is further alleged that said judgment is in full force and effect, and remains unreversed and unsatisfied; that appellee did perform labor in and about said mine as aforesaid at the special instance and request of the said receiver, and while the said Binz was such receiver, a bill of particulars of which work is filed with and made a part of the complaint; that there is due appellee the sum of \$136, with 6 per cent. interest for two years; that said Heisen and others have formed a corporation known as the Shelburn Coal-Mining Company, which last-named corporation is now in the possession and control, and is operating and claiming the ownership, of the said mine and mining property herein described. Judgment is asked for \$170; that the same be declared a lien upon the property described in the complaint; that said lien be foreclosed, and the property ordered sold to pay appellee's claim. Appellant's demurrer to the complaint was overruled.

As before stated, this ruling of the lower court is the only question presented by the record in this cause. The necessary inference from the complaint is that the Shelburn Coal Company owned the mining property therein described, at the time of the execution of the mortgages to Heisen; that, in a certain action begun in the Sullivan circuit court, a receiver for said property was appointed; that, by and through proceedings instituted in said action, the said Heisen obtained a title to all of said mortgaged property, which property was subject to the lien of appellee's claim, as established by the court in its judgment rendered on the exceptions to the receiver's report. Heisen was a party to both actions. He was the cross complainant in the action in which the receiver was appointed, and excepted to the report of the receiver. It was upon the trial of the exceptions to the receiver's report that appellee's claim was declared valid, the amount fixed, and it was held to be a lien upon the property purchased by Heisen. Whatever title appellant has in the property was acquired from Heisen. Appellant cannot now question the legality of appellee's claim. The interested parties were all before the court in the action wherein the appellee's rights were adjudicated. We think the complaint states abundant facts, which when uncontroverted, justified the court in rendering judgment for appellee. The demurrer was properly overruled. Judgment affirmed.

(21 Ind. App. 261)

**NATIONAL EXCH. BANK OF ANDERSON
v. BERRY et al.**

(Appellate Court of Indiana. Nov. 30, 1898.)

PROMISSORY NOTES — HOLDERS FOR VALUE — APPEAL — EVIDENCE — BILL OF EXCEPTIONS — REVIEW — SPECIAL INTERROGATORIES.

1. A holder of notes as collateral security is a holder for value.

2. Ordinary promissory notes were indorsed to a bank as collateral security for a note of the indorser. The cashier knew that the maker of the notes pledged had ample means, and the indorser stated they represented advancements of money by him to the maker. The latter lived a few miles in the country, and the bank made no inquiry of her; relying on the "solvency of the notes," and on "the fact that they were payable in bank." *Held* not to charge the indorsee with notice of defenses.

3. Horner's Rev. St. 1897, § 650a, providing that, to make evidence part of the record, it is sufficient if the transcript contains the original bill of exceptions embracing such evidence, if it appears from the record that such bill was duly presented to the judge, approved and signed by him, and filed with the trial clerk or in open court, and providing that the act shall not apply "to cases now pending on appeal," extends to appeals which were perfected after the act became operative; and in such case the record need not affirmatively show that the long-hand manuscript of the evidence was filed in the clerk's office before it was embraced in such exceptions.

4. A special interrogatory, whether, when notes were indorsed, the indorsee could have learned of the maker that the notes were without any consideration, was erroneous, as calling for a conclusion of law.

Appeal from superior court, Madison county; Henry C. Ryan, Judge.

Action by the National Exchange Bank of Anderson, Ind., against Henrietta M. Berry and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

Henry, McMahan & Van Osdol, for appellant. W. S. Ellis and Kittinger, Reardon & Diven, for appellees.

COMSTOCK, J. Appellant (plaintiff below) instituted this suit to recover of appellees on five promissory notes executed by Henrietta M. Berry to her co-appellee, and by him indorsed before maturity to appellant as collateral security for two promissory notes executed by appellee McMillen to appellant for borrowed money. Appellee Henrietta M. Berry answered in five paragraphs: (1) A general denial; the others pleading fraud, want of consideration, and set-off. Appellant replied (1) by general denial; (2) setting up a consideration on part of appellant, and alleging that appellant had no notice of any fraud, or want of consideration of the notes in question. Upon the issues thus formed a trial was had by a jury, resulting in a verdict in favor of appellee Henrietta M. Berry. Appellant moved for a new trial upon the grounds (1) that the verdict was not sustained by the evidence; (2) that the verdict was contrary to law. This motion was overruled, and exceptions taken. Appellee McMillen joins in the appeal, and confesses error.

Appellant's counsel discuss but one specification in the assignment of errors (thus waiving the others), which is that the court erred in overruling appellant's motion for a new trial. The notes sued on were governed by the law merchant, and, with the exception of one assigned before maturity, as security for an indebtedness of McMillen due appellant. "One who takes the assignment of notes governed by the law merchant as collateral security is a holder for value." *Valette v. Mason*, 1 Ind. 288; *Work v. Brayton*, 5 Ind. 397; *Straughan v. Fairchild*, 80 Ind. 598; *Farmers' Loan & Trust Co. v. Canada & St. L. Ry. Co.*, 127 Ind. 268, 26 N. E. 784. If appellant took these notes for value, before maturity, without notice that Henrietta M. Berry had any defense to them, it took them freed from any defense which might have been made against them in the hands of McMillen.

Appellant asks a reversal of judgment upon the ground that there is no evidence showing, or from which it could reasonably be inferred, that appellant had notice of appellee Berry's defense to the notes. We understand the law to be, as announced by the supreme and appellate courts of this state with reference to the purchase of negotiable paper before maturity, that if there is anything about the paper itself, or the circumstances attending its presentment for discount, calculated to excite suspicion in the mind of a reasonably cautious person, it is the duty of the purchaser to make inquiry as to its genuineness; otherwise not. *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316; *Bank v. Leonhart*, 126 Ind. 206, 25 N. E. 1099. *Hankey v. Downey*, 3 Ind. App. 331, 29 N. E. 606, and authorities there cited. Under this view of the law, let us examine the evidence: Appellee Berry in her testimony, admitted the execution of the notes. The only witness who testified as to their negotiation was the cashier of the appellant bank, between whom and McMillen (appellee) the business resulting in the indorsement of the notes in question was transacted. The notes are set out in the evidence. There is nothing unusual in the form or on the face of them, to arouse suspicion. The cashier testified that appellee McMillen was indebted to the bank for borrowed money; that the bank loaned him an additional \$100, taking a new note for \$470, covering the total indebtedness, and received the notes in suit as collateral; that he (the cashier) knew at the time the notes were indorsed to the bank that Berry, the maker of the notes, owned 80 acres of land a few miles from town, on which there was an incumbrance of \$1,300 or \$1,400; that he believed it ought to bring \$3,200; that, before the indorsement of the notes to the bank, McMillen informed him that the notes had been executed to him for a valuable consideration,—for money advanced by him to appellee Berry; that he knew appellee Berry; that she lived a few miles from the bank, in the country; that he made no inquiry concerning the notes of her; that he took them "relying upon the fact that they were payable in bank,"

and "on the solvency of the notes." The foregoing facts are undisputed. In them we see nothing to deprive appellant of the rights of a good-faith purchaser, for value, before maturity, of commercial paper. As to the merits of the controversy between appellees Berry and McMillen, we intimate no opinion. We do not understand *Cronkhite v. Nebeker*, 81 Ind. 319, to be in conflict with the later decision of the supreme court cited herein.

Counsel for appellees contend that the evidence is not properly in the record, and that, therefore, the questions presented by the assignment of errors cannot be considered by this court. They insist that the evidence is not in the record because it does not affirmatively appear that the stenographer's longhand manuscript of his shorthand notes was filed in the clerk's office before it was incorporated in the bill of exceptions. Whether it was or was not so filed, we need not decide. The transcript was filed in this court December 31, 1897, and is therefore to be tested by the act approved March 8, 1897 (Acts 1897, p. 244; *Horner's Rev. St. 1897*, § 650a). *Store Co. v. Hammond* (Ind. App.) 51 N. E. 506. Under that act, if it appears from the record that the original bill of exceptions embracing the evidence was presented within the time allowed to the judge, approved and signed by him, and duly filed, it is sufficient. The record shows that this was done.

With the general verdict, the jury returned answers to certain interrogatories. Among them was the following, numbered 8, and answer thereto: "At the time of the indorsement of the notes in suit to the plaintiff, could the plaintiff have learned, by making proper inquiry of the defendant Henrietta M. Berry, that each and all of said notes so executed on the 26th day of February, 1896, were given to said John M. McMillen, plaintiff's indorser, without any consideration whatever? Answer. Yes." The question called for a legal conclusion, and must therefore be disregarded. The remaining interrogatories and answers were pertinent to the questions of fraud and want of consideration as between appellees, but do not show notice to appellant. Judgment reversed, with instructions to the trial court to sustain appellant's motion for a new trial.

(21 Ind. App. 707)

ADDISON SCHOOL TP. et al. v. SCHOOL CITY OF SHELBYVILLE.

(Appellate Court of Indiana. Nov. 30, 1898.)

SUPREME COURT—DECISIONS—RETROACTIVE EFFECT
—Dog Tax.

The decision of the supreme court requiring township trustees to distribute the surplus dog fund among towns and cities, under *Burns' Rev. St. 1894*, § 8654 (*Horner's Rev. St. 1897*, § 2651h), thereby overruling a prior decision to a contrary effect, enables a town to recover its share of such fund, though the trustees had expended it for other purposes, after the first decision was made, and before it was overruled.

Appeal from circuit court, Shelby county; W. J. Buckingham, Judge.

Action by the school city of Shelbyville against the Addison school township and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Wilson & Yarling, for appellants. Hord & Adams, for appellee.

ROBINSON, J. Appellee, in this action, seeks to recover its pro rata share of the surplus dog fund remaining in the hands of appellant for the years 1893 and 1894. It is alleged in the first paragraph of complaint that, in March of said year 1893, the surplus dog fund over \$50 in the hands of appellant was \$311.66; that a portion of said sum should have been distributed to appellee in proportion to its enumeration for school purposes, and that said pro rata share is \$278.77; that appellee received no part of said fund; that appellant failed and refused to pay any part thereof to appellee, but expended the same for the benefit of the schools of the school township. The second paragraph of complaint seeks to recover the sum of \$244.33, appellee's pro rata share for the year 1894. A demurrer by Addison school township to each paragraph of the complaint was overruled, and, appellant refusing to plead further, judgment was rendered in appellee's favor for \$523. The overruling of this demurrer is the only question presented.

By section 8654, *Burns' Rev. St. 1894* (section 2651h, *Horner's Rev. St. 1897*), provision is made for the disposition, by the township trustee, of the surplus dog fund over \$50 in his hands in March of each year. The above section was construed by the supreme court in the case of *Taggart v. State*, 142 Ind. 668, 40 N. E. 260, 42 N. E. 352; and it was held that the trustee, under that section, was required to turn over to each school corporation within his township its pro rata share of such fund in proportion to its enumeration. It is argued by counsel for appellant that, at the times complained of, it was the law, as declared by the supreme court, that no part of said fund belonged to appellee, and that the question here is whether the rights of the parties to the fund in this action will be determined by the law as it is now declared to be, or as it was declared to be by the supreme court at the times it is claimed appellant obtained the funds sued for; in other words, whether a decision by the supreme court made since the acts complained of were done will be given a retroactive effect. In the recent case of *Center School Tp. v. State*, 150 Ind. 168, 49 N. E. 961, the supreme court had before it this same question, and held adversely to the position maintained by appellant's counsel. Upon the authority of that case, the judgment must be affirmed. See *Center School Tp. v. State*, 20 Ind. App. 703, 51 N. E. 103. Judgment affirmed.

(21 Ind. App. 233)

**PORT HURON ENGINE & THRESHER CO.
v. SMITH et al.**

(Appellate Court of Indiana. Nov. 30, 1898.)

**APPEAL — RECORD — ASSIGNMENTS OF ERROR —
CAUSES FOR NEW TRIAL—REVIEW—EVIDENCE —
INSTRUCTIONS—SALES—WARRANTY — NOTICE OF
BREACH—AGENCY.**

1. Error in suppressing a deposition, or in giving or refusing instructions, is ground for new trial, and hence cannot be independently assigned as error on appeal.

2. An entry in the record that "all the instructions to the jury are now filed and ordered to be made a part of the record without a bill of exceptions" does not include instructions requested and refused.

3. No error can be predicated on instructions to which no exceptions were taken below.

4. Where one bought a machine on an agreement that a warranty thereof would be considered fully satisfied unless the buyer gave the seller and the agents from whom they purchased written notice within 10 days after trial and its failure to fulfill the terms of the warranty, and the buyer gave the agent selling it a verbal notice of defects, and he, acting for the seller, undertook to remedy them, no other notice is required, since notice to the agent was notice to the principal.

5. The appellate court cannot weigh the evidence to determine where the preponderance lies.

Appeal from circuit court, Huntington county; J. W. Adair, Judge.

Action by the Port Huron Engine & Thresher Company against John W. Smith and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Thomas G. Smith, J. C. Branyan, and E. D. Smith, for appellant. R. A. Kaufman and Whitelock & Cook, for appellees.

ROBINSON, J. Appellant brought suit against appellees on a promissory note executed by the appellees as part payment for a threshing outfit, consisting of traction engine, separator, and necessary appurtenances, purchased of the Upton Manufacturing Company, which note was afterwards, for value, and before maturity, assigned to appellant. Appellees answered in general denial, and also an answer of warranty and breach thereof. A trial by jury resulted in a verdict for appellees.

The first assignment of error—"sustaining defendants' motion to suppress parts of plaintiff's deposition, to which the plaintiff at the time excepted"—presents no question, for the reason that such a motion must first be specified as a cause for a new trial; and such was not done. *Burnett v. Milnes*, 148 Ind. 230, 46 N. E. 464; *Hatton v. Jones*, 78 Ind. 466; *Patterson v. Lord*, 47 Ind. 203.

The next twelve assignments of error are the refusing to give certain instructions, and the giving of certain instructions therein specified. These assignments present no question. "The assignment of the causes for a new trial as error is not the proper mode of raising any question embraced in the motion for a new trial." *Busk. Prac.* p. 126; *Todd v. Jackson*, 75 Ind. 272; *Freeze v. De*

Puy, 57 Ind. 188; *Baecher v. State*, 19 Ind. App. 100, 49 N. E. 42.

The fourteenth assignment of error is overruling appellant's motion for a new trial. The fourth, fifth, sixth, and seventh causes for a new trial are the refusal of the court to give instructions numbered 9, 11, 12, 14, and 15, requested by appellant. The instructions given to the jury, and those requested by appellant, and refused, have not been brought into the record by any bill of exceptions. An attempt was made to have them made a part of the record by order of court. The record entry for that purpose is as follows: "And all the instructions to the jury are now filed and ordered to be made a part of the record in the cause, without bill of exceptions, to wit." Then follows a copy of all the instructions given, and of instructions requested and refused. The point is made by appellees' counsel, and seems to be well made, that none of the instructions requested by appellant and refused by the court are properly in the record. In the sixth clause of section 542, Burns' Rev. St. 1894 (section 533, Horner's Rev. St. 1897), it is provided that "all instructions given by the court must be signed by the judge, and filed together with those asked for by the parties, as a part of the record." In *Childress v. Callender*, 108 Ind. 394, 9 N. E. 292, the court, speaking of the above provision, said: "In construing this statutory provision, it has been uniformly held that, in order to save any question for our decision in reference to the giving or refusal of instructions, it must be shown, in some manner, that such instructions were filed 'as a part of the record.' *Supreme Lodge v. Johnson*, 78 Ind. 110; *O'Donald v. Constant*, 82 Ind. 212; *Elliott v. Russell*, 92 Ind. 526; *Olds v. Deckman*, 98 Ind. 162; *Landwerlen v. Wheeler*, 106 Ind. 523, 5 N. E. 888." The expression "all the instructions given to the jury" cannot be said to include all instructions requested and refused. This is not an order that all instructions requested should be filed and made a part of the record. It is well settled that instructions given and those requested must be brought into the record, either by a bill of exceptions or by order of court. The instructions requested and refused have not been brought into the record by either of these methods, and no question is presented on the refusal to give such instructions.

The eighth and ninth causes for a new trial were the giving to the jury instructions 16 and 18. The instructions which were given to the jury were filed and ordered made part of the record, as appears from the entry above set out. But it is argued that no question is presented upon the giving of these instructions, because no proper exception was taken. As already stated, the instructions were not brought into the record by any bill of exceptions. Nor is there anything in the record to show that appellant excepted to the giving of instructions 16 and 18 at the time

they were given or at any time. Neither does the order bringing the instructions into the record; nor is it shown anywhere in the record, either by marginal notes by the judge and dated, or in any other manner, that appellant took any exception to the giving of the above instruction. It therefore follows that appellant cannot complain in this court of the supposed error of the trial court in giving these two instructions. *Railroad Co. v. Lutes*, 112 Ind. 276, 11 N. E. 784, and 14 N. E. 706; *Olds v. Deckman*, 98 Ind. 162; *Landwerlen v. Wheeler*, 106 Ind. 523, 5 N. E. 888; *Joseph v. Mather*, 110 Ind. 114, 10 N. E. 78; *Silver v. Parr*, 115 Ind. 113, 17 N. E. 114.

In the interrogatories returned with the general verdict, the jury found that the engine and threshing machine outfit were sold to appellees by Esta G. Crill, agent of the Upton Manufacturing Company; at the time the machinery was ordered, a warranty was given on the same; that the engine was not well made, from good material, and durable, with proper care and management; that Lyman Myers, the engineer, was sufficiently experienced and competent to properly operate said engine; that said engine, when in the hands of an experienced and competent engineer, did not develop full 12 horse power; that, when said machinery failed to operate well, appellees, shortly after commencing to operate the same, gave written and verbal notice to Crill, the agent, at North Manchester, Ind.; that said Crill came to appellees, and assisted and instructed them in operating the same, and that he did not leave said machinery operating well when he left; the machine was never in good running order, and notice of that fact was given different times; that appellees ran the machine five or six weeks altogether in the fall of 1890; that the Upton Manufacturing Company did not furnish any new part or repairs; that the Upton Company agreed to furnish duplicate parts of said machinery, free of charge, when requested by appellees, but did not fulfill the agreement; that during the fall of 1890, appellees threshed with said machinery about five or six thousand bushels; that appellees, within 10 days after a trial and the failure of said machinery to operate satisfactorily, and in full of said warranty, gave written and verbal notice to the Upton Company, through their agent, Crill; that the agent, Crill, after he had tried to make the machine do good work, and had failed, informed appellees that he could not make said machinery do good and successful work, and that appellees informed Crill that they would not undertake to operate said machinery any longer in that condition; that said Crill then and there stated to appellees that he would notify the company to send some one to fix the machinery, and for them to go on and thresh and do the best they could until the man came, and that appellees relied upon such statement of said Crill; that the company never sent any one to fix the machinery. The warranty contain-

ed in the original order or contract of sale of said machinery provides, among other things, that it was well made, from good material, and durable with proper care, and that the engine was of the capacity represented, "conditioned that if, upon trial, the purchasers are unable to make it operate well, notice is to be given to the party selling it, and to the Upton Manufacturing Company, at Port Huron, Mich., and time given to get to it and put it in order. If they are not able to make it perform as above, the purchasers rendering necessary assistance, and the fault is in the machine, it is to be taken back, and the payment refunded, or the defective part remedied. But if the purchasers fail to make it perform through improper management or want of skill, and call on the manufacturers or their representatives as above stated, then the purchasers are to pay all expenses incurred. This warranty shall be considered fully satisfied unless the purchasers shall give us, and our agents of whom they purchased said machinery, written notice, within ten days after trial, of its failure to fulfill the terms of the warranty."

There is no evidence in the record that appellees gave written notice to the Upton Company. There is evidence that notice was given the agent, Crill, and that he acted upon such notice. It is argued by counsel for appellant that this is not sufficient. A contract of warranty very similar to that in the case at bar was before this court in *Thresher Co. v. Kennedy*, 7 Ind. App. 502, 34 N. E. 856. In the warranty in that case it was provided that, if the machine should fail to fill said warranty, written notice should be given to plaintiff, at Springfield, Ohio, and also to the local agent of whom the machine was purchased, stating wherein it failed to fill said warranty, and a reasonable time allowed to remedy such defect. Speaking of a paragraph of answer setting up this warranty, and averring that notice of defects was given to the agent who sold the machine, the court said: "As to this paragraph, appellant's counsel say it is defective, in that there is no averment that the defendants notified the plaintiff in writing, at its home office, in Springfield, Ohio. But there is an averment that its general agent was notified, and that, through its agent, it accepted and acted upon such notice. By such action, the appellant waived the written notice." See, also, *Machine Co. v. Gray*, 100 Ind. 285; *Loan Co. v. Dunn*, 106 Ind. 110, 6 N. E. 131.

There was some evidence that the engine was defective; was unskillfully constructed; that it would not furnish the necessary power for threshing, on account of its defective construction; that the separator did not clean the wheat; that the agent Crill was notified of the failure of the machine to properly work, and tried to remedy the defects, and failed, and stated to the purchasers that he himself was unable to fix it, and for appellees to go ahead with it, and do what they

could, and he would send or write at once for a man to the company to come and fix it, and see that it was made satisfactory; that when taking the engine home when first purchased, and when Agent Crill was along, the engine failed to work on the road home, and had to be hauled home with a team; that its defects never were remedied by the sellers; that, some five or six weeks after the machine was purchased, Crill told appellees that he had notified the company about the defects, but it does not appear from the evidence when Crill gave the company this notice. It is not disputed that Crill was the agent of the Upton Company to make sales of its machinery, and was such at the time he received notice of the defects, and tried to remedy them. He, as agent, had sold the machine upon the warranty, and the sale could not be said to be complete until the seller made the machine comply with the warranty. What Crill did afterwards in trying to remedy defects, and in the promises made by him, were in the line of perfecting the sale. It was a matter within the scope of the agency and in such case notice to the agent is notice to the principal. As is said in *Thresher Co. v. Kennedy*, supra: "His powers for that purpose were general, and with reference thereto he was a general agent. As such, he received notice of the defects in said machinery, and notice to him was notice to the principal. His subsequent acts and promises were in the line of perfecting the sale." The rule has long been declared that notice to an agent of a corporation relating to any matter of which he has the management and control is notice to the corporation. *Railroad Co. v. Ruby*, 38 Ind. 204. And it has been held that this rule is peculiarly applicable to foreign corporations doing business in this state. *Thresher Co. v. Kennedy*, supra, and cases there cited. There was evidence that notice of the defects was given the agent, and, acting for his principal, he undertook to remedy them. Under the above authorities, this was sufficient. Counsel for appellant cite the case of *Selberling & Co. v. Rodman*, 14 Ind. App. 460, 43 N. E. 38. In that case the purchaser did give notice to both the agent and the company, and, without waiting or giving the company time to get to and remedy the defects, he returned the machine to the place he received it; and, when the company's agent afterwards offered to make the machine good as warranted, the purchaser refused to permit the repairs to be made, or to accept the machine. It is true in that case it is said that notice to the agent and the company were conditions precedent to be observed and performed by the purchaser before he could claim a breach of the warranty. But neither in that case nor in the authorities there relied upon does it appear that the agent responded to the notice, and, acting for the company, undertook to remedy the defects. The turning point in that case seems to have been the failure of

the purchaser to give the company or its agent time or opportunity to reach the machine, and attempt to make good its defects.

Appellant's counsel have argued at some length the evidence; but this court cannot weigh the evidence to determine where the preponderance lies. There is some evidence to support the verdict on all the material issues in the case. We are unable to see anything in the answers to the interrogatories inconsistent with the general verdict. While the answers to some of the interrogatories may not be supported by sufficient evidence, yet there is evidence to support the answers upon all the material issues in the case which have been discussed by counsel for appellant. We find nothing in the record to warrant our interference with the judgment of the trial court. Judgment affirmed.

(21 Ind. App. 541)

FRICK CO. v. BARRETT.¹

(Appellate Court of Indiana. Nov. 30, 1898.)

CONTRACTS—EXECUTION—PLEADING.

From an averment that a contract was executed in duplicate by two parties, it is presumed that it was delivered.

Appeal from circuit court, Morgan county; George W. Grubbs, Judge.

Action by the Frick Company against Cyrus C. Barrett. From a judgment for defendant, plaintiff appeals. Affirmed.

Oscar Matthews, for appellant. L. P. Newby and C. G. Renner, for appellee.

WILEY, J. Appellant sued appellee upon a promissory note, which was originally \$2,000, but, preceding the commencement of the action, appellee had made a payment upon it of \$1,500. Appellee filed an answer of general denial and a cross complaint. In the latter, appellee admits the execution of the note sued on, but avers: That the consideration of the note was part of the contract and purchase price of certain machinery, etc., bought by appellee of appellant for the manufacture of ice and the erection and building of an ice plant, pursuant to an agreement between the parties. That, after said note became due, a controversy arose between appellant and appellee as to parts of said ice plant for which the note was given. That, in order to settle said controversy, appellant and appellee, on the 27th of January, 1897, entered into a written contract that, in consideration of appellee paying to appellant \$1,500 cash on said note, appellant would furnish certain additional articles to complete and equip said plant. By the terms of said agreement, said articles were to be furnished and delivered to appellee, and placed in position in said ice plant, according to the directions of appellee, within 35 days from the date of the contract; if so furnished and delivered and placed within 35 days, then appellee was to pay the balance of said note; but, on failure or refusal of appellant to per-

¹ Rehearing denied.

form its part of the agreement within the time fixed, then appellant was authorized to buy and place said articles at his own expense in said plant, and in which event the balance due on said note was to be "deemed fully paid, satisfied, settled, and canceled." That appellant has wholly failed to comply with its said agreement, and did not, within the time fixed by said contract, furnish, deliver, and place in said plant said articles, within the 35 days, and appellee was compelled to, and did, purchase said articles at his own expense. The contract referred to is filed as an exhibit to the cross complaint, and the relief asked is that the note sued on be declared fully paid and satisfied, and that it be canceled. A demurrer to this cross complaint was overruled, and appellant replied in two paragraphs. The first was a general denial, and the second set up affirmative matter; but, as no question is presented to its sufficiency, we need not extend this opinion by further referring to it. Upon the issues thus joined, trial was had by the court, without the intervention of a jury, resulting in a finding and judgment in favor of appellee, in which it was adjudged that the note in suit should be canceled and satisfied. Appellant moved the court for a new trial, on the ground that the decision was contrary to law, and not sustained by sufficient evidence, which motion was overruled.

The assignment of error challenges the action of the court in overruling appellant's demurrer to the second paragraph of appellee's answer or cross complaint, and its motion for a new trial. It will be observed that, by the averments of the second paragraph of appellee's answer, appellant and appellee, after the maturity of the note sued on, which was the contract between them, entered into a subsequent contract which abrogated the original contract. It is averred that there was a controversy between them as to their respective rights under the original contract, and by the subsequent agreement said controversy was adjusted, by the terms of which new and additional obligations were imposed on each of them. There is no question but what the parties had the right to enter into these new contractual relations, and that there was a sufficient and valuable consideration to bind each of them. This proposition is conceded by appellant, but it insists that the second paragraph of answer is insufficient, because it does not aver that the new agreement or contract was ever delivered. It is probably true, as insisted by appellant, that, before said contract became effective, there had to be a delivery of it; but we think it affirmatively appears, both by the averments of the answer and the contract itself, that it was delivered. The answer avers that appellant and appellee "did, on the 27th day of January, 1897, contract and agree between each other," etc. The agreement which accompanies the answer, and is a part of it by exhibit, contains the following: "This contract and agreement,

made and executed in duplicate, this 27th day of January, A. D. 1897." At the conclusion of the contract is the following language: "Witness our hands and seals, this — day of January, 1897;" following which are the signatures of the parties. It is also further averred in the answer "that said plaintiff [appellant] has wholly failed and refused to comply with its part of said contract, executed January 27, 1897." The contract on its face shows that it was executed January 27, 1897, and the answer avers with particularity that it was executed on that day. The answer does not, in express terms, aver that the contract was "delivered," but this was not necessary to make it good. Appellant cites two cases—*Elliott v. Champ*, 91 Ind. 398, and *Petty v. Board*, 70 Ind. 290—to support the proposition that, as the second paragraph of answer is based upon a breach of a written contract, it was necessary to aver that it was delivered. These cases do not lend any strength to appellant's contention. In *Elliott v. Champ*, supra, the action was upon a written proposition signed by Champ alone, wherein he agreed to place certain property in the hands of appellants for sale, and by the terms of which he was to pay them a fixed commission for effecting a sale. In the writing was also a stipulation that, if Champ should sell the property himself while it was in the hands of appellants for sale, he would pay them the full commission. The agreement or proposition was not signed by appellants, and there was no averment of its delivery to or acceptance by them. The complaint was held bad, because the mere subscribing of an instrument does not imply its delivery, and there was no averment of delivery. In *Petty v. Board*, supra, the complaint alleged that the defendant (appellant) had "subscribed under a heading as follows,"—setting out a subscription to a church over defendant's signature; but there was no averment of its execution or delivery. For such omission the complaint was held bad. In that case the court said: "A man may subscribe a promissory note, yet, until its delivery, it has no binding force." In other words, a note is not executed till its delivery, for delivery is an essential element in its execution. The mere statement of the facts in these two cases clearly distinguishes them from the one we are now considering. In this case there is a specific and clear averment in the second paragraph of answer that the contract relied upon and set out in the answer was "executed" in duplicate on the 27th day of January, 1897, and it also appears that appellant acted upon it. It having been executed, it must be presumed to have been delivered, and no express averment of its delivery was necessary. Where a contract is executed in duplicate, by two parties, it will be presumed, in the absence of any showing to the contrary, that each of them retains a copy. There was no error in overruling the demurrer to the second paragraph of answer or cross complaint.

Appellant next insists that the decision of the court is contrary to law, and not sustained by sufficient evidence, and that it was error to overrule its motion for a new trial. To determine this question, we must look to the evidence. After a careful examination of all the facts disclosed by the evidence, we are forced to the conclusion that there was abundant evidence before the trial court to support the finding and judgment; and hence, under the long-established rule in this state, we are not authorized to reverse the judgment. The trial judge had all the witnesses before him, heard and weighed the evidence, and determined the pivotal facts in favor of the appellee. There being evidence to support the conclusion reached, we cannot disturb it. Judgment affirmed.

(21 Ind. App. 667)

TOWN OF SULLIVAN v. CLUGGAGE et al.

(Appellate Court of Indiana. Nov. 30, 1898.)

PRINCIPAL AND SURETY — GUARANTY—NOTICE OF DEFAULT—CONTRACTS—BREACH—DAMAGES—RIGHT OF ACTION.

1. Where one gives a bond to a town conditioned for performance of another's contract to supply it with light, he is a surety, and not a guarantor, and hence is not entitled to notice of his principal's default.

2. It is no defense to an action against a surety on a bond conditioned for performance of a contract that he relied on information from the contractor that he has been released from the contract, and consequently neglected to carry out the contract and save himself harmless.

3. In an action against a surety on a bond conditioned for the performance of a contract to supply a town with lights at \$50 a light per annum, no defense was presented by an answer alleging that, after the contract was abandoned by the contractor, a bid was submitted at \$67 per light; that it was temporarily withdrawn for changes, when the bidder was informed that a bid for over \$50 would not be considered; and that within three days thereafter a bid at \$63 was accepted.

4. Where one abandons his contract to supply a town with light, the town need not contract with another before suing the contractor's bondsmen.

Appeal from circuit court, Sullivan county; William W. Moffett, Judge.

Action by the town of Sullivan against James H. Cluggage and others. From a judgment for defendants, plaintiff appeals. Reversed.

W. S. Maple and John T. Hays, for appellant. Brigg & Lindley, Buff & Nesbit, and Harris & Douthitt, for appellees.

WILEY, J. In November, 1893, appellee Cluggage entered into a written contract with appellant to light appellant town with electric lights for a term of years. The contract provided that he should furnish a fixed number of arc lights, of 2,000 candle power each, and for each light appellant was to pay him \$50 per annum, payable monthly. For the faithful carrying out of the contract on the part of Cluggage, he executed a bond in the sum of \$5,000, with appellees Crowder

and Balser as sureties. Under said contract, Cluggage furnished said lights during the month of April, 1894, and then failed and refused to so furnish said lights; that June 21, 1894, he notified appellant of his inability to comply with his contract, and wholly abandoned the same; that, on receiving said notice, appellant took steps to have said town lighted for the unexpired term of said contract, advertised for bids, declared said contract forfeited, and, after receiving such bids, accepted one at \$63 for each arc light per year, that being the lowest and best bid; that, for the purpose of carrying out the terms of the Cluggage contract, the best bid made was \$96 for each arc light, which contract ran for five years; that, in order to get said lights at \$63 each, appellant had to enter into a contract for a period of seven years. These facts all appear from the complaint, and this action was to recover the difference between the price of each lamp as fixed by the Cluggage contract and the latter contract, which was \$13 per lamp, for the unexpired term of five years. The contract and bond are filed as exhibits to the complaint. The bond is as follows: "This indenture witnesseth that James H. Cluggage as principal, and W. H. Crowder and F. E. Balser as sureties, acknowledge ourselves held and firmly bound unto the town of Sullivan, state of Indiana, in the penal sum of \$5,000.00. Witness our hands and seals this the 22d day of November, 1893. The conditions of these obligations are such that whereas, the above-bound James H. Cluggage has this day entered into a contract with the said town of Sullivan for the lighting of the streets and alleys of the said town with electric lights, which said contract is hereby referred to for the conditions therein named and for greater certainty: Now, if the said James H. Cluggage shall well and truly comply with all and singular the terms and conditions of said contract, and pay all damages accruing to the said town of Sullivan in the event of his failure to carry out the terms of his said contract as herein referred to, then this bond shall be null and void; otherwise to remain in full force and effect. J. H. Cluggage. W. H. Crowder. F. E. Balser." The appellees each filed separate answers. Appellee Crowder's answer was in six paragraphs, to the fourth and sixth paragraphs of which a demurrer was sustained. Appellee Cluggage answered in four paragraphs, to the second of which a demurrer was sustained, and overruled as to the first. Appellee Balser answered in three paragraphs, to the first and third of which a demurrer was overruled. The first paragraph of Crowder's answer was a general denial. In the second the execution of the bond is admitted, but he avers that appellant did not notify him that Cluggage had refused and failed to carry out the contract on his part, and that appellant would hold him on said bond; that, by the fact that he did not

¹ Rehearing denied.

receive such notice from appellant, he believed that plaintiff and Cluggage had abandoned said contract, and that Cluggage had been released from liability on said bond; that, had he (Crowder) been so notified, he was able and willing to carry out said contract, and would have done so; that at the time of said default, and for a long time thereafter, he was willing and able, had he been notified thereof, to have purchased said plant used by Cluggage, at a greatly reduced price, and could thus have completed said contract, and saved himself harmless. The third paragraph of Crowder's answer is substantially like the second, except that it is therein averred that Cluggage informed him that appellant was not going to hold him liable on the contract, but had released him (Cluggage) therefrom; that he relied on said information, and took the same as true, by reason of appellant's failure to notify him, etc. The fifth paragraph of Crowder's answer differs from the second and third, in that it omits any averment of his ability to have purchased the Cluggage plant at a reduced price, and avers that he had no knowledge of the failure to light the streets, and that, on notice from appellant, he would have carried out the contract so as to have saved himself harmless. This paragraph further alleges that Sullivan Electric Light & Power Company had put in a bid at \$57 per light, when it was informed by a majority of appellant's board of trustees that a bid of over \$50 per light would not be considered; that said bid at \$57 per light was temporarily withdrawn, for the purpose of making some changes; and that within three days thereafter appellant accepted a bid of Crawford at \$63 per light. The first paragraph of answer of appellee Cluggage admits the execution of the contract and bond, and that there was a breach thereof; that appellant thereupon advertised for bids for lighting the town; that it did not attempt to make a contract similar to appellee's contract, but did enter into a contract with one Crawford, the terms of which were essentially different, when it could have procured a contract for the unexpired term of the Cluggage contract on the same terms, etc. The third paragraph of the separate answer of Cluggage is, in substance, that appellant refused to accept a bid at \$57 per light for ten years; that such bid was withdrawn to make some changes therein; and that within three days thereafter appellant accepted the bid of Crawford. The fourth paragraph of Cluggage's answer is a general denial. Appellee Balser's answer was in three paragraphs. The first paragraph is in all essential particulars like the first paragraph of Cluggage's answer, except that it avers that he was surety for Cluggage. The second paragraph of Balser's answer alleges that he was surety for Cluggage; that, on his failure to carry out his contract, appellant advertised for bids to carry out the same; that

bids were received and rejected, and further time given; that bids were again received and rejected, and bidders were notified that the letting of the contract would be postponed 30 days; that one of the bidders withdrew its bid to change it, fully intending to procure the contract, if it became necessary, upon the terms of the Cluggage contract; that 10 days thereafter appellant secretly entered into the Crawford contract, to prevent competition, and did thereby prevent competition; that, with reasonable effort, appellant could have procured the completion of the Cluggage contract upon the same terms, and that said bidder would have done so, but for the conduct of the appellant as stated. The issues were joined by replies of general denial and affirmative matter, but, as we will rest our decision upon the overruling of the demurrers to certain of the separate answers, we need not refer to the affirmative facts pleaded in the replies. Upon these issues trial was had by a jury, resulting in a general verdict for all the appellees.

Appellant's motion for a new trial was overruled, and judgment rendered on the verdict against appellant for costs, and it has assigned error as follows: (1) The court erred in overruling the demurrers to the second, third, and fifth paragraphs of the separate answer of appellee Crowder. (2) The court erred in overruling the demurrer to the first paragraph of the separate answer of appellee Cluggage. (3) The court erred in overruling the demurrers to the first additional and third paragraphs of the separate answer of appellee Balser.

The second paragraph of the answer of appellee Crowder is bottomed on the alleged facts that appellant did not notify him that Cluggage had abandoned his contract; that, had he been so notified, he was able and willing to carry out said contract, and would have done so. The theory of this paragraph is that Crowder was a guarantor, and not a mere surety, and hence was entitled to notice of the failure of Cluggage to carry out his contract, to the end that he might have saved himself harmless. In the light of the facts pleaded, we are unable to agree with counsel that Crowder was a guarantor. He admits the execution of the bond, and in it he agrees to become liable to appellant in the sum of \$5,000, if Cluggage shall fail to carry out his contract with appellant to light its streets. Upon failure of Cluggage to comply with his contract, he and his sureties became liable to appellant for the damages occasioned by such a failure, and no notice was necessary. We think the question as to whether Crowder and Balser were sureties or guarantors on the bond of Cluggage is settled beyond all controversy by the supreme court of this state. In *Nading v. McGregor*, 121 Ind. 465, 23 N. E. 283, the question is ably discussed by Coffey, J., and many authorities cited. The learned judge says: "It is often a question of very great difficulty to determine whether a particular instrument of writing constitutes a strict

guaranty, or whether it constitutes an original undertaking. In a strict guaranty, the guarantor does not undertake to do the thing which his principal is bound to do, but his obligation is that the principal shall perform such act as he is bound to perform, or, in the event he fails, that the guarantor will pay such damages as may result from such failure. It is this feature which enables us to distinguish a strict or collateral guaranty from a direct undertaking or promise. So that when an instrument of writing resolves itself into a promise or undertaking on the part of the person executing it to do a particular thing which another is bound to do, in the event such other person does not perform the act himself, it is said to be an original undertaking, and not a strict or collateral guaranty. In the latter class of contracts, the undertaking is in the nature of a surety, and the person bound by it must take notice of the default of his principal." See, also, *Manufacturing Co. v. Black*, 111 Ind. 308, 12 N. E. 504; *Wright v. Griffith*, 121 Ind. 478, 23 N. E. 281; *Ward v. Wilson*, 100 Ind. 52; *La Rose v. Bank*, 102 Ind. 332, 1 N. E. 805; *Relgart v. White*, 52 Pa. St. 438; *Woods v. Sherman*, 71 Pa. St. 100; *Riddle v. Thompson*, 104 Pa. St. 330. In view of these authorities, we need not pursue this inquiry further, for by them it is settled that Crowder and Balser were sureties for Cluggage.

The averment in the third paragraph of Crowder's answer, that Cluggage had told him that appellant was not going to hold him liable on the contract, and had released him therefrom, and that he relied on the said information, does not add any strength or force to it. Crowder could not avoid liability on the bond because Cluggage informed him that appellant had released him. If this were true, any surety on a bond could be released from liability, and the beneficiary in the bond could be deprived of all rights under it as to the surety, by the principal saying to the surety that the beneficiary had released him from liability. Such a doctrine would be fraught with serious consequences, and to so declare would be a reproach to the law.

Neither is the fifth paragraph of Crowder's answer good. This paragraph omits any averment of his ability to purchase the Cluggage plant, but avers that he had knowledge of the failure of Cluggage to light the streets, and, on notice from appellant, he would have carried out the Cluggage contract so as to have saved himself harmless. This paragraph also avers that another electric light plant had put in a bid to light the streets at \$57 per light, but it was informed that a bid for over \$50 would not be considered; that said bid

was withdrawn temporarily, for the purpose of making some changes; and that within three days appellant had accepted a bid for \$63 per light. This paragraph of answer is peculiar, to say the least. Crowder says he knew that Cluggage had failed to carry out his contract, and yet complains because appellant did not notify him of such fact. There is no merit in these averments, and they fall short of making the paragraph good. And the further fact that another bid was submitted for \$57 per light, and withdrawn to make some corrections, does not aid the answer. It is not stated what those corrections were, or that appellant had any knowledge what they were. The question as to what price the appellant might or could have made a contract for lighting its streets for might be properly considered on the measure of damages, but the facts here pleaded do not make a good answer.

The demurrer to the first paragraph of answer of appellee Cluggage should have been sustained. The answer charges that the appellant did not attempt to make a contract similar to the Cluggage contract, but made one essentially different, when it could have procured a contract for the unexpired term on the same terms, etc. If for no other reason, the paragraph is bad because it does not aver that appellant attempted to procure a like contract, and knew that it could do so. The abandonment by Cluggage of his contract created a liability, under the terms of the contract and bond, and a right of action immediately accrued, and appellant was under no legal obligations to enter into another contract before seeking its remedy against Cluggage and his sureties.

What we have said as to the several paragraphs of answer of Crowder and Cluggage is applicable to the first, second, and third paragraphs of appellee Balser, so far as the facts are the same, and we need not repeat what we have said. Neither paragraph was sufficient to withstand the demurrer. For the several errors in overruling the demurrers to these several paragraphs of answers the judgment will have to be reversed.

There are other questions presented by the record, but, as they are not likely to arise upon a subsequent trial, we need not consider them. Judgment reversed, with instructions to the court below to sustain the demurrers to the second, third, and fifth paragraphs of the separate answer of appellee Crowder, to sustain the demurrer to the first paragraph of the separate answer of appellee Cluggage, and to sustain the demurrers to the amended first additional and third paragraphs of answer of appellee Balser.

(157 N. Y. 365)

BOYD v. GORMAN.

(Court of Appeals of New York. Dec. 6, 1898.)

COURT OF APPEALS—JURISDICTION—STATUTE
—CONSTRUCTION.

Code Civ. Proc. § 191, subd. 2, as amended by Laws 1898, c. 574, providing that no appeal shall be taken to the court of appeals from a unanimous judgment of affirmance hereafter rendered, *inter alia*, in an action "to recover wages, salary, or compensation for services, including expenses incidental thereto," except on certain conditions, is not to be restricted to actions on claims of employes and laboring men employed at a given rate of wages or compensation, but includes claims for professional services.

Appeal from supreme court, appellate division, First department.

Action by William A. Boyd against Gertie A. Gorman. From a judgment of the supreme court (51 N. Y. Supp. 1083) affirming a judgment for plaintiff, defendant appeals. Motion to dismiss the appeal. Granted.

Thomas Allison, for the motion. Treadwell Cleveland, opposed.

VANN, J. This action was brought by an attorney and counselor at law, as upon a quantum meruit, to recover compensation for professional services rendered by him upon the retainer of the defendant. Upon the trial before a referee the plaintiff recovered, and judgment was entered in his favor on the 27th of August, 1897. An appeal was taken by the defendant to the appellate division, which unanimously affirmed said judgment on the 9th of June, 1898. Two days later, without procuring leave from any source, the defendant appealed to this court; and the plaintiff now moves to dismiss the appeal upon the ground that, owing to recent legislation, we have no jurisdiction to entertain it.

The Code of Civil Procedure now provides that "no appeal shall be taken to" this "court from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer, conveyance, assignment or written instrument, as in fraud of the rights of creditors, or in an action to recover wages, salary or compensation for services, including expenses incidental thereto, or damages for breach of any contract therefor, when the decision of the appellate division of the supreme court is unanimous, unless such appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or unless in case of its refusal to so certify, an appeal is allowed by a judge of the court of appeals." Code Civ. Proc. § 191, par. 2. The part italicized in the above quotation was inserted by chapter 574 of the Laws of 1898, which went into force on the 27th of April last. It is urged in opposition to this motion that the legislature in-

tended by the amendment of this year "to make provision for appeals in cases of the claims of employes and laboring men who should be employed under a given rate of wages, or at a given salary or rate of compensation, and for such only." We do not think this position should be sustained. The language of the amendment is so broad and comprehensive as to fairly embrace claims for professional services. Not only are wages and salary mentioned, but "compensation for services," also. No intention on the part of the legislature is apparent from the words of the statute to discriminate between the services of a day laborer and those of a professional man. The word "services," as used in the statute, means work done by one person at the request of another; and the nature of the work, whether of a humble or high grade, is unimportant. The lawyer serves his employer, the same as a hodcarrier or a bookkeeper, by personal labor in his particular line, and the payment that he receives therefor is simply compensation for services. The history of said amendment to the Code, when considered in connection with the recent change in the judiciary article of the constitution, shows that the object of the legislature was to relieve the calendar of the court of appeals. The constitution not only expressly restricted appeals to this court, but it also authorized the legislature to place further restrictions upon the right of appeal, provided the right was not made to depend upon the amount involved. Const. art 6, § 8. The legislature, at its first session after the adoption of the revised constitution, carried the express restriction into effect by an enactment which was almost in the language of the constitution itself. Laws 1895, c. 946, § 1; Code Civ. Proc. § 191. It did not exercise the right to further restrict appeals until the session of 1896, when it prohibited appeal, except by permission, from a unanimous judgment of affirmance in actions for personal injuries, for injuries resulting in death, or to set aside judgments or transfers as in fraud of creditors. Laws 1896, c. 559; Code Civ. Proc. § 191. In 1898 it added actions to recover wages, salary, or compensation for services, as already appears. Thus we have progressive action towards the single object of relieving a court overburdened with work. The legislature, in the exercise of its power to restrict appeals, wisely selected those classes of actions in which the law has been so well settled for so long a period as to make a second appeal unnecessary, except in rare instances, involving new questions, when permission can readily be obtained. We think the language of section 191, as well as its history, show that the object of the legislature by its last amendment was to place a judicious limitation upon the right of appeal to the court of last resort by adding to the list of nonappealable actions those brought to recover compensation for personal

services of any kind. The motion to dismiss must therefore be granted, with costs. All concur. Appeal dismissed.

(157 N. Y. 393)

MYERS et al. v. BOLTON et al.

(Court of Appeals of New York. Dec. 13, 1898.)

ACCOUNTING — UNAUTHORIZED COLLECTION OF RENTS—COMPENSATION—COMPOUND INTEREST.

1. Executors were empowered to sell testator's real estate, in which they were interested, but not to rent it. The firm of which they were members did so, and, on accounting, claimed compensation, on the theory that their co-tenants acquiesced in their action, and impliedly promised to pay. No actual authority to collect such rents, nor affirmative act of acquiescence, was shown; and no evidence of implied authority, except that the co-tenants did not take charge of their interest, or object to such conduct. The rents were collected and retained by the firm in its business, except such as were paid out for the benefit of the estate. *Held* that, the referee's refusal of a request to find that co-tenants acquiesced to such an extent as to warrant the inference of an implied promise to pay not being an error of law, a judgment refusing such compensation would not be disturbed.

2. It was erroneous for the referee, in stating the account, to charge defendants with compound interest.

Appeal from supreme court, general term, First department.

Action by Sarah L. Myers and others against Thomas Bolton and others for an accounting. From a judgment on report of referee in favor of plaintiffs, defendants appealed to the general term, and, from a judgment of affirmance (35 N. Y. Supp. 577), defendants appeal. Modified.

Alex. Thain, for appellants. T. W. Foster, for respondents.

VANN, J. On the 29th of September, 1882, Ann Bolton, the mother of all the parties except William H. Birchall, who was her adopted son, died, seised of some valuable real estate situated on the Bronx river, at a place known as Bronxdale. She left a will dated April 6, 1880, which was duly admitted to probate on the 20th of November, 1882, whereby she devised all of her real property, except a single house and lot, to the parties to this action and Emily B. Norris, a daughter, who died in 1887, intestate and without descendants. She also gave power to her executors to sell any or all of her real estate, either at public or private sale, but gave them no other authority with reference thereto. The most valuable part of her real estate had been leased to her sons, Henry B. and Thomas Bolton, and her adopted son, William H. Birchall, who were co-partners, under the name of the Bronx Company, for five years from March 1, 1880, with the privilege of five years more, which was duly exercised, at a rent reserved of \$4,500 a year. Said lessees occupied all of this leased property until 1891, although the most

valuable part of it was taken by the city of New York for Bronx park, under chapter 522 of the Laws of 1884, the report of the commissioners of estimate having been confirmed on the 9th of July, 1889. This action was brought to compel the defendants composing said company to account for rents received for the use and benefit of the plaintiffs. Code Civ. Proc. § 1666; 1 Rev. St. p. 750, § 9.

Many questions have been argued before us, but we are satisfied with the disposition made thereof, and the reasons given therefor, by the general term, so far as those questions received expression of consideration in the opinion of that learned court. We will briefly examine two questions, not discussed below, that are pressed upon our attention with great earnestness by the counsel for the appellants.

The defendants who compose the Bronx Company are the only appellants, and they insist that the referee erred in not allowing them, or the two who assumed to control the real estate, as executors, compensation for their services in collecting rents and managing the real estate. It is admitted that, so far as they rendered services for the benefit of their co-tenants in common in the condemnation proceedings, they have received compensation already, and that the two executors have received compensation for all the services rendered by them, as such, with reference to the personal estate. The appellants were neither employed nor authorized to collect rents or manage the realty, but they base their claims to compensation therefor upon the theory that their co-tenants acquiesced in their action, and hence impliedly promised to pay what their services were reasonably worth. They raised the question by a request to find duly presented to the referee, under the practice in force at the time of the trial, in these words: "The plaintiffs acquiesced in the management by the said defendants, under the title of the 'Estate of Ann Bolton,' of the properties left by the deceased." The referee refused to so find, and the appellants excepted. Unless the evidence was such that it was an error of law for the referee not to find as requested, we cannot reverse the judgment upon the question now under consideration. The case contains no certificate that it includes all the evidence given on the trial, and all that appears on the subject is, in substance, as follows: Prior to the death of Ann Bolton, the appellants had managed her estate, and transacted her business for her. After her death, the executors, assuming that they had power to do so under the will, continued to manage the real estate by renting it, collecting rents, and the like. All the moneys collected went into the business of the Bronx Company, and no account was kept except in the books of that company. No affirmative act of acquiescence on the part of the plaintiffs was shown. From 1882 until 1889, when this action was begun, the appellants collected, received, and retained all the rents, but paid therefrom taxes, insurance, in-

terest on mortgages, and a small amount of the principal. When called upon to account in surrogate's court, in 1889, it was discovered that they had no power over the realty as executors, except to sell it under the power of sale, and thereupon this action was commenced. Whatever they did in the management of the real estate was done without any actual authority from the plaintiffs; and we find no evidence of implied authority, except that the plaintiffs did not take charge of their interests respectively in the real estate, or object to the conduct of the defendants with reference thereto. All the rents collected by the appellants, amounting to nearly \$46,000, have been retained by them, except such portions as they paid out for the purposes already mentioned. They paid no part of it to the plaintiffs, and, while it does not appear expressly that a demand was made upon them for it, the evidence is very suggestive that demands were made but not complied with. The appellants pleaded no counterclaim for compensation in their answer, nor did they move to amend the pleadings in that regard upon the trial. All the money collected they mingled with their own, and have had the use of it in their business, except as aforesaid. While they owe the balance individually, because they received it and used it, they now claim the right to counterclaim for services which two of them assumed to render as executors, but which they had no right to render in any capacity. They made no charge in their books, and claimed no compensation therefor, so far as appears, until the trial of this action. Over two-thirds of the rents received and retained were owing by the three appellants as co-partners, under said lease from Ann Bolton.

In the absence of an agreement, one tenant in common is not entitled to compensation for collecting the rents belonging to himself and his co-tenants. An executor who intermeddles with the real estate, and assumes the management thereof, without authority, has no right to compensation even for valuable services rendered as such. Like an executor *de son tort*, he is subject to personal liability without any compensating advantage. There is therefore no basis of fact or law to sustain the contention of the appellants that they, or that the two of them, who were executors, have a right to compensation for services connected with the real estate in question. To permit executors to charge for services rendered without authority would be a dangerous rule, especially in a case like the one before us, where the executors were business men, and the persons against whom they seek to make the charge were their own sisters, who do not appear to have sanctioned the management of the real estate by them, or to have accepted any benefit therefrom. There was no acquiescence on the part of the plaintiffs, unless it is to be inferred from silence; and it does not appear whether they said anything by way of demand or protest, or not. They are not estopped, for they made

no representation and took no action upon which an estoppel can be predicated. It has been held that acquiescence "is no more than an instance of the law of estoppel by words or conduct." *De Bussche v. Alt*, 8 Ch. Div. 286, 314. So, in *Kent v. Mining Co.*, 78 N. Y. 159, 187, acquiescence was said to be "the doctrine of equitable estoppel, which applies to members of corporate or associated bodies, as well as to persons acting in a natural capacity." While submission to an existing state of things for a longer or shorter period, with full knowledge thereof, is evidence of acquiescence, still, as was said in *Jenison v. Hapgood*, 7 Pick. 1, 8, "there is no precise rule as to what length of time or what other fact or circumstance shall be considered sufficient proof of acquiescence."

From November 20, 1882, when the will was proved, until a short time prior to April 24, 1889, when this action was commenced, the plaintiffs do not appear to have shown open discontent, but mere negligence in submitting to a wrong even for that length of time was not conclusive under the circumstances. What should they have done? They might have brought an action to partition the premises, but they were not bound to; or an action for an accounting, which they finally brought. Their omission to take any action, as the referee might have properly concluded, may have been owing to the fact that, during the most of the period of silence, nearly all the land was subject to proceedings in condemnation. As early as the year 1882, it was known by the parties that the city of New York contemplated taking the most of the property for a park, although the act authorizing condemnation was not passed until 1884. It does not appear that the plaintiffs knew all the material facts. While they may be fairly presumed to have known of the will, for it could not have been proved without notice to them, still it is not a presumption of law that they knew what the executors were doing with reference to the realty. The evidence of knowledge, aside from presumption, is confined to the declaration of a single interested witness in the form of a conclusion that they understood what was going on. Even if they did, we do not think that mere silence, under all the evidence, is sufficient to make it an error of law for the referee to refuse to find that they acquiesced to such an extent as to warrant the inference of an implied promise to pay. Acquiescence was a question of fact, and, while he might have found for the defendants upon this question, he was not bound to so find.

The appellants also claim that injustice was done them by the allowance of compound interest, and this, we think, is well founded. The referee, in stating the account, charged them with the amount collected, and credited them with the amount paid out, each year. As the annual receipts always exceeded the disbursements, he deducted the latter from the former, and charged them with interest

on the balance from the last day of the year in which it accrued until August 1, 1894, although why that date was selected does not appear, for the report was dated March 28, 1895. He directed judgment in favor of the plaintiffs for their proportion of the aggregate of these annual balances, with interest thereon, from August 1, 1894. Compound interest was thus allowed, and the judgment is erroneous to that extent. The defendants were liable for interest on the annual balances to the date of the report, because they had mingled the collections with their own funds, had used them in their own business, and had failed to render any account. They thus received a benefit from the use of the money of others which they ought to have promptly accounted for and paid over. As they were not actual trustees, we do not think they were liable for compound interest, for even trustees are not held liable to this extent except under special circumstances. This error, however, does not necessarily require a reversal of the judgment, as it may be corrected by making the proper deduction, the amount of which can be computed with absolute certainty.

The judgment should be reversed, and a new trial granted, with costs to abide the event, unless the respondents stipulate to deduct the amount of compound interest included in the judgment; and in that event the judgment should be modified accordingly, and, as thus modified, affirmed, without costs in this court to either party. The order, if not agreed upon, may be settled before the judge who prepared the opinion of the court.

GRAY, HAIGHT, and MARTIN, JJ., concur. O'BRIEN and BARTLETT, JJ., vote for further modification, for the reason that the appellants were also entitled to commissions as trustees by consent or acquiescence. PARKER, C. J., not sitting.

Judgment reversed, unless, etc.

(174 Ill. 211)

THALER et al. v. WEST CHICAGO PARK COM'RS.¹

(Supreme Court of Illinois. June 18, 1898.)

MUNICIPAL CORPORATIONS—IMPROVEMENTS
—ASSESSMENTS.

A judgment assessing the cost of an improvement is void where the contract for the improvement was let nearly a month before the ordinance providing for the improvement and the special assessment was passed.

Appeal from Cook county court; William T. Hodson, Judge.

Proceeding by the West Chicago park commissioners against August Joseph Thaler and others. There was a judgment for plaintiffs, and defendants appeal. Reversed.

¹ Rehearing denied October 6, 1898.

I. T. Greenacre and Samuel J. Sloan, for appellants. Francis A. Riddle and H. S. McCartney, for appellees.

CARTWRIGHT, J. The West Chicago park commissioners procured the right of way and opened Humboldt boulevard, running northeasterly from Western avenue to Diversey street, for the purpose of connecting the West Chicago system of parks and boulevards with the Lincoln Park system. On May 12, 1896, an ordinance was passed for the improvement of that part of this boulevard from the east line of Western avenue to the center line of Elsdon avenue. The ordinance provided that the cost of the improvement should be paid by a special assessment, which was thereby ordered. The commissioners then made an estimate of the cost of the improvement, and ordered a petition filed and a proceeding instituted to assess the cost. This ordinance was insufficient, in its specifications of the locality, character, and description of the improvement, to authorize any assessment. Contracts for the work were made August 6, 1896, or before that time, and after all the contracts had been let and a good part of the work had been done an amendatory ordinance was passed September 22, 1896, which was the same as the original one, except that it contained a specific description of the improvement which had been attempted. A resolution was also passed reciting that the former estimate was made upon the identical specifications set forth in the amendatory ordinance, and readopting such former estimate as the estimate of the cost of the improvement described in the amendatory ordinance. On October 24, 1896, a petition was filed in the county court for assessing the cost on the property benefited, and an assessment roll was filed, to which objections were interposed. This assessment roll was plainly unfair and unequal, and the court ordered it set aside and a new assessment roll made. A new roll was filed December 26, 1896, to which objections were also filed. The legal objections addressed to the court were heard and overruled, and the issue as to benefits was thereupon tried by a jury.

That part of the boulevard for which the special assessment was levied is 930 feet long, across a tract of open prairie, 95 per cent. of which is vacant. The remainder is occupied by poor people living in small one-story frame cottages, who are not able to live in a better locality. The tract is surrounded by brick yards, clay holes, reaper works, terra-cotta works, railroad tracks, and a bone factory for making soap, lime, and glue. Near the property is the Chicago river, which, according to the testimony, adds to the smoke of factories and the smells of soap and glue making an overpowering stench. The surroundings are such that while they continue the neighborhood must be of the same character as at present, and nothing but the poorer class of people can be induced to occupy it. No person able to own a pleasant home would ever buy a resi-

dence nor live there. Owners of property, residents, and real-estate agents testified that the property was not benefited by the boulevard, because it was necessarily occupied by poor people, who lived there on account of its cheapness, and did not value a pleasure drive-way, which they were not able to use. On the other hand, a superintendent of special assessments for the town of Cicero and three real-estate agents testified that they had examined the assessment roll and the property, and thought the benefits were fairly assessed; that the assessment was about right; and that the property was benefited to the extent assessed. The jury credited the opinions of the witnesses for objectors, and returned a verdict that the property was not benefited. This verdict the court set aside, and by stipulation the case was then submitted to the court to be determined upon the evidence already in, which had been offered before the jury. The court did not adopt the evidence on either side, and decided that the property was benefited, but not so much as the assessment roll, and that it was benefited 65 per cent. of that amount. Judgment was entered in accordance with that conclusion.

A great many objections are presented and argued, and some of them raise serious questions, but there is one that is fatal to the judgment, and that alone will be considered. It was proved by the secretary of the board that a contract for the grading and filling of the boulevard from Western avenue to Diversey street was made with Sackley & Peterson by the park commissioners about a month before the first attempted ordinance was passed. The first payment for work under that contract was made May 18, 1896, and the contract was let as much as a month before that time, and work was done under it before the attempted ordinance. It has been repeatedly held that no work can be done or expense incurred which can become charged upon the property of the owner until an ordinance has been passed providing for the making of the improvement, and that it shall be paid for by special assessment. The first step to be taken to charge a property owner is the passage of the ordinance which lies at the foundation of the proceeding. *City of Carlyle v. County of Clinton*, 140 Ill. 512, 30 N. E. 782; *City of East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934. Not only was the contract for grading let before the passage of the ordinance, but it included the rest of the boulevard from Elsdon avenue to Diversey street, and there was no way to determine from the ordinance or the contract how much of the grading was done on this part for which the special assessment was levied. All the contracts for the various kinds of work were let for the entire improvement, and, while some of them may furnish data for determining the cost of this part of the boulevard, the contract for grading and filling certainly does not. Proprietors who are assessed for an improvement, based upon an estimate of its cost, are not liable for

more than the actual cost, and if the assessment exceeds such actual cost they are entitled to a rebate. If other work, which is paid for by general taxation, is included in the contract, there must be some way of keeping separate the cost of that part for which the assessment is levied, or the property owner would be denied a substantial right. For the reason given the judgment is reversed, and the cause is remanded. Reversed and remanded.

(176 Ill. 267)

KEOKUK & H. BRIDGE CO. v. PEOPLE.¹
(Supreme Court of Illinois. Oct. 24, 1898.)

TAXATION—ASSESSMENT OF BRIDGE AND APPROACH—OVERVALUATION—TESTIMONY OF ASSESSOR.

1. An approach to a bridge and the bridge proper may be legally assessed together, though the approach is worth considerably less per lineal foot than the bridge, where they are contiguous, and form parts of the same structure, and the assessment is not by the lineal foot, but in gross.

2. Though an overvaluation appears, an assessment will be sustained where it cannot be said to be so excessive as to warrant a finding that it was not honestly made, and was known to be excessive.

3. On an issue as to whether the assessment was fraudulent on an application for judgment against property for delinquent taxes, error in refusing to compel the assessor to testify at what ratio to its fair cash value (the statute requiring property to be assessed at its fair cash value) he had assessed all other property was not sufficiently material to justify a reversal.

Appeal from Hancock county court; David E. Mack, Judge.

Application by the county collector of Hancock county for judgment against the property of the Keokuk & Hamilton Bridge Company for delinquent taxes. From a judgment for the people for part of the taxes, the bridge company appeals. Affirmed.

G. Edmunds, for appellant. Sterling P. Lemmon, State's Atty., and Sharp & Berry Bros. (Frank Halbower, of counsel), for the People.

WILKIN, J. This is an application by the county collector of Hancock county for judgment against the property of the appellant for delinquent taxes for the years 1895 and 1896. At the June terms in 1896 and 1897 of the county court, application was made for judgment for the taxes of the preceding year, and the cases were continued from time to time until August, 1897, when both were heard as one case, upon the same evidence. A part of appellant's objections were sustained, but the people had judgment for a part of the taxes. Exceptions were duly taken, and, as the case comes to us, three questions are presented, viz.: First. Can the bridge proper and the east approach be legally assessed together? Second. Is the assessment fraudulent? Third. Is any part of the 1,567 feet assessed in the state of Iowa?

¹Rehearing denied December 20, 1898.

The approach to the bridge is an earth bank ripped, and, if valued separately, is worth considerably less per lineal foot than the bridge proper. But this fact would not necessarily compel the assessment of the bridge and approach separately. They are contiguous, and virtually parts of the same structure. The assessment is not made by the lineal foot; it is in gross. We cannot see in what respect it could be material to appellant whether the two are assessed together or separately. It is hard to conceive of the value of the bridge entirely disconnected from the approach, or of the value of the approach without the bridge. The values of the two are so closely interwoven and dependent upon each other that to assess them together is the only feasible way to value them at all.

The second question—whether the assessment is fraudulent—has been considered by us several times heretofore, in suits between the same parties. A full discussion of the law on this branch of the case will be found in the opinion in *Bridge Co. v. People*, 161 Ill. 514, 44 N. E. 206. From an examination of the evidence in this record, even though it were conceded that an overvaluation appears, we do not find that it can be said to be so excessive as to warrant us in finding the assessment was not honestly made, and known to be excessive.

Another point brought to our attention under this head is that the trial court refused to compel the assessor, when on the witness stand, to testify at what ratio to its fair cash value he had assessed all other property in his town. The witness declined to answer, on the ground that the answer might tend to criminate him. The statute requires all such property to be assessed at its fair cash value. To show it was valued at less might be one link in the chain of evidence against him for a failure to do his official duty, on a prosecution under paragraph 289 of the revenue law. 3 Starr & C. Ann. St. (2d Ed.) p. 3518. Even if error was committed in refusing to compel an answer, it was not sufficiently material to justify a reversal of the judgment below.

The third question presents two questions,—one of law, and one of fact. On the proposition of law,—i. e. the legal boundary line between this state and Iowa,—we are bound by the rule of stare decisis. We have several times held, between these same parties, that the line is the middle of the main navigable channel of the river. In every instance when the question has been before this court and directly in issue, the holding has been uniformly to that effect. In that view of the law, we are sustained by the supreme court of the United States. *Iowa v. Illinois*, 147 U. S. 1, 13 Sup. Ct. 239. The reasons for our conclusion have been already fully stated, and a repetition now could make the holding no clearer. *Bridge Co. v. People*, 145 Ill. 596, 34 N. E. 482; *Id.*, 167 Ill. 15, 47 N. E. 313.

On the question of fact,—i. e. does any part of the 1,567 feet of bridge assessed extend beyond the state line?—the differences between counsel and witnesses on the respective sides of this issue arise principally out of the fact that, on the one hand, the center of the stream is assumed to be the state line, while, on the other, the center of the navigable channel is accepted as the true line. It being settled as a question of law that the latter construction is correct, we think there can be no reasonable question but that the clear preponderance of the evidence is that the dividing line between the two states is at least as far west as the assessor in this assessment fixed it. The evidence is substantially the same as it was in the last case before us between the same parties, reported in 167 Ill. 15, 47 N. E. 313; and we see no reason for changing the conclusion there reached. The judgment of the county court will be affirmed. Judgment affirmed.

(176 Ill. 351)

RHODES et al. v. ASHURST et al.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

EQUITY — DECREE — FINALITY — APPEAL — RIGHTS PENDING — COURTS — JURISDICTION — PATENTS — LICENSES — ASSIGNMENT — ESTOPPEL — ACCOUNTING — PAYMENT.

1. A decree finding the existence of facts giving a right to an accounting, and directing the master to state the account, is conclusive after an affirmance on an appeal to the supreme court.

2. On an appeal from a judgment rendered on the report of a master on an accounting before him according to a decree that had been affirmed on appeal to the supreme court, the facts determined by such decree are conclusive.

3. Where a pretended assignee of a patent conveyed a license to another for an agreement to pay certain royalties, the state courts have jurisdiction, in a suit by the owner of the patent, to compel such licensee to account to him for the royalties; such a suit not being for an infringement.

4. A pretended assignee of a patent conveyed a license to use it to a defendant agreeing to pay royalties therefor, and a decree was rendered requiring defendant to account to the real owner for the royalties. *Held*, that where defendant used the patent pending an appeal by him from the decree without surrendering the license, he could not assert that he was liable as an infringer, and not as a licensee, so as to oust the state courts of jurisdiction.

5. On an accounting by a licensee of a patent in accordance with a decree that had been affirmed on appeal, he is bound to account for royalties due for using the patent pending the appeal.

6. One who has accepted a license to use a patent, and has enjoyed benefits under it, is estopped to assert that the patent is valueless because lacking in novelty, or because it is an infringement.

7. In a suit by the owner of a patent for royalties which defendant had contracted to pay to a pretended assignee, defendant must show with certainty any payments which he claims to have made to the assignee.

8. A. executed notes to complainant corporation for shares of its stock, and he was made its manager. Subsequently he conveyed a M-

¹Rehearing denied December 20, 1898.

cense to it to use a certain patent so long as he remained manager. Afterwards it assigned the license to S., contracting to pay royalties, and A. was forced to resign as manager. A. assigned the patent to defendant, subject to complainant's rights. *Held*, that defendant, affirming the assignment of the license to S., and obtaining a decree compelling S. to account to him for the royalties, must account to complainant for A.'s notes.

Error to appellate court, Third district.

Bill by the Havana Press-Drill Company and John W. Rhodes against John L. and Lewis B. Ashurst for the enforcement of an agreement to assign a patent. Defendants filed a cross bill against complainants and the Stoddard Manufacturing Company, alleging that Rhodes had conveyed a license to the Stoddard Manufacturing Company to use said patent, and prayed for a cancellation of the license and an accounting. From a decree of the appellate court affirming a decree dismissing the original bill, complainants appealed to the supreme court, which affirmed the decree (148 Ill. 115, 35 N. E. 873), whereupon the master in chancery stated an account in accordance with the decree, and judgment was rendered for Lewis B. Ashurst against Rhodes and the Stoddard Manufacturing Company. Both parties to the judgment appealed to the appellate court, which affirmed the judgment (71 Ill. App. 242), and they bring error to the supreme court. Affirmed.

The Havana Press-Drill Company and the plaintiff in error Rhodes filed a bill in the circuit court of Mason county against John L. and Lewis B. Ashurst, praying for the specific enforcement of an agreement to assign a patent numbered 297,961, concerning an improvement in grain drills. After answering this bill, the Ashursts filed a cross bill, in which it was alleged that Lewis B. Ashurst was the owner of said patent, but that John W. Rhodes had entered into a contract with the Stoddard Manufacturing Company for the manufacture of wheat drills embracing the improvement covered by said patent, and for the payment of certain royalties. The prayer was for the cancellation of the license attempted to be conveyed by Rhodes and for an accounting. Answers were filed, and replications thereto. Evidence was taken, and on the hearing the original bill was dismissed for want of equity, and a finding and decree were entered in favor of the complainants in the cross bill. By appeal this decree was brought to the appellate court, and then to this court, where it was affirmed. A transcript of the order of affirmance was duly filed in the circuit court, and thereupon the master in chancery proceeded to take evidence, and state an account in accordance with the directions of the decree. The master's report shows that the entire royalty under the Rhodes-Stoddard contract up to January 1, 1895, amounted to \$22,680. This royalty, however, covered the use of other patents which Rhodes had the right to assign, and the master apportioned it so as to allow Lewis B. Ashurst 76 per cent. there-

of. He also allowed a set-off of \$6,326.15, arising out of some notes given by John L. Ashurst to the Havana Press-Drill Company. Objections were filed before the master by Rhodes and the Stoddard Manufacturing Company, and also by John L. and Lewis B. Ashurst. These being overruled by the master, were renewed as exceptions before the court. Part of the exceptions were sustained, and the court apportioned the royalty so as to give one-half to each party, then deducted the set-off, and gave judgment in favor of Lewis B. Ashurst for \$4,795.80 against Rhodes and the Stoddard Manufacturing Company. An appeal was taken from this decree to the appellate court, where the finding was affirmed. The case now comes before us on a writ of error for further review, both parties assigning errors. When the former case was before us, a full statement was made of all the facts out of which this litigation arises, and a repetition of the same here would be useless. The case is reported in 148 Ill. 115, 35 N. E. 873.

Lyman Lacey, Sr., and Ohas. M. Peck, for plaintiffs in error. John W. Pitman, for defendants in error.

WILKIN, J. (after stating the facts). The practice in chancery, where an accounting is prayed, and where the right to an account is denied, is that the preliminary matter in bar of the accounting should first be disposed of. A decree is then entered finding the facts to exist which give a right to the accounting, directing the basis of the account, and referring the whole matter to the master in chancery to take evidence as to the state of the account, and to report the evidence and a statement of the account. *Ligare v. Peacock*, 109 Ill. 94. Such a decree was entered in this case, and, whatever might have been its effect as *res judicata* had it not been appealed from, the plaintiffs in error certainly are now concluded by it. Having appealed from it, and having procured the decision of this court upon the questions involved, they cannot now be heard to say that it was merely interlocutory. 5 Enc. Pl. & Prac. p. 1046.

Much of the argument of counsel is devoted to the question of whether the Stoddard Manufacturing Company used the invention covered by the patent in question. It is affirmed by counsel for plaintiffs in error that it did not. There are two answers to this position: First, the pleadings admit that it did; and, second, the finding of the former decree is conclusive on that point. The abstract shows that the answer to the cross bill "admits that before and since January 1, 1891, said Stoddard Company made some drills with said Ashurst improvements attached thereto as part thereof," and also that the decree recites that said company had made drills "with said improvements on." As we understand the evidence, there is no claim that there was any difference in the drills manufactured, but the contention

is that the patent does not cover the device used. This question is certainly foreclosed by the former decree. In the consideration of the case as it now comes before us, we must begin, then, with the assumption that the invention in question was used; that it belonged to Lewis B. Ashurst; that the contract between Rhodes and the Stoddard Company covered this patent, as well as others which belonged to Rhodes; that Lewis B. Ashurst is entitled to an accounting, and that the basis thereof is to be a division of the royalty according to the relative value and importance of the respective appliances covered by said patents. The main question for decision, therefore, is, has an equitable division been made? Before disposing of this question, we ought, perhaps, to notice the point made as to jurisdiction. It is claimed that the subject-matter of this suit is cognizable solely in the federal courts. Our former decision in this case is adverse to that position. We have again examined the question, and feel satisfied that that conclusion is correct. The theory of the cross bill is that Lewis B. Ashurst, as the owner of the patent, has the right to demand the royalty agreed to be paid by the Stoddard Manufacturing Company to Rhodes under the contract which they entered into. It proceeds upon the basis of a ratification of that contract so far as executed, but avers that the money arising therefrom is in equity the property of Ashurst. The foundation of the action is clearly the contract. Nor can it be said that the court was without jurisdiction as to the royalties accruing after the entry of the original decree. The assignment of the license was thereby declared void, but the Stoddard Company continued, during the pendency of the appeal, to manufacture drills, the same as before. It made no surrender of the claimed license. So long as the company and Rhodes continued under that contract, they were in no position to say that the patent was used without license, and that they were infringers, and not licensees. The plaintiffs in error continued to stand in the same relation to Lewis B. Ashurst after that decree as before, and the same right to an accounting existed.

Recurring to the question of the division of the royalty, so far as the Stoddard Manufacturing Company is concerned, although it assigns error in this regard, it would seem to be a matter of no moment to it whether Ashurst succeeds in his contention or Rhodes in his. Its position is that of a mere stakeholder. It concedes the royalty must be paid; therefore to whom it is to be paid is not a vital question to it. The real controversy lies between Rhodes and Lewis B. Ashurst.

In the account stated by the master, royalty was charged on all drills made up to January 1, 1895. It is contended that the accounting should have ceased upon the entry of the former decree, November 13, 1891. One of the exceptions raises this question. We think the

point not well taken. The operation of the decree was suspended during the appeal, but the manufacture of drills continued under the same contract. The interlocutory decree usually directs that all matters of account shall be adjusted down to the time of stating the account, even though no facts are stated in respect to them in the pleadings. 1 Enc. Pl. & Prac. p. 103. To hold that matters of account arising during the pendency of the suit could not be considered would be to circumscribe the power of equity to do complete justice, which is one of its attributes.

As to the relative value of the patents embraced in the Rhodes-Stoddard contract, we find the evidence conflicting, and in some respects uncertain and unsatisfactory. From the nature of the case, it could hardly be expected to be otherwise. To estimate how much value one of several devices adds to a piece of machinery is, ordinarily, a difficult question. Here each party claims all for his own invention, and nothing for that of his adversary. Plaintiffs in error say that the Ashurst patent is valueless, because it is lacking in novelty, and is in fact an infringement upon other prior patents. Having accepted a license under it, they cannot now attack it in that regard. "A licensee who has admitted, either expressly or impliedly, in the license contract or in pais, the validity of the license contract, or has enjoyed benefits under it, is estopped from contesting the validity of the patent in relation to acts done under the license." 13 Am. & Eng. Enc. Law, p. 570; *Kinsman v. Parkhurst*, 18 How. 239. "They have made and sold the machines under complainant's title, and for his account, and can no more be allowed to deny that title and retain the profits to their own use, than an agent, when he has collected a debt for his principal, can insist that the debt was not justly due." *Hall Mfg. Co. v. American Ry. Supply Co.*, 48 Mich. 331, 12 N. W. 205; *Bartlett v. Holbrook*, 1 Gray, 114. It is claimed that the Ashurst patent merely covers the particular mode of fastening the spring. Rhodes and the Stoddard Company have themselves put a different construction upon it, else they would never have admitted its use, for it is clear that the spring used by the company had a different fastening from that illustrated in the Ashurst patent. The statement in the patent itself is that the invention consists in a series of springs attached to the runners and front frame, so that pressure applied on the springs acts directly on the heel of the runner to press it into the earth. The specifications expressly state that this spring may be fastened in any suitable or convenient manner. Nor is there any requirement that the spring must be flat.

Examining the testimony in the light of this construction of the patent, we think a fair division of the royalty has been made. The evidence of the defense was principally directed to an attack upon the novelty of the device and as to whether it was used. A num-

ber of witnesses, farmers and implement dealers, testified that the spring was the most important of the attachments. Rhodes and Ashurst each thought all of the value lay in his improvements. One J. P. Mowder gave it as his judgment that each contributed one-half. William Heberling divided it by giving Rhodes one-third. A. E. Windsor put the Rhodes devices at 25 cents per drill. George Bell put them at 40 cents per drill. Outside of Rhodes, no witness for the defense gave any opinion as to the relative value of the attachments. The contention that the patent is valueless results from a narrow construction of it, not warranted in this case by the relation in which the parties stand to each other.

A statement is made by counsel for plaintiffs in error to the effect that the Stoddard Company has made payment in full to Rhodes of all royalties, and therefore it should not be held. It seems incredible that such payments could have been made, and no clearer evidence thereof appear in the record. If the amounts designated opposite the word "payments," at the foot of the royalty statement furnished by John W. Stoddard represented actual payments, it is remarkable that in his testimony he should refer only to the payment of the first item. We are inclined to think this statement was intended to represent the time when the payments became due. The first part of the statement shows the time of manufacture. The royalty, however, was not payable, under the contract, until January 1st next after the sales were made. If it were actually true that payment was made, it should have been shown with certainty. In our judgment, the objection has no foundation in fact.

The cross error presents the question of whether the set-off allowed was proper. John L. Ashurst gave his notes to the Havana Press-Drill Company in consideration of a certain number of shares of its capital stock, and also granted the license in question to it as a part of the same transaction. The deduction represents the balance due on these notes. A license is not assignable, strictly speaking, and when Lewis B. Ashurst elected to affirm the Rhodes-Stoddard contract as to the license obtained through John L. Ashurst and the Havana Press-Drill Company he must be held to have taken it subject to all equities; particularly in view of the fact that the assignment of the patent from his brother to him recited that it was subject to the rights of the Havana Press-Drill Company. It may seem a hardship upon him to be compelled to pay the debt of John L. Ashurst, but he might have elected to treat the assignment of the license as a nullity, and proceeded against the Stoddard Manufacturing Company as an infringer, in which case this question would not have arisen. We find the cross error not well taken. On the whole record, we think the decree of the circuit court is equitable and just, and that it was properly af-

firmed by the appellate court. Judgment affirmed.

BOGGS, J., took no part in the decision of this case.

(59 Ohio St. 137)

ALLEN v. RUSSELL et al.

(Supreme Court of Ohio. Nov. 1, 1898.)

HOMESTEAD OWNED BY MOTHER—IMPROVEMENTS BY SON—PAYMENT OF TAXES—INVALID TAX DEED.

1. Where, after a homestead has been set off to a mother in real estate owned by her in fee simple, her son, already occupying the premises, agrees to support her in consideration of its rents and profits, and continues in possession of the premises, and to support her under the agreement during her lifetime, he is not liable after her death to account to the creditors of the mother who have judgment liens thereon for the rents and profits that accrued prior to his mother's death.

2. If, in such case, the taxes become delinquent, and the son purchases the premises at tax sale, and subsequently obtains a tax deed therefor, and on the faith of such title makes valuable and lasting improvements on the premises, he will not, if his title is invalid, be allowed, under the occupying claimant's act, as against the judgment creditors of the mother, the value of the improvements thus made.

3. If, however, he was under no obligation to pay the taxes on the premises, he falls within the provisions of section 2880, Rev. St., and should be subrogated to the lien of the state for the amount paid at the tax sale, the taxes subsequently paid, and interest at 6 per centum from the time payment was made.

(Syllabus by the Court.)

Error to circuit court, Summit county.

This action was brought by William E. Russell, to assert a judgment lien against certain real estate of Mrs. Jane Allen, deceased, and to marshal the liens thereon. The cause was appealed to the circuit court, and there tried on the merits, and judgment rendered for defendant in error and certain other lienholders, and denying to William E. Allen a claim he had set up for taxes and for improvements made as an occupying claimant of the land in question. Thereupon the plaintiff in error instituted proceedings in this court to reverse the judgment of the circuit court. Reversed.

Tibbals & Frank, for plaintiff in error. Musser & Kohler and G. M. Anderson, for defendants in error.

BRADBURY, J. There was no substantial conflict in the testimony relating to any fact upon which the respective rights of the parties rested. The circuit court, however, found and stated the facts separately from its conclusions of law. From this finding and the pleadings it appears that, in the year 1878, Jane Allen was the owner of the real estate which is the subject of the controversy; that, at the May term of the court of common pleas of Summit county for that year, the plaintiff recovered a judgment against said Jane Allen and others for the

sum of \$424.17, and thereafter the said James S. Carpenter and George K. Pardee, in their lifetime, also recovered a judgment against Jane Allen for the sum of \$168.51; that executions were issued upon both said judgments, and severally levied upon the said premises of said Jane Allen, the lien of the plaintiff's judgment being prior to that of said Carpenter and Pardee; that executions have been issued from time to time upon said judgments, and the liens of both have been kept alive and in force up to the hearing of this cause, and are now valid liens against said premises; that, after the said Russell had recovered judgment, he caused execution to issue thereon, and levied on the premises in controversy; that said Jane Allen thereupon demanded that the same should be set off to her as a homestead, which the sheriff refused to do, but, instead, sold the same on a vendi. exponas to said William E. Allen, who paid the purchase price to the sheriff; that afterwards, by decision of this court, Mrs. Allen was adjudged to be entitled to hold the premises as a homestead, and thereupon the price that said plaintiff in error had paid was refunded to him; that, at the time and prior to the rendition of said judgments, said Jane Allen was living in, and occupying, said premises as her homestead, and that said defendant William E. Allen, after said sale by the sheriff, immediately moved into said premises, and occupied them, his mother living with and being supported by him until April, 1887, at which time he removed from said premises; that thereafter said William E. Allen received the rents of said premises, and continued to support his mother, until her death, on the 6th day of June, 1894; that after the sale of said premises by the sheriff to said William E. Allen, and during the pendency of said litigation in the district and supreme courts, as above stated, "he paid the taxes on said premises, aggregating, at the time of the setting aside of the sale by the supreme court, to the sum of \$74.54"; that after the setting aside of said sale by the supreme court, and the holding that said Jane Allen was entitled to a homestead therein, to wit, on the 20th day of January, 1885, said premises were sold for taxes unpaid and delinquent thereon for the years 1883 and 1884, to the amount of \$118.18; that at said tax sale said defendant William E. Allen purchased said premises, and received a tax certificate therefor, which he held for a period of two years, and on the 21st day of January, 1887, he received a tax deed of the auditor of said county for said premises, which said tax deed, by reason of irregularities and nonconformity to the statutes relating thereto, is found to be invalid and irregular, and the same is set aside, held for naught; that at the time he purchased said premises at said tax sale, and received said certificate and also said tax deed, he was still living in said premises with his mother, un-

der said agreement to care for and support her; that he continued to occupy said premises with his said mother until said 1st day of April, 1887, when he removed from said premises, and made the new agreement hereinbefore mentioned; that, after two years from the date of the sale of said premises for taxes, said defendant William E. Allen made lasting and valuable improvements on said premises under said tax title, and in good faith, and supposing that he had a good title to said premises; that the value of said improvements was \$160; that he annually paid the taxes on said premises after purchasing the same as aforesaid, down to the present time, amounting in the aggregate to the sum of \$245.92; that, after he removed from said premises, he has received and collected the rent thereof, amounting in the aggregate to more than the taxes so paid by him, and of the lasting improvements so made by him.

Conclusions of law: "And the court, as its conclusions of law from the facts above stated, holds, finds, and adjudges: (1) That said defendant William E. Allen is not entitled to be reimbursed for taxes so paid by him pending litigation under the sheriff's sale as aforesaid made; and said claim is by the court disallowed and dismissed. (2) The said William E. Allen is not entitled to be reimbursed for lasting and valuable improvements made and established as aforesaid, and the same are disallowed, and said claim dismissed. (3) That said William E. Allen is not entitled to be reimbursed for the taxes thereafter paid by him, with interest thereon. All said claims are disallowed, on the ground that, said Allen having occupied said premises as aforesaid, and having collected and received rents of said premises in excess of all said taxes and lasting and valuable improvements, it is ordered that his said answer and cross petition be, and the same is hereby, dismissed."

From this conclusion of law it is quite apparent that the circuit court, in arriving at its judgment, did not take into consideration the value of the support given by the plaintiff in error to his mother. If the circuit court was right in this, its judgment should be affirmed; otherwise, it should be reversed. The plaintiff in error occupied the premises in one of two capacities. His relation to it was either that of an owner or as a tenant of his mother. He could not at the same time occupy it in both capacities. The circuit court dealt with him as if he had been the owner under a bona fide claim of title, which was defective. It in fact expressly found that the tax sale and deed were defective, but that he believed in good faith that they conferred a good title on him, and, on the faith of that belief, made the improvements for which he claimed compensation, and it further found that the sale was irregular and invalid. This finding placed him within the category of occupying claimants,

under section 5786, Rev. St. That court did not deny his claim to be reimbursed for taxes paid and improvements made, but, finding that the rents received by him from the premises exceeded the aggregate sum composed of the taxes paid by him, and the value of the improvements he had made thereon as a bona fide occupant under claim of title, denied his claim to relief on account of such expenditures, simply because that claim had been satisfied by the rents he had received. His first possession of the property was taken as purchaser thereof at judicial sale, and, of course, his relation to it was then that of an absolute owner in fee simple; and the rents or profits received by him while the property was thus occupied should be set off against any claim he might have for improvements made and taxes paid during this period; for if he was occupying the property as its owner, and not by virtue of a contract with his mother to support her in consideration of the rents from it, he had no legal claim to have the support given to her taken into the account. But after this court had adjudged that Mrs. Jane Allen was entitled to a homestead in the premises, and the money the plaintiff in error had paid for it at the judicial sale had been refunded to him, his title terminated; and thenceforward, until his mother's death, his possession was under her, unless he subsequently acquired an independent title adverse to her. The only title he subsequently acquired was that founded on the sale for taxes mentioned in the special finding of facts.

The finding of the circuit court does not specifically state the terms of the contract between the plaintiff in error and his mother by virtue of which he occupied the premises after the homestead had been assigned to her. It does state, however, that when he bought the property "at tax sale, and received said certificate, and also said tax deed, he was still living in said premises with his mother, under said agreement to care for and support her." This constituted the relation of landlord and tenant between the two. A most confidential relation, that of mother and son, also existed; and in addition to these relations, she was a member of his family, and, as the income of the property was not sufficient to support her, to a considerable extent dependent upon him. Under these circumstances, as against her, he could not acquire, by a tax sale and deed, a title adverse to her, but would hold it as her trustee. A court of equity would not permit him in that way to acquire an adverse title, by means of which he could cast off the burden of his contract to support her. Equity, notwithstanding this tax sale and deed, would continue to regard him as her tenant. But whether the tax sale and deed were, in all respects, regular and valid or not, as long as the plaintiff in error continued to support his mother, she could not have asserted against him a claim to the rents of the prop-

erty. If she could not assert such a claim in her lifetime, her creditors could not directly or indirectly assert it after her death. To permit, in favor of these creditors, the rents and profits to be set off against any claim he could otherwise assert against the property on account of taxes paid and improvements made would, in effect, be to compel him to account to such creditors for those rents and profits. The judgment of the circuit required this accounting, which was the foundation of the error it fell into. Whatever claim the plaintiff in error could assert against the premises should not be defeated in this way. This brings us to a consideration of his claims.

If the plaintiff in error is regarded as a tenant of his mother under a contract to support her in consideration of the rents of the premises, and permitted to avail himself of that relation to avoid a legal accounting for those rents to her judgment creditors, he should not be allowed to occupy an inconsistent relation to the property,—that of an independent owner,—in order to charge those creditors with the value of the improvements made by him thereon. We think, therefore, that the claim of the plaintiff in error to compensation on account of any improvements placed on the property by him should be disregarded.

His mother, being the owner of the premises, should have paid the taxes assessed against it. Her obligation in this respect was neither enlarged nor diminished by its having been set off to her as a homestead. But, while this was so, she incurred no forfeiture by neglecting this duty. The effect of the nonpayment of the taxes was simply to create an obligation to the state, which became a lien on the premises superior to that of the judgment creditors. The plaintiff in error, in the absence of a stipulation to that effect in the contract between his mother and himself for her support, was under no valid obligation to pay the taxes on the premises. The record is silent respecting such stipulation. It may be assumed, therefore, that their nonpayment should not be attributed to any default on his part.

This being so, we see no reason for prohibiting him from purchasing the premises at the tax sale; the title he should thereby acquire being, at the election of his mother, held in trust for her. If the sale had been valid, and his mother had sought to have him declared her trustee, it is clear that she would have been entitled to that relief only on condition that he should be reimbursed for the money he had paid at the sale, and subsequently for taxes. It is not, however, material to inquire into his right in this supposed state of the case, for the circuit court, as a matter of fact, found the sale to have been irregular and invalid. The sale having been invalid, and he under no obligation to pay the taxes originally, no reason is apparent for denying to him the lien created by

section 2880, Rev. St., which reads as follows: "Sec. 2880. Upon the sale of any land or town lot for delinquent taxes, the lien which the state has thereon for taxes then due shall be transferred to the purchaser at such sale; and if such sale should prove to be invalid on account of any irregularity in the proceedings of any officer having any duty to perform in relation thereto, the purchaser at such sale shall be entitled to receive from the proprietor of such land or lot the amount of taxes, interest and penalty legally due thereon at the time of such sale, with interest thereon from the time of payment thereof, and the amount of taxes paid thereon by the purchaser subsequent to such sale; and such land or lot shall be bound for the payment thereof." We think, therefore, that he was entitled on the pleadings and the undisputed facts, to a decree for the amount he had paid at the tax sale, and the taxes subsequently paid by him, together with interest thereon, at the rate of 6 per cent. per annum from the date the respective payments were made, and that for the sum thus due him he had a paramount lien on the premises. The finding of facts does not give the dates, nor the respective amounts, of the several payments of taxes made by the plaintiff in error. Had the finding stated those matters, final judgment would have been rendered by this court. For want of that data, the cause will be remanded to the circuit court. Judgment reversed, and cause remanded.

(55 Ohio St. 163)

CITY OF PIQUA v. GEIST.

(Supreme Court of Ohio. Nov. 1, 1898.)

COUNTY COMMISSIONERS—DUTY TO REPAIR BRIDGES ON CITY STREETS—DUTY OF CITY.

Under the amendment made February 8, 1894, of section 860, Rev. St. (91 Laws, p. 19), county commissioners are not required to construct and keep in repair bridges over natural streams and public canals, on streets established by a city or village for the use and convenience of the municipality, and not a part of a state or county road, though the city or village receive no part of the bridge fund levied on the property within the same. It is the duty of the city or village to construct and keep in repair such bridges, and it is liable in damages to one injured by its neglect to do so.

(Syllabus by the Court.)

Appeal from circuit court, Miami county.

Action by one Geist against the city of Piqua. Judgment for plaintiff, and defendant brings error. Affirmed.

D. S. Lindsay and M. H. & W. D. Jones, for plaintiff in error. Long & Kyle, for defendant in error.

PER CURIAM. The plaintiff below sued the city of Piqua, by her next friend, for an injury received by reason of a certain bridge in the city being out of repair, and recovered damages. The bridge was over a natural

stream of water, but not on a state or county road, free turnpike, improved road, abandoned turnpike, or plank road, in common public use. It was simply on a street that had been laid out and established for the use and convenience of the municipality. The city, for a defense, claimed that under section 860, Rev. St., as amended February 8, 1894 (91 Ohio Laws, p. 19), it was the duty of the commissioners of the county to keep the bridge in repair, as it received no portion of the bridge fund; and that it cannot, for this reason, be made liable to any one for the bridge being out of repair. The court below held otherwise. We are of the opinion that there is no error in the judgment. The amended section reads as follows: "Sec. 860. The commissioners shall construct and keep in repair all necessary bridges over streams and public canals on all state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in such cities and villages having by law the right to demand, and do demand and receive, part of the bridge fund levied upon property within the same; and when they do not demand and receive said portion of bridge tax the commissioners shall construct and keep in repair all bridges in such cities and villages: provided, that in all cases, except counties containing a city of the first grade of the first class, the granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the said board of commissioners." (The italics are ours, for the purpose of indicating important words.) It was not, as we think, intended by this amendment to extend the duty of county commissioners to the construction or repair of bridges which before the amendment they were not required in any case to construct or keep in repair. The phrase "all bridges," employed in the amendment, simply relates to and includes all the necessary bridges over streams and public canals, on all state and county roads, etc., first enumerated in the section, being the bridges that it is the general duty of county commissioners to construct and keep in repair, except where a city or village receives a portion of the bridge fund authorized to be raised by section 2824, Rev. St.; and the only change intended by the amendment was to give an option to the commissioners to allow, or not, a demand made by a city for a portion of the bridge fund, except in counties having a city of the first grade of the first class. In so construing this amendment, we but follow an established rule of construction, which requires the intent of a statute to be gathered from all the language employed, in connection with its apparent object and purpose; and, in doing this, it not infrequently happens that words of a general sense must be restrained to a more limited one, or the real intention of the legislature will be defeated. Judgment affirmed.

(59 Ohio St. 165)

KEEFER et al. v. MYERS et al.

(Supreme Court of Ohio. Nov. 1, 1898.)

PRINTED RECORD — JURISDICTION IN ERROR —
REVIEW OF MERITS.

When a printed record has been filed with the clerk of this court for the purpose of complying with the requirements of section 6711, Rev. St., that "so much of the record to be reviewed as will show the error complained of shall be printed," the court will not, on motion of the defendant in error, enter upon a consideration of the merits of the case to determine whether enough of the record has been printed, for a failure in that regard can in no event operate to his prejudice.

(Syllabus by the Court.)

Error to circuit court, Stark county.

Action between William B. Keefer and others and William G. Myers and others. From the judgment, Keefer and others bring error. Motion to dismiss. Overruled.

The defendants in error file a motion to dismiss the printed record filed in this case by the plaintiffs in error, for the following reasons: (1) Because said record does not contain all of the testimony offered and admitted in said cause, necessary to be reviewed upon the errors complained of in said plaintiffs' petition in error, to wit, the deposition of Charles W. Robinson, the assignor, which was used in said cause in the court below, and which was part of the bill of exceptions allowed by the court in this case; (2) because of other testimony offered in said cause necessary to be reviewed upon the error complained of in said petition in error, and which does not appear in said printed record. The motion is supported by affidavits showing that, upon the trial of the cause below, the defendants in error relied upon the testimony not printed.

Baldwin & Shields, for the motion. Sterling & Wernitz, opposed.

PER CURIAM. It is required by section 6711, Rev. St., that, "when a petition in error is filed in the supreme court, so much of the record to be reviewed as will show the error complained of shall be printed, and ten of the printed copies thereof filed with the papers, which printing the plaintiff in error may have done, or he may deposit with the clerk sufficient money to pay the costs thereof," etc. The result of a failure to file a printed record for the purpose of complying with this requirement is declared by the statute to be that the petition in error shall be dismissed, unless, for cause, the court orders the omission of such printing or the extension of time therefor. But, when there is an attempt to comply with this requirement of the statute, the court will not, on motion, enter upon a consideration of the merits of the case, to determine whether sufficient portions of the record have been printed. Whether, upon the submission of the cause, the judgment is affirmed because enough of the record to show the error complained of has not been printed, or the court examines other portions of the record to see

whether an error apparent upon the portion printed was cured, does not concern the defendants in error. A failure to comply fully with the requirement of the statute can in no event operate to their prejudice. The motion, therefore, anticipates the consideration of the case upon the merits. It will be overruled.

(59 Ohio St. 167)

STATE ex rel. SPRINGER v. HADLEY et al.
(Supreme Court of Ohio. Nov. 1, 1898.)

COUNTY AUDITOR — DEATH OF APPOINTEE — ELECTION TO FILL VACANCY — TERM OF OFFICE.

A county auditor elected to succeed one appointed by the county commissioners to fill a vacancy is elected for the full term of three years, commencing on the third Monday in October next after the election.

(Syllabus by the Court.)

Application by the state, on the relation of one Springer, for a writ of mandamus against one Hadley and others. Writ refused.

The petition of the relator alleges that at the general election of November, 1895, one Frank L. Niterhouse was duly elected auditor of Fayette county for a full term of three years, to commence on the third Monday of October, 1896; that he died prior to the commencement of said term, to wit, on the 30th of September, 1896; that on the third Monday of October, 1896, the commissioners of said county appointed to fill the vacancy in said office one J. L. Lindsay, who qualified and entered upon the discharge of the duties of said office, and continued therein until the filing of this petition, October 4, 1898; that at the general election in November, 1897, one John F. Craig was elected auditor of said county, received a certificate of election and a commission entitling him to enter upon the discharge of the duties of said office on the third Monday of October, 1898, and to continue therein until the third Monday of October, 1899, but not longer. The relator further alleges his eligibility to said office, and that his nomination thereto as a candidate to be voted for in the election in November, 1898, was properly certified to the defendants, who refused to print his name on the ballot because they were of the opinion that Craig's official term will continue until the third Monday of October, 1901, and that no election to said office is to be held in November, 1898. He prays for a writ of mandamus compelling the defendants to print his name on the official ballot to be voted at said election. The allegations of fact are admitted.

J. D. Post, for relator. John Logan, for respondents.

PER CURIAM. The contention of counsel for the relator is that on the third Monday of October, 1896, in view of the expiration of the official term of the auditor, and the death of Niterhouse, who had been elected to succeed him, there happened a vacancy

in the office for the definite term of three years, and that, as the vacancy occurred less than 30 days before the general election of that year, it would require both an appointment by the commissioners and an election by the people to fill it. This view does not seem to be warranted. As to this particular vacancy it was held in *State v. Dahl*, 55 Ohio St. 195, 45 N. E. 56, that it did not happen upon the death of Niterhouse, but on the third Monday in October, 1896, and that, as this was less than 30 days before the general election of that year, it could not then be filled by the people. It therefore became the duty of the county commissioners, under section 1017, Rev. St., to fill the vacancy by appointment. By the terms of section 11, Id., the appointee was entitled to hold until "his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy." The first proper election was that of November, 1897. *State v. Barbee*, 45 Ohio St. 347, 13 N. E. 731. It is admitted that the election of Craig to the office at that time was proper. For what term was he elected? This question is explicitly answered in section 1013, Rev. St.: "A county auditor shall be chosen triennially in each county, who shall hold his office for three years, commencing on the third Monday in October next after his election." The adverb "triennially" cannot have the determining effect claimed for it by counsel for the relator. The auditor of Fayette county having been properly elected in 1897, an election to that office in 1898 would not be triennial. Auditors are elected triennially if vacancies do not happen. But there is not, nor was there in 1897, any authority of law for the election of a county auditor for a term shorter than three years. Writ refused.

(59 Ohio St. 170)

CARTER v. CITY OF ZANESVILLE et al.
(Supreme Court of Ohio. Nov. 1, 1898.)

UNLAWFUL POSSESSION OF CORPSE—CEMETERY ASSOCIATIONS.

Section 3764, Rev. St., prescribing a penalty against persons, etc., having the unlawful possession of the body of a deceased person, is not directed against cemetery associations or their trustees; nor does it relate to the remains of persons long buried and decomposed.

(Syllabus by the Court.)

Error to circuit court, Muskingum county.

Action by Sarah S. Carter against the city of Zanesville and others. Judgment for defendants was affirmed by the circuit court on error, and plaintiff brings error. Affirmed.

The plaintiff in error filed in the court of common pleas of Muskingum county the following amended petition: "The state of Ohio, Muskingum County, Court of Common Pleas. Sarah S. Carter, as Administratrix, etc., v. The City of Zanesville, Wm. Morrison, George

Kerner, John Nepp, C. Stolzenbach, and David Hahn, Defendants. Amended Petition. The plaintiff, for her amended petition, says: That she is the administratrix of Alice T. Carter, deceased, duly appointed and qualified by the probate court of said county. That one Jehu W. Carter, late of said county, deceased, was the father of said Alice T. Carter, and he died on May 27, 1880, intestate, leaving said Sarah S. Carter his widow, and the following children, Charles R. Carter, James W. Carter, Mary I. Carter, and Edward S. Carter, who still survive, and together are the sole next of kin of said Jehu W. Carter and said Alice T. Carter, who died, intestate and unmarried, on July 16, 1852. That, about said last-named date, said Jehu W. Carter purchased from said city of Zanesville, for a valuable consideration then paid, lot No. nine (9) in the twelfth (12) tier of the east center square, in what was then called the Zanesville Cemetery, which is the same as is now called Greenwood Cemetery. Said grant of said lot was to Jehu W. Carter, his heirs and assigns, to be held and used as a burial place. On the 18th of July, 1852, the body of said Alice T. Carter was buried in said lot No. nine (9), and remained there till about the 1st of June, 1890, when it was, by the said city of Zanesville and said Stolzenbach and said Hahn, and their superintendent, agents, and employes, and who (with Thos. Lindsay, who is now deceased) composed the then board of trustees of said cemetery, and represented said city in the management of the same, none of which acts were within their statutory powers as such trustees, unlawfully and forcibly and fraudulently taken up and taken into their possession, and, by their carelessness and negligence, commingled with many other remains, so as to make identification impossible, and carted off to some unknown spot in said cemetery, and is now still held by defendants, said city, and said Morrison, Kerner, and Nepp, who are now the trustees of said cemetery, and represent said city in its management. Said unlawful having of the possession of said body and remains, and the said disinterring and removal thereof, and all of said acts, were done when defendants had the means of identifying said remains, and without any notice whatever to the said owners of said lot and next of kin of said descendants (although they or some of them lived in said city all the time), and against their wish. That the plaintiff and next of kin never found out said unlawful disinterring, taking, and holding by defendants, of said body or remains, until about June 12, 1895. Said Morrison, Kerner, and Nepp are, and then were, the board of trustees of said cemetery; and plaintiff and said next of kin have several times, since said June 12th, requested and demanded said body or remains; and they have failed and refused to surrender the same, or locate same. And plaintiff further says it was the duty of defendants to afford repose and security to said body or remains, and they held said

cemetery upon that, among other sacred trusts, for the benefit and solace of the lot owners, their heirs and next of kin, and the next of kin of those buried therein. Wherefore the plaintiff says a cause of action has accrued in her behalf against the said defendants, in the sum of five thousand dollars, for the benefit of the said next of kin of said Alice T. Carter, for which sum she asks for judgment, and also for all other relief to which she may be entitled." The court of common pleas sustained a general demurrer to this amended petition, and, the plaintiff not desiring to plead further, a final judgment was rendered against her, which on error was affirmed by the circuit court. The cause was thereupon brought to this court for review.

King & Browning, for plaintiff in error. C. A. Maxwell, Durban & McDermott, and Charles G. Griffith, for defendants in error.

PER CURIAM. The plaintiff founds her right of recovery on section 3764, Rev. St., which reads as follows: "Sec. 3764. Any person, association or company, having unlawful possession of the body of any deceased person shall be jointly and severally liable with any and all other persons, associations and companies, that had or have had unlawful possession of such corpse in any sum not less than five hundred dollars and not more than five thousand dollars, to be recovered at the suit of the personal representative of the deceased in any court of competent jurisdiction, for the benefit of the next of kin of deceased." This statute is directed against such persons, etc., as have unlawful possession of a "body" of a deceased person. The section further refers to the "body" as such "corpse." The terms "body" and "corpse," found in this statute, do not include the remains of persons long buried and decomposed. Nor is the penalty imposed by it directed against cemetery associations (or their trustees) where such remains may be quietly reposing. On the contrary, the object of the statute is to secure to the bodies of dead interment and that secure repose which natural affection and a decent respect for the remains of a human being demand. Judgment affirmed.

(59 Ohio St. 147)

CITY OF WELLSTON v. MORGAN.

(Supreme Court of Ohio. Nov. 1, 1898.)

MUNICIPAL CORPORATIONS—CONTRACTS FOR LIGHTING STREETS—VALIDITY—APPEAL FROM COMMON PLEAS—JURISDICTION—WAIVER.

1. Where a statute gives power to a municipal corporation to contract for the lighting of its streets and other public grounds for a period not exceeding 10 years, the conclusive implication is that such corporation is forbidden to contract for a longer period. And where such corporation undertakes, by the passage of an ordinance, to contract with an electric light company for an exclusive privilege to such company for the use of its streets, and stipulating for the lighting of the streets, etc., for 99 years, at a given price per month, such ordinance is ultra vires and void, and the contractual stipu-

lations therein are equally void, and neither party can enforce them.

2. M., the assignee of an electric light company, brought action in the court of common pleas against the city of W., claiming that the company had furnished electric light to the city under a valid subsisting contract, which had not been paid for, and that the city had violated its contract, and refused to perform it, and was threatening to prevent plaintiff from performing on his part in the future by destroying the poles, etc., of plaintiff, rightfully in the streets of the city, and praying an injunction, and that an account be taken of the amount due for light furnished, and that the city be required to pay for such lighting, and to recover damages for the violation of the contract. A general demurrer to the petition was sustained by the court of common pleas, and judgment being rendered against plaintiff, he perfected an appeal to the circuit court. In due time the defendant moved to dismiss the appeal for want of jurisdiction, which was overruled, and exceptions taken. An answer was then filed. This pleading disclosed, what had not appeared in the petition, that the only semblance of a contract between the city and the electric light company was in the form of an ordinance passed by the council, which undertook to grant to the company the exclusive use of the streets for the erection of its poles, etc., for the period of 99 years, and to bind the city to purchase light of the company during that time at a stated sum per month. These allegations were not controverted. As to other matters involved, issues were made up, and a trial had. The court thereupon found the ordinance illegal, null, and void, and found against the plaintiff in all respects except as to light furnished, and as to that claim found that the plaintiff ought to recover for light furnished what it was reasonably worth, viz. the sum of \$3,600, and proceeded to render judgment in favor of plaintiff for that sum, interest, and costs, and, as to the equitable relief prayed for, dismissed the petition. The defendant moved for a new trial on the ground that the finding and judgment were contrary to law, which, being overruled, exception was duly taken. *Held:* (a) That the case of the plaintiff, when fully disclosed in the circuit court, embraced a cause of action legal in its nature, and a simulated cause of action equitable in its nature, not arising from the same transaction, nor transactions connected with the same subject of action. (b) Of the latter the circuit court acquired jurisdiction by appeal. But as to the legal action it had not jurisdiction to adjudicate it, and upon discovery of the facts a dismissal of plaintiff's entire petition was the proper judgment to render. (c) The city having, in proper time, moved to dismiss the appeal on the ground of want of jurisdiction in the circuit court, and having, at the first opportunity, pleaded the real facts, and brought to the attention of the court the illegal character of the ordinance, and having also moved for a new trial upon a like ground, and preserved proper exceptions, is not estopped to make the question of such want of jurisdiction in this court.

(Syllabus by the Court.)

Error to circuit court, Jackson county.

Action by one Morgan against the city of Wellston, in the court of common pleas, for injunction, accounting, and specific performance of a contract. A demurrer to the petition was sustained, and plaintiff appealed to the circuit court. There was a judgment for plaintiff, and defendant brings error. Reversed.

The petition alleged, in substance, that about the year 1888 the municipality, through its council, duly and legally entered into a

contract with the Consolidated Wellston Coal & Iron Company, a corporation, providing for the lighting by electricity of its streets, alleys, and public places therein, and by ordinance granted to the company and to its assigns certain rights and franchises in the use of its streets and alleys for the erection and building therein of necessary buildings, poles, wires, etc., to carry out the terms of the contract of lighting, and further provided for the rights of the company and its assigns in the operation of the plant for lighting, fixing the price, time, and manner of payment. Pursuant to the contract and ordinance, the company, at great expense and outlay of money and labor, erected its plant within the city limits, all in conformity to the contract and ordinance, and to the acceptance of the city, until about February 7, 1889, in accordance with the terms of the contract. On that day the city, without any fault on the part of the company, or the owners of the plant, refused to further pay, and still refuses, although the contract is in full force and effect; notwithstanding which the company continued to operate the plant and light the streets, etc., according to the terms of the contract and ordinance, for more than two years after the refusal, and until the city became indebted to the company therefor in the sum of \$4,800, which it still owes, and refuses to pay. The company continued ready to perform, but did not light after that date because of the refusal of the city to pay. The petition further alleged the assignment by the company and transfer of its said plant and all appurtenances, including all rights, privileges, and franchises, and the said claim of \$4,800, to the plaintiff, Morgan, who, since that date, at great expense, has kept up the plant, and has been ready and willing and offered to carry out the terms of the contract; but the city has wholly refused to permit the plant to be operated, and refused to carry out its stipulations under the contract and ordinance, which have continued and still are in full force and effect. Said plant, etc., is adapted only for the lighting of said streets, alleys, and public places, as well as the buildings in said city, and does not interfere in the use of said streets, alleys, and public places for other matters, and the plant could not be removed, and would be of no value for any other purpose or place. The city, regardless of plaintiff's rights, and unlawfully, and without a hearing, and without consent of the plaintiff, without condemning or making compensation to plaintiff, and by force, is threatening to and is about to tear down and remove said machinery, poles, wires, and lamps, and will, if not restrained, cut down and remove the same, to the irreparable damage and injury of the plaintiff, against which he could have no adequate remedy at law.

The prayer was for a temporary restraining order; also that an account may be taken between the city and plaintiff, the owner of the plant, that the city may be required to

carry out the terms of the contract, said injunction be made perpetual, and the plaintiff recover such damages as may be justly due for the violation of the terms of the agreement, and the city's refusal to perform on its part, and for other and further relief in law and equity as he may be entitled to. A temporary restraining order was allowed upon the filing of the petition. To this petition a general demurrer was filed by the city; which, upon hearing, was sustained, and, the plaintiff failing to plead further, judgment was rendered for defendant that it go hence without day, and recover costs. Notice of appeal to the circuit court was entered, and in due time bond given, and the appeal perfected.

In the circuit court a motion was interposed by the defendant to dismiss the appeal because (1) it appears by the petition that the case is in law, and not in equity; (2) because there was no final order or decree made by the common pleas from which an appeal can be legally taken; (3) because the judgment rendered is a money judgment, and not a decree in equity. Upon hearing, this motion was overruled, to which the city duly entered its exception. A general demurrer to the petition was then interposed, which was overruled, and exception taken. Thereupon an answer was filed by the city, alleging, in substance, as a first defense, that the so-called ordinance undertook to give to the company exclusive permission and authority within the limits of the municipality to erect, lay, operate, and maintain on the public streets, alleys, etc., its poles, wires, etc., and other electrical apparatus, for the period of 99 years. It provided also that the company should receive \$200 a month, and for each lamp over 20, \$8 per lamp. It further provided that the company may at any time after three months' notice to the council abandon all rights and privileges granted to the company by the ordinance; and that, when the company signified its assent in writing, filed with the clerk, the same should become operative. The ordinance was the only authority, contract, or agreement that the municipality had with the company, and the only semblance of contract that the company had when it erected its said plant. The ordinance is unconstitutional and illegal, because the council had no power to pass the same; because it is contrary to law, is in restraint of trade, and against public policy; and because it is an attempt to dispose of public money without such money being in or due the treasury, or any tax levied therefor, at the time said company entered upon what it claimed to be part performance on its part of the stipulations of the pretended contract. The company was not formed for the purpose of furnishing light, nor could it, under any implication, possess the power of entering into any such contract, the same not being authorized by the certificate of its organization or by the laws of the state. So there was and is no mutuality of obligation between the municipality and the company, nor

between the plaintiff and the defendant; and on the 7th day of February, 1889, the council duly notified the company that said council had stopped the payment of said \$200 per month, as it then did, and as it was legally bound to do, and from said date no further payments were made on said alleged contract. For a second defense the city denied the indebtedness claimed, and put in issue generally the averments of the petition not covered by the allegations of the first defense. For a third defense the answer took issue with allegations of the petition bearing upon plaintiff's claim for equitable relief, and tending to justify the city's action with respect to its order for the removal of the poles, etc., from the streets. A copy of the ordinance was attached to the answer, and made a part of it. A reply was filed to the third defense, which took issue upon all the allegations of new matter therein.

At the May term, 1896, of the circuit court, the cause was heard upon the petition, the answer and reply, and the evidence. The court, on request, stated its conclusions of fact and law separately. Among other facts found by the court was the passage of the ordinance of the character as stated in the answer; that the poles for lights were placed and located by direction of the city; that in erecting the plant and lighting the city the company acted under the ordinance, and in good faith, and in the belief that the same was legal and binding; that the company commenced to light and continued from about the 1st of May, 1888, for over two years, and the city paid the bills which were rendered until February 7, 1889, subject to certain deductions agreed upon. On the date named the city refused to further pay because of certain other promises made by the company with other parties. The company and its assigns continued to run and operate the plant for 24 months after February, 1889, with the knowledge of the council, and without objection other than as shown by a written notice of February 7th, to the effect that the council had ordered the payment of \$200 per month to be stopped until certain agreements and contracts were complied with by the company. About February 1, 1891, the city notified the company to take down its poles and wires from the streets, and remove the plant, or that it would be done by the direction of the council, and at the expense of the owners. The city did not pay any portion of the amount provided by the ordinance to be paid monthly for the 24 months from and after the 1st of February, 1889. The court found that the lighting during the 24 months was subject to a deduction of \$50 a month because the plant was not in repair, and the light furnished not as good as the ordinance required, but that it was worth \$150 a month. The court further found that Morgan was the owner and assignee of the rights of the company, and of the claim against the city, and entitled to recover any amount that might be due thereon. As conclusions of law the court found (1) the ordinance to be illegal, null, and void, and

the plaintiff not entitled to the equitable relief thereunder as prayed for; (2) the city to be liable for lights furnished after the 7th of February, 1889, and the plaintiff entitled to recover from the defendant the value of said lighting, being \$150 a month for 24 months, amounting to \$3,600. To all of which findings of fact and to the second conclusion of law the defendant excepted. Judgment was thereupon rendered for plaintiff for the amount found, with interest and costs, and, as to the equitable relief prayed for, the petition was ordered dismissed. A motion for a new trial was filed by defendant, and overruled, exception duly taken, and this proceeding is to reverse the judgment of the circuit court on the grounds, among others, that the court erred in overruling the motion to dismiss the appeal, that it erred in overruling the demurrer to the petition, that it erred in its second conclusion of law, erred in overruling the motion for a new trial, and erred in rendering judgment against the city and in favor of Morgan.

James M. Tripp, for plaintiff in error. J. W. Bannon and J. M. McGillivray, for defendant in error.

SPEAR, C. J. (after stating the facts). Our inquiry naturally begins with the petition. It was the judgment of the common pleas that it did not state facts sufficient to entitle the plaintiff to any relief, and hence the sustaining of the demurrer followed, and a judgment for the defendant. The record does not disclose the ground of the ruling. The circuit court took the opposite view, and overruled the demurrer, holding that sufficient facts were stated to entitle the plaintiff to some relief. We are of opinion that in this the circuit court was right, and that, had the allegations of the petition been sustained by proof, and no countervailing facts presented by the defendant, the plaintiff would have been entitled to judgment. But the case finally made was one essentially different from that set out in the petition. The plaintiff's theory was that he could stand on the ordinance as a valid contract (there being no other express contract), and hence was entitled to relief,—legal, upon showing that he had performed the contract on his part, and thus earned the stated compensation for lighting; and equitable, upon showing that the city was violating its contract, and undertaking to make it impossible for the plaintiff to perform in the future on his part, and unlawfully attempting to destroy his property; and, further, that the former ground was an incident to the latter, and not an independent ground of action. His theory, although consistent with the allegations of his petition, was shown to be wrong upon a disclosure of the facts, because of the invalidity of the ordinance, the council being without power to contract, either for an exclusive privilege to the company for the use of its streets, or for a stipulation to purchase light at an agreed price for 99 years, as the circuit court properly held

And, clearly, the city could not have been held to the performance of the stipulations of the ordinance, and had the right to cease operating under it, and this without reference to the motive which induced its action; and on notice of such intention to the company it could not longer claim to act under it, and could not maintain its poles, etc., in the streets after reasonable notice to remove them. Indeed, it was bound to know, and in law did know, that the ordinance was ultra vires, and invalid. But the council had power, under section 2491, 1 Rev. St. (Bates' Ed.), to contract in a legal way for the lighting of its streets and other public grounds for a term not exceeding 10 years, and, upon its being shown by the company that it had furnished light to the city, which it had accepted and enjoyed, a right to recover as upon a quantum meruit would arise in favor of the plaintiff. The action of the city in permitting the company to place its poles, etc., in the streets, and in directing the location thereof, gave to the company the position of a licensee as to occupancy of the streets, which would forbid a ruthless or unreasonable destruction of its poles by the city. Its rights would not be based upon contract, however, but would result from the conduct of the city in giving consent and direction. Whether the judgment of the circuit court is or is not erroneous in this respect we need not inquire, inasmuch as no complaint is here made of the judgment in that respect.

It is suggested, however, that the ordinance was not absolutely void, but may be treated as good for the term of 10 years, since the subject-matter is not ultra vires, and inasmuch as 99 years is greater than 10 years, and must include it; and hence the contract, in that way, may be supported. This implies that the purpose of the law is only to prevent the enforcement of contracts made in violation of its terms, and not to prevent the making of such contracts. Now, the language of the statute is that the municipalities referred to shall have power to contract for light for any term not exceeding 10 years. This implies, with as much force as if it had been expressly stated, that the municipality shall not have power to contract for any term longer than 10 years, and the natural inference is, we think, that the purpose is to inhibit such contracts entirely, for the only certain way of insuring their nonenforcement is to prevent their attempted execution. This may not be effectually accomplished unless they are held to be void. And this is in accord with the general rule which is well expressed by Prof. Freeman in his note to *Robinson v. Mayor, etc.*, 34 Am. Dec. 625: "As if [the municipal corporation] is permitted to exercise the powers which its charter authorizes, so it is prohibited from exercising those which are not authorized. Any act or attempted exercise of power which transcends the limits expressed or necessarily inferred from the language of the instrument by which its powers are conferred is beyond the authority of a municipal corporation, and is, therefore, null

and void." Attention is also called to the language of Follett, J., in *Coke Co. v. Avondale*, 43 Ohio St., at pages 267, 268, 1 N. E., at page 531.

But another objection seems equally fatal to the proposition. We are dealing with the subject of contract. It implies parties, and a meeting of the minds. The paper presented undertakes to stipulate for the furnishing of light, and an agreed price therefor, for a period of 99 years. The proposition is that we now treat it as a contract for 10 years; that is, that the court shall make a new contract for the parties for 10 years, and then enforce it. How can we say that the company would have incurred the great expense and outlay of money and labor, which the petition declares was incurred, for the period of 10 years only? And if the court were of opinion that probably the company would have been willing to so contract, where is there any authority in the court to now alter the terms that they did agree upon, and then enforce them as changed? We are of opinion that neither in law nor reason is there any ground for such a proposition.

Another theory of the plaintiff we think equally mistaken. Reference is had to the claim that the legal relief asked was incidental to the claim for equitable relief. At first blush, it might seem that this proposition is tenable, but it will not, we think, bear examination. If the alleged contract (ordinance) had been a valid one, so that the rights of plaintiff could be founded on it, then it might possibly be said that in an action to enforce it the right to maintain the poles, etc., in the streets, and the right to continue to operate the plant and furnish to the city light at the price named in the contract, and for injunction to prevent the city from interfering with these rights by forcibly destroying the poles, etc., was the major ground of action, and that the claim for pay for light already furnished was but an incident to it. But the moment it is ascertained that the averments of the petition alleging a contract are wholly false, and that there never was a contract, then it becomes apparent that the real ground of action is totally distinct from the pretended one, and that the maintaining of one would not, in the slightest degree, aid the support of the other, and the defeat of one not in any manner tend to the defeat of the other. Had there been, in fact, a contract between the parties, and the plaintiff had simply failed to sustain by his proof the alleged attempted breach by the city, and the threatened destruction of his property, there might, perhaps, have been some warrant for claiming that an accounting to ascertain the amount due under the contract was an incident to the other claim. But, the claimed equitable case having no basis whatever, being in fact a myth, resting only on unsubstantial averments of the petition, a claim for money could not be an incident to it. Substance cannot, in any sense, become an incident to mere shadow. In other words, the petition, when the real situation was dis-

closed, contained, as already suggested, a ground of action cognizable at law, being upon a quantum meruit for light furnished. It also contained in form, but in form only, a cause of an equitable nature. True, the two were conglomerated in one statement, but that affects only the form; it does not reach to the substance. This initial error on the part of the plaintiff led him to a mistaken course as to the future. Falling in the common pleas, he appealed to the circuit court, thus attempting to carry the whole case up. As to the attempted cause of action relating to the injunction, being tested by the allegations of the petition, it was appealable, and hence the appeal as to that was effective. Therefore the overruling of the motion to dismiss the appeal by the circuit court, at that stage of the inquiry, was not erroneous. But, the action to recover pay for light already furnished, being an action to recover money only, and of right triable by jury, and not an incident to the equitable cause, neither arising from the same transaction nor transactions connected with the same subject of action, was not, standing by itself, appealable, and the circuit court could not, under our statutes, rightfully take jurisdiction of it. But, beyond this, if the money claim could, in any view, be treated as an incident to the other, it would necessarily depend for its support upon the other, and perforce must share its fate; and, when that was dismissed as without foundation, the claim for an accounting should have been dismissed with it,—that is, there cannot be an accounting under a contract which does not exist.

But it is contended that the question of the jurisdiction of the circuit court cannot be raised in this court, because the case was tried below as though that court had jurisdiction; that it was practically so conceded in argument, and hence the conduct of the city amounts to an acquiescence; and the case of *Kershaw v. Snowden*, 36 Ohio St. 181, is cited in support of the contention. In that case an administrator was sued for money alleged to have been placed in the hands of his intestate upon the express trust to be repaid to the plaintiff on the death of the intestate, but retained by her as trustee of the express trust, viz. to retain the same in trust until her death, and then to execute the trust by the return of the sum; and the petition prayed that the administrator be ordered, adjudged, and decreed to pay plaintiff out of the estate the amount he is equitably entitled to. A demurrer to the petition was overruled, and then an answer filed, traversing the facts alleged, and setting up the six-years limitation. On trial in the common pleas the court found for the plaintiff, and rendered judgment. Both parties gave notice of appeal. Plaintiff perfected his appeal by giving bond. The administrator was not required to give bond. In the district court a larger sum was recovered. A motion

for new trial was made on the ground that the finding was not supported by the evidence. A bill of exceptions was taken, containing all the evidence. The errors assigned in this court by the administrator were that the petition does not show a cause of action, and that the evidence does not support the finding; the latter being the principal ground. The court found the judgment excessive, and reduced it, and rendered judgment for the proper amount. The court also found that the case was one of a legal, and not an equitable, nature; but, inasmuch as the case was tried on its merits in the district court without objection, this court did not feel called upon, sua sponte, to consider the question of error in entertaining the appeal. That point does not appear to have been presented by the plaintiff in error, but seems to have been first noticed by the court here, and the statement of it made as an explanation of the court's ruling in affirming the judgment notwithstanding the nature of the action. Clearly, this holding does not cover the case at bar. In this case the defendant interposed a motion to dismiss the appeal at the threshold on the ground that the case is at law, and not in equity, and excepted to the order overruling it. True, upon the face of the record as it then stood, the motion was properly overruled. But it was probably the best the defendant could do to express its objection to the effort to try the case over again in the circuit court. At least it showed that the city did not intend to give away its rights; and, had the petition contained a true and full statement of the exact case as it existed, and of the ground on which the plaintiff must finally rest his claims, the motion to dismiss would have properly raised the real question of jurisdiction, and, in such condition of the record, would have been well taken. The answer followed, setting up the invalidity of the ordinance. The city also excepted to the second conclusion of law. It then moved for a new trial because the judgment was contrary to law, and error is urged here because the circuit court erred in the particulars named, and because of error in rendering judgment for the plaintiff. Just what argument was made to the court we cannot know, as, of course, the record does not disclose that. But, inasmuch as the answer pleaded that the ordinance was invalid, which the court found, and that, therefore, there was no contract, it may be inferred that the point was made by counsel in argument also, and its legal effect pointed out. However, this matter of argument is not of much consequence. Suffice it to say that we cannot find from this record that the city's action was such as to estop it from now questioning the jurisdiction of the circuit court. We think that court was without jurisdiction, and that its judgment should be reversed, and judgment entered for plaintiff in error. Reversed.

(173 Mass. 286)

CLEMONS ELECTRICAL MFG. CO. v. WALTON.

(Supreme Judicial Court of Massachusetts. Bristol. Dec. 14, 1898.)

BILL OF EXCEPTIONS—DISALLOWANCE—ESTABLISHMENT.

Where a bill of exceptions disallowed by the presiding judge contains several distinct and independent exceptions, clearly and separately established, the truth of one or more of them may be established on a petition to establish the truth of all the exceptions, though the others are not proved as alleged, or are waived by exceptant.

A petition was filed in the supreme judicial court by William A. Walton, as defendant in an action by the Clemons Electrical Manufacturing Company, to establish the truth of exceptions which had been disallowed by the trial judge. The court ordered the appointment of a commissioner to hear the parties and to make a report. 47 N. E. 102, 168 Mass. 304.

S. H. Tyng and C. C. Mellen, for plaintiff. Burdett & Snow, for defendant.

FIELD, C. J. After the decision reported in 168 Mass. 304, 47 N. E. 102, the petition to prove the exceptions was referred to a commissioner, with the usual powers, and his report is before us. The argument has been confined to the questions whether the bill of exceptions as originally filed by the defendant is in proper form and whether the truth of the exceptions therein alleged has been established. We see nothing in the form of the bill of exceptions as filed which can be held to justify the disallowance of the exceptions. One of the defendant's requests for rulings was "that upon all the evidence the plaintiff cannot recover." This rendered it necessary that the substance of all the evidence relating to the plaintiff's cause of action should be set out in the exceptions. The bill of exceptions as filed contains little that can be regarded as immaterial, and some complaint has been made by the counsel of the plaintiff that on some points sufficient evidence has not been recited. It may be that some of the evidence which has been set out in the exceptions by question and answer could have been reduced to the narrative form, but plainly there has been an attempt to abridge the evidence, and we cannot say that this has not been done, so far as was reasonably safe for the excepting party. The present case is easily distinguished from *Ryder v. Jenkins*, 163 Mass. 536, 40 N. E. 848. In *Sawyer v. Iron Works*, 116 Mass. 424, 433, it is said in the opinion: "If the bill as tendered to the presiding judge contains several distinct and independent exceptions clearly and separately established, the truth of one or more of them may be established, although the others are not proved as alleged or are waived by the excepting party." See *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, and 29 N. E. 525. It appears from the report of the commissioner that ten of the exceptions

alleged, which are numbered in the report as follows, viz. 1, 2, 3, 4, 5, 6, 8, 9, 12, 14, "were duly taken, and that the ruling excepted to and the evidence to which they excepted are stated with accuracy." The evidence reported at the request of the plaintiff concerning the second exception seems to us immaterial, and does not tend to modify the exception as taken. These are distinct and independent exceptions, and the truth of them has, we think, been established. The exceptions alleged which are numbered in the report 10 and 11 are not established, and are waived. As to the exception numbered 13 in the report, we think that the difference between the exception as alleged and the exception as proved is verbal and unimportant, and the truth of this exception is established. *Markey v. Insurance Co.*, 118 Mass. 178. As to the exceptions numbered 15 and 16 in the report, it appears that the petitioner is willing to accept the facts as found by the commissioner, and we think that he should be permitted to do so. Whether on these facts the same questions in the same aspects are presented in the exceptions reported as in the exceptions filed may perhaps be disputed. We do not at present see any substantial difference between the two statements, but the bill may be amended in these respects according to the report of the commissioner. See *Lemery v. Railroad Co.*, 167 Mass. 254, 256, 45 N. E. 688; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, and 29 N. E. 525. There remains only the exception numbered 7 in the commissioner's report. We think that the same disposition of this should be made as of the fifteenth and sixteenth exceptions. The exceptions as alleged in the bill as filed, except those numbered 10 and 11 in the report of the commissioner, will stand for argument, with the findings of the commissioner on the seventh, fifteenth, and sixteenth exceptions. So ordered.

(157 N. Y. 368)

PEOPLE ex rel. SWEET v. LYMAN, State Com'r of Excise.

(Court of Appeals of New York. Dec. 6, 1898.)

OFFICERS—CIVIL SERVICE—APPOINTMENT—PROBATION—STATUTES—REPEAL—INTOXICATING LIQUORS—EXCISE BOARD—CONFIDENTIAL AGENT—APPEAL—REVIEW.

1. Laws 1883, c. 354, as amended by Laws 1894, c. 681, providing that in civil service appointments there shall be a period of probation before any absolute appointment, was not repealed by Const. 1895, art. 5, § 9, providing that civil service appointments shall be according to fitness, to be ascertained, "so far as practicable," by examinations, but providing that soldiers in the Civil War shall be given preference, without regard to standing, on the list.

2. Laws 1896, c. 112, § 10, provides that special agents appointed by the state commissioner of excise "shall be deemed the confidential agents of the state commissioner." The duties of such agents are to perform acts in the name of the commissioner which are secret, and which involves trust and confidence. Held that, notwithstanding the civil service com-

mission placed the position of special agent in the list where competitive examinations are required, such agents hold "confidential positions," which are expressly excepted from the operation of Laws 1896, c. 821, providing that Union veterans shall be preferred in civil service appointments.

3. When a correct judgment has been rendered on incorrect grounds, the court of appeals may affirm it on grounds not raised in the courts below.

Haight, Bartlett, and O'Brien, JJ., dissenting.

Appeal from supreme court, appellate division, Third department.

Application by the people, on the relation of William H. D. Sweet, for a peremptory writ of mandamus commanding Henry H. Lyman, state commissioner of excise, to reinstate relator as special agent in the excise department. An order denying the writ (44 N. Y. Supp. 1084) was affirmed by the appellate division (50 N. Y. Supp. 444; 51 N. Y. Supp. 641), and the relator appeals. Affirmed.

The relator is a citizen of this state, and an honorably discharged soldier of the Union army, who served in the late War of the Rebellion. He passed a civil service examination for the position of special agent in the excise department, was notified thereof by the civil service board, and that his name was on the eligible list for appointment. Subsequently the state commissioner of excise wrote him as to his name being on the civil service list for appointment as special agent, and made inquiry in the letter as to his past, and afterwards had a personal interview with him. Afterwards, and on September 25, 1896, the commissioner appointed him for the probationary term of three months, and assigned him to certain duties, which he undertook to perform. On the 19th of the following December, and a few days before the expiration of the three months, the respondent wrote to the relator stating that his efficiency and capacity for the work during his probationary term of three months had not been found satisfactory, and that in accordance with the terms of his appointment, and the civil service rules under which it was made, his term of service would cease on the 23d of December. More than three months after the relator had left such employment this proceeding was instituted. The petition for the writ alleged his citizenship; that he was an honorably discharged soldier; that he was examined by the civil service board, which certified that he was eligible for appointment; that he was assigned to duty at Ogdensburg, N. Y.; that he properly rendered the services required in the position; that he received notice from the defendant stating his efficiency and capacity were not satisfactory; that no notice of any charges against him was ever given, and no such charges were made; that he was competent to fill the position; and that the defendant refused to reinstate him. Most of the allegations of the petition were admitted by the defendant's answer, except those relating to the competency of the relator to discharge the duties

of the place. It then set up affirmatively that he was incompetent, inefficient, and performed certain improper acts during his service under such probationary appointment. Upon the writ, petition, and return the matter was brought to a hearing before a special term, when the relator asked for an alternative writ if the court held that any issue of fact arose upon the return. Upon the hearing the special term denied the relator's application for a peremptory writ, and did not award an alternative one. From that determination an appeal was taken to the appellate division, where the order of the special term was affirmed. That court held that the relator was not removed from the position of special agent within the meaning of the "Veterans' Act"; that he was properly appointed, but that his appointment was a probationary one for three months; and that, as that period had expired, he was not removed from the position to which he was assigned, and therefore could not be reinstated under the provisions of chapter 821, Laws 1896.

Eugene D. Flanagan, for appellant. Theodore E. Hancock, for respondent.

MARTIN, J. (after stating the facts). At the time of the relator's appointment chapter 354 of the Laws of 1883, as amended, provided for the appointment of commissioners who should constitute the New York civil service commission. It then made it the duty of such commission to aid the governor in preparing suitable rules for carrying the statute into effect; declared that such rules should provide for open, competitive examinations for testing the fitness of applicants for positions in the public service; that all the offices, places, and employments should be arranged in classes; and that there should be a period of probation before any absolute appointment or employment. When the relator was appointed, one of the rules established by the civil service commission was as follows: "Every original appointment or employment in the civil service shall be for a probationary term of three months, at the end of which time, if the conduct and capacity of the person appointed or employed shall have been found satisfactory, the probationer shall be absolutely appointed or employed, but otherwise his appointment shall cease." It is manifest that the purpose of the statute and rule relating to probationary appointments was to enable the appointing officer to ascertain and correct any error or mistake of himself or of the civil service commission arising from the inefficiency of a candidate certified as eligible, where he might prove incompetent to discharge the duties of the place to which he was appointed. It seems to be practically admitted that if the statute of 1883, and the civil service rules established in pursuance of it, were in force and valid when the relator's probationary term ended, the determination of the learned appellate division was right and should be affirmed, unless the question is controlled by the "Veterans'

Act," which will be subsequently considered.

But it is contended that the provisions of the constitution of 1895 relating to this subject have suspended or repealed the law and rules existing at the time, so that the defendant had no authority to make a probationary appointment. In other words, the appellant's claim is that, having been appointed by the respondent in pursuance of a certificate of his eligibility furnished by the civil service commission, his appointment could not be limited to any probationary term, and therefore he could not be removed except for cause shown, after a notice and hearing.

Thus, the first point involved in this controversy is whether the amended constitution repealed or suspended the existing statute and rules of the civil service commission so as to render a probationary appointment improper and illegal. Section 9 of article 5 of the constitution of 1895 provides: "Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive: provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section."

The effect of this provision upon the existing statute and rules of the civil service commission has been several times considered by this court. In *People ex rel. McClelland v. Roberts*, 148 N. Y. 360, 363, 42 N. E. 1082, it held that chapter 354 of the Laws of 1883, as amended by chapter 681 of the Laws of 1894, constitutes a general system of statute law applicable to appointments and promotions in every department of the civil service of the state, with such exceptions only as are specified in the statute itself, and that by section 16 of article 1 of the constitution of 1895 that act was continued in force as the law of the state, subject only to such alterations as the legislature might make. In delivering the opinion in that case, Judge O'Brien said: "It is quite clear, also, that the civil service statutes constitute a general system of statute law applicable to appointments and promotions in every department of the civil service of the state, with such exceptions only as are specified in the statute itself." In *Chittenden v. Wurster*, 152 N. Y. 345, 355, 46 N. E. 857, it was held that the statute of 1883 was in force, and provides the necessary machinery for carrying the provisions of the constitution into effect, and the doctrine of the *McClelland Case* in that respect was reaffirmed. In the *Sweeley Case*, 12 Misc. Rep. 174, 181, 33 N. Y. Supp. 369, Judge Herrick discussed

this provision of the constitution. That case was affirmed by this court without opinion (146 N. Y. 401, 42 N. E. 543), and his opinion was especially commended by Judge Bartlett in the *Keymer Case*, 148 N. Y. 219, 224, 42 N. E. 687. In that case Judge Herrick said: "The civil service law of the state, as it was prior to the adoption of the new constitution, is, with the exception of the acts that have been passed relative to soldiers, in harmony with the constitution." That principle was adopted by this court in affirming that case. Thus, we have its authority as declared in at least three of its decisions, establishing the proposition that the act of 1883, so far as it affects the question under consideration, is, and has been, in operation and effect since the adoption of the new constitution, as well as before.

We think this proposition should be sustained upon principle, as well as upon the authority of our former decisions. The declaration of the constitution is that appointments and promotions shall be made according to merit and fitness. The obvious purpose of this provision was to declare the principle upon which promotions and appointments in the public service should be made, to recognize in that instrument the principle of the existing statutes upon the subject, and to establish merit and fitness as the basis of such appointments and promotions in place of their being made upon partisan or political grounds. Record Constitutional Convention, vol. 5, p. 2444; vol. 6, p. 2552 et seq. It then declares that merit and fitness shall be ascertained by examinations, and also the extent to which they shall be thus determined. The extent to which examinations are to control is declared to be only so far as practicable. This language clearly implies that it is not entirely practicable to fully determine them in that way. It was the purpose of its framers to declare those two principles, and leave their application to the discretion of the legislature. As was said by the chairman of the committee to which this amendment was referred: "It seemed best to the committee, after very careful and repeated consideration, to leave the application of the principle (of merit and fitness) to the good sense of the legislature * * * the application of it." Thus, it is apparent, not only upon the face of the provision itself, but from the debates in the constitutional convention, that the framers of this amendment did not intend to absolutely determine how the merit and fitness of appointees were to be ascertained and determined. The constitution provides that to an extent those questions are to be determined by an examination, but it is obvious that it was understood at that time that it would be impracticable to fully determine the merit and fitness of an employé or appointee by a mere examination, whether competitive or otherwise. It is to be observed that the provision of the constitution is that the merit and fitness of the ap-

plicant or appointee shall be ascertained in the manner stated, so far as practicable; that is, in part at least, if they can be even partially ascertained in that manner. The words "so far as practicable" plainly relate to the degree or extent to which the examination should control. The provision is not that the examination shall be the basis of determining merit and fitness when or where, or in such cases as it is practicable, but that in all cases they are to be ascertained by an examination, only so far as practicable. In other words, it does not declare that the examination shall control in ascertaining merit and fitness in any or all cases where it is practicable, but that the qualifications of the candidate shall be ascertained in each case by an examination to the extent and only so far as it is practicable, and consequently sufficient to insure the selection of proper and competent employees. The constitution plainly implies that other methods and tests are to be employed when necessary and calculated to fully ascertain the merit and fitness of the applicant. If a probationary term or other method is necessary to enable the appointing officer to fully or correctly ascertain the merit and fitness of the applicant, the plain and clear intent of this provision is that it shall be employed.

Assuming, then, that the framers of the constitution contemplated that other methods might also be employed, surely it cannot be properly said that the trial of an applicant for a probationary period is not an appropriate method of testing, and thus correctly ascertaining, his merit and fitness. Besides, it is a reasonable method. Indeed, it is the usual one. What good business man would employ an assistant, a clerk, or even a laborer, for a period which he could not limit or control, without adopting that method of ascertaining his qualifications for the place? There can be but one answer. Therefore, that the method provided by the statute and the rules of the civil service commission is appropriate and well calculated to materially aid an officer or department in determining the merit and fitness of an employ  cannot be successfully denied.

Moreover, when this constitutional provision was adopted, and when it was proposed in the convention, the statute and civil service rules to which we have adverted were in force, and were well known to and understood by the framers of that provision. Hence it is but reasonable to suppose that when it was proposed they had the existing statute and rules in view, and did not intend to supersede or interfere with them. In the words of Judge O'Brien: "It is evident from the language of the new provision of the constitution, and from the debates in the convention which followed its introduction into that body, that it was framed and adopted with reference to existing laws, which were intended to give to it immediate practical operation. So that, in adopting the new con-

stitution, the people, in their original capacity, decreed that thereafter all the departments of the government should be brought within the operation of existing laws on the subject of appointments." *People ex rel. McClelland v. Roberts*, 148 N. Y. 369, 42 N. E. 1085.

While it is true that under the constitution the merit and fitness of an applicant for appointment in the civil service of the state or its civil divisions are to be ascertained, in part at least, by an examination, competitive or otherwise, except in cases where such an examination would be wholly ineffectual to determine those questions, still, even in cases where an examination may be had, it is to control only so far as merit and fitness may be ascertained by a mere examination. As the constitution plainly discloses that other methods were expected to be employed to insure proper appointments in the civil service of the state, doubtless it was the then existing method of probationary trial that was in the minds of its framers.

Again, when we examine the history of the reform in the civil service, we find that the question of its propriety had arisen and been considerably discussed in this country for a considerable time before the year 1871. In the month of March in that year congress passed the first civil service statute enacted in this country. That statute, however, was short, and amounted to but little more than a mere declaration of the principle of civil service reform, with brief, and what were regarded as insufficient, provisions as to the means of carrying it into effect. It remained in that situation until 1883, when, by reason of a continued agitation of the subject, the statute was extended and enlarged so as to include substantially all the provisions of the present law upon the subject. In that year the legislature of the state of New York also passed the act under consideration, which is, in all its essential particulars, like the act of congress. That statute has been in full operation and effect in this state since that time, without amendment except in some minor particulars. Thus, although the act of 1883 was, to an extent, considered as tentative when passed, the experience of 13 years under its provisions, both in relation to the state and federal governments, had not, when the state constitution was amended, seemed to its friends to require any radical or substantial change. Both the federal and state statutes embodied the principle or method of probationary trials as a means of determining the merit and fitness of candidates. This method had also been employed in the civil service of Great Britain since 1855. The English civil service rules in existence then and since provide that no person shall receive a formal appointment in the civil service until his practical capacity and disposition have been tested by a probationary trial of six months, at the expiration of which, if not satisfactory, he is to be dropped. Practically the

same provision is included in the federal statute as well as in the statute of this state. It is also included in the civil service rules in the cities of Albany, Brooklyn, Poughkeepsie, Elmira, Rochester, Schenectady, Troy, Yonkers, and other cities of the state. Indeed, I have been unable to find any commonwealth or political division where the principle of civil service reform is in force that does not include, as a method of determining the qualifications of an appointee, the test of a probationary trial.

The propriety of this method is also particularly recognized by such civil service advocates as Dorman B. Eaton and Silas W. Burt. The former, one of the earliest and most earnest advocates of civil service reform, in substance says that the period of probation before actual appointment is necessary to exclude an applicant, if any should have passed the competition successfully who are found wanting in practical ability for the work. 1 Enc. Political Science, 485. The latter, who for more than 35 years has been interested in the reform of the civil service, and under whose direction the first civil service examination in this country was had, in speaking of the subject of probationary trials, says: "This limitation [referring to the selection from the three persons standing highest] reduced the opportunities for favoritism to the lowest point deemed possible, since a restriction to the one person standing highest would annul the officer's discretion and responsibility for the appointment, while the three names gave a discretionary range that has by long trial been approved as sufficient, particularly since it was supplemented by appointment for a probationary period only, before a permanent tenure was given. This probation was an essential part of the examination, and has in practice shown how satisfactory the antecedent procedure was, since the number of those who were dropped from service during or at the end of the probationary period has been so inconsiderable that it may be disregarded." Report of 1897. Thus we find not only that the civil service rules of Great Britain, the act of congress, the statute of our own state, the civil service rules of the United States, of the state and of the cities thereof, provide for a probationary test, but the early and continuous friends and advocates of civil reform also concur in regarding the probationary period as useful and necessary to the proper administration of the civil service. Therefore, when we consider the laws and civil service rules existing when the constitutional amendment was adopted, the position taken upon this subject by its friends and advocates, and the guarded language of limitation employed in the amendment, there would seem to be no doubt as to the purpose of the amendment, nor that it was intended to continue the hitherto uniform rule as to probationary trials.

This is made more clear when we remember that the individuals and organizations that

were urging this amendment had previously induced the legislature to adopt the statute of 1883, and the statutes amending it, and that they were also influential in shaping the rules which were adopted by the civil service commission. Obviously there are many positions in the civil service where the merit and fitness of an applicant cannot be ascertained with any certainty by a mere examination under the rules of the civil service. It seems apparent that what was intended by this provision of the constitution was that merit and fitness should be the basis of appointments of public officers and employes, and that those qualities should be ascertained and determined, so far as they could be practically, by such an examination, but that other and further methods should be employed when necessary to secure efficiency of service. It is manifest that actual trial of an appointee in the place which he seeks would furnish better means to accurately determine his fitness and merit than would any mere examination that could be had. Can it be said that the purpose of this provision was to prevent a probationary trial to discover the fitness and merit of an applicant, in view of the language employed, and of the extent to which probationary terms were then provided for? It is obvious that in many cases an applicant for a position in the civil service of the state or of a municipality might be entirely qualified so far as his attainments disclosed by a civil service examination were concerned, and still be wholly unfit to occupy the position by reason of indolence, inadaptability to the service, garrulousness, want of character, experience, tact, integrity, or lack of a proper disposition, or the existence of habits which would render him quite unfit to assume the duties of the position, and yet not be actually incompetent. This court has held that where the relations between the officer and the appointee are confidential this provision of the constitution does not apply, but fails by reason of the impracticability of determining merit and fitness for such a position by a civil service examination. *People ex rel. Crummey v. Palmer*, 152 N. Y. 217, 46 N. E. 328. In *Chittenden v. Wurster*, 152 N. Y. 345, 359, 46 N. E. 857, in discussing this question, Judge Haight said: "A candidate may be ever so competent, and still lack many of the necessary elements of a trustworthy officer; he may be ever so learned, and still lacking in judgment and discretion; he may be discreet, and still without character; he may be honest, and yet meddlesome and a person in whom you could not confide."

If this provision of the constitution is absolute, and permanent appointments must be made whenever the civil service board certifies that an applicant is eligible, then, as the constitution makes no exception as to confidential clerks or employes, no reason exists why it must not be enforced in those cases as well as in any other. It is true the statute in relation to veterans provides that it

shall not apply to a private secretary, deputy of any official or department, or to any other person holding a strictly confidential position. That, however, is a mere declaration of the legislature; and if it be true that the constitution of 1895 relates to all appointments and positions in the civil service, and makes the examination by the civil service commission as to merit and fitness the measure which controls, then the veterans' act, so far as it relates to confidential appointees, is in conflict with that provision and is invalid.

The manifest purpose of the civil service statutes and of the amended constitution was to improve the civil service of the state by securing employes of greater merit and fitness. Therefore it is quite as much within their purpose and provisions that an examination should not control when other and better methods would secure an improved service as that it should not apply to confidential positions. If it does not apply in one case, it applies only partially in the other. It can with no more propriety be said that an examination is impracticable because a position is confidential, than that it is at least partially impracticable because it will not fully ascertain the merit and fitness of the applicant. In one case the examination is impracticable by reason of the responsibility and confidential character of the position; in the other, by reason of the inefficiency of such an examination to fully and fairly determine the merit and fitness of the contemplated employé. One is impracticable because of the character of the position, and in the other the manner of ascertaining the qualifications of the applicant by examination is impracticable because insufficient. While we have held in regard to the former that those positions are not included in the provision as to examinations because they are not practicable to determine merit and fitness for such places, and hence no examination need be had, still it is to be observed that the constitution does not say that examinations shall not be made when impracticable, but that they shall be made so far as practicable to determine merit and fitness; that is, to the extent that they are practicable to accomplish that purpose, they shall be employed.

We think there are two classes of cases where the question of practicability arises,—one, where the place is such that no examination can be had because the questions of merit and fitness for the particular place cannot be reached in that way; and the other, where an examination may be had, but different and additional tests will tend to secure an improved service by more accurately determining these questions. If the statute providing a probationary term as one of the means to determine the merit and fitness of an appointee or employé is in conflict with the constitution, then the statute which excepts from its operation deputies and confidential employes is also in conflict with it, and the former decision of this court as to persons holding a confidential relation to the person or department appoint-

ing them was not justified under the provisions of the constitution. If the words "so far as practicable" do not apply to a case where the real merit and fitness of an appointee are sought to be determined by other methods which are surer and will more accurately determine those questions, then they have no meaning, and cannot be employed to sustain the decision of this court in the Chittenden Case.

As it is evident that the amendment of the constitution was not intended to provide that civil service examinations should be the sole means of determining the merit and fitness of applicants, and as it expressly declared that laws should be made by the legislature to provide for its enforcement, and in view of the fact that this court has already decided that the statutes which were in existence when the constitution was adopted are still in force, and are the laws of this state relating to the subject, we think it cannot be properly held that the statute which then provided for a probationary appointment as one of the means of ascertaining the merit and fitness of applicants is in conflict with that provision of the constitution.

But it is said that, if this construction of the constitution shall obtain, its provisions may be violated by unscrupulous and dishonest officers. That may be. There are few statutes or constitutional provisions that may not be thus violated. But, in construing the language of the constitution, distrust of public officers, or fear that they may not discharge their full duties, should not be assumed or entertained and made a basis for holding the statute of 1883 in conflict with it. In construing this amendment, this court should not assume that public officers will not perform their duty or will fail to discharge the responsibilities imposed upon them by law, in an honest and proper manner. "It must be assumed that the legislature, and all other public bodies intrusted with the functions of government, general or local, will use the power conferred by the constitution or the law fairly and in the public interests." *Clark v. State*, 142 N. Y. 101, 105, 36 N. E. 817. Nor is it to be assumed that the framers of the constitution had any such idea in view when it was proposed and adopted. If it had been the purpose of the framers of this provision to prevent the legislature from requiring other and existing means of determining the merit and fitness of appointees or employes in the public service, they would not have employed language limiting the extent and effect of such examination to practicability in ascertaining and determining them, but would have made the examination absolute and controlling. So, too, if they had intended to limit the matter of practicability to particular positions or places, they would have employed language expressing that idea, such as, "in such cases as it is practicable," or some other equally apt term. Instead of employing any such expression, they have used one which shows plainly that the limitation

of practicability was intended to be one of extent, and applicable to all cases alike. By these considerations, we are led to the conclusion that the law of 1883, providing for a probationary term in which to test the merit and fitness of an applicant for a position in the civil service of the state or the various municipalities thereof, is not in conflict with the provisions of section 9 of article 5 of the constitution. Therefore, that statute being valid and in force at the time of the relator's appointment, it is obvious that his services for the state were properly terminated, so far as the civil service laws and regulations are involved.

This brings us to the consideration of the question whether the rights of the relator are controlled by the veterans' act (Laws 1896, c. 821). It is contended that, independently of the civil service law and by virtue of that act, a veteran has an absolute right to be preferred and appointed to any appointive position he seeks, unless the officer or department having the power of appointment shall show affirmatively, upon a hearing after notice upon charges made, that he is incompetent, or has been guilty of some act or misconduct which renders him unfit for the place, and the burden of proof is upon the officer or department to establish such incompetency or misconduct. The veterans' act, however, declares that its provisions shall not be construed so as to apply to any person holding a confidential position. So that, if the position of special agent was confidential, then chapter 821 has no application in this case, although it may have force in others. Section 10 of the liquor tax law (chapter 112, Laws 1896) permits the state commissioner of excise to appoint not more than 60 special agents, at an annual salary of \$1,200, payable monthly, and then declares: "Such special agents shall be deemed the confidential agents of the state commissioner, and shall, under the direction of the commissioner and as required by him, investigate all matters relating to the collection of liquor taxes and penalties under this act, and in relation to the compliance with law by persons engaged in the traffic in liquors." Then follows a detailed statement of the duties of such special agents, which shows quite clearly that they are of an important and confidential character. The position of such an agent is one in which he represents the commissioner in a manner and to an extent which may well be regarded as strictly confidential. Thus, we find that the same legislature, which excepted from the operation of the veterans' act any person holding a strictly confidential position, declared the position held by the relator to be confidential. That the position of special agent is confidential there can be little doubt. This court has had occasion recently to several times consider the question as to what constitutes a confidential position.

In *Re Ostrander*, 12 Misc. Rep. 476, 34 N. Y. Supp. 295, it was held that the position of

deputy superintendent of public buildings was a confidential one, and therefore fell within the exception to the veterans' act, which gave preference in appointment to honorably discharged soldiers, sailors, and marines. That case was affirmed by this court on the opinion of the court below. 146 N. Y. 404, 42 N. E. 543.

In *People ex rel. Crummey v. Palmer*, 152 N. Y. 217, 220, 46 N. E. 328, this court again considered the meaning of the word "confidential," as used in a similar statute, and it was there said: "The statute which we have under consideration has reference to officials, and the confidential relations mentioned undoubtedly have reference to official acts, and include not only those that are secret, but those that involve trust and confidence which are personal to the appointing officer. If, therefore, the statute casts upon an officer a duty involving skill or integrity, and a liability either personal or on the part of the municipality which he represents, and he intrusts the discharge of this duty to another, their relations become confidential." It was there held that an assistant warrant clerk in the office of the comptroller of the city of Brooklyn sustained a confidential relation to his superior officer, within the meaning of a statute preventing the removal of soldiers, sailors, or members of a volunteer fire department in any city of the state.

In *Chittenden v. Wurster*, 152 N. Y. 360, 46 N. E. 857, this question was also considered, and, after referring to the *Crummey Case*, it was there said: "We then were of the opinion that where the duties of the position were not merely clerical, and were such as were especially devolved upon the head of the office, which, by reason of his numerous duties, he was compelled to delegate to others, the performance of which required skill, judgment, trust, and confidence, and involved the responsibility of the officer or the municipality which he represents, the position should be treated as confidential."

When we read the provisions of section 10 of the liquor tax law, which declare that a special agent shall be deemed the confidential agent of the state commissioner, and ascertain the duties he is required to discharge under the immediate direction of the commissioner, it becomes manifest that they are of a confidential character. His acts are official acts performed for and in the name of the commissioner, and are not only secret, but they also involve trust and confidence which are personal to the appointing officer. The duties cast upon the special agent involve skill, integrity, and liability personal to the officer he represents, and the relations between the excise commissioner and the special agent fall plainly within the principle of the previous decisions of this court upon the subject. Thus the position to which the relator was appointed was not only declared by statute to be confidential, but its duties were such as to render it clearly so

under the doctrine of the cases decided by this court.

It is, however, said that the civil service commission has placed the position of special agent in the list where competitive examinations are required, and hence the position cannot be regarded as confidential. Surely the civil service commission cannot change the actual status of a position by declaring one which is actually confidential not to be so, nor is it vested with power to repeal a valid statute, or to practically annul it, by declaring a position to be competitive when the law has provided otherwise, and the position is plainly of a strictly confidential character.

I find no significance in the suggestion that the question of the confidential character of the position of special agent was not raised by the excise commissioner in the courts below. If that were admitted, it would not aid the relator, as it is a universal rule that it is the duty of an appellate court to affirm a judgment which is correct, although the ground assigned for the decision may be untenable. In other words, the rule requires that a correct judgment should be affirmed, regardless of the correctness of the reasons given for awarding it. If the act of 1883 is valid and still in force, and the position of special agent is a confidential one, it follows that the judgment was right and should be affirmed.

We are of the opinion that the statute of 1883 and the statutes amendatory thereof are still in force and are not in conflict with the constitution; that the position of special agent was a confidential one; that the relator was not entitled to be appointed to or retained in the position of special agent; and that the appellate division properly so held. The order should be affirmed, with costs.

HAIGHT, J. (dissenting). William H. D. Sweet, the appellant, is a citizen of this state, and is an honorably discharged soldier of the Union army during the late Civil War, having served therein as a second lieutenant of the 3d regiment of cavalry of New York State Volunteers. In June, 1896, he passed the civil service examination, and was placed upon the register of applicants eligible for appointment to the position of special agent, under the liquor tax law. On the 25th day of September thereafter the defendant appointed him to the position of special agent for a probationary term of three months, upon a salary of \$1,200 per annum. He thereupon entered upon the discharge of the duties of his position, and served the term for which he was appointed. On the 19th day of December, 1896, he received a letter from the defendant notifying him that his efficiency and capacity for the work required as a special agent during his probationary term of three months had not proved satisfactory, and that his employment would cease on the 23d day of December thereafter. On the 8th

day of April, 1897, he petitioned the court for a peremptory writ of mandamus directed to the defendant commanding him to reinstate him to the position of special agent, or for such other and further relief as may be just and proper. In his petition he alleged that he had the capacity required for the performance of the duties of a special agent, and that he was efficient in the discharge of his duties as such during his probationary term. The defendant opposed his application for the writ upon an affidavit filed by him asserting his inefficiency and incapacity for the discharge of the duty of the position. Upon the hearing of the motion before the court, the relator asked that an alternative writ issue, in order that the question of his capacity and efficiency might be determined by the court. The court refused to issue an alternative writ, and denied his motion for a mandamus, and this order was affirmed in the appellate division.

Chapter 821 of the Laws of 1896 provides that: "Section 1. In every public department and upon all public works of the state of New York, * * * honorably discharged Union soldiers, sailors and marines shall be preferred for appointment, employment and promotion: * * * provided they possess the business capacity necessary to discharge the duties of the position involved. And no person holding a position by appointment or employment in the state of New York * * * who is an honorably discharged soldier, sailor or marine, * * * shall be removed from such position or employment except for incompetency or misconduct shown, after a hearing upon due notice, upon the charge made, and with the right to such employee or appointee to a review by writ of certiorari; a refusal to allow the preference provided for in this act to any honorably discharged Union soldier, sailor or marine, or a reduction of his compensation intended to bring about a resignation, shall be deemed a misdemeanor, and such honorably discharged soldier, sailor or marine shall have a right of action therefor in any court of competent jurisdiction for damages; and also a remedy by mandamus for righting the wrong. The burden of proving incompetency or misconduct shall be upon the party alleging the same. But the provisions of this act shall not be construed to apply to the position of private secretary or deputy of an official or department or to any other person holding a strictly confidential position."

It may be that the provisions of this act casting the burden of proving incompetency upon an officer charged with the duty of making appointments to the civil service is unwise, and that the clause making him guilty of a misdemeanor, and liable personally in damages in case he fails to allow the preference provided for, is harsh and unreasonable. Possibly these provisions may operate to deter officers from exercising their judgment against applicants in considering their busi-

ness capacity, and that, in consequence, incompetent persons may receive appointments to positions in the civil service, thereby prejudicing the public interests; but as to the wisdom and effect of these provisions we have nothing to do, and, if they are unwise, harsh, and unreasonable, the remedy is with the legislature. As long as they remain a part of our statutes, it is the duty of the courts to faithfully execute them.

The statute, as we understand it, as applied to the case under consideration, casts the burden of showing that the relator did not possess the business capacity necessary to discharge the duties of special agent upon the defendant. He appointed the relator for the probationary term of three months, provided by the statute and the rules promulgated by the governor. The commissioner thus had an opportunity to ascertain his competency and business capacity. At the end of the probationary term the relator, being an honorably discharged Union soldier, was entitled to his permanent appointment, provided he possessed the business capacity necessary to properly discharge the duties of the position. The commissioner, in the first instance, was charged with the duty of determining that question of fact. He found against the relator, but his finding is not conclusive. Under the provisions of the act, the relator is given the right to have the correctness of the commissioner's determination ascertained by mandamus. This remedy he invoked, and it appears to us that, upon the papers presented, he was entitled to an alternative writ, to the end that the question raised with reference to his competency and business capacity might be tried and determined by the court in the usual way.

It is now contended that the provisions of the liquor tax law (section 10, c. 112, Laws 1896) provide that the special agents "shall be deemed the confidential agents of the state commissioner," and that the provisions of the act which we have above considered do not apply to any "person holding a strictly confidential position." It will be observed that in the liquor tax law the word "strictly" is omitted, but, assuming that it was the intention of the legislature to make the position of special agents a strictly confidential position, the question then arises as to whether it is in conflict with the civil service clause of the constitution, which provides that "appointments and promotions in the civil service of the state * * * shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive." In considering these provisions of the constitution in the case of *Chittenden v. Wurster*, 152 N. Y. 345, 46 N. E. 857, we held that competitive examinations were not practicable for positions which were strictly confidential to the appointing officer; and in that case, and in the *Crummey Case*, 152 N. Y. 217, 46 N. E. 328, we discussed to some extent the question as to what consti-

tuted a confidential position. Of course, great weight should be given to the determination of the legislature as to the character of the position. It, however, cannot override the constitution, and by an enactment make a position confidential which, under a fair and reasonable construction of the constitution, is not confidential. Whether a position is confidential or not depends largely upon the character of the duties of the position. We think, however, that we are relieved from the consideration of this question at this time for the reason that the commissioner of excise in this case has made no claim that the position was confidential or that he refused to appoint the relator for that reason. In his answer to the petition for the writ of mandamus he alleged two grounds, and two only, for the opposing of the allowance of the writ. These grounds were—First, incompetency; and, second, laches in instituting the proceedings. Those were the only questions brought to the attention of the court, and are the only questions which we think can properly be here considered. The order of the appellate division and that of the special term should be reversed, and an alternative writ issued, and for that purpose the proceeding should be remitted to the special term, with costs to abide the final award of costs.

BARTLETT, J. (dissenting). I agree with Judge HAIGHT for reversal, but place my vote on the grounds stated in his opinion, and the additional one based on the civil service provisions of Const. art. 5, § 9. The fundamental law commands that appointments and promotions in the civil service shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive. It then further commands that the honorably discharged soldiers and sailors in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion may be made. In my opinion, when the name of a veteran is duly reached on the eligible list, he is entitled, under the provisions of the constitution and the law enacted to carry them out, to an absolute appointment, and thereafter can be removed only for incompetency or misconduct. Laws 1896, c. 821. The provisions for a probationary appointment of three months (Laws 1883, c. 354, § 2, and rule 12 of the Civil Service Board) are contrary to the letter and spirit of the constitution, and consequently void. The rule enacted by legislative authority, and as amended in 1896, provides: "At the end of such term, if the conduct, capacity and fitness of the probationer are satisfactory to the appointing officer, his retention in the service shall be equivalent to his absolute appointment; but if his conduct, capacity and fitness be not satisfactory, he may be discharged at any time." If this rule,

and the legislation upon which it is based, can stand, it may be well asked what has become of that protection which the constitution is supposed to afford the veteran after his merit and fitness have been ascertained by a competitive examination and his name entered on the eligible list? It comes to this: that he receives his absolute appointment only if his conduct, capacity, and fitness are satisfactory to the appointing officer. To my mind, this amounts to a practical repeal of the constitutional provisions to which reference has been made. If the act of 1883 and the rule framed in pursuance of it stand, the legislature can repeal the act of 1896 and all other acts standing in the way, and appointments will depend upon the whim—the caprice—of an appointing officer, if he is disposed to abuse the power with which he is vested. It is no answer to say that the law presumes an officer will perform his duty properly. The civil service policy of the state, which was finally placed in the constitution, seeks to do away with this abuse of power and patronage. I am not content to rest my vote solely on the act of 1896.

MARTIN, J., reads for affirmance. PARKER, C. J., and GRAY and VANN, JJ., concur. HAIGHT, J., concurs so far as it relates to the civil service provisions of the constitution and statutes, but dissents as to the portion relating to the veterans' act, upon the grounds specified in his opinion. HAIGHT and BARTLETT, JJ., read for reversal, and O'BRIEN, J., concurs.

Order affirmed, with costs.

(176 Ill. 228)

GAINES et al. v. KENDALL.¹

(Supreme Court of Illinois. Dec. 21, 1898.)

STATUTE OF FRAUDS — LANDS — CONTRACTS — IMPROVEMENTS — GIFTS — EVIDENCE — PARENT AND CHILD — CONTROL OF PROPERTY.

1. A verbal promise to convey land at a certain time in the future is taken out of the statute of frauds where the donee takes possession and retains it until such time, and makes valuable improvements.

2. Complainant testified that defendant, his father-in-law, promised him, when he was married, to convey certain land to him and his wife, when defendant's youngest son became of age, if complainant would take possession and improve the land. Several witnesses testified that defendant had declared that he had given the land to complainant, and others that he had declared that it was given to complainant and his wife. Complainant held possession for eight years, when his wife died, being a few days before defendant's son became of age. Complainant had made valuable improvements, and had bought adjoining lands, which were specially valuable when used with the land in question. Defendant's uncorroborated testimony was that he merely promised to let complainant have the land rent free, and he denied that he ever promised to make a deed, or that he had declared that he had given the land to complainant or to him and his wife. *Held*, that

complainant was entitled to a decree of specific performance.

3. A verbal promise to convey land is taken out of the statute of frauds where the donee takes possession and makes valuable improvements, though he pays no rent while in possession, and the value of the improvements does not exceed the rental value of the land.

4. Where defendant promised to convey land to complainant, his son-in-law, and his wife, complainant, on the death of his wife, cannot affect the rights of his infant child in the land by any concessions he might make to defendant.

Magruder, J., dissenting.

Appeal from circuit court, Edgar county; H. Van Sellar, Judge.

Bill by Ralph Gaines and another against Henry M. Kendall. From a decree for defendant, complainants appeal. Reversed.

This is a proceeding in chancery, begun in the Edgar circuit court, to compel the specific performance of a contract to convey a tract of land. The bill alleges that Ralph Gaines, one of the complainants, was married to Frankie Kendall in January, 1888; that at that time her father, Henry M. Kendall, who is the defendant, owned a certain 105 acres of land in Edgar county; that, in February following, the defendant gave this land to the complainant Ralph Gaines and his wife, Frankie Gaines, if they would move upon it and improve it and make it their home; that he promised complainant and his wife that he would make them a deed to said land as soon as his youngest son, George, became 21 years of age, which would be December 10, 1896; that his said wife, Frankie, died 14 days before said George became of age; that, at the time defendant gave them said land, they were living on land belonging to the father of complainant; that defendant, on the 6th day of August, 1888, put complainant and his wife, Frankie, into the possession of this land, and told them the land was theirs, and to go on and improve it as they desired; that, from that date to the present, they have held and owned the land; that they have made extensive and valuable improvements thereon; that they bought other smaller tracts, amounting to 100 acres, adjoining this 105 acres, which had a special value only because they adjoined this tract, and that these purchases were made at the instance of defendant; that in November, 1896, Frankie Gaines died; that she left an infant son, Orville, as her only heir; that, since her death, complainant Ralph Gaines holds the same for himself and the infant son; that, after the wife's death, defendant began to claim some interest in the land, and on December 30, 1897, gave complainant Ralph Gaines notice to quit, and deliver up possession, claiming absolute ownership, and threatening to eject complainants. The prayer is that defendant be required to convey the 105 acres to the complainants in fee simple, and for other general relief. A demurrer was interposed to the bill, but was overruled. Defendant answered, admitting

¹ Rehearing denied.

the possession of the land in the complainants, as alleged, but averring that, at the time Frankie Gaines and Ralph Gaines moved onto the land, "defendant told them they could have the use of and the right to cultivate said land without the payment of any other rent than the payment of all taxes assessed" against it, and "that they could have the balance of the rent to help them along"; that they entered and held the land as tenants only; and that the improvements made were only such as were needed for their own convenience. The answer also alleges that by a mutual arrangement, after the death of the wife, Ralph Gaines abandoned all claims to the land; and it was arranged that he should be permitted to use and occupy the premises without rent until March 1, 1898. The statute of frauds is set up and relied upon to defeat the agreement to convey, alleged in the bill. A general replication was filed, and much testimony was taken upon the issues thus made up. Upon a hearing, the bill was dismissed, and the complainants appeal.

Eads & Eads and Dundas & O'Hair, for appellants. H. S. Tanner and J. W. Howell, for appellee.

WILKIN, J. (after stating the facts). The theory of the appellants is that appellee, soon after the marriage of Ralph Gaines and Frankie Kendall, agreed and promised the former that, if he and his wife would go upon this land and improve it, he would make them a deed to it upon his son (George) becoming 21 years of age, and that, in pursuance of that promise and agreement, they entered into possession of the land, occupying it as their home, and made valuable improvements thereon. This, under the decisions of this court, if established by the proof, is sufficient to entitle the complainants to a performance of the contract. *Langston v. Bates*, 84 Ill. 524; *Bright v. Bright*, 41 Ill. 97; *Kurtz v. Hibner*, 55 Ill. 514; *McDowell v. Lucas*, 97 Ill. 480; *Warren v. Warren*, 105 Ill. 568; *Smith v. Yocum*, 110 Ill. 142. These authorities are full to the effect that, although the contract was a mere verbal one, taking possession under the agreement and making the improvements as alleged will take the case out of the statute of frauds.

The answer and theory of the defense are that no contract or agreement to convey was ever made, but that the complainant Ralph Gaines and his wife were simply permitted to occupy the premises as tenants, without rent, except the payment of the taxes. The testimony of the complainant Ralph Gaines fully sustains the theory of the bill. He testifies that shortly after he and defendant's daughter were married, in 1888, and before they went to housekeeping, he and defendant were passing the farm in controversy, and defendant said, "I suppose you have heard what I intend to do for you, but haven't told you;" that he then said, "I will tell you; I will give you

and Frankie this 105 acres," pointing to it; that he reserved a small corner that he mentioned, then; that he had to get a passage-way down to the branch that was running through the 105 acres; that he said he wanted to reserve that until he got a better watering place; that he said, "I will not make you a deed to this farm now, but will make you a deed when George becomes of age;" that George is defendant's youngest son. He further testified: "Defendant knew then that I had a place rented, and he said, 'I wish you could go on to that right now,'—that is, the 105 acres. He said Burkhart had a lease on a part of it, and that I couldn't get possession of that until next year, I had 160 acres rented of my father. I told him I had wheat sowed, and would have to go onto my place. Then he said, 'I want you to go on this 105 acres just as soon as you can, and go to fixing it up and improving it.' He said: 'It is yours, and don't be uneasy; if I should happen to drop off at any time, it is fixed down at Paris.' He didn't say how it was fixed. He told me to go ahead and improve it to suit myself; that it was mine and my wife's." It appears that Gaines and his wife then moved on the farm and occupied it about eight years; that they made improvements, by way of remodeling the barn, setting out a new orchard, building fences, etc., and placed the farm in first-class condition. The wife died November 26, 1896, and appellee's youngest son, George, came of age a few days thereafter. Walter Green, who collected the taxes the two years following the marriage, says, speaking of the directions he received from defendant as to the making of tax receipts: "He told me these two pieces belonged to Ralph Gaines. These two pieces were the 105 acres where Gaines lived. Kendall said those two pieces belonged to Ralph Gaines. * * * Mr. Kendall also had me correct the tax books;" and that the tax books were changed to show them assessed to Ralph Gaines. Ed Hildreth says defendant told him "he had bought that place for Frankie. He said he had given it to his daughter and Ralph." William Jones says: "I had a conversation with Mr. Kendall about this 105 acres of land just before Ralph and Frankie moved there. He said he had given it to Ralph and Frankie, but he did not allow to make them a deed for it just then, but he allowed to give them a deed after awhile." Mrs. Mary Jones, who had worked at the Kendall house, said that at various times she heard Kendall say he had given this land to Ralph and Frankie, and would give them a deed for it when George came of age. Ed McGrew says Kendall told him he had bought this land for his daughter. Henry Baker says he heard Kendall refer to it as Ralph's land in 1891. Fremont Black says defendant told him he had given this farm to Ralph. Charles Wallis says that in July, 1888, he heard Kendall say he intended to give this 105 acres to Ralph and his wife, and that he bought it for them. Three of Ralph's brothers corroborate his testimony

as to the gift of the land and promise to make the deed. Several other persons testify to transactions which indicate that the defendant always treated the land as belonging to his daughter and her husband. Conceding that the testimony of these witnesses, standing alone, would not be sufficient to establish the alleged agreement to convey, still it does strongly tend to support the evidence of Ralph Gaines, who does testify to the contract.

All the testimony of the above-named witnesses is contradicted by the defendant, who testifies that he did not give the land to Ralph and Frankie Gaines, and never, at any time, stated to any person that he had given that land to them or either of them, and he specifically denies having had the conversations above set forth. It cannot be reasonably said that so many witnesses, who, so far as the record shows, are unimpeached and uncontradicted except by the defendant himself, should have made false statements in regard to conversations had with him, or have been mistaken as to what he said. The reasonableness of the testimony of Ralph Gaines, viewed in the light of all the surrounding circumstances, seems to us much more apparent than that of the defendant. It not only appears that complainant and his wife expended money in erecting buildings and making other improvements upon the land, putting it in grass, farming it in such a way as to improve it, while renting adjoining land upon which to raise annual crops, and purchasing adjoining pieces of land which, detached from this farm, would be of much less value than to a common owner, but we think there is to be gathered from all the evidence in this case clear proof that it was the intention to convey this property to his daughter and her husband, and that he only changed his purpose to do so upon the death of his daughter. In other words, we think it is impossible to read the testimony in this record without reaching the conclusion that, if the daughter had survived the period of the son becoming 21 years of age, the conveyance insisted upon would have been made without objection. We are satisfied the allegations of the bill are sustained by the proofs.

Appellee insists that the evidence fails to show that appellants will sustain so great a loss upon the appellee refusing to comply with the agreement to convey as will amount to a fraud upon appellants, contending that the rule in such case is that, unless so great a loss be sustained as to amount to a fraud, the contract cannot be enforced. To support this theory, he shows that the reasonable rental value of such land in that locality for the eight years would amount to more than the value of the improvements placed upon the land. We cannot agree with this view of the law applicable to this case. The rights of the parties do not wholly depend upon whether there would have been a loss upon failure to convey as agreed. They are fixed by the verbal agreement and the subsequent act of taking possession and making improvements thereunder, which take

the parol contract out of the operation of the statute of frauds. See authorities above cited. If Ralph Gaines took possession of the land under a promise to convey it to himself and wife, and placed lasting and valuable improvements thereon, fitting it for a home for himself and family, it cannot be said the refusal of the defendant to comply with his agreement would not operate as a fraud upon Ralph Gaines merely because the value of the improvements did not exceed the rental value of the land during the time it was occupied.

It is said that the evidence of appellants' witnesses shows the promise of appellee to convey was indefinite, in that some say the promise was to convey to Ralph, some to Frankie, and others to both of them. This discrepancy in the evidence does not militate against the equity of the appellants. The obvious intention was, no doubt, to donate the property for the benefit of the family.

It is further contended that the evidence does not show that Frankie Gaines ever assented to and accepted the terms of the contract, and for that reason it cannot be enforced. This contention, as well as that the donee is not definitely named, is fully met by what is said in the case of *Langston v. Bates*, 84 Ill. 524. As is said in that case, if the husband is induced to go upon the property under an agreement for a future conveyance to him and his wife, or either of them, and, upon the faith of the contract thus made, he improves the land, and by his money and labor renders it more valuable, the appellee ought in equity to be compelled to perform his contract. There is no controversy in the case between the husband and his child, who is the only heir of his deceased wife, as to whether the conveyance shall be made to one or both of them; and appellee cannot, in equity, refuse to perform an agreement made with the husband because the evidence discloses slight discrepancies as to whether the conveyance shall be made to the husband alone, or to him and the child.

The contention that, after the death of the wife, appellant Ralph Gaines abandoned his right to a specific performance of the contract to convey, is untenable. Gaines could not affect the rights of the infant child by any concessions he might wish to make. As to himself, it appears that he and appellee had several conversations regarding a compromise of the matters relating to this land, the last one being on March 15th, before the bringing of this suit; but it does not appear that a definite arrangement or compromise was entered into. On the other hand, from the testimony of a witness who seems to be entirely disinterested it appears that the parties on that occasion entirely failed to arrive at any satisfactory settlement of the matters between them.

From a careful review of the whole record, we are satisfied the action of the court in dismissing the bill was erroneous. The decree should have been for the complainants as prayed, for the 105 acres as described in the bill, except 3 acres in the southwest corner of

the tract. The decree of the circuit court will accordingly be reversed, and the cause remanded, with directions to enter a decree as here indicated. Reversed and remanded.

MAGRUDER, J., dissents.

(176 Ill. 275)

CATLIN COAL CO. v. LLOYD.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

MINES AND MINERALS—POSSESSION OF SURFACE—SEVERANCE OF ESTATE—ADVERSE POSSESSION.

1. The possession of the surface of land does not carry with it the possession of the minerals beneath, so as to confer title thereto under the statute of limitations, where the estate in the minerals has been severed from that in the surface.

2. Coal and minerals in place, the title to which has been severed from the title to the surface, constitute "land," within Rev. St. c. 83, § 7, providing that, whenever a person having color of title made in good faith to vacant and unoccupied land shall pay all taxes legally assessed thereon for seven successive years, he shall be adjudged its legal owner, etc.

Appeal from circuit court, Vermillion county; F. Bookwalter, Judge.

Ejectment by Henry Lloyd against the Catlin Coal Company. From a judgment of the circuit court for plaintiff, defendant appeals. Reversed.

W. J. Calhoun and H. M. Steely, for appellant. Kimbrough & Meeks and Lawrence & Lawrence, for appellee.

BOGGS, J. This was ejectment brought by the appellee against the appellant company to recover the coal and mineral underlying the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 34, township 19 N., range 12 W., in Vermillion county, Ill. The defendant filed a plea of not guilty, and the cause was submitted to the court without a jury. The declaration was amended so that it described and claimed only the undivided five-sixths of the said tract. The judgment of the court was that appellee was the owner of and entitled to the possession of the property as described in the amended declaration.

It was stipulated by the parties that the appellee was the owner of the surface of the land in question, and the title in fee to the said tract of land, including the coal and mineral, at one time rested in one Harvey Sandusky. It appeared said Harvey Sandusky severed the estate in the coal and minerals underlying the tract from the estate in the surface, and that the title to the coal and minerals passed from him by a deed duly executed by him in 1863 or 1864. Each of the litigants endeavored to trace title to the estate in the coal and minerals from said Harvey Sandusky, and the appellant also claimed title under the statute of limitations.

Many objections were made to different

deeds presented by the respective parties, and many exceptions saved to the rulings of the court upon such objections and upon other points; but, in the view we have taken of the case, it is not necessary that we should investigate as to the correctness of such rulings, for, independently of and aside from them, the judgment of the court should have been for the appellant.

It appeared that one Bernice Morrison, on the 6th day of March, 1879, obtained a deed, regular and valid upon its face, purporting to convey to her the coal and mineral underlying the said tract. Nothing appeared to question that she obtained and held such title in good faith. This title passed by mesne conveyance to the appellant company. Said appellant company contended that it appeared from other deeds produced in evidence that the title held by Harvey Sandusky passed by mesne conveyances to, and vested in, the said Bernice Morrison by the deed to her before mentioned. Without assuming to decide this contention, it is sufficient to say the deed to Bernice Morrison constituted good color of title in her, and was made and held in good faith to the said separate estate in the coal and minerals in said tract, and that such color of title passed to, and vested in, the appellant company by a deed dated October 28, 1895, and that under such deed the appellant company entered into possession of the premises in question by means of an entry driven from the adjoining mine, and began to mine and remove coal therefrom some months before the suit was instituted, and was so in possession and so engaged at the time of the institution of the suit. It further appeared that the estate in the coal and mineral in said tract was assessed and taxed separately from the estate in the remainder of the land as early as the year 1880, and that the said Bernice Morrison, and those holding under her, to and including the appellant, paid the taxes annually so assessed for seven successive years prior to the beginning of the action, to wit, from 1890 to 1896, inclusive. It is true, during this period of time, and for a period of more than 10 years before, the appellee was in possession of the surface of the tract, and paid taxes thereon; but during all this time it was proven he knew the estate in the coal and mineral in the tract had been separated from the estate generally in the land, and that it was taxed separately from his estate therein. He purchased the estate in the coal and mineral at tax sale prior to 1890, and received the money paid for the redemption thereof.

If the estate in the coal and mineral in this tract may properly be regarded as comprehended within the meaning of the words "vacant and unoccupied land," as those words are employed in section 7 of chapter 83 of the Revised Statutes entitled "Limitations," it is beyond question the appellant has brought its case and claim of title to the estate in controversy within the operation of the provisions

¹ Rehearing denied December 15, 1898.

of that section, and should have been adjudged by the court to be the owner of said estate according to the purport of its paper title therefor. If the estate in question should be deemed "land," it is clear it could not be held to be occupied by, or to have been in the possession of, the appellee by virtue of his undisputed possession of the surface of the tract. The general rule that the possession of the surface carries with it possession of all minerals beneath the surface has no application where the title to the surface has been severed from the minerals. Speaking upon that subject, it was said in *Caldwell v. Copeland*, 37 Pa. St. 427: "It is not true that after such a severance (by deed) the possession of the surface is possession of the underlying minerals. That mines may form a distinct possession and a different inheritance from the surface lands has been long settled in England, as may be seen by reference to the cases cited in the two opinions heretofore delivered in this case, and reported as *Caldwell v. Fulton*, 31 Pa. St. 476, 482. See, also, *Barnes v. Mawson*, 1 Maule & S. 84. The acts of ownership, however, which constitute possession and confer title, must be distinct from such as are exercised over the surface. *Tyrwhitt v. Wynne*, 2 Barn. & Ald. 554; *Cullen v. Rich*, Bull. N. P. 102." And in *Armstrong v. Caldwell*, 53 Pa. St. 287, it was said: "Where there has been a severance of the coal from the surface, by deed, an exclusive and continued enjoyment of the surface will not confer title to the coal and minerals, under the statute of limitations." And in *Washburn on Real Property* (volume 2, p. 377) it is said: "As a consequence of this double ownership of the surface and the mines below, no mine owner is affected by any acts of possession for gaining an adverse title done upon the surface." That the possession of the surface of a tract of land does not constitute possession of underlying coal and minerals when the same has been severed has been frequently judicially declared. *Williams v. Gibson*, 84 Ala. 228, 4 South. 350; *Hartwell v. Camman*, 10 N. J. Eq. 128. In *Barringer & Adams on Law of Mines & Mining* (page 568) it is declared that, where the ownership of minerals in place is severed from the ownership of the soil, the possession of the surface merely is not possession of the minerals. It cannot be regarded otherwise than that coal and minerals in place are land. 2 Washb. Real Prop. 377; 2 Bl. Comm. 16; And. Law Dict. tit. "Land."

Because of the very large mining interests in that state, the courts of Pennsylvania have been called upon to consider and determine this question, and the following extract from the opinion in the case of *Lillibridge v. Coal Co.*, 143 Pa. St. 293, 22 Atl. 1035, may be regarded as a satisfactory and comprehensive statement of the law here involved: "We have emphatically decided that coal and other mineral beneath the surface is land, and is attended with all the attributes and incidents

peculiar to the ownership of land. We have held the mineral to be a corporeal, and not an incorporeal, hereditament; that the surface may be held in fee by one person and the mineral also in fee by another person; that the mineral may be subject to taxation as land, and the surface to an independent taxation as land when owned by a different person; that possession of the mineral may be recovered by ejectment, and title to it may be acquired by adverse possession under the statute of limitations. * * * In short, we have for nearly half a century judicially regarded the ownership of mineral, where it has been properly severed from the surface, as the ownership of land, to all intents and purposes. * * * In other words, mines are land, and subject to the same laws of possession and conveyance. *Caldwell v. Fulton*, 31 Pa. St. 475; *Caldwell v. Copeland*, 37 Pa. St. 427; *Scranton v. Phillips*, 94 Pa. St. 15; *Sanderson v. City of Scranton*, 105 Pa. St. 469; *Railroad Co. v. Sanderson*, 109 Pa. St. 583, 1 Atl. 394." And it was said by the same court in *Caldwell v. Copeland*, supra: "Title to mines or minerals, distinct from title to surface of land, may be shown by documentary evidence, or, in the absence thereof or in opposition thereto, by proof of possession and acts of ownership under the statute of limitations."

In our own courts, in the case of *Manning v. Frazier*, 96 Ill. 279, it was held the grantor of coal and mineral in place was entitled to enforce the equitable lien of a vendor, and it was there said (page 285): "That the coal and other mineral in the mine, under the soil, was real estate, is too plain to admit of discussion. And it is equally true and manifest that, as such, it was capable of being conveyed like other real estate; and the coal, stone, and ore thus situated was conveyed by complainant to Squire and Payne, and they thereby received an estate capable of being inherited and conveyed to others." And in the case of *Ames v. Ames*, 160 Ill. 599, 43 N. E. 592, the question was presented whether, in a proceeding for the partition of lands among tenants in common, the court, sitting in chancery, had power to separate the ownership of the surface from the ownership of the underlying minerals, and allot the fee in the surface to one and the fee in the mineral to another of the tenants. In the course of the opinion it was said (page 600, 160 Ill., and page 593, 43 N. E.): "Coal underlying lands may be acquired by a title absolute and in fee in one person while the right to the surface is in another. Each may be held by separate and distinct titles in severalty, and each is a freehold estate of inheritance, separate from, and independent of, the other. The only distinction as to the respective rights rests on the principle that the servient estate owes the servitude of affording sufficient supports to sustain the surface. * * * The right of the owner of land to convey the coal and mineral rights

underlying the land, and reserving the surface absolutely in fee, has long been recognized. When such conveyance is made two separate estates exist, and each is distinct. Each may be conveyed by deed, each may be devised under a will, each will pass to the heir under the statute of descent, and each is subject to taxation. In *re Major*, 134 Ill. 19, 24 N. E. 978. In all these phases each estate passes and must be treated as real estate. These principles are, in effect, sustained by this court in *Locey Coal Mines v. Chicago, W. & V. Coal Co.*, 131 Ill. 9, 22 N. E. 503. Mining claims have been recognized as legal estates of freehold (*Merritt v. Judd*, 14 Cal. 60), and subject to partition (*Hughes v. Devlin*, 23 Cal. 502). The right to partition was collaterally recognized in *Jones v. Wagner*, 66 Pa. St. 429. Two separate estates and interests being in existence, in principle there can be no difficulty in recognizing separate titles."

Authorities are abundant that a conveyance of the minerals in or under a tract of land passes an estate in fee, and that the owner thereof has all the rights of an owner of land in fee, and may invoke the same remedies to assert or defend his rights and protect his title as may the owner of a fee estate in land generally. *Barring & A. Mines*, p. 36. And in the same work, on page 568, the authors remark: "In some states and territories special limitations have been imposed by statutes upon suits for the recovery of mining property, but, in the absence of such limitations, such suits are governed by the general statutes relating to actions for the recovery of real estate."

The conclusion, then, seems to be inevitable that coal and minerals in place, where the title thereto has been severed from the title to the surface, constitute land as fully as does the surface, and as such are subject to all the laws of possession and conveyance of real estate, and the owner thereof has all the rights of an owner in land, and may invoke every legal right to assert and defend his title that is provided for owners of title in fee to the surface, and no reason is perceived why he should be denied the beneficial operation of our statute of limitations.

It is, however, urged by attorneys for appellee that coal and mineral beneath the surface are not within either the spirit or letter of the section of the limitation act in question, for the reason that, as they allege, such property was unknown to commerce in Illinois at the time the section of the law was first enacted, in 1839. That such property was unknown to commerce in this state at that time is left by counsel for appellee to rest upon their mere assertion; but if it could be conceded to be true that, at the time of the first enactment of the said section, the vast coal fields of the state had not been developed, and that the title to the coal and other minerals had not, in any

single instance, been separated from the title to the surface, yet it was then a well-established rule of law that such separation might be lawfully made, and well known that it had been found highly convenient and advantageous in other states and countries to make separation of the ownership of the surface from the minerals underlying it, and it is more reasonable to believe that the section was enacted in view of the existing state of the law, and of the possibilities and probabilities that the development and growth of the state would make it desirable that such separation of estates in the surface and the minerals underlying should be made in the future, and that the law was enacted in view of probable future necessity therefor. It follows, if we are right in what has been said, that the appellee should not have prevailed in the trial court, but that the judgment in that court should have been that the appellant was not guilty. The judgment must be reversed, and the cause remanded for further proceedings in conformity with this opinion. Reversed and remanded.

On Rehearing.

(Dec. 21, 1898.)

In the brief of counsel for appellee the position of appellant company in its brief that the proofs established that it had complied with the requirements of section 7 of the statute of limitations as to the payment of taxes for the statutory period was responded to as follows, to quote from page 14 of appellee's brief: "It has sought to prove possession and payment of taxes for seven successive years, and the payment of taxes for a like period without actual possession, treating it as unoccupied land. The proof of payment of taxes for the statutory period is not satisfactory. There is not any proof that the taxes for 1895 were paid on this property. A tax receipt was read in evidence for taxes of 1895 on the east half of the southeast quarter section 34, town 18 (instead of 19), range 12, over objection of plaintiff. No ruling by the court. There was no proof to supply this defect, and we say there is not evidence of seven successive years' payment of taxes." In reply brief, appellant met this alleged defect in the proof as follows, to quote from appellant's reply brief: "Counsel for appellee next contend that we have not shown payment of taxes for the statutory period of seven years, because there is a mistake in the description in the tax receipt for the taxes of 1895, shown at Abst. 46, R. 144. But had counsel for appellee turned over to Abst. 49, R. 150, they would have found that we also proved payment of taxes for the year 1895 by the town collector's tax book, where the description is correct, and the taxes are receipted as having been paid by the Catlin Coal Company." This was the only issue made by the parties as to the sufficiency of

proof of payment of taxes. We consulted the abstract and record as to it, and found it appeared the appellant company produced in evidence the collector's book for the year 1895, and that it appeared from an entry made by the collector opposite this coal and mineral land in question that the appellant company paid the taxes for 1895 to said collector. Section 163, c. 120, Rev. St., entitled "Revenue," made it the official duty of the collector to make the entry, and it therefore became competent proof of the payment, and fully explained the discrepancy in the description in the tax receipt for that year. Finding the only objection or suggestion advanced by the appellee as to the sufficiency of the proof of payment of taxes to be wholly untenable, we proceed to dispose of the question whether property in the coal and mineral underlying the surface was "land," within the meaning of the limitation act, and whether that statute was applicable to such property.

The petition for rehearing does not question the correctness of the conclusion reached upon that point, but asks that the judgment and decision of this court upon it be opened, and the cause again argued, in order to allow appellee to be heard to insist that it does not appear from the proof in the record that the full period of seven years elapsed between the date of the payment of the taxes for the first year of the period and the beginning of the suit or the taking of actual possession by the appellant company. Rule 30 of the rules of this court (47 N. E. viii.), by force whereof this petition for a rehearing is filed, provides the petition shall state concisely the point supposed to have been overlooked or misapprehended by the court. This petition is not based upon the ground that the court overlooked, misapprehended, or erroneously decided any point or points presented by appellee, or any position assumed by counsel for appellee in their brief submitting the cause to this court for decision. If the court proceeded to decision upon an erroneous assumption as to the evidence upon the points mentioned in the petition for a rehearing, it was because the argument of the appellee proceeded upon the same assumption as to the true state of the case. If our decision finally determined the rights of appellee, we might be disposed to open the judgment, and order the points mentioned in the petition for a rehearing to be argued by the parties and submitted for our determination; but our decision but remands the case to the circuit court, to be again tried upon evidence produced anew by the respective parties. At this trial appellee is not to be deemed concluded by our opinion upon any matter of fact relating to the payment of taxes. We have modified the opinion to remove all question on that point, and we decline to grant the petition for rehearing, but deny the prayer therefor. Petition denied.

(152 Ind. 317)

THORNE v. INDIANAPOLIS ABBATTOIR CO.¹

(Supreme Court of Indiana. Dec. 13, 1898.)

APPEAL—BILL OF EXCEPTIONS—CONTENTS.

A bill of exceptions which affirmatively discloses that it does not contain all the evidence will not present for review questions involving the sufficiency of the evidence, notwithstanding it recites in the proper place that "this was all the evidence given in the cause."

Appeal from superior court, Marion county; L. M. Harvey, Judge.

Action by William Thorne against the Indianapolis Abbatoir Company. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Geo. W. Galvin and W. A. Reading, for appellant. Miller & Elam, for appellees.

MONKS, O. J. Appellant brought this action against appellees, and, at the conclusion of the evidence, the court instructed the jury to return a verdict in favor of appellees, the defendants in the court below. Appellant's motion for a new trial was overruled, and judgment rendered in favor of appellees. The errors assigned call in question the action of the court in overruling the motion for a new trial. The causes assigned for a new trial were "(1) that the verdict of the jury is not sustained by sufficient evidence; (2) the verdict of the jury is contrary to law; (3) the court erred in giving instruction No. 1, being the one instructing the jury to find for the defendants; (4) the court erred in refusing to give instructions 1, 2, and 3, requested by plaintiff."

Appellees insist that all the evidence is not in the record, and that, in its absence, neither cause for a new trial presents any question. The proper determination of said causes for a new trial requires a consideration of all the evidence given in the cause. The bill of exceptions, while it contains at the proper place the following, "And this was all the evidence given in this cause," affirmatively shows that all the evidence given is not set forth therein. Such being the case, we cannot consider the causes assigned for a new trial. *Noerr v. Schmidt* (Ind. Sup.) 51 N. E. 332; *Weaver v. Kennedy*, 142 Ind. 440, 41 N. E. 810, and cases cited; *Stout v. Turner*, 102 Ind. 418, 420, 26 N. E. 85; *Jennings v. Durham*, 101 Ind. 391; *Collins v. Collins*, 100 Ind. 266; *Railway Co. v. Grantham*, 104 Ind. 353, 357, 4 N. E. 49, and cases cited. The judgment is therefore affirmed.

(152 Ind. 227)

MESSENGER v. STATE.¹

(Supreme Court of Indiana. Dec. 13, 1898.)

CRIMINAL LAW—NEW TRIAL—MISCONDUCT OF BAILIFF.

1. In the absence of proof, it will not be presumed that a juror to whom a bailiff in charge

¹Rehearing denied.

of the jury made an improper remark communicated it to the other jurors, or that it influenced the jury in rendering their verdict.

2. Where the evidence on a motion for a new trial, because of misconduct of the bailiff in charge of the jury, is conflicting, the decision of the trial court, if warranted by the evidence, is conclusive.

3. Misconduct of the bailiff in charge of the jury is waived, where accused and his counsel have knowledge thereof before the verdict is returned, and do not communicate it to the court.

Appeal from circuit court, Starke county; G. W. Beeman, Judge.

William Messenger was convicted of murder, and he appeals. Affirmed.

Burson & Burson, for appellant. F. J. Vurpillat, Pros. Atty., W. L. Taylor, Atty. Gen., and Merrill Moores, for the State.

JORDAN, J. Appellant was charged by indictment with the crime of murder in the first degree, and upon a trial by jury was convicted of murder in the second degree, and, over his motion for a new trial, judgment on the verdict was rendered that he be imprisoned for life in the state prison. The only error assigned in this appeal relates to the decision of the trial court in denying his motion for a new trial. His counsel, in their brief, urge but two reasons for reversal, namely: First, misconduct of the bailiff in charge of the jury, which conduct, it is alleged, prevented appellant from having a fair trial; second, that the verdict of the jury is not sustained by sufficient evidence.

We are requested by the learned counsel appearing for appellant to examine and consider the evidence in connection with the alleged misconduct of the jury bailiff, in order that we may be better enabled to determine the question involved in this feature of the case. We have carefully read and considered the evidence, and, while it may be said that it is conflicting to some extent, still it amply sustains the judgment. The misconduct imputed to the bailiff in charge of the jury arises out of the alleged fact that, after the jury had retired to deliberate on a verdict and after their deliberation had continued for a number of hours, a member thereof came from the court room, which the jury was then occupying, to the door of the room leading from the court room to the sheriff's office, and inquired of the bailiff for the judge of the court, stating at the time that the jury were unable to agree and that they desired to see the judge. It is claimed that the bailiff, who at the time was in the sheriff's office, in response to this inquiry, informed this juror "that the judge had said that they would be a great deal older than they were before he would let them out, unless they agreed." Appellant, in the lower court, endeavored to support the issue raised under his motion for a new trial, relative to the alleged misconduct of the bailiff, by the affidavit of his counsel, whose statements were

based merely upon information and belief, and by the affidavits of Jesse F. and Albert Miller, who each claimed to have been in the sheriff's office at the time and overheard the conversation between the juror and the bailiff. The evidence presented by appellant by these several affidavits in support of the issue upon his part was controverted by the state by the affidavits of George H. Wenigar, the bailiff in question, and by W. H. Harter, the sheriff. The latter states in his affidavit that he had no authority from the judge to carry any information to the jury, or to any member thereof, and that he did not request the bailiff to inform the juror what it was claimed by defendant that he did relative to keeping the jury together unless they agreed. The sheriff further deposed that, at the time it was alleged that the bailiff was communicating with the juror, the door of the sheriff's office opening into the corridor was closed, and that neither he nor any other person in his office saw the juror, or heard what was said between the latter and the bailiff, at the time of the conversation. Wenigar, the bailiff, states that he was in charge of the jury on the occasion in controversy; that on the afternoon of Saturday, January 8, 1898, when the jury was occupying the court room, he was called "by a knock on the door" leading from that room out into the corridor; that the juror did not request to see the judge, but simply stated to him that the jury could not agree; that all he said in response to this statement was, "The judge said you had to decide;" that no request was made by the juror that the judge be sent for; and that he (the bailiff) made the remark which he did of his own accord, without instructions from the judge to do so, and without request from the sheriff or any other person.

It is insisted that the communication which appellant claims was made to the juror must be presumed to have served in coercing the jury into returning the verdict which they did, and that, therefore, appellant was prejudiced thereby and is entitled to a new trial. There is a difference, or conflict, between the evidence presented to the trial court on the part of the appellant to support the issue involved and that given by the state to refute or rebut it. If the lower court considered the statements made by the sheriff and the bailiff as the more credible, under the circumstances, the question is reduced to the bare fact that the bailiff, without any direction from the judge or sheriff and solely on his own account, informed the juror that the judge had said that the jury "had to decide." There is nothing which discloses that the remark, which the bailiff admits he made to the juror, which was not made in the presence or hearing of the other members of the jury, was ever communicated by this juror to any of his associates. To presume that it was so communicated by him, and that it exerted, or even tended to exert, such an in-

fluence over the jury as to cause them to return, under the evidence, a verdict against appellant more unfavorable to him than they otherwise would, would certainly be an unwarranted stretch of judicial presumption.

The evidence presented upon the question of the alleged misconduct, as we have said, was conflicting, and its weight and force, therefore, became a matter to be determined solely by the trial court. The latter, under the circumstances, had better opportunities and means of testing the credibility of the statements made by the several affiants, and thereby ascertaining the truth in regard to the matter under investigation, than we have; and, by overruling the motion for a new trial, the court in effect decided the issue raised adversely to the contention of appellant, and, there being evidence which fully sustains its decision upon that issue, we, in obedience to the well-settled rule of appellate procedure, must abide by its ruling. See *Weaver v. State*, 83 Ind. 289; *Doles v. State*, 97 Ind. 555; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *Smith v. State*, 142 Ind. 283, 41 N. E. 595; *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, and 47 N. E. 465.

Again, upon another view of the question, were it conceded that the alleged misconduct was of a character which might vitiate the verdict, still it is not disclosed whether or no appellant or his counsel obtained information in regard to such misconduct before or after the return of the verdict. If appellant had knowledge before its return, it was manifestly his duty to make complaint to the court, and interpose his objections in due season, and not wait until the jury had returned what he might consider an unfavorable verdict, and then challenge it upon the ground of the alleged misconduct. If he had knowledge prior to the return of the verdict in regard to the alleged misconduct, he, at the first opportunity, certainly ought to have informed the court of the fact, in order that it might have an opportunity to remedy the harm done, if any, by an instruction to the jury, or, if it were deemed necessary under the circumstances, to withdraw entirely the submission of the case from the jury. Where a party fails to interpose seasonable objections in regard to alleged misconduct before a return of the verdict against him, without showing a sufficient excuse for such failure, it will be presumed that he acquiesced therein, and thereby waived his right to complain; and, under such circumstances, he will not be heard, after the return of the verdict, to make complaint for the first time relative to such misconduct. *Waterman v. State*, 116 Ind. 51, 18 N. E. 63, and cases there cited; *Reed v. State*, 141 Ind. 116, 40 N. E. 525, and cases cited. We discover no error in the record upon the questions presented, and the judgment is therefore affirmed.

HOWARD, J., concurs in result, but doubts the correctness of the holding as to bailiff's

communication to the jury. He thinks that, if the case had been uncertain on the evidence, the judgment should be reversed for the misconduct of the bailiff.

(151 Ind. 575)

STETSON, County Treasurer, et al. v. ROCHESTER SHOE CO. et al.

(Supreme Court of Indiana. Dec. 15, 1898.)

RECEIVERS—TAXES—SALES.

Under Horner's Rev. St. 1897, § 6436, providing that where a receiver neglects to pay taxes on property he may be cited to show cause why such taxes, with penalty, should not be paid, it was a "good and sufficient cause" that the receiver had sold the property, which was realty, by the court's order and approval, and that the purchaser had taken it subject to taxes.

Appeal from circuit court, Fulton county; A. C. Capron, Judge.

Petition by William A. Stetson, county treasurer, to require Andrew T. Bitters, as receiver of the Rochester Shoe Company, to show cause why certain delinquent taxes should not be paid. There was a judgment for the receiver, and petitioner appeals. Affirmed.

Holman & Stephenson, for appellant. Conner & Rowley, for appellee.

HACKNEY, J. The appellant treasurer of Fulton county filed his petition in the circuit court, under section 6436, Horner's Rev. St. 1897, to require the appellee, as receiver of the Rochester Shoe Company, to show cause why he should not pay the taxes delinquent upon the property of said company. In answering a rule of the court, issued upon said petition, the receiver showed as cause for his nonpayment of taxes that prior to the filing of the petition, and upon the order and approval of the court, he had sold the property of said company, consisting of real estate, and that the purchaser had taken the same subject to the taxes due thereon, and was liable therefor. The sufficiency of this answer raises the only question for decision. The statute, supra, provides that it shall be the duty of the receiver of any corporation to pay the taxes due upon its property, and, where he neglects to do so, the county treasurer shall file, in the court making the appointment, a brief statement showing the delinquency, and the court shall thereupon issue an order directing the receiver to show cause why such taxes, with penalty, etc., should not be paid, and, upon his failing to show good and sufficient cause, the court shall order him to pay the same. The appellant insists that the answer did not show good and sufficient cause under this statute. The statute was intended to secure a short and simple method of enforcing the taxes due upon property in custodia legis, and to enable the court in whose custody the property should be held, not only to judge with considerable discretion as to what should

constitute "good and sufficient cause" for the failure of its officer, but to punish a failure without such cause by denying a credit for the sum which might be ordered paid. The conduct of the officer, the welfare of the trust estate, and the interest of the public, within this statute, are to be judged by the court under the undefined provision "good and sufficient cause," but with a degree of strictness in favor of the officer, since an insufficient cause for nonpayment requires the officer to suffer, personally and upon his bond, a penalty to the extent of the delinquency. The sale having been made under the direction and approval of the court, subject to liens, and the liability of the trust having been thereby transferred to the purchaser, the property at all times standing as indemnity for the tax, it would seem to be a very rigid construction against the officer to require him to bear the penalty. In our opinion, the lower court did not err in holding the answer to the rule as showing "good and sufficient cause." The judgment is affirmed.

(151 Ind. 573)

NOBLE v. SHERMAN.

(Supreme Court of Indiana. Dec. 15, 1898.)

LICENSE—REVOCATION—PLEADING—CONSIDERATION.

1. An oral license to use a roadway over the land of another is irrevocable after the licensee has performed labor on the faith thereof.

2. A complaint to enjoin defendant from obstructing a private way alleged that plaintiff entered into an agreement with defendant whereby the latter granted to him a perpetual roadway "for considerations paid and value parted with, said consideration being the use of, and right in, certain lands of plaintiff by defendant as a roadway; * * * also to grade, grub, and make said highway suitable for travel." Held not demurrable on the ground that it failed to show that plaintiff had paid the consideration or otherwise performed his part of the contract.

Appeal from circuit court, Carroll county; T. S. Palmer, Judge.

Action by Rebecca Sherman against Enoch Noble. From a judgment for plaintiff, defendant appeals. Affirmed.

L. D. Boyd and E. E. Prulitt, for appellant. J. A. Sims and A. W. Reynolds, for appellee.

MONKS, C. J. This action was brought by appellee to enjoin appellant from obstructing a private way running from appellee's real estate over appellant's real estate to a public highway. The complaint was in two paragraphs, and appellant's demurrer to each paragraph thereof was sustained to the first and overruled to the second paragraph. The cause was tried by the court, and a finding made in favor of appellee, and, over a motion in arrest, judgment was rendered perpetually enjoining appellant from obstructing said private way. The errors assigned call in question the sufficiency of the second paragraph of the complaint. The allegations of said second paragraph clearly show that,

while the contract under which appellee entered into possession of said private way over appellant's land was oral, under the doctrine declared in *Joseph v. Wild*, 146 Ind. 249, 253, 254, 45 N. E. 467, and the cases there cited, such license was, on account of the work and labor performed on the faith thereof, irrevocable. See, also, *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497, and note, pages 501-506.

It is insisted, however, by appellant that said paragraph was not sufficient, because it shows that appellee obtained said right of way under an oral contract, and it is not averred that she performed her part thereof. As appellee is not seeking to enforce the performance of any contract or to recover damages for the breach thereof, but to protect her title to and right to use said way, which right is vested in her under a license which is irrevocable, it would seem that she would not be required to allege that she had paid the consideration or fully complied with her part of the contract, any more than she would be if the way had been conveyed to her by deed, and she had not paid the consideration therefor. In such case, her rights would not depend upon her payment of the consideration, whether the same was to be paid in money, real estate, or labor. But, if it is necessary in such a case as this to allege that plaintiff had paid the consideration or otherwise performed her part of the contract,—which we need not and do not decide,—we think such fact is fully shown in said paragraph. It is alleged in the second paragraph "that, in the spring of 1894, she entered into an agreement with the defendant, by the terms of which he granted to her a perpetual roadway (for considerations paid and value parted with, said consideration being the use of, and the right in, certain lands of the plaintiff by the defendant as a roadway running east one-half mile to a public highway; also to grade, grub, and make said highway suitable for travel) or easement of fourteen feet in width and one-half mile in length on his land, commencing at the center of said township two (2), and running thence due west, immediately on the south side of the half section line, until it intersects a public highway running on the west line of said section two (2)." If the "considerations" appellee was to pay and the value she was to part with for the right of way given her by appellant were paid, and the value parted with, by her, as alleged, then she has fully complied with her part of said contract to give appellant the use of her land, running east one-half mile to a public highway, as a roadway, and to grade, grub, and make said roadway suitable for travel. Unless she has done this, she has not paid the consideration and parted with the value as alleged. Said paragraph of complaint is not, therefore, open to the objection urged by appellant, and his demurrer and motion in arrest were properly overruled. Judgment affirmed.

(151 Ind. 550)

SAUNDERSON et al. v. STATE.

(Supreme Court of Indiana. Dec. 13, 1898.)

CONTEMPT—PROCEDURE—INDICTMENT.

1. A document purporting to be an indictment, presentment, or report of the grand jury, and stating facts constituting an alleged contempt, signed by the prosecuting attorney, but not sworn to by him nor by any person, nor based on an affidavit, and not "indorsed by the foreman of the grand jury 'A true bill,'" as required by Rev. St. 1894, § 1738 (Horner's Rev. St. 1897, § 1669), does not comply with section 1024 (1012), providing that a rule for an attachment for an indirect contempt shall not issue until the facts alleged therein to constitute such contempt shall have been brought to the knowledge of the court by an information duly verified by the oath or affirmation of some officers of the court or other responsible person.

2. Rev. St. 1894, § 1024 (Horner's Rev. St. 1897, § 1012), providing that in all cases of indirect contempt a rule to show cause shall be served before the person charged must answer or can be punished, that a time and place of hearing shall be designated, and the facts pleaded which constitute the contempt, and that no rule shall ever issue except on a duly-verified information by an officer of the court or other responsible person, affords the appropriate proceeding for contempts, and therefore a prosecution cannot be by indictment.

Appeal from circuit court, Benton county; S. P. Thompson, Judge.

James T. Saunderson and others were fined for contempt, and appeal. Reversed.

Elliott & Elliott, for appellants. W. A. Ketcham, Atty. Gen., and A. E. Chizum, for the State.

HOWARD, J. The appellants, who are attorneys of the bar of the Benton circuit court, were fined for an alleged indirect contempt of court, in having adopted, at a bar meeting held for that purpose, certain resolutions in relation to the procedure and practice in said court, and in causing such resolutions to be published by sending copies thereof to certain attorneys in other counties of the Thirtieth judicial circuit, of which circuit Benton county forms a part. The proper procedure for bringing before the court persons charged with indirect contempt is found set out in section 1024, Rev. St. 1894 (section 1012, Horner's Rev. St. 1897), as follows: "In all cases of indirect contempt, the person charged therewith shall be entitled, before answering thereto or being punished therefor, to have served upon him a rule of the court against which the alleged contempt may be committed; which said rule shall clearly and distinctly set forth the facts which are alleged to constitute such contempt, and shall specify the time and place of such facts with such reasonable certainty as to inform the defendant of the nature and circumstances of the charge against him, and shall specify a time and place at which he is required to show cause, in said court, why he should not be attached and punished for such contempt, which time the court shall, on proper showing, extend so as to give the defend-

ant a reasonable and just opportunity to purge himself of such contempt. No such rule, as heretofore provided for, shall ever issue until the facts alleged therein to constitute such contempt shall have been brought to the knowledge of the court by an information duly verified by the oath or affirmation of some officers of the court or other responsible person."

The record does not show that any of the steps thus provided for in the statute were taken in the case before us. There was laid before the court no sworn statement of the facts alleged to constitute the contempt. Neither was there served upon the appellants any rule to show cause, "which said rule," as required by the statute, "shall clearly and distinctly set forth the facts which are alleged to constitute such contempt." See *Stewart v. State*, 140 Ind. 7, 39 N. E. 508. It is true that there is set out in the record what purports to be an indictment, presentment, or report of the grand jury.—It is not clear which,—stating certain facts as to the alleged contempt. This document is signed by the prosecuting attorney, but not sworn to by him, nor based upon any affidavit by any one else; neither is it "indorsed by the foreman of the grand jury 'A true bill,'" as required by section 1738, Rev. St. 1894 (section 1669, Horner's Rev. St. 1897). There was a motion by each of the appellants to quash the so-called indictment, which several motions were overruled. In *Strange v. State*, 110 Ind. 354, 11 N. E. 357, it was held that "an indictment not indorsed by the foreman of the grand jury as required by the statute is bad for want of such indorsement, on a motion to quash." And in *State v. Buntin*, 123 Ind. 124, 23 N. E. 1140, it was held that even the signature of the foreman, without the words "A true bill," is not enough to save an indictment on a motion to quash. The action so taken by the grand jury—if, indeed, any such action is shown—was an attempt to present the appellants for an indirect contempt of court; but our statute makes no provision for any such duty or power on the part of the grand jury. On the contrary, all the steps to be taken in proceedings for contempt of court, whether direct or indirect, are otherwise provided for. Rev. St. 1894, §§ 1017-1026 (Horner's Rev. St. 1897, §§ 1005-1014). It is recognized in these sections of the statute that contempt proceedings are of a summary nature and immediately concern the court itself. A direct contempt is one committed in the presence of the court, while the facts in relation to an indirect contempt are brought before the court by affidavit. There is no place in either case for any action of the grand jury. Even, therefore, if the proceedings here taken before the grand jury were properly authenticated by its foreman, and not simply by the signature of the prosecuting attorney, they would still not be a compliance with the statute. Neither would a simple information by the prosecuting attorney, or any other officer, under his oath of office, be sufficient. The requirement of the statute is explicit,—that the

facts be brought before the court "by an information duly verified by the oath or affirmation of some officers of the court or other responsible person." It was therefore error to overrule the motions to quash the indictment. The judgment is reversed, with instructions to sustain the several motions of the appellants to quash the indictment or report of the grand jury.

(151 Ind. 558)

SNYDER et al. v. STATE.

(Supreme Court of Indiana. Dec. 14, 1898.)

CONTEMPT—WHAT CONSTITUTES—PUNISHMENT.

1. Where attorneys during a court day, but while it was not in session, held a meeting, at which one of their number presided, in a room in the court house adjoining the court room, and occasionally used as a court room, which meeting was attended by the judge, at their request, their acts in his presence are not committed in the presence of the court, and hence cannot constitute direct contempt.

2. The filing of an unverified statement by a judge having personal knowledge of an indirect contempt is insufficient to institute proceedings for indirect contempt.

Appeal from circuit court, Benton county; *S. P. Thompson, Judge.*

Proceeding against Charles M. Snyder and others for contempt. A motion to quash the statement charging contempt was overruled, and respondents appealed. Reversed.

Chas. M. Snyder and Daniel Fraser, for appellants.

HOWARD, J. This was a proceeding for contempt of court, growing out of the facts and proceedings in the case of *Saunderson v. State* (decided at this term) 52 N. E. 151. The proceedings in the case at bar were based upon a statement made and filed in the Benton circuit court by the judge of that court. From this statement it appears that on April 29, 1898, during a court day, the judge left the court for a short time to visit a sick friend, and while so absent was informed by the court bailiff that the attorneys wanted him at the court house; that thereupon he returned, "and, finding no one in the court room proper, was told by the bailiff that the attorneys were in the room adjoining, generally used for the consultation of attorneys, and, in case a special judge is trying a cause in the court room, is also used to try causes before the regular judge, and in hearing reports and probate matters." The statement further shows that in this room the judge, on entering, found the appellants and six others who had participated in the preparation of certain resolutions adopted in vacation of court, February 19, 1898, being the same resolutions referred to in the case of *Saunderson v. State*, supra. With the purpose to restore good feeling between the judge and the attorneys, and prevent further publication of said resolutions, the judge had theretofore presented to said attorneys a statement which he asked them to sign and

make a part of the records of the court. When the judge entered the room on this occasion, as so invited through the bailiff, he found the attorneys talking over his written proposal, "and, instead of assenting thereto, it was asserted, in an angry and contentious manner, by some of said eight persons, and not rebuked by the others, that the resolutions were right, that they spoke the truth, and that the publication" was right, etc.,—using, also, certain disrespectful language to the judge; that "the bailiff was not present, and the court merely said to them, 'You are wrong and unfair to the judge,' and the court offered to retire, but was requested to remain and hear the matter." The statement further shows that the meeting was organized and presided over by one of the attorneys as chairman. It seems very clear that, although court was technically in session at the time of the refusal of the attorneys to sign the apology prepared by the judge, yet the action of the attorneys, whether blamable or otherwise, was not a direct contempt. The statement of the judge shows that the attorneys were not "in the court room proper," but in a room adjoining, used generally for consultation, though sometimes also for court. On the occasion in question the room was certainly not used for court, but for a meeting of attorneys; and to this meeting the judge was invited, and he attended. He did not even preside there, however, for his statement shows that an attorney was chairman. A direct contempt is an act committed in the presence of the court, or so near to it as to interrupt or disturb the proceedings thereof. *Whittem v. State*, 36 Ind. 196; *Ex parte Wright*, 65 Ind. 504; *Holman v. State*, 105 Ind. 513, 5 N. E. 556. The judge in this case was not sitting in court, nor was there any court then holding in any room in the court house. Neither will the statement suffice as a pleading to institute proceedings for indirect contempt. For this purpose, as shown in *Saunderson v. State*, supra, it is necessary that the facts be brought to the knowledge of the court by an information duly verified by oath, and that a rule to show cause, distinctly setting forth such facts, be served upon the persons charged with such contempt. The motions to quash were improperly overruled. The judgment is reversed, with instructions to sustain the motion of each appellant to quash the statement charging contempt of court.

(153 Ind. 119)

WABASH R. CO. v. KELLEY.¹

(Supreme Court of Indiana. Dec. 15, 1898.)

RAILROADS—MASTER AND SERVANT—ACCIDENT CONTRACTS—VIOLATION OF STATUTE AS DEFENSE—HOSPITAL SYSTEM—LIABILITY—REASONABLE CARE.

1. In an action by an employé against a railroad company for malpractice of its physicians while he was confined in the company's hospital in pursuance of a contract between the company and its employés, whereby it deduct-

¹Rehearing denied, 54 N. E. 762.

ed a certain sum from the monthly wages of each employé, and agreed to provide surgical and medical attendance for injured employés, the company cannot escape liability on the ground that plaintiff employé, whose wages had been used to contribute therefor for years, had not given his "written consent," within Rev. St. 1894, §§ 2300, 2301 (Acts 1885, p. 123), providing that it shall be unlawful for a railroad company to exact from its employés, without first obtaining written consent thereto in each and every instance, any portion of their wages for the maintenance of any hospital.

2. The hospital system of a railroad company was managed by a board of trustees, consisting of the vice president, the general manager, and the assistant secretary of the road, all of whom were general officers of the road, and members of the executive department. The funds for the support of the hospital system, made up of deductions from the wages of the employés, were confided to the management of said trustees. On the other hand, everything was superintended and directed by the company itself, the hospital officers acting and reporting precisely as officers of other divisions of the company's affairs. The company issued a publication entitled "Book of Rules. * * * The Wabash Railway Company. Hospital Department. List of Local Surgeons and Instructions, Issued for Information of Employés." The book provided for deductions from employés' wages, rights to care and treatment, certificates of admission, transportation to hospital, use of telegraph line, right to summon the nearest available surgeon, etc. The money deducted from the wages went into the company's treasury, and the bills of the department were audited by the general auditor, and paid by the general treasurer. There was no written contract of any kind between the hospital department and the company itself. The land on which one of the hospitals was located was held in the name of the trustees of the hospital fund, as such, but subject to the order and direction of the board of directors of the company. *Held*, that the company itself was liable for failures to faithfully comply with the hospital duties which it had assumed.

3. A railroad company which has undertaken to provide its injured and sick employés with medical and surgical assistance is bound to exercise reasonable diligence in the selection and retention of its physicians and other attendants.

4. The reasonable diligence which a railroad company must use in carrying out its agreement to care for its injured and sick employés includes the duty to discharge a surgeon in chief who had become incompetent from the use of intoxicants and narcotics, which was notorious in the community, so that the supervising officials of the company must have, or at least ought to have, known it.

Hackney and McCabe, JJ., dissenting.

Appeal from circuit court, Dekalb county; W. L. Penfield, Judge.

Action by Frank M. Kelley against the Wabash Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. E. & J. H. Rose and Stuart Bros. & Hammond, for appellant. R. W. McBride, C. S. Denny, Frank S. Roby, T. S. Wickwire, J. S. Shuman, and D. M. Link, for appellee.

HOWARD, J. Appellee was a fireman on one of appellant's freight engines. On August 2, 1893, while his train was running

from Del Ray, Mich., to Ashley, Ind., and while he was engaged in his duties cleaning his engine, he slipped and fell from an alleged defective step on the engine, and the wheels ran over and crushed one of his feet. It is alleged in the complaint filed by appellee that the company "had undertaken, at the time it employed plaintiff, and as a part of the contract of his employment, and did on said day undertake, to provide surgical and medical attendance and care to the plaintiff, as the same should be rendered necessary by casualty and accident, and to treat him for such injuries received while in its service." Accordingly, immediately after his said injury, appellant took appellee to the Emergency Hospital in Detroit, where his foot was amputated by a Dr. Maire, a local surgeon acting for appellant's medical division. Afterwards, on August 5, 1893, appellee was removed by appellant to Peru, in this state, and placed in the hospital located there, and connected with appellant's railroad. This hospital was then in charge of one Dr. Higgins, a local surgeon, under Dr. Morehouse, chief surgeon of the hospital department of the Wabash Railroad Company. On August 9, 1893, Dr. Higgins reamputated three or four inches more of appellee's leg. On November 2, 1893, Dr. Morehouse removed Dr. Higgins on account of his indulgence in the use of drugs, and in December following an additional amputation was performed on appellee's leg by a Dr. Griswold, appointed by Dr. Morehouse to succeed Dr. Higgins. About an inch and a quarter more of the bone of the leg was removed in this third amputation. In appellee's complaint damages were sought both for the negligence of appellant in the use of the defective engine step and other acts alleged to have caused the accident, and also by reason of malpractice on the part of Dr. Higgins in the second amputation and other treatment of the wounded leg. The jury found for appellant as to the original accident and for appellee as to malpractice by Dr. Higgins, and assessed damages in the sum of \$6,500.

The sufficiency of the complaint is questioned under various assignments of error. The defect indicated is that it appears from the complaint that the company exacted from appellee, without his written consent given, a part of his wages, to be used for the maintenance of a hospital, contrary to the provisions of sections 2300, 2301, Rev. St. 1894 (Acts 1885, p. 123). Appellant has retained appellee's money, and has placed the same in its treasury as a part of its funds for the care of its sick and disabled employés; but contends that, as appellee did not give his written consent to such retention, he has, therefore, by reason of appellant's said wrongdoing, no right to the benefit which appellant promised him in return for the money so exacted. We do not think the complaint shows any agreement on the part of appellee to violate the statute in question. It

is alleged, simply, that the appellant had undertaken, as a part of the contract of employment, to provide surgical and medical attendance and care to the appellee, as the same should be rendered necessary by casualty and accident, and to treat him for such injuries received while in its service; that, consequently, on the happening of appellee's injury, appellant was in duty bound to furnish him such medical and surgical services; and that appellant, recognizing its said duty, did send appellee first to the Emergency Hospital at Detroit, and then to the hospital at Peru, to receive the care and attention originally promised. Such undertaking to provide surgical and medical care is not, by the statute, made void as a part of the contract of service. The provision of the statute is that it shall be unlawful for a railroad company "to exact from its employes, without first obtaining written consent thereto in each and every instance, any portion of their wages for the maintenance of any hospital, reading-room, library, gymnasium or restaurant." If the appellant did, indeed, exact any such contributions without the written consent of appellee,—which does not appear from the complaint,—that was not a wrong for which appellee can be held liable. It was the act of appellant; and it is a familiar principle that one cannot take advantage of his own wrong. As to the deductions from appellee's wages, it appears from the complaint that appellee had no voice in the matter, but that appellant had "for seven years [the period of appellee's service] deducted and taken from his monthly wages the sum of fifty cents per month, with which to reimburse and recompense itself for expenses and charges incurred or rendered necessary in treating or providing surgical and medical treatment for plaintiff." It would be strange, indeed, if appellant, while retaining this money, could now claim that appellee had no right to the promised benefit from the money so retained, for the reason only that appellant had no right to so retain it. Even if such unlawful retaining by appellant could, in any way, be considered as a contract on the part of appellee, still, as said in 9 Am. & Eng. Enc. Law, 910, "an innocent party, defrauded by a guilty one, may have redress as to him." The law is aimed at the wrongdoer. So it was said in *Stockwell v. State*, 101 Ind. 1: "The general rule is that contracts in violation of law are void, but this rule will not be extended and applied to a case like this, so as to enable the wrongdoer to take advantage of his own wrong against an innocent party." And in *Insurance Co. v. Pennsylvania R. Co.*, 134 Ind. 215, 33 N. E. 970, Judge Coffey writing the opinion, it was held that a foreign insurance company, which had insured property for an agreed consideration, could not, in case of loss, avoid payment on the ground that it had wrongfully omitted to comply with the statute regulating foreign insurance companies. "The law

ceases with the reason thereof," as said in *Deming v. State*, 23 Ind. 416. In that case many instances are given and authorities cited, showing that it is a grave error to regard the rule here relied upon "as a merely arbitrary rule, applicable to all contracts which are prohibited by statute." It is the wrongdoer himself, the violator of the statute, who is prohibited from reaping any benefit from his own wrong. In *Light Co. v. Veal*, 145 Ind. 506, 41 N. E. 334, and 44 N. E. 353, cited by counsel, the party who sought to recover under the violated statute was himself a principal wrongdoer in the violation of the statute. It is not shown here, either in the complaint or by the evidence, that the appellee was guilty of any violation of the statute in suffering a part of his wages to be retained by the appellant.

The first reason given to show that the court erred in overruling the motion for a new trial is substantially the same as that urged against the sufficiency of the complaint; that is, that, under the statute above cited, appellant had no right, without appellee's written consent, to make deductions from his wages, in order to reimburse itself for care given or to be given to him in case of sickness or accident. We think we have shown this reasoning to be unsound. Appellant may not thus visit its own wrong upon the head of appellee. Appellee's evidence showed that he worked for the company seven years; that he was hired by one Sternberg, who employed and discharged men, and directed them in their work; that, when the first pay car came along, Sternberg explained the matter of deducting monthly amounts from his wages, saying: "The company's surgeons and physicians would treat me, and all my nursing would be done, and that they had trained nurses, and that they could take care of the men better at the hospital than any man could be taken care of at home. I told him I never had been sick any, and I would rather not pay the hospital fee, and run my own chances, and take care of myself. He said, if I worked for the company I would have to pay it. If I didn't want to pay it, I would have to quit working for the company. * * * I didn't make any kick about it after that, and it was always taken out of my wages." To the same effect was the company's book of rules, which was introduced in evidence. This book is entitled as follows: "Book of Rules. Form 1,399. The Wabash Railroad Company. Hospital Department." At the end it is authenticated as follows: "Approved. Charles M. Hayes, General Manager. Dr. H. W. Morehouse, Chief Surgeon." In this book of rules the names of the several surgeons and hospitals are given; among them Dr. L. E. Maire, local surgeon, at Detroit, and Dr. O. B. Higgins, assistant chief surgeon, at the Peru hospital. The first rule set out in the book of rules is as follows: "(1) In order to provide a fund for the sup-

port of a hospital and the care of the sick and injured employes, a deduction will be made on the pay rolls from the pay of each employe, as follows: Where the pay of an employe amounts to \$50 or more per month, a deduction of 50 cts. will be made; where the pay of an employe amounts to less than \$50 per month a deduction of 35 cts. will be made. The above deductions will be made in all cases where the employe is in continuous service, or has worked as many as fifteen days in such month." We do not think anything further is needed to show that appellant had assumed an obligation to care for its injured employe, and that it cannot now thrust that obligation aside under the plea that it had no right, under the statute, to take from the employe, without his written consent, a part of his wages, monthly, during his seven-years service. If the company should feel that by reason of the violated statute it could not conscientiously carry out its promise to care for the appellee, then it ought, at least, in compliance with the dictates of the same good conscience, return, with interest, the money which it had so persistently retained from his wages.

Counsel for appellant next insist that the evidence fails to show that Dr. Higgins was incompetent to perform the duties of a surgeon at the time of the alleged malpractice. The incompetency of Dr. Higgins, as claimed by appellee, was not due to any original want of knowledge or skill as a surgeon, but to violence of temper, roughness of conduct, and carelessness, chiefly due, as alleged, to habits of drunkenness, induced by the use of whisky and drugs. A great deal of testimony was given on both sides of this and other disputed matters on the trial. On which side was the greater weight of evidence in any case is not for us to determine. Counsel for appellant details a large amount of evidence by most respectable witnesses to show that Dr. Higgins was considered by these witnesses to be an able and trustworthy physician and surgeon. Counsel for appellee have quite as formidable an array who gave evidence to support the conclusion of the jury that he was not such reliable and trustworthy physician and surgeon, at least from the date when appellee was admitted to the hospital until Dr. Higgins was discharged, three months afterwards, on account of the excessive use of drugs. It is true that much of the evidence which tends to support the verdict was given by those whom counsel call "a set of malignants, brim full and running over with animosity against appellant on account of their discharge." We have, however, been unable to discover in their evidence any malignity or animosity. The witnesses were not impeached. It would be easy to accuse appellant's witnesses of some tendency to favor their employer. But we do not think counsel on either side have anything to gain by unduly characterizing the testimony of those

who are sworn to tell the truth, and who, so far as the record shows, seem to have striven to perform this solemn duty. In any case, this matter of judging witnesses and weighing their testimony was a duty to be performed by the jury in rendering their verdict, and by the court in passing on the motion for a new trial. All that is left for us to do is to see whether there was or was not competent and sufficient evidence given upon which the verdict of the jury may rest. Not only was there competent evidence given by appellee's witnesses from which the jury might infer that Dr. Higgins was at the time in question intoxicated and incompetent, but much corroborative evidence to the same effect came also from appellant's witnesses. Even Dr. Morehouse, appellant's surgeon in chief, testified that on November 2, 1896, when he went to Peru to discharge Dr. Higgins for using cocaine to excess, the doctor told him that he had contracted the habit of using that drug two or three years previous, at a time when he had been up night and day during the sickness and death of a beloved daughter. Dr. J. Spooner, consulting surgeon of the Peru hospital, testified that Dr. Higgins, in the next month after his removal by Dr. Morehouse, went to an inebriate asylum or sanitarium at La Porte, and that he died some time later, after his return from La Porte. Dr. Spooner also admitted that after the return from La Porte Dr. Higgins told him that many a time he had taken a quart of whisky with him at night to drink up before morning, or words to that effect; though Dr. Higgins did not tell him when it was that he had drunk whisky to this amount. Dr. H. O. Wells, house surgeon at the Peru hospital, who does not seem to have considered the amputation performed by Dr. Higgins to have been necessary, testified to conduct on the part of Dr. Higgins which may well have caused the jury not only to believe him under the influence of intoxicants or narcotics, but also to have been rough and uncouth in his language and conduct towards his patient, the appellee. No matter how great the talent and ability of Dr. Higgins as a surgeon may have been, there can be no doubt that there was evidence given from which the jury might infer that at the time of the amputation by him, and afterwards while he cared for appellee's wounded leg, up to the date of his removal by Dr. Morehouse, he was unfit for the responsible work with which he was intrusted as surgeon in charge of the hospital.

What we have said as to the evidence of the surgeon's drunkenness and consequent incompetency, may also be applied to the evidence adduced for and against the question of malpractice. Competent evidence was adduced on each side, and that which sustains the verdict of the jury was sufficient for the purpose. Whether the second amputation was necessary, whether it was performed in a proper manner, and whether the

patient received proper care thereafter until the third amputation became necessary to correct the evil results of the second, were all questions for the jury; and they have decided these questions in favor of the appellee.

Evidence was also introduced as to the reputation of Dr. Higgins for sobriety during the year 1893, in order to show that Dr. Morehouse and other officials of the company knew of his incompetency; and the court specially instructed the jury that this evidence as to reputation was admitted only for the purpose of bringing home to appellant knowledge of such incompetency and unfitness. Dr. Morehouse himself testified that he made it a rule to visit each hospital once a month, or oftener. He recollected visiting the hospital at Peru three times during September, 1893. Several of the officials also lived at Peru. The jury may therefore have believed from the evidence that the reputation of Dr. Higgins as to sobriety was known, or should have been known, to Dr. Morehouse and other officials of the company, long before the time of his removal, November 2, 1893. Dr. Morehouse, besides, admitted that complaint had been made to him previous to June, 1893, by one of the patients of the hospital, accompanied by a physician, urging certain charges as to conduct of Dr. Higgins affecting his conduct as surgeon. The jury may have thought this alone sufficient to put the chief surgeon on inquiry during his monthly visits, and thus enable him to learn whether the talk as to Dr. Higgins' misconduct was well founded or not. It was the duty of those in charge to use ordinary care in seeing that only competent surgeons were kept in control of the hospitals of the company.

Counsel finally contend that, even if malpractice on the part of Dr. Higgins and failure on the part of Dr. Morehouse to remove him after learning of his inefficiency are shown by the evidence, yet appellant is not liable, for the reason that it is shown that the hospital system is managed by a board of trustees, consisting of "the vice president, the general manager, and the assistant secretary of the Wabash Railroad Company," all general officers of the road, and members of the executive department; and also because the funds for the support of such hospital system are made up of deductions from the wages of the employes of the company, which funds, it is said, are confided to the management of said trustees. We think that, even from what has already appeared from the record, a much closer relation is shown between the company and its hospital system than counsel would have us understand. From the moment the employé begins work until his treatment in the hospital on account of sickness or accident, the hospital department, as we think, is shown to be as closely connected with the administration and management of the road as any other department of the company's business. Everything is superintended and directed by

the company, the hospital officers acting and reporting precisely as officers of other divisions of the company's affairs. The publication issued by the company, and entitled "Book of Rules. Form 1,399. The Wabash Railroad Company. Hospital Department. List of Local Surgeons and Instructions, Issued for Information of Employés," is quite as much a part of the machinery of government used by the company as any other document put forth by its authority. Rule 1 of this book, as we have seen, provides for deductions from the employé's wages as the source of income to support the company hospitals, and to care for sick and injured employés. Rule 2 fixes and prescribes the rights of the sick or injured employé to care and treatment while disabled. Rule 3 provides for blank certificates of admission, to be placed in the hands of foremen, and by them issued to such of their men as may be entitled thereto. Rule 3 provides for free transportation to the nearest hospital of employés holding such certificates. Rule 4 provides that in case of necessity the surgeon of the nearest hospital may arrange by telegraph for such transportation without a certificate. Rule 5 provides for the free use of the company's telegraph line. Special rule 1 requires immediate report to the "chief officers of the road and the surgeon in charge of the nearest hospital" in every case of injury to an employé. Special rule 2 provides that, in case an injured employé cannot be moved, he shall be placed in care of "the nearest local agent," and that "the nearest available local surgeon" shall be summoned; except that there be absolute necessity, and then, "for the first attention only," the nearest competent surgeon shall be secured until "the local surgeon can reach the spot." By special rule 3 provision is made for stretchers to be kept at the stations and in the baggage cars. Special rule 4 requires a report by wire to the hospital surgeon to be sent by "the conductor in charge of the train having patients." In case of injury by wreck to a number of passengers or employés, special rule 5 provides for the summoning of the local surgeons, and also other competent surgeons, and, besides, for notification "by wire at once to the nearest hospital and the chief officers of the road." In case of injury to citizens, trespassers, and others not employés or passengers, those in charge are required by special rule 6 to give notice to the local authorities, and also to "notify by wire the general claim agent at St. Louis." Such injured persons are not to be sent "to company's hospitals," and no employé is to incur expenses in such cases, "except for surgeon for first attention only, without special authority from the general claim agent." Special rule 7 provides that, in case of death of passenger, employé, or others, notice is to be given to "the chief officers of the road," and others named, but no expenses are to be incurred "until first specially authorized by the chief surgeon or general claim agent." It further appears from the evidence that the money exacted from

the employes goes into the company's treasury, and that it is paid out again in quite the same way as in case of any other department of the Wabash Railroad Company. The accounts of the hospital department are kept and the bills audited by the general auditor of the road, and the bills are paid by the general treasurer. The hospital department has no treasury or fiscal officer of its own, as separate or apart from the general treasury and auditing departments of the Wabash Railroad Company. Indeed, so far as any independence of control of the Wabash Company goes, the medical department cannot be distinguished from any of the other great departments of that system. There is no written contract or agreement of any kind between the hospital department of the company and the company itself. All is directed by the general management. Outside of the rules prescribed by the company, there is no authority for any action of the department or the employes. The title to the ground upon which the Peru hospital is located is held by the vice president, general manager, and assistant secretary of the company, as trustees of the hospital fund, subject, however, to the order and direction of the board of directors of the Wabash Railroad Company. The evidence, all considered, shows clearly that the property of the medical department, quite the same as the property of any other department, of the road, is wholly under the control and management of the company; and that, although the funds for its support are drawn from the wages of the employes, they are but nominally in the hands of the trustees named, and are so held by them merely for the convenience and advantage of the company. So far as the trustees act in relation to such property, they act as officials of the company. The company undertook to care for its disabled employes out of moneys derived from their own monthly wages, and the plan devised for the hospital department has been contrived as the means of carrying out that undertaking. Whatever defects may be found in the plan adopted, or in the manner in which it has been conducted, it appears, on the whole, to be a wise and praiseworthy undertaking. It would, however, be a great wrong to hold that the obligation to comply with the duty so assumed by the company could be lightly thrust aside by laying it upon the shoulders of the officials who, under direction of the company, are placed in charge of the several hospitals and relief system established by the company itself. Here, as in *Railway Co. v. Sullivan*, 141 Ind. 83, 40 N. E. 188, the appellant company, having undertaken to provide its injured and sick employes with medical and surgical assistance, was bound to exercise reasonable diligence in the selection and retention of its physicians and other attendants. This reasonable diligence included, of course, the duty to supervise the work of its hospitals, and to discharge any appointees who, although reasonably competent at the time of their appointment, had, on account of the use of intoxi-

cants and narcotics, or for other causes, since become incompetent. This was particularly the case where the incompetency of the surgeon in chief had become notorious in the community, so that the appellant's supervising officials must have, or at least ought to have, known it.

The criticism of counsel in regard to instructions given and refused and those modified by the court, has all, as we think, been sufficiently considered in what we have said of the contract relation of appellant and appellee, and of the hospital system as a department of the appellant company. Having found no available error in the record, the judgment is affirmed.

HACKNEY and McCABE, JJ., dissent.

CITY RY. CO. v. CITIZENS' ST. R. CO. et

(Supreme Court of Indiana. Dec. 16, 1898.)

STREET RAILROADS—CONSTRUCTION OF FRANCHISE—EXTENSION—VALIDITY—CONFLICTING FRANCHISE—UNOCCUPIED STREETS—COMPLETION OF TRACKS—CONSTITUTIONAL LAW—CONTROL OF STREETS.

1. Acts 1861, p. 75 (Rev. St. 1894, § 5450; Horner's Rev. St. 1897, § 4143 et seq.), authorizes the organization of street-railway companies, which are declared to be "corporate in perpetuity," and provides that such companies shall first obtain the city's consent to the construction of their roads through the streets of any city, and that the act shall not take from the city the exclusive control of its streets. A city passed an ordinance granting a street-railroad company a franchise to operate on its streets for a stated period, and afterwards extended such period. *Held*, that the street-railway company had not, without further legislation, the right to continue the operation of its railroad on such streets after expiration of the time fixed by the ordinances.

2. Where a street-railroad company incorporated under said provisions accepted an ordinance of a city granting it a franchise to operate its road on the city's streets for a stated period, and thereafter sought and secured an extension of such period, it, by so doing, in conjunction with the city, construed said act as giving it no power to occupy streets beyond the time granted by the city, and was bound by such construction.

3. The fact that a city has given a street-railway company permission to construct its road on all the streets of the city, and that thereunder such company occupied a portion of the streets, does not make a franchise granted by the city to another company during the life of the former franchise invalid as to streets not occupied by the former company, since its franchise was exclusive only as to streets on which it had constructed its road, and from the time of such construction.

4. Where a city authorized a street-railroad company to construct its road on all the streets of the city, and thereafter, during the life of such franchise, authorized another company to construct a street-railroad system on the same streets, the rights of the two companies during the co-existence of the two charters, as to unoccupied streets, were equal, and, where one company thereafter constructed its road on any of such streets, its right as to so much thereof as was necessary for the proper operation of its cars was exclusive.

5. A contract by which a city authorized a street-railroad company to construct a system of street railroads on its streets, in consideration of an annual payment to the city by such company, and its agreement to repair and clean that part of the streets occupied by its tracks, the fare being limited, and the undertakings of the company secured by sufficient indemnity, is legal and binding as between the city and the company, even though the contract may not be an advantageous one for the city.

6. After passage of two municipal ordinances, one of which granted a street-railroad franchise for a term and the other of which extended it, the city attorney advised the city that the extension was invalid. The city then granted a franchise to construct a street-railroad system in the city's streets, including those occupied under the former franchise, to another company, on condition that a certain portion of its system should be constructed within a specified time, the contract providing that delays caused by judicial restraint of the construction should not be counted, and delays caused solely by injunctions against the construction issued because of the prior franchise should extend the term of the second franchise for a time not to exceed a stated period. The extension of the original franchise was afterwards adjudged valid. *Held*, that the second franchise was not invalid, as granted under a mistake of law or of fact.

7. Where a street-railway franchise required the company to complete its road on certain streets within a stated time, and another company, without authority so to do and without consent of the former company or of the city, forcibly took possession of such streets, and extended its road over them, the latter company could not complain that the former had failed to complete its road over such streets within the required time.

8. Act June 4, 1861, § 12 (Rev. St. 1894, § 5450; Horner's Rev. St. 1897, § 4143), requires street-railroad companies to first obtain the city's permission to lay their tracks over said streets, and provides that nothing in the act shall deprive a city of the exclusive control of its streets. A company organized under said act was by a city given permission to construct a street-railroad system on all the streets of the city. It constructed a road on a portion of such streets, and left others unoccupied. *Held*, that it could not thereafter take possession of, and extend its road over, other streets without further permission from the city.

9. A valid contract between a street-railroad company and a city, whereby the former is given a franchise to construct a street-railroad system on the streets of the latter, cannot be abrogated by an act of the legislature.

10. Acts 1897, p. 154 (Horner's Rev. St. 1897, § 4154), amending Act June 4, 1861, § 12, which provides that street-railroad companies shall first obtain the city's consent to lay their tracks in streets, and that the act shall not deprive a city of the exclusive control of its streets, by adding that, on expiration of a street-railroad franchise, the right to use the streets shall forever cease, does not annul an existing franchise to operate on city streets granted by a city under charter authority.

Monks, O. J., and Jordan, J., dissenting.

Appeal from circuit court, Hamilton county; J. F. Neal, Judge.

Action by the city of Indianapolis against the City Railway Company. From a judgment sustaining a demurrer of plaintiff to defendant's answer to plaintiff's amended and supplemental complaint, and overruling a demurrer of defendant to the cross complaint of the intervener, the Citizens' Street-Railroad Company, and sustaining a demurrer of inter-

vener to the answer to its cross complaint, defendant appeals. Reversed.

A. O. Harris, Elliott & Elliott, and John R. Wilson, for appellant. Miller & Elam and W. H. Latta, for appellees.

HOWARD, J. By an act of the general assembly approved June 4, 1861 (Acts 1861, p. 75; Rev. St. 1894, § 5450; Horner's Rev. St. 1897, § 4143, and succeeding sections), authority was given for the incorporation of street-railroad companies, with the condition that such companies should "first obtain the consent of the common council to the location, survey and construction of any street railroad through or across the public streets of any city before the construction of the same shall be commenced." On January 18, 1864, under authority of said act, and by virtue of other powers vested in its common council, the appellee city of Indianapolis passed an ordinance granting to the Citizens' Street-Railway Company of Indianapolis consent to lay a passenger street railroad in and along certain streets of said city, to be operated by animal power only. The franchise so granted was for the term of 30 years from the date of the ordinance. By a supplemental ordinance, passed September 18, 1865, permission was given said street-railway company to lay and operate its tracks in and along all the streets of the city; and on April 7, 1890, a third ordinance was passed, by which the right to operate said street railroad was extended to 37 years from January 18, 1864. In April, 1888, the appellee Citizens' Street-Railroad Company was incorporated, and purchased from the said Citizens' Street-Railway Company its entire railroad system in said city, together with all its rights, franchises, and other property. This transfer was ratified and approved by an ordinance of the city passed April 23, 1888. On December 18, 1889, an ordinance was passed, and afterwards duly accepted by the Citizens' Company, by which the right was given to use electric as well as animal power on said street railroad, but in no other way modifying the terms of the ordinance of January 18, 1864, under which said appellee continued to operate its railroad system. On April 24, 1893, the appellant, the City Railway Company, entered into contract with the city, by its board of public works, for the construction of a street-railroad system for said city, which contract was on said day confirmed by an ordinance of the common council. The question as to the validity of this last-mentioned contract and ordinance presents the chief matters for our examination and decision.

Many questions growing out of the foregoing ordinances and the act of 1861, supra, were considered in Citizens' St. R. Co. v. City Ry. Co., 56 Fed. 743, and 64 Fed. 647, and in City Ry. Co. v. Citizens' St. R. Co., 166 U. S. 557, 17 Sup. Ct. 653. In the case last cited, the supreme court of the United States held that under the ordinance of January 18, 1864, as

amended by the ordinance of April 7, 1890, the Citizens' Company had a valid contract with the city, which would not expire until January 18, 1901. The correctness of this holding does not seem to be seriously controverted by any of the parties to the present action. Neither does it seem to be in dispute that the City Company, under the contract and ordinance of April 24, 1893, has no rights, as against the Citizens' Company, in so far as concerns streets and parts of streets occupied by the latter. The question remains whether the contract of April 24, 1893, is valid as between the city and the City Company, in so far as concerns streets and parts of streets not occupied by the Citizens' Company.

An answer to this question will, however, require that we first determine the extent and duration of the rights of the Citizens' Company under its charter. There is no controversy whatever as to the validity of the original ordinance of January 18, 1864, under which said company derived its 30-year franchise. The extension ordinance of April 7, 1890, under which the term of the company was lengthened to 37 years, was held to be also valid, by the supreme court of the United States, in *City Ry. Co. v. Citizens' St. R. Co.*, supra, and we are content with the reasons given by that high court in support of the conclusion there reached.

Granting, then, that the Citizens' Company, under the act of 1861, supra, and under the ordinances of January 18, 1864, and April 7, 1890, has the right to use the streets occupied by it, and which it may hereafter lawfully occupy, up to the full term of 37 years, or until January 18, 1901, the inquiry arises whether without additional legislation, or consent given by the city, the company may continue to exercise its franchise after that date. We think it cannot. It is true that, by the second section of the act of 1861, a street-railroad company, when duly organized, is declared to be "a body politic and corporate in perpetuity"; but by the twelfth section of the act, from which we have already quoted, it is also declared that "nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys and bridges within the corporate limits of such cities." And it is there further declared that, before constructing its railroad, any such company shall first obtain the consent of the common council. It may well be, therefore, that, subject to the right of the legislature to amend or repeal, retained in the eleventh section of the act, the franchise of the company is perpetual. But the exercise of that franchise requires the consent of the common council of the city as a condition precedent.

It is not pretended that any such consent has been given in this case to the Citizens' Company, except for the term of 37 years from January 18, 1864. It would never do, as seems to us, to admit that by first agreeing

to allow the company to enter upon its streets, and continue there for a definite term, the city had thereby given up forever that exclusive control over its streets which the same section of the act says shall never be impaired by any construction that may be given to the statute. As well contend that the landowner, by allowing a tenant to enter upon and cultivate his farm for a limited period, had thereby lost forever the right to reoccupy it himself, even after the time prescribed in the lease had expired. The very circumstance, too, that the statute provides for the consent of the city to the exercise of the franchise, implies that the city may give or refuse such consent, according to its own discretion; and, if it give consent, such consent may be with such limitations and conditions as the city may deem consistent with its own welfare and the welfare of its citizens. It is not contended that in giving consent the city may not make all reasonable requirements as to location of rails, running of cars, kind of motive power, repair and improvement of streets occupied by tracks, amount of fare charged, and numerous other details, and it is inconceivable that the much more important consideration as to the length of time during which the company may occupy the streets should not also be in the control of the city. Moreover, the company, by accepting the original grant for 30 years, given in the ordinance of January 18, 1864, and also in seeking and accepting the extension of that grant for 7 years longer, given in the ordinance of April 7, 1890, has, in conjunction with the city, put a practical construction upon the act under which it claims corporate existence. It would hardly be consonant with common honesty, as practiced between man and man, to seek for and enter into a contract, first for 30, and afterwards for 37, years, and then, when the right had been enjoyed for the time stipulated and agreed to, to turn around and claim that the contract was without a time limit; that the tenant for a term of years, being once in, had thereby become the owner of the fee simple. We have no doubt, therefore, that the right of the Citizens' Company to exercise its franchise will terminate on January 18, 1901. See the forcible argument of Judge Baker, to the same effect, in 64 Fed. 656-658.

The question then recurs as to the validity and scope of the contract entered into April 24, 1893, between the city and the City Railway Company. As bearing on the question so raised, it was said by Judge Woods in *Citizens' St. R. Co. v. City Ry. Co.*, 64 Fed. 647: "In so far, therefore, as the contract of April 24, 1893, by its terms confers, or attempts to confer, upon the defendant company the right to lay its tracks in the place of the tracks of the Citizens' Company, or to appropriate those tracks, it is an invasion of the rights of the latter company, and should be enjoined. I am not to be understood as meaning that under the act of 1891 [the city charter] the city may not authorize the defendant or any other

company to lay its tracks in the same streets on which the complainant's tracks are laid; but, without additional legislation, the cars of one company may not, without consent, run upon the rails of another company, nor may the rails of one be so laid as to prevent or needlessly impede the running of the other's cars." This is a true and comprehensive statement of law, and is in full harmony with what has always been held by this court. So, it was said in *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369, 24 N. E. 1054, and 26 N. E. 893, Coffey, J., speaking for the court: "The ordinance granting to the Citizens' Street-Railway Company the right to construct street railways upon streets of the city of Indianapolis does not grant to it the exclusive right to construct street railways thereon. Indeed, * * * it is conceded that the common council may grant to other persons or corporations the same right. Where the sovereign has granted a special charter to a corporation to conduct a particular business, without granting any exclusive privileges over that business, the same sovereign may, in like manner, grant special charters to other corporations to carry on the same business, and where there is a conflict of profits between them the first has no remedy. *Turnpike Co. v. Smith*, 89 Ind. 290; *Charles River Bridge v. Warren Bridge Co.*, 11 Pet. 420. Acting upon this well-known principle, the common council of the city of Indianapolis granted to the appellant the right, also, to construct, maintain, and operate street railroads upon the streets of the city of Indianapolis. At this point the question arises as to what were the respective rights of the appellant and the appellee, in so far as they had the right to occupy the streets of the city, as between themselves. As to the unoccupied streets, our opinion is that they stood upon an equality, and that the controversy resolved itself into a question of first occupancy." In the same connection the court cites *Elliott, Roads & S. 570*, where the learned author says: "If the company which secures the first grant actually occupies the streets it is authorized to use, then there is much reason for affirming that its right to the part of the street actually occupied and used is paramount and exclusive."

While, therefore, it is clear, to repeat the strong words of Judge Woods, that, without additional legislation, "the cars of one company may not, without consent, run upon the rails of another company, nor may the rails of one be so laid as to prevent or needlessly impede the running of the other's cars," yet it is equally clear that one company cannot have a monopoly of the streets. There can be no question, therefore, that in April, 1893, or at any other time, the city might, as it did, enter into contract with the appellant company to lay a street railroad upon any streets or parts of streets not actually occupied by the tracks of the appellee railroad company or needed for the operation of its road. The contract of April 24, 1893, consequently, is valid as be-

tween the City Company and the city, in so far as it does not interfere with the prior rights of the Citizens' Company. As to unoccupied streets, prior to January 18, 1901, the rights of the two companies are equal. As to streets actually and legally occupied by either company, including, however, only so much of such streets as may be necessary for the proper operation of its cars, the rights of such occupying company are exclusive.

As to the city itself, it is clear, from what has been said, that, as between it and the City Company, the contract of April 24, 1893, is unquestionably binding and valid. It would be strange, indeed, if the law were so unjust and unreasonable as to forbid a city to enter into a contract such as that shown in the record, providing for the payment annually into the city treasury of thousands of dollars, thus lowering taxation; providing for the improvement, repair, and cleaning of so much of the streets as is occupied by the tracks, and a foot and a half on either side, thus lowering street assessments; and providing for what is practically equivalent to a four-cent fare, thus lowering to the people their daily expenses for street-car fare; besides securing all these beneficial results by the giving of a bond to the city in the sum of \$100,000. But, whether the contract may be an advantageous one for the city and the people or not, it is very plain, in any event, that the city had the right to enter into such contract, and that the same is legal and binding as between the city and the City Railway Company.

Nor is there anything in the contention that because the parties to this contract were in ignorance of, or mistaken as to, the law or the facts relating to the subject-matter of the contract, the same is therefore not binding between them. This contention is based upon the circumstance that the city attorney, shortly prior to the making of the contract, gave it as his opinion that the contract of the Citizens' Company would expire January 18, 1894; whereas, said contract would not in fact expire until January 18, 1901. The contract itself, however, shows that this circumstance was taken into consideration and fully provided for. It was plainly deemed, in the contract with the City Company, that it was a matter of uncertainty whether the Citizens' franchise would terminate in 1894 or in 1901. To be prepared for either contingency, a contract in present was entered into on April 24, 1893, in which it was provided that six miles of lines should be constructed within six months, and all lines specified in the contract should be constructed within eighteen months. That was an ample and proper preparation for the construction of a complete system of street railroads for the city, in case the Citizens' franchise should terminate January 18, 1894. But because it was uncertain whether the Citizens' Company might not have a right to exercise its franchise until January 18, 1901, as to the streets actually occupied by it, the fol-

lowing provisos were introduced into section 22 of the contract: "Provided, however, that should the construction of one or more of said lines, or the carrying out of any of the provisions of this agreement, be delayed by the injunction or order of any court of competent jurisdiction, the time so lost shall be added to the time herein specified, within which the same shall be constructed: provided, further, should the completion or operation of the main portion of said lines be delayed by the order of any court of competent jurisdiction, and which order shall be made solely by reason of any franchise or grant heretofore made to any other company or companies, and that said party of second part shall have in good faith, by every reasonable effort, resisted the granting and continuance of said order, and shall have used every reasonable endeavor to comply with its said agreement to construct and operate said lines, the time so lost shall be added to the term of this agreement: provided, that said extension shall not be for a longer time than for six years." The plain import of these provisos is that there was no ignorance or mistake as to the fact or the law, but, on the contrary, there was a clear recognition of the uncertainty of the time which the courts might construe to be the termination of the Citizens' Company's contract, and hence the City Company's contract was so drawn as to provide for both contingencies. It was a contract in present as to all unoccupied streets and parts of streets, and also a contract as to all other streets as soon as they should be vacated by the occupying company. The contract could not be more fitly drawn, so as to provide for either contingency. There was, then, no ignorance or mistake of fact or law, but a contract fully intelligible to both parties thereto. The proviso was—First, that any time lost in the completion of any line or lines, by reason of any order of court in relation thereto, should be added to the time prescribed for the completion of such line or lines; and, second, that, if the time lost should be by order of court made solely on account of a franchise theretofore granted to any other (the Citizens') company, then such time, not, however, more than six years, should be added to the term of the contract. In other words, all time lost by reason of any order of court should be added to the time given to complete any line or lines; and all such lost time, up to six years, if due to the franchise of the Citizens' Company, should be added to the term of the franchise of the City Company.

But it is said that there was no order of court enjoining the construction of any of the lines until the decree of the United States circuit court, November 10, 1894, notwithstanding which the company did not enter upon the performance of its agreement. This, if unexcused, might perhaps be ground for annulling the contract with the City Company for failure to comply with its terms.

But, even if this were true, there is nothing in the action here brought, or in any of the pleadings filed, that looks to a forfeiture of the contract of the City Company, or that would even authorize such forfeiture.

It is to be remembered, also, that the bill in equity to enjoin the City Company was filed in the United States circuit court by the Citizens' Company, May 11, 1893, within a few days after the making of the City Company's contract. *Citizens' St. R. Co. v. City Ry. Co.*, and *City Ry. Co. v. Citizens' St. R. Co.*, 64 Fed. 647, and 168 U. S. 557, 17 Sup. Ct. 653. More than this, however, it is averred in the City Company's answer to the amended complaint of the city, in this case, and admitted by demurrer thereto, that the six miles of unoccupied streets, designated the "North and South Line," and which the City Company was to complete in six months, was, during the very time of the passage of the ordinance of April 24, 1893, and without the consent of the city, violently and forcibly taken possession of by the Citizens' Company, which thereupon, against the written objection and protest of the City Company, proceeded to extend its lines of street railroad upon said "North and South Line." The Citizens' Company, by its acts, is therefore in no position to charge the City Company with a failure to resist such action by physical force and so comply with its contract. The contract of April 24, 1893, contemplated legal, not armed, proceedings for the performance of its conditions. That the building of the Citizens' road upon the "North and South Line," without seeking or receiving permission from the city, was an illegal act is apparent, as we have seen, from the terms of the act of the legislature under which the Citizens' Company was organized. It is there provided, in section 12 of the act, that the consent of the city must be obtained for "the location, survey, and construction" of any line through or across any public street before the construction of such line is commenced. That the building of this "North and South Line" by the Citizens' Company was unauthorized, was likewise the holding of both the judges in *Citizens' St. R. Co. v. City Ry. Co.*, supra. Said Judge Woods, in speaking of the Citizens' Company: "By its own charter, as I construe it,—indeed, according to the plain letter,—it had no right to commence construction on a particular line without first having obtained the consent of the council to the 'location, survey, and construction' proposed. The necessity for this consent was not affected, as I think, by anything contained in the ordinance of January 18, 1894, or in the supplemental ordinance of September 18, 1895. * * * By its own charter the complainant had no right to enter upon a street without the consent of the city, and the city was free, with or without reason, to give or withhold its consent." And Judge Baker said: "Prior to the designation of the additional north and south streets

for the use of the defendant [the City Company], the complainant [the Citizens' Company] had no lines upon those streets except a fragment upon South Pennsylvania street, which had been practically, if not legally, abandoned. I do not think the complainant, under the ordinance of 1864 or 1865, had any vested right to commence the construction of a particular line without first obtaining the consent of the common council to the 'location, survey, and construction' of such proposed line. Therefore, the complainant, having obtained no consent from the city to occupy the streets in question, has no right to complain of their occupation by the defendant company." That the contract of the City Company as to this unoccupied "North and South Line" was, on the contrary, valid and binding between the parties, was the deliberate opinion of Judge Baker, who said: "It is too clear for debate that all these parties [the board of public works, the common council, and the City Railway Company] have agreed to the designation of the 'North and South Line'; that such designation has been approved by ordinance, and accepted by the defendant company. It is a fundamental rule in the construction of contracts that it is the duty of the court to ascertain and give effect to the intention of the parties, if lawful, whenever it can be done, 'Ut res magis valeat quam pereat.' It seems to me, while the contract in regard to the 'North and South Line' is not technically formal, that, taken as a whole, in connection with the ordinance of April 24, 1893, it contains enough to be binding on both contracting parties."

Finally, the contention is made that the legislature, by an act approved March 5, 1897 (Acts 1897, p. 154; Horner's Rev. St. 1897, § 4154), so amended section 12 of the act of June 4, 1861, *supra*, for the incorporation of street-railroad companies, as in some way to abrogate or annul the contract of April 24, 1893. If that contract was in fact valid and binding, it could not be abrogated or annulled by any act of the legislature or of the city. But the act does not profess to annul any contract with the appellant or with any other company. It simply provides, as to existing time contracts, that "upon the final expiration of such time, the rights to use such tracks in such streets, and other public places, * * * shall immediately terminate and cease forever." It is well to remember, too, that the act in question was an amendment of the act of June 4, 1861, whereas the contract of April 24, 1893, was made under provisions of section 59 of the city charter, approved March 6, 1891 (Acts 1891, p. 137; Rev. St. 1894, § 3830; Horner's Rev. St. 1897, § 6872). There seems to be little doubt, as intimated by Judge Woods, in *Citizens' St. R. Co. v. City Ry. Co.*, *supra*, that, by reason of the reservation in section 11 of the act of 1861, any charter acquired under the act would be subject to modifica-

tion by the legislature, even as to franchises granted thereunder; and this was expressly held by this court, in the recent case of *City of Indianapolis v. Navin*, 151 Ind. —, 47 N. E. 525. But, as we have just said, no attempt has been made by the legislature, either in the act of March 5, 1897, or elsewhere, to abrogate or annul any franchise, whether granted under the act of 1861, or under said section 59 of the city charter. That section provides, among other things, that the board of public works shall have power "to authorize and empower by contract, telegraph, telephone, electric light, gas, water, steam or street car or railroad companies to use any street, alley or public place in such city, and to erect necessary structures therein, and to prescribe the terms and conditions of such use, to fix by contract the prices to be charged to patrons: provided, that such contract shall in all cases be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect." This statute was strictly followed in the making of the contract of April 24, 1893. The board of public works and the city company entered into the contract, after which such contract was submitted to the common council, and approved by ordinance duly passed by that body.

We, conclude, then, that the right of the Citizens' Company to exercise its franchise upon the streets of the city of Indianapolis will expire on January 18, 1901, by limitation of its contract; and also that the agreement entered into by the city and the City Company April 24, 1893, was and is a valid contract in present between the parties thereto; and that said City Company, under said contract, had a right to enter at once upon the construction of the "North and South Line," and, on consent given by the city, upon any other unoccupied streets and parts of streets not in use by the Citizens' Company or necessary for the reasonable and safe operation of its lines; and that, on like consent given by the city, said City Railway Company may, upon the expiration of the term of the Citizens' Company, and the vacation of the streets by said company, enter upon and occupy such vacated streets for the construction and operation of its lines. The judgment is reversed, with instructions to overrule the demurrer of the appellee city of Indianapolis to the answer of the appellant to the amended and supplemental complaint; to sustain the demurrer of the appellant to the cross complaint of the appellee Citizens' Street-Railroad Company; and to overrule the demurrer of the appellee Citizens' Street-Railroad Company to the answer of the appellant to the cross complaint of said Citizens' Street-Railroad Company; and for further proceedings not inconsistent with this opinion.

MONKS, C. J., and JORDAN, J., dissent.

(151 Ind. 556)

SCOTT v. STATE ex rel. GIBBS.

(Supreme Court of Indiana. Dec. 14, 1898.)

COUNTY TREASURERS—TERM OF OFFICE—STATUTE—QUO WARRANTO—CONSTITUTIONAL LAW.

1. Under Acts 1897, p. 288, providing that the term of county treasurer shall begin on the 1st day of January next following the term of the present incumbent, which expired in September, the treasurer-elect is not qualified to enter on the discharge of the duties of the office until the succeeding January, and hence has no "interest," within Rev. St. 1894, § 1146 (Rev. St. 1881, § 1182; Horner's Rev. St. 1897, § 1182), so as to entitle him to be a relator in an information to oust the incumbent before the succeeding January.

2. The legislature has power to fix the time for the commencement of the terms of office of those not fixed by the constitution.

3. Acts 1897, p. 288, providing that the term of county treasurer shall begin on the 1st day of January next following the term of the present incumbent, which expired in September, does not itself lengthen the term of the county treasurer, so as to be unconstitutional, since the term is fixed (Const. art. 6, § 2) at two years, and (article 15, § 8) until a successor is elected and qualified.

Howard, J., dissenting.

Appeal from circuit court, Hamilton county; Theo. P. Davis, Special Judge.

Information in the nature of a quo warranto by the state, on relation of Albert J. Gibbs, against George M. Scott. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed.

Christian & Christian, Smith & Korbly, and Hawkins & Smith, for appellant. Kane & Kane, for appellee.

MCCABE, J. The appellee's relator filed an information in the nature of a quo warranto against the appellant to try the right of the defendant to the office of treasurer of Hamilton county, Ind. It appears from the petition that appellant was elected to that office at the November election in 1894, afterwards qualified and entered upon the discharge of the duties of said office on September 7, 1895, and that his two-year term of office expired on September 7, 1897. Appellee's relator was elected to said office as the successor of the appellant at the November election in 1896, and on November 14, 1896, was duly commissioned as such treasurer elect. Afterwards he duly qualified as treasurer, by filing his official bond, which was approved by the board of commissioners of Hamilton county on the 9th day of June, 1897, and by taking the oath of office on September 3, 1897. On September 7, 1897, the expiration of the two years for which appellant was elected, he refused to vacate the office of treasurer, claiming that by reason of the passage of the act approved March 8, 1897 (Acts 1897, p. 288), which provided "that the term of county treasurer shall begin on the first day of January next following the term of the present incumbent," he was entitled, under the constitution, to hold said office until the latter date. If said act is valid, this claim must be upheld. But the circuit court over-

ruled defendant's demurrer to the complaint setting forth the foregoing facts, holding said act invalid; and, the defendant failing to amend or plead over, the court rendered judgment ousting him from said office, and awarding possession thereof to the plaintiff's relator (appellee). The correctness of this ruling is presented by the assignment of errors as the sole question upon which a reversal of the judgment is sought.

Appellee's learned counsel seek to uphold the ruling of the circuit court on the ground that said act is unconstitutional, in that it lengthens or extends the term of office of Scott beyond two years, conceding that, if said act is valid and constitutional, the ruling of the circuit court was wrong, and its judgment must be reversed. The particular provision of the constitution which it is contended the act quoted violates is section 2 of article 6 which provides that "there shall be elected in each county by the voters thereof, at the time of holding general elections, . . . a treasurer. . . . The treasurer . . . shall continue in office two years. . . ." But it is insisted by appellant, and we think correctly, that the act in question does not, and did not, lengthen or add any time to appellant's term of office. It only provides "that the term of county treasurer shall begin on the first day of January next following the term of the present incumbent"; and that is all there is of the act, except the enacting clause, the clause repealing conflicting laws, and declaring an emergency. This language adds nothing to the term of the present incumbent. It simply postpones and fixes the time when his successor's term of office shall legally begin. That time happens to be nearly three months after the expiration of Scott's two-year term. Hence it is argued by appellee that, if the act is upheld, there will either be a vacancy in the office created by the act, or Scott's two-year term will be lengthened from September 7, 1897, when it expired, to January 1, 1898, by virtue of the act. But, as before observed, the language of the act clearly does not lengthen or add any time to the present incumbent's (Scott's) term. Nor does the language of the act purport to deprive the present incumbent of the right to hold the office until his successor is elected and qualified; nor does it purport to deprive any person from holding the office from September 7, 1897, the time when the two-year term of the present incumbent expires, until January 1, 1898, the time it fixes for the legal beginning of the term of the successor to the present incumbent. Though no provision is made in the act as to who shall fill the office during the time between said two dates, a vacancy cannot result from the effect of the act, even if such vacancy would render the act unconstitutional, as contended by appellee's relator, because section 3 of article 15 of the constitution provides that "whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer other than a member of the

general assembly shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified." Therefore the provision of the constitution first above quoted and relied on by the appellee must be construed to mean "that county treasurers shall continue in office two years, and until a successor is elected and qualified." Accordingly, it was adjudged in *Koerner v. State*, 148 Ind., at pages 166, 167, 47 N. E. 325, that "it is settled that all officers except members of the legislature hold their offices under the constitution for the term for which they are elected, and until their successors are elected and qualified." *Rev. St. 1894*, § 225 (*Rev. St. 1881*, § 225); *Baker v. Kirk*, 33 Ind. 517; *Steinback v. State*, 38 Ind. 483; *State v. Bogard*, 128 Ind. 480, 27 N. E. 1113; *Butler v. State*, 20 Ind. 169; *State v. Berg*, 50 Ind. 496.

Under the constitution, officers who are elected for a term are thereby authorized to continue to hold and discharge the duties and receive the emoluments of their office, until they are superseded by other persons in their places, even though that extends beyond the legal length of the term for which they were elected. *State v. Harrison*, 113 Ind. 434, 440, 16 N. E. 384; *Tuley v. State*, 1 Ind. 500; *Miller v. Burger*, 2 Ind. 337; *Baker v. Kirk*, supra; *State v. Berg*, supra; *Gosman v. State*, 106 Ind. 203, 6 N. E. 349; *Elam v. State*, 75 Ind. 518. The policy of constitutional provisions of that nature is to prevent the happening of vacancies in office except by death, resignation, removal, and the like. *State v. Harrison*, supra. As was said in the latter case, at page 441, 113 Ind., and page 387, 16 N. E.: "It adds an additional contingent and defeasible term to the original fixed term, and excludes the possibility of a vacancy," etc. But it is insisted by appellee, even under this provision of the constitution, that "appellant had served the term of two years, for which he had been elected, and his successor had been elected and qualified" on September 7, 1897, when appellee's relator demanded the office of appellant, and hence it was his duty, even under this provision of the constitution, to deliver the possession of the same to that successor. This contention involves the inquiry as to what term of office it was upon the discharge of the duties of which appellee's relator had been qualified to enter. If it was the term of two years next ensuing after the expiration of appellant's two-year term, on September 7, 1897, then Gibbs' demand ought to have been complied with, and Scott ought to have turned over the office to Gibbs. But, at the time that Gibbs qualified and demanded the office, the act already quoted, if valid, was in full force, and fixed the time for the commencement of his term on the 1st day of January next following the term of the present incumbent, which expired on September 7, 1897. He therefore could not and did not qualify to enter upon any other term than the one com-

mencing on the day fixed therefor in said act, if the same is valid; and that day was January 1, 1898. *State v. Long*, 91 Ind. 357; *Shannon v. Baker*, 33 Ind. 390; *Board of Com'rs of Boone Co. v. State*, 61 Ind. 385; *State v. McCracken*, 51 Ohio St. 123, 36 N. E. 941; *Smith v. More*, 90 Ind. 294. Therefore Scott's successor was not elected and qualified to enter upon the discharge of the duties of the office at the expiration of Scott's two-year term. *State v. Long*, supra. Hence Scott was entitled to hold over, by virtue of the hold-over clause of the constitution already quoted, until his successor was qualified to succeed him; and he was not authorized to so hold over by the act in question. If there had been no hold-over clause in the constitution, the right of Scott, the incumbent, to longer discharge the duties of the office, after the expiration of the express term fixed by the constitution, would have terminated. *State v. Menaugh* (Ind. Sup.) 51 N. E. 117, and authorities there cited.

Assuming that the act was valid, Gibbs was in no way concerned with or interested in the question whether Scott's term had expired or not, or who should fill the office during the interval from its expiration on September 7, 1897, to the commencement of Gibbs' term, on January 1, 1898. He was only interested in his two-year term beginning on the latter day, and therefore had no such interest in the office previous to that day as to authorize him to file an information to oust Scott previous to said day. *Rev. St. 1894*, § 1146 (*Rev. St. 1881*, § 1132, and *Horner's Rev. St. 1897*, § 1132); *State v. Long*, supra. The validity of the act depends solely upon the question whether an act of the legislature fixing the time when the term of county treasurer as limited by the constitution shall commence violates any provision of that constitution. If it does not, then it must be valid, because, as was said in *Townsend v. State*, 147 Ind., at page 634, 47 N. E. 23: "The state legislature possesses all legislative power, except such as has been delegated to congress, and prohibited by the constitution of the United States, * * * and such as is expressly or impliedly withheld by the state constitution from the state legislature." There is nothing in the constitution, either state or federal, that conflicts with the exercise of the legislative function of fixing the time when the terms of office the commencement of which is not fixed in the constitution shall begin. *Paine, Elect.* § 130.

There are no offices the commencement of the terms of which is prescribed in the constitution, except that of the executive and members of the legislature. The power to fix the time for the commencement of the terms of office of those not fixed in the constitution has been exercised by the legislature, without question, from the organization of the state, at various times. Indeed, without the exercise of such power by the legislature in the interest of public convenience, no man elected to such an office can legally compel his induction into

such office, because there would be no law authorizing and requiring his admission into such office at any particular period of time. The constitutional power of the legislature to fix such time is not seriously questioned by the appellee. But it is insisted that it must be so exercised as to neither shorten nor lengthen the term of an office the length of which is fixed in the constitution, and that the act in question had the effect of adding the time from September 7, 1897, to January 1, 1898, to the two-year term of Scott. If it does so, it would certainly violate the constitutional provision fixing the length of county treasurer's term at two years. But it does no such thing. It simply postpones and fixes the time for county treasurers' terms to begin in the future. If there had been no hold-over clause in the constitution requiring the section thereof fixing the term of county treasurers at two years to be construed as authorizing him to hold two years, and until a successor was elected and qualified, Scott's right to hold the office would have expired at the end of his two-year term, and the act in question could not, and it did not, authorize him to hold the office during the interval between September 7, 1897, to January 1, 1898. Therefore the act does not lengthen Scott's term. That is fixed at two years, and until his successor is elected and qualified, wholly by the constitution, and so remains absolutely unaffected by the act in question. All must concede that the legislature cannot fix the time for the commencement of the county treasurer's term so as to make the term of any treasurer less than two years; that is, by fixing it before the expiration of the present incumbent's term. Then it follows that appellee's contention would result in holding that the legislature cannot change the time for the commencement of the term of treasurer at all, because he contends that postponing it beyond the expiration of the present incumbent's term lengthens that term beyond two years.

It is contended, however, that Howard v. State, 10 Ind. 99, sustains appellee's contention. In this, counsel are in error. In that case, Stembell was elected treasurer of Benton county, at the October election in 1854, for a term of two years, commencing on August 15, 1855, and terminating August 15, 1857. Vawter was elected to said office at the October election in 1856. He qualified and demanded the office on August 15, 1857, at the expiration of Stembell's two-year term. The right of Vawter to enter into the office at that time was resisted, on the ground that the act approved March 3, 1856, had extended Stembell's term from August 15, 1857, to the first Monday in November following. The act consists of but two sections. The first provides that, among other officers, the terms of county treasurer "shall commence on the first Monday of the month of November immediately following the general October elections, and that any of the above-named officers to be elected hereafter shall hold their

offices until the first Monday of November aforesaid. * * * The second section provides that "the aforesaid officers * * * elected at the October election of 1854 * * * shall * * * hold the same (said offices) as provided in the first section of this act." It is clear that the first section fixed a different time for the commencement of the term of county treasurer and other county officers from that previously fixed by law by postponing the same. As to the particular office of treasurer of Benton county the time for the commencement of the term was postponed from August 15, 1857, to the first Monday in November following. But that part of the act was not questioned in the decision in Howard v. State, supra. But it was the second section which created the trouble. It provided that the officers named in the first section who had been elected at the October election of 1854 should hold their offices the same as provided in the first section; and that was until the first Monday in November following the October election. If enforced in that case, it actually and directly extended Stembell's term from August 15, 1857, to the first Monday in November following, making it that much longer than the constitutional length of two years. The pith of the decision is in these words: "Applied to this case, it [the statute] affirmatively extends the term of office beyond the limit fixed by the constitution, and must therefore be held invalid." In Douglass v. State, 31 Ind. 429, this court held that the said act of 1855, in so far as it fixes the time for the commencement of the term of offices therein mentioned, including county treasurer, was still valid and effective, and repealed by implication the act of May 31, 1852, fixing the time for the commencement of the term of such offices, because the act of 1855 fixed a different time for the commencement of said terms. To the same effect is Griebel v. State, 111 Ind. 369-377, 12 N. E. 700. At all events, there is nothing in the case of Howard v. State, supra, holding that an act of the legislature fixing the time for the commencement of a term of an office, the length of which is fixed in the constitution, at a later date than had been previously fixed for such term, in the absence of a provision that the present incumbent should hold the office during the interval, would lengthen the present incumbent's term, and thereby violate the constitution. It may be said the hold-over clause of the constitution might have been applied in that case to have justified Stembell's claim to hold over until the first Monday in November. But it was neither involved, considered, nor applied to the case. The only question passed on was whether a statutory provision directly and affirmatively extending the term of an office beyond the length thereof fixed in the constitution violated that constitution. Plainly, the court was right in holding that it did. But that is not the case now before us. It follows from

what we have said that the circuit court erred in overruling the demurrer to the complaint. The judgment is reversed, with instructions to sustain said demurrer.

HACKNEY, C. J., did not participate in this decision.

HOWARD, J. (dissenting). However desirable it may be that the several county treasurers of the state should take office on the 1st day of January succeeding the termination of the terms of their predecessors, and however praiseworthy may have been the motive that actuated the legislature in seeking to enact a law to bring about such a result, yet I cannot, even for such reason, agree to what I believe to be a plain violation of the fundamental law of the land. The constitution is no less binding on the courts and legislators than on the people at large. Least of all should this court, set up as it has been for the interpretation and defense of the constitution, lend its high sanction to any disregard of that sacred instrument. The office of county treasurer was at first a statutory, and not a constitutional, office. By an act approved January 8, 1831, the office was created by the legislature, and it was provided that the same should be filled by appointment of the board of county commissioners. Rev. St. 1838, p. 158. It was afterwards provided that the treasurer should be elected at the general election then held in August of each year, and that he should hold his office for the term of three years from and after the first Monday in March next succeeding his election, and until his successor should be elected and qualified. Rev. St. 1843, pp. 98, 122. But by the present constitution, adopted in 1851, the office was made a constitutional one, and it was provided that the treasurer should "be elected, in each county, by the voters thereof, at the time of holding general elections," and that he should "continue in office two years." Article 6, § 2. By item 10 of the schedule to the constitution, it was provided that every person elected by popular vote, and in office at the time of the taking effect of the constitution (except as in the constitution itself otherwise provided), should continue in office until the term for which he had been elected should expire, provided that no one should continue in office after the taking effect of the constitution for a period longer than the term of such office as prescribed in the constitution. From these provisions it is clear that, under the present constitution, the term of office of the county treasurer is two years, and that the first term in each county began at the end of the last term under the old constitution. Thus, while the length of the term is fixed, there is no uniform time for its beginning. This is likewise true of the other county offices, and also of the administrative offices of the state, as created by the constitution. For the members of the legislature, and for the executive,

it is different. There, both the beginning and the duration of the term are fixed. In article 4, § 3, it is provided that "senators shall be elected for the term of four years, and representatives for the term of two years from the day next after their general election." And in article 5, § 9, it is provided that "the official term of the governor and lieutenant governor shall commence on the second Monday of January, in the year one thousand eight hundred and fifty-three; and on the same day every four years thereafter." To secure such uniform beginning of the governor's term, and avoid any vacancy, it was further provided, in item 5 of the schedule, that the last governor, under the old constitution, should continue to act until his successor should be sworn into office. Like provisions could, of course, have been made to secure a uniform time for the beginning of the terms of the administrative officers of the state and county; but the framers of the constitution do not seem to have considered this necessary, and such administrative officers, as we have seen, began their terms under the new constitution at the several dates when the terms of their predecessors under the old constitution came to an end.

It is not doubted that, under the provisions of the constitution cited, the term of the appellant would have ended on September 7, 1897, and the relator would have been entitled to enter upon the duties of the office on that day. It is said, however, that the legislature, by the act in force March 8, 1897 (Acts 1897, p. 288; Horner's Rev. St. 1897, § 5911a), provided that the term of the county treasurer should begin on the 1st day of January next following the term of the then present incumbent, and, consequently, that the term of the relator did not begin until January 1, 1898. To this, counsel for the relator answer that the statute in question, changing, as it does, the time when a county treasurer should take his office under the constitution, and thereby, in effect, extending the length of the term of his predecessor, as fixed by the constitution, must be null and void. So long as the office of county treasurer remained merely statutory, it was almost completely under the control of the legislature, and the term might begin or end at any time, or be lengthened or shortened, at the will of the legislature; and this is still true as to statutory offices, provided only the tenure be not made more than four years. Const. art. 15, § 2; *Ham v. State*, 7 Blackf. 314; *State v. Hyde*, 129 Ind. 302, 28 N. E. 186. As soon, however, as the office was made a constitutional one, the power of the legislature over it became limited by the provisions of the constitution relating thereto. Those constitutional provisions, as we have seen, fixed the length of the term primarily at two years. This term might, of course, be abruptly broken off by the death, resignation, or removal of the incumbent, in which case provision

was made for filling the vacancy until the next general election, at which time a new succession of two-year terms would begin. But the only provision for adding to the two-year term is found in article 15, § 3, which declares that, "whenever it is provided in this constitution * * * that any officer * * * shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term, and until his successor shall have been elected and qualified." It is certain that this provision did not authorize the legislature to enact a law postponing the time when the relator should take his office. On September 7, 1897, appellant had served as county treasurer for the two-year term provided for in the constitution; and, as the relator had then been elected and qualified, there was no constitutional warrant for allowing appellant to hold any longer. His successor had already "been elected and qualified." The words of the constitution limiting the term of appellant to two years could not be plainer, namely, that he should "hold his office for such term and until his successor shall have been elected and qualified." It is admitted by the demurrer that his successor, the relator, had been elected and qualified on September 7, 1897, at which time also appellant had already served his full term of two years. It must therefore be that the statute relied upon by appellant to deprive the relator of his right to take his office at the time authorized by the constitution is wholly void.

This is not the first time that the question has been before this court. While the first legislature that assembled under the new constitution, composed, as it was, to a large extent, of men who had framed that instrument, provided, by an act approved June 4, 1852, and in harmony with the fundamental law, "that the term of county treasurer shall commence at the expiration of the term of the present incumbent" (Rev. St. 1852, p. 490), yet a subsequent legislature, actuated, no doubt, by the same laudable purpose that influenced the legislature of 1897 in fixing a uniform and convenient date for the beginning of the terms of county treasurers, provided, by an act approved March 3, 1855, that such terms should begin "on the first Monday of the month of November immediately following the general October elections" (Acts 1855, p. 52). But in *Howard v. State*, 10 Ind. 99, the act so passed was held void, as in conflict with the constitution, which limited the term to two years. In deciding that case, the court said: "The term of the office of treasurer is fixed; and, though it be conceded that the legislature may have the power to fix the time at which such term shall commence, still, in order to effect that object, they are not authorized either to shorten or lengthen it. This construction is well supported by another provision. Section 2 of article 15 says: 'When the duration of any office is not provided for by the constitution,

it may be declared by law;' and thereby clearly implies that, when such duration is limited by the organic law, it cannot be changed by legislation." The conclusion thus reached has since been adhered to. In *Grieble v. State*, 111 Ind. 376, 12 N. E. 708, it was said: "In the case of *Howard v. State*, 10 Ind. 99, it was held that the legislature has no power either to abridge or extend the term of an officer where his term is prescribed by the constitution, and that hence the act of 1855, supra, was in conflict with the second section of article 6 of the constitution, herein above set out (fixing the terms of county officers), and for that reason void. In the more recent case of *Douglass v. State*, 31 Ind. 429, the doctrine that the legislature can neither abridge nor extend the term of an officer which is fixed by the constitution was reaffirmed." In *Pursel v. State*, 111 Ind. 519, 12 N. E. 1003, the court, in citing the foregoing decision, said: "In the case of *Grieble v. State*, the doctrine that the term of an office fixed by the constitution can neither be abridged nor extended by a statutory enactment was fully considered and reaffirmed. It was also then held that, under the operation of the several constitutional provisions and statutes having a bearing on the subject, there was not, and could not be made to be, any uniformity in the several counties of the state as to the time at which persons elected to county offices of the same class shall be entitled to enter upon their duties, where the duration of the term is prescribed by the constitution." Speaking of the incumbent in that case, the court said, further: "Having taken possession of the office in pursuance of his election, and having held the office for the full term of two years,—the time fixed by the constitution,—he was at all events, as against his regularly elected and properly qualified successor, estopped from denying that his term of office had expired." And in *State v. Friedly*, 135 Ind. 119, 34 N. E. 872, this court again, citing 7 *Lawson, Rights, Rem. & Prac.* 5970, said: "If the constitution provides for the duration of an office, the legislature has no power, even for the purpose of changing the beginning of the term, to alter its duration." This seems to be the exact question for decision in the case at bar, for in the act under consideration the express purpose was to change the beginning of the county treasurer's term, and the necessary result of that attempt, if successful, would have been to alter the duration of the term of the incumbent. The incumbent had served two years, and his successor had been elected and qualified; and the constitutional provision being that the term shall be two years, and until the successor has been elected and qualified, the consequence inevitably follows that the incumbent's time, under the express provisions of the constitution, had expired.

It is to be kept in mind that the office of county treasurer was created, and the dura-

tion of the term fixed, by the constitution. Much, therefore, of what has been said as to statutory offices, and the control of the legislature over them, can have no relation to such a case as the one before us. The constitution limited Mr. Scott's term of office to two years, ending September 7th, if at that time his successor had been elected and had qualified. His successor at that time had been elected and had qualified; hence, under the constitution, he would have taken the office at that time; and the law continuing Mr. Scott in office has the effect of annulling that part of the constitution limiting the term to two years, for the reason that the condition upon which the constitution permits him (Scott) to continue in office, viz. failure of his successor to be elected and to qualify, does not exist. However convenient or desirable it may be that county treasurers should begin their terms on the 1st day of January, yet I am unable to see how that may be done without at least an indirect violation of the constitution; and it is not doubtful that the legislature cannot do indirectly what it cannot do directly. If the time when a treasurer-elect shall take his office can be made to be four months after the end of his predecessor's term, thus, in effect, lengthening such term four months, no reason appears why an incumbent's term might not, in the same manner, be indirectly extended to any length beyond the time absolutely fixed by the constitution. That would be to nullify the constitutional requirement as to fixed terms for county and state officers. I think it a dangerous construction of the constitution. As said in *Pursel v. State*, supra, I do not think that any uniformity as to beginning of terms of county officers can be attained without a violation of the constitution.

(152 Ind. 699)

STATE ex rel. McMULLEN, Pros. Atty., v. HARRIS.

(Supreme Court of Indiana. Dec. 16, 1898.)

COUNTIES—TREASURERS—TERM OF OFFICE.

Acts 1897, p. 288, providing that county treasurers' terms of office shall begin on January 1st following their election, being constitutional, the term of a county treasurer elected in November, 1894, for a term of two years ending August 10, 1897, will continue until January 1, 1898.

Appeal from circuit court, Ohio county; N. S. Glivan, Judge.

Information, in the nature of quo warranto, on relation of Harry R. McMullen, prosecuting attorney, against Martin L. Harris. A demurrer to the information was sustained, and the state appeals. Affirmed.

Harry R. McMullen, R. L. Davis, and Coles & Hall, for the State. Joshua M. Spencer and Roberts & Stapp, for appellee.

JORDAN, J. This action was instituted by the state, upon information filed on the relation

of Harry R. McMullen, prosecuting attorney for the Seventh judicial circuit, of which the county of Ohio forms a part, for the purpose of ousting the appellee from the office of treasurer of that county. A demurrer was sustained to the information for insufficiency of facts, and the court gave judgment in favor of appellee, from which the state appeals, and assigns that the court below erred in sustaining the demurrer to the information. The question sought to be presented involves the validity of the act of the legislature approved March 8, 1897, which fixes the beginning of the terms of county treasurers in each county in this state. Acts 1897, p. 288. The facts in this case appear to be as follows: Appellee, Harris, was elected treasurer of Ohio county at the general election of 1894, for a term of two years ending August 10, 1897, and was serving his first term under said election. At the November election in 1896, one William H. Elliott was elected his successor; and on the 10th day of August, 1897, he duly qualified, as provided by law, and, on the day following, demanded the office of appellee, which the latter refused to surrender, on the ground that the former's term did not begin until January 1, 1898, as provided by the statute in question. The constitutional validity of the act of 1897, and the right of appellee to hold over, under the provisions of the constitution, until January 1, 1898, was sustained by the lower court in its ruling on the demurrer; and, under the authority of the decision of this court in the appeal of *Scott v. State* (at this term) 52 N. E. 163, this holding is correct, and the judgment must be affirmed. Judgment affirmed.

(22 Ind. App. 132)

DIAMOND PLATE-GLASS CO. et al. v. TENNELL.¹

(Appellate Court of Indiana. Dec. 13, 1898.)

MINES AND MINERALS—CONSTRUCTION OF GAS LEASE.

1. A lease of a tract 20 feet square of a certain parcel "eight rods south and fifteen east of the northwest corner" of the parcel, is not sufficiently definite, though the word "rods" be substituted after "fifteen," as the directions of the side lines of the tract are not given, and it is not stated what point in the tract is 8 rods south and 15 rods east of the corner of the parcel.

2. In a lease reading, "All that part W. $\frac{1}{4}$ N. E. 4 Sec. 24," etc., the figure "4" means "quarter," and will be so construed.

3. In a lease that provides that the lessee shall pay \$8 per annum from its date until January 1, 1892, and \$100 annually thereafter, as to each gas well after the completion thereof, but until the drilling of a well the rental to be \$8, the lease not binding the company to drill a well, the higher rental is not due until a well is completed.

4. A gas lease of a tract 20 feet square out of 32 acres, which does not bind the company to drill a well, and provides for a nominal rent, only, until a well is drilled, is not inequitable to the lessor where the lease also provides that, if any other well than the lessee's shall be drilled upon the 32 acres, the lessee shall be relieved from the payment of rent.

¹ Rehearing denied.

5. Where, under a mistake of law, the lessor in a gas lease had paid an annual rental higher than that provided by the plain terms of the lease, there is not such a construction of the lease by the parties as will bind the court in construing it.

Appeal from circuit court, Tipton county; George H. Gifford, Special Judge.

Action by Millard F. Tennell against the Diamond Plate-Glass Company and others. From a judgment for the plaintiff, the defendants appeal. Reversed.

Blackledge & Shirley and Stuart Bros. & Hammond, for appellants. Moon & Wolf, for appellee.

ROBINSON, J. This cause was transferred to this court by the supreme court. Appellants appeal from a judgment recovered against them for rents alleged to be due appellee on a gas lease. The errors assigned call in question the sufficiency of the complaint, striking out the cross complaint of appellant Diamond Plate-Glass Company, and overruling the motion for a new trial. The questions argued call for a construction of the lease, and will be considered under the motion for a new trial.

It is argued that the lease introduced in evidence does not contain a sufficient description of the real estate attempted to be leased. The description set out in the lease filed with the complaint is as follows: "One tract of land, each twenty (20) feet square, of the following real estate in Union township, Howard county, Indiana, to wit: All that part W. $\frac{1}{2}$ N. E. $\frac{1}{4}$ Sec. 24, Town. 23 north, range five east, which lies south and west of Wildcat creek, containing in all thirty-two acres, one of said twenty (20) foot tracts being eight rods south and fifteen east of northwest corner of the above-described land." Counsel for appellant say, in their brief: "If the lease covered the whole 32 acres, there would be no difficulty in the description, but, as it covers only '20 feet square,' the description of the same should be sufficiently definite to enable a competent surveyor to find it." In describing the location of this tract 20 feet square, it is evident that a word has been omitted after the word "fifteen." But admitting, without deciding, that the word "rods" should be supplied after the word "fifteen," there is yet a defect in the description which is fatal. It does not appear from the record that appellants ever took possession of the leased premises. Appellee testified that no gas well had ever been drilled upon the land attempted to be described in the lease, that he had been in possession of the land since the lease was executed, and that neither of the appellants had ever been in possession of any part of it. In the description of real estate in a written instrument the land must be so far described that it may be identified without resort to parol evidence. In such cases, if an officer is unable to locate the land without the exercise of an arbitrary discretion, the description is

insufficient. *Gravel-Road Co. v. Moss*, 92 Ind. 119; *Miller v. Campbell*, 52 Ind. 125. Because the particular tract is in the form of a square, it does not necessarily follow that two of its boundary lines run north and south, and that two of them run east and west. There is no more authority for saying that the northwest corner of the square tract lies 8 rods south and 15 rods east of the northwest corner of the whole tract than there is for saying that the northeast corner of the square tract is so situated. It is manifest that every part of the square tract cannot be 8 rods south and 15 rods east of the northwest corner of the whole tract; and, as the description falls to state what part of it is so situated, an officer undertaking to locate the square tract must arbitrarily determine what point is so located, and then must arbitrarily determine whether the boundary lines shall run with the points of the compass or otherwise. *Swatts v. Bowen*, 141 Ind. 322, 40 N. E. 1057; *Howell v. Zerbe*, 26 Ind. 214. The case of *Gas Co. v. Spaulgh*, 17 Ind. App. 683, 46 N. E. 691, is not controlling in the case at bar. In that case there was a provision in the lease, and as a part of the description of the particular tract, that its boundaries should be designated and fixed by the lessor, and the complaint showed that the lessor was ready and willing and offered to locate all boundary lines, but that the company refused to allow the same to be done. See, also, *Lingeman v. Shirk*, 15 Ind. App. 432, 43 N. E. 33, and *Stahl v. Van Fleck* (Ohio) 41 N. E. 35. The fact that there was a stipulation in the lease that the parties might, by mutual agreement, change the location of the well, can have no bearing one way or another under the pleadings. The complaint seeks to recover rent for a location attempted to be fixed in the lease itself. Counsel for appellee cite the case of *Collins v. Dresslar*, 133 Ind. 290, 32 N. E. 883. In that case the description was as follows: "A part of the west half of the northwest quarter of section fifteen (15), township thirteen (13) north, range three (3) east, described as follows, to wit: 'Twenty-nine (29) acres off the south end of sixty (60) acres off the north end of the west half of the northwest quarter of said section fifteen (15).'" This description was held sufficient, the court saying, "Where the contrary is not expressed, it will be presumed that lines are to be run straight, and parallel with other lines." But in that case two sides of the particular tract sought to be described were fixed. It required the running of only one line to fix the boundary of the 60 acres, and the running of an additional line to fix the boundary of the 29 acres. The east and west boundaries were already located. In the lease introduced in evidence the description of the real estate reads: "All that part W. $\frac{1}{2}$ N. E. 4 Sec. 24, Town. 23 north, range 5 east," etc. It is claimed by counsel for appellant that this description is bad. The figure "4" after "N. E." evidently means "quarter," and should be read so. The word "quarter" would

be supplied if the description read "W. $\frac{1}{2}$ N. E. Sec. 24," etc. Association v. Jarrell, 33 Ind. 131.

It is argued that nothing was due on the lease when suit was brought, or at most only the eight dollars acre rental. It appears from the evidence that the lessee never took possession of the premises, and that no well was ever drilled. The lease was made May 16, 1889. The description of the ground leased has been set out above. It was provided: That the lessee should have the right of ingress and egress to and from each 20-foot square tract over the entire tract for the purpose of operating said gas wells, laying mains, etc. The lessees agreed to deliver to said first party during the continuance of the lease natural gas, free of charge, necessary for domestic use for dwelling house now on said premises, said gas to be delivered in a main or pipe line on a public highway nearest to the principal dwelling, said gas to be furnished on or before the 1st day of November, 1889, unless prevented by unavoidable accident or delay. That the lease should be deemed to commence and run from the date of the signing, and should be deemed to have terminated whenever natural gas ceases to be used generally for manufacturing purposes in Howard county, Ind., or whenever the lessees should fail to pay or tender the rental price agreed upon within 60 days from the date of its becoming due. That, "as an additional consideration, the said second party agrees to pay said first party an annual rental of one hundred dollars each year for each gas well drilled as aforesaid which produces gas in paying quantities sufficient for manufacturing purposes, said payments to commence and become due and payable on the 1st day of January, 1892, as to each of said gas wells after the completion thereof, and to continue thereafter annually during the continuance of this lease. Until the drilling of a gas well on said premises by said second party, they shall pay to said first party an annual rental of eight dollars, to be paid on the 1st day of January of each year. Should any other gas well or wells be put down on said thirty-two acre tract of land other than herein stipulated for, then said second party, their heirs and assigns, shall thereafter be relieved and released from the payment of the rental as in this contract provided." It is true, it is alleged in the complaint that it was orally agreed between the parties at the time that the lessee should pay the lessor an annual rental upon said land of \$8, payable till 1892, and \$100 to be paid on the 1st day of January, 1892, and of each year thereafter, and that said oral agreement was by both the parties to said lease intended to be expressed in said written agreement. But there is no evidence in the record to sustain this allegation. The lessor, Tennell, testified that at the time the lease was made the terms thereof were agreed upon, and were then reduced to writing, and there is no evidence

of any oral agreement having been made. We find no provision in the lease by which the lessees bound themselves to drill any well on the leased premises.

We are unable to see how this lease can be construed so that any well rental should be due and payable until after a well should have been drilled. The lease provides that the payments of the \$100 each year for each gas well drilled should commence and become due and payable on the 1st day of January, 1892, as to each of said gas wells after the completion thereof, and continue thereafter annually during the continuance of the lease. Were this provision standing alone, we could but hold that the well rental should become payable only upon the drilling of a well. Any other construction necessitates the ignoring of certain words used in the lease. Whether, in the event a well had been drilled after 1892, the rent should be payable from January 1, 1892, is a question we do not and need not decide, because no well ever was drilled. But any doubt that might exist as to the meaning of the above provision is cleared away by the provisions of the lease immediately following, which say: "Until the drilling of a gas well on said premises by said second party, they shall pay to said first party an annual rental of eight dollars, to be paid on the first day of January of each year." As we have seen, the lessees did not bind themselves to drill any well. They did agree to pay an annual rental for the 20 foot square tract until a well was dug, and, in that event, the acre rental was to cease, and the well rental take its place. It cannot be said that such a construction makes the contract an inequitable one as to appellee. The lease gave appellants the right to the possession of the 20 foot square tract only, with the right of ingress and egress and pipe-laying as to the balance of the 32 acres. Appellee had a perfect right to sink wells upon any part of the 32-acre tract except the particular 20 feet square. That this right was recognized and considered at the time is evident from that part of the lease which states that, should any gas well or wells be put down on said 32-acre tract of land other than stipulated for in the lease, then the lessees should thereafter be relieved and released from the payment of the rental as provided in the contract.

It is argued by counsel for appellee that the parties themselves had placed a construction upon the lease, and had acted upon that construction, and, having construed it, such construction is now binding. It appears from the evidence that the acre rental of \$8 was paid up to January 1, 1892, and beginning with that year the lessees had paid a well rental of \$100 each year for the years 1892, 1893, 1894, and 1895, in full to January 1, 1896. This evidence is shown by the testimony of appellee, and also by the entries on a page of register of leases kept by appellant, the Diamond Plate-Glass Company. It appears from the evidence that this record

was made up from the lease, and was entered by a clerk of appellant, and, when payments were made, they were made without consulting the lease, but were made from this entry in the register. There is no evidence that these payments were made pursuant to any oral agreement made at the time of or subsequent to the execution of the lease. From all the evidence we can but conclude that these payments were made upon the construction given the lease as written, and not from any oral agreement as to how payments should be made. The construction to be given the lease is purely a question of law for the court. As we read the lease, there is no ambiguity in it. Its meaning is plain. It has been given a construction contrary to its express terms. The annual well rental has been paid under a mistake of law. The doctrine has been declared a number of times in this state that when the language of a contract is indefinite or ambiguous, it is the duty of the court to adopt the construction and practical interpretation which the parties themselves have placed upon the contract, and to enforce that construction. *Casualty Co. v. Teter*, 136 Ind. 672, 36 N. E. 283; *Wagon Works v. Coombs*, 124 Ind. 62, 24 N. E. 589; *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573; *Vinton v. Baldwin*, 95 Ind. 433; *Bates v. Dehaven*, 10 Ind. 319. But the effect of a contract will not be controlled by an erroneous construction given it by the parties themselves, where its meaning is clear. *Ketcham v. Coal Co.*, 88 Ind. 515; *Morris v. Thomas*, 57 Ind. 316; *Railroad Co. v. Trimble*, 10 Wall 367; *Fogg v. Insurance Co.*, 10 Cush. 337; *Land Co. v. Doll*, 35 Md. 80; *Garard v. Monongahela College*, 114 Pa. St. 337, 6 Atl. 701. In *Morris v. Thomas*, supra, the court said: "If there was any obscurity, uncertainty, or ambiguity in the terms of this contract, then the acts of the parties in connection therewith, as suggested by appellant's counsel, would furnish valuable aid in the construction of the contract. But where, as in this case, the terms of the contract are plain, intelligible, and free from doubt and uncertainty, rules of construction are unnecessary, and of no possible service. In such a case it is certainly not the province of the courts, by any rules of construction, to make another and entirely different contract for the parties from the one they made for themselves." In *Garard v. Monongahela College*, supra, where a party to a contract had for three years paid interest, which, on a proper construction of the contract, and by the letter of the instrument itself, he did not owe, it was held that such payment could have no weight on the question of the construction of the contract. This action was brought to collect rent alleged to be due on the lease for gas wells. As we construe the lease, nothing was due for such rent when the action was brought. The motion for a new trial should have been sustained. Judgment reversed.

(21 Ind. App. 285)

THOMAS v. FELT et al.

(Appellate Court of Indiana. Dec. 13, 1908.)
SPECIAL JUDGES—AUTHORITY—TRIAL—VERDICT—
APPEAL—INSTRUCTIONS—REVIEW.

1. The action of a special judge in setting a cause for trial without authority cannot be assigned as error, where the record shows objection made for the first time on motion for a new trial after the trial of the action before the regular judge on the day so set.

2. Recitals in the record that a special judge set a cause in controversy for trial on a day certain, "he not being appointed to try this cause, and W. being sole judge, and not being incapacitated to try said cause, and no change of venue having been taken from said sole judge, and it not being agreed that said [special judge] should take any steps in said cause," do not show a want of judicial capacity in him to set the cause for trial.

3. An assignment of error in giving the "following instructions," embracing several, without specifying the erroneous ones, will not be considered, if any of the instructions are correct.

4. A ruling on a motion to tax costs on appeal from a justice court cannot be reviewed, unless the bill of exceptions shows by whom such appeal was taken, and what was the judgment appealed from.

5. A motion to have the verdict made more specific is too late, after discharge of the jury.

6. A motion "to have the verdict returned by the jury * * * made more specific" is too indefinite.

Appeal from circuit court, Elkhart county; H. D. Wilson, Judge.

Action by Elmer B. Felt against George A. Thomas and others. There was a judgment for plaintiff, and defendant Thomas appeals. Affirmed as to plaintiff, and dismissed as to other defendants.

Wilber L. Stonex and Charles C. Black, for appellant. State & Chamberlain, for appellees.

BLACK, C. J. This was an action brought by the appellee Felt against the appellant and the other appellees to recover possession and damages for detention of certain real estate, from the appellant, unlawfully holding over after the determination of his tenancy under a lease which, upon the conveyance of the real estate to the appellee Felt, it was alleged in the complaint, had been assigned to him by his grantors, the other appellees. The case was in the court below upon appeal from the court of the city of Elkhart. The record does not otherwise show any pleadings filed, or proceedings taken, or decision made for or against said other appellees. The only judgment shown in the record is one in favor of the appellee Felt against the appellant for the recovery of possession, and damages for detention. Errors are assigned against the appellee Felt alone, and there does not appear, from the record, to have been any reason for joining the other appellees. The evidence is not in the record.

The appellant has assigned as error the overruling of his motion for a new trial. One of the causes assigned in the motion for a new trial was, "For error of Lou W. Vail in

arbitrarily setting this cause for trial without authority." In the bill of exceptions relating to this matter it is stated that on the 25th day of June, 1897, the 29th judicial day of the May term, 1897, Hon. Lou W. Vail, who was acting as judge of the court below, set this cause for trial on the 7th day of July, 1897, the 39th judicial day of said term; he not being appointed to try this cause, and Hon. Henry D. Wilson being the sole judge of said court, and not being incapacitated to try said cause, and no change of venue having been taken from said sole judge, and it not being agreed by the parties that said Lou W. Vail should take any steps in said cause. To the setting of the cause for trial by said Lou W. Vail, it is stated in the bill, the appellant then and there, by counsel, objected, which objection was by the court overruled, to which ruling the appellant then and there excepted, "but no objections or exceptions were taken to said Vail acting as judge in said cause." The cause was tried by jury (Hon. Henry D. Wilson, said sole judge, presiding) on the day for which it was so set. The record does not show what ground of objection was stated to setting the cause for trial, or that any ground of objection was stated, but it does show that there was no objection or exception taken to the special judge acting as judge in this cause. It is shown that at the time set for the trial the appellant appeared in court, the regular judge presiding, and went to trial without any objection of any kind, and without any motion for continuance or postponement of the trial; but, after the trial thus entered upon without any objection (the regular judge presiding) had terminated unfavorably to the appellant, he asked the court to grant a new trial, suggesting for the first time that the special judge erred in arbitrarily setting the cause for trial without authority. If it should be admitted that the record shows the special judge's want of authority, and if the record had also shown an objection, based thereon, to his setting the cause for trial, still the question whether or not the cause should be tried at the time so fixed should have been presented to the judge before whom the cause was tried. If it was set for trial without authority, the court was not bound by the action of the special judge (*Fitch v. Bank*, 97 Ind. 211, 214); and, in the absence of any objection or motion for delay before the regular judge, we cannot conclude that he erred in proceeding with the trial of the cause, which had to be tried some time, and why not at the time when it was tried, if there was no showing to the court that the appellant probably would be substantially prejudiced in some way unless the trial were postponed? It does not appear that the cause was tried out of its proper order by reason of the act of the special judge, or that the appellant was in any way injured because of the trial being had at the appointed time, or that he would probably have been benefited by having the

trial at some other time. The only possible effect of the act of the special judge upon the case was to cause it to be for trial at the time designated. If the appellant had any reason for not being required to go to trial at that time, he should have brought it to the attention of the court before the commencement of the trial. Notwithstanding all that is stated concerning the special judge in the bill of exceptions, he might have been serving under a valid appointment made in conformity with the statute, with authority to set the cause for trial. Want of authority of the special judge does not appear in the record, and it does not appear that his want of authority (the ground stated in the motion for a new trial) was suggested as an objection either to the special judge or to the regular judge. This would be sufficient reason for overruling such an objection made after the trial. See *Cox v. Stout*, 89 Ind. 422, 426; *Greenwood v. State*, 116 Ind. 485, 19 N. E. 333; *Lillie v. Trentman*, 130 Ind. 16, 29 N. E. 405; *Bowen v. Swander*, 121 Ind. 164, 22 N. E. 725; *Cargar v. Fee*, 119 Ind. 536, 21 N. E. 1080.

Another cause was stated in the motion for a new trial thus: "For error of the court in giving to the jury the following instructions." Then follow the instructions of the court to the jury, being more than two type-written pages, in paragraphs not numbered. In argument, counsel have criticised one of these paragraphs only. Where it is assigned as a cause in a motion for a new trial that the court erred in giving an entire series of instructions, the assignment will not be available on appeal, if any of the instructions be not erroneous; and where, as here, the instructions consist of a number of paragraphs or statements, not numbered, and the instructions collectively are thus attacked as erroneous in the motion for a new trial, such assignment in the motion will not avail on appeal, though some statement or paragraph be erroneous, if any portion of the instructions be not erroneous, and such assignment can only be maintained by showing that all the instructions are incorrect. *Railroad Co. v. McCartney*, 121 Ind. 385, 23 N. E. 258; *Mock v. City of Muncie*, 9 Ind. App. 536, 37 N. E. 281; *Lawrence v. Van Buskirk*, 140 Ind. 481, 40 N. E. 54; *Hoover v. Weesner*, 147 Ind. 510, 45 N. E. 650, and 46 N. E. 905. It is not denied by counsel, and it is quite plain, that some portions of the instructions were properly given. We do not examine the paragraph condemned by counsel.

The appellant moved that the costs of appeal be taxed to the appellee Felt, and also moved to have the verdict made more specific. The appellant assigned as causes in his motion for a new trial the overruling of these motions, and, besides assigning here as error the overruling of the motion for a new trial, he has also assigned in this court each of the same rulings as an error. It appears by bill of exceptions that the appellant moved the

court to tax the costs of appeal to the plaintiff "for the reason that in the justice's court, or in the court of J. D. Arnold, from whose court this cause was appealed, the amount of recovery was \$200, basing the recovery for the time up to the date of the judgment rendered in said justice's court, viz. April 23, 1897, and fixing the amount of recovery at \$200, while the verdict of the jury in the Elkhart circuit court was returned on the 7th day of July, 1897, and only fixed the amount of the plaintiff's damages at \$220." It does not appear from the record before us by whom the appeal to the circuit court was taken, and it is not even stated in this motion to tax the costs. Nor does it, elsewhere than in this mere unsupported statement of the appellant in his motion, appear what was the judgment in the court from which the appeal was taken. Assuming that the appellant's statement in the motion was true, it would appear that the original judgment was increased, instead of diminished, on the appeal, and there is no showing in the record from which we can know how the amount of damages was arrived at in the court below. It is not made manifest that the court erred in overruling the motion to tax the costs to the plaintiff. Concerning the motion to have the verdict made more specific, it appears by the bill of exceptions that it was not made until after the discharge of the jury, and that the motion was simply "to have the verdict returned by the jury in said cause made more specific," without indicating in what respect it was desired to have the verdict modified. The motion was not made at a proper time, and was not sufficiently definite. The judgment of the appellee Felt against the appellant is affirmed, and the appeal is dismissed as to the other appellees.

(21 Ind. App. 277)

PATTON et al. v. MATTER et al.

(Appellate Court of Indiana. Dec. 14, 1898.)

MECHANICS' LIENS—CONTINUOUS CONTRACTS—NOTICE.

Defendants furnished labor and material as directed by the owner of a building for the purpose of making it into an opera house. There were no plans and specifications to work by, and no agreement as to price or time of payment, or as to the amount of work to be done, or when it was to be completed, and at no time had there been any settlement of the amount due to defendants. *Held*, that a notice of a mechanic's lien filed within the statutory time from the last item included all the items, though prior to such time the work had been interrupted, and parts of it had been completed.

Appeal from superior court, Grant county; Hiram Brownlee, Judge.

Action by Phillip Matter, trustee, and others, against Hattie White and others, to quiet title against liens claimed on land that had been assigned to plaintiffs for creditors. From a judgment for plaintiffs, defendants Phillip Patton and others appeal. Reversed.

John A. Kersey, for appellants. Elliott & Elliott and H. J. Paulus, for appellees.

HENLEY, J. On the 10th day of May, 1897, William White, a resident of Grant county, Ind., duly executed and acknowledged a deed of assignment in accordance and compliance with the laws of this state providing for voluntary assignments for the benefit of creditors. In the deed of assignment one Phillip Matter was named as trustee. Among the property conveyed to said trustee by the deed of assignment was the following: Forty-four feet off of the south side of lot 8, in block 16, in the original plat of the town (now city) of Marion, in Grant county, Ind. Situated upon the above-described tract was a three-story brick building, used in part as an opera house. On the 5th day of May, 1897, the said William White executed to his wife, one Hattie White, a mortgage upon said real estate, to secure an alleged indebtedness to her of about \$15,000, which mortgage was duly recorded on the 5th day of June, 1897, in the recorder's office of Grant county, in Mortgage Record No. 34, at page 463. On the 22d day of May, 1897, appellants Phillip Patton and John M. Thornburgh, who were partners doing business under the firm name and style of Patton & Thornburgh, filed in the office of the recorder of said county a written notice of their intention to hold a mechanic's and material man's lien on said real estate and the buildings thereon for moneys due them on account of work, labor, and material done, performed, and furnished by them in repairing the building on said real estate, which notice was recorded as is provided by law; the amount claimed being \$1,426.56. On the same day the appellants Henry Byrely and Shively Byrely, who were doing business as partners under the name and style of Byrely Bros., filed in the office of the recorder of said county their written notice of their intention to hold a mechanic's and material man's lien on said property for work, labor, and material furnished by them in repairing and improving the building situated upon said real estate. The amount claimed by Byrely Bros. is \$536.22. The record shows the proper recording of these notices. On the 10th day of May, 1897, the appellants Leroy M. Whisler and Ralph P. Whisler, who are partners under the name and style of Whisler & Whisler, filed in the recorder's office of said county a mechanic's and material man's lien upon said property for work and labor and material furnished by them in and about the said building in repairing and improving the same. The amount claimed by them is \$739.76. This notice was duly recorded according to law. This action was brought by said Phillip Matter, trustee, etc., against the said Hattie White and all the above-described lienholders, averring the facts as above stated, and alleging further that the mortgage held by said Hattie White was fraudulent, and giv-

en to secure a pretended indebtedness, and was without any consideration whatever; that neither of the other defendants named in the complaint had done or performed any labor or furnished any material for repairing or improving said real estate, or the building thereon, within the 60 days next preceding the filing of their said notices of their intention to hold liens on said property; "that said pretended liens of each and all said defendants are clouds upon the title of said property." The prayer of the complaint is that the title to the property be quieted against said liens, and that, in case any part of them is found to be valid, the court determine the amounts, etc. Appellants Patton & Thornburgh, Whisler & Whisler, and Byrely & Byrely appeared to the action, and separately answered by general denial and by cross complaint, in which each firm demanded the foreclosure of their alleged mechanic's and material man's liens. Answers in general denial were filed by each of the cross defendants to the different cross complaints. The plaintiff dismissed his action as to said Hattie White, and also dismissed his complaint, and the cause was tried by the court upon the issues presented by the denial of the material allegations of the cross complaints of appellants Patton & Thornburgh, Whisler & Whisler, and Byrely & Byrely. The court having announced its finding, the cross complainants severally moved for a new trial, assigning as reasons therefor (1) that the finding of the court is contrary to the evidence; (2) the finding of the court is contrary to law; (3) the finding of the court is not sustained by sufficient evidence; (4) for error in the assessment of the amount of recovery on the mechanic's lien, in that the same is too small. The motions for a new trial were each overruled, and the court rendered the following judgment: "And the court now renders judgment on all said findings as follows, to wit: It is considered by the court that the said cross complainants Phillip B. Patton and John M. Thornburgh recover of and from said defendant William White the sum of \$1,567.75, with relief except as to \$13.75 thereof, and costs, and that as to the \$13.75 their mechanic's lien sued on in their said cross complaint be, and the same is hereby, foreclosed against all said defendants, and the land described in their said cross complaint, to wit, said 44 feet off of south side of lot 8, in block 16, in the original plat of the town (now city) of Marion, in said Grant county, Indiana, is ordered to be sold by the sheriff of said county, without relief, upon a certified copy of this decree as upon executions at law, to make said sum of \$13.75 and costs herein, taxed at \$— and — cts. It is further considered by the court that said cross complainants Henry Byrely and Shively Byrely recover of and from said defendant William White the sum of \$596.84, with relief except as to \$11.25 thereof, and costs, and that as to said \$11.25 their me-

chanic's lien sued on in their cross complaint be, and the same is hereby, forever closed against all said defendants, and the land described in their said cross complaint, to wit, said 44 feet off of the south side of lot No. 8, in block 16, in the original plat of the town (now city) of Marion, in said Grant county, Indiana, is ordered to be sold by the sheriff of said county, without relief, upon a certified copy of this decree as upon executions at law to make said sum of \$11.25 and costs herein, taxed at \$— and — cts. It is further considered by the court that the cross complainants Leroy M. Whisler and Ralph P. Whisler recover of and from said defendant William White the sum of \$469.76, with relief except as to \$62.50 thereof, and costs, and that as to said \$62.50 their mechanic's lien sued on in their said cross complaint be, and the same is hereby, foreclosed against all said defendants, and the land described in their said cross complaint, to wit, said 44 feet off of the south side of lot No. 8, in block 16, in the original plat of the town (now city) of Marion, in said Grant county, Indiana, is ordered to be sold by the sheriff of said county, without relief, upon a certified copy of this decree as upon executions at law, to make said sum of \$62.50 and costs herein, taxed at \$— and — cts." The cross complainants severally moved the court to modify the judgment and decree, all of which motions were overruled.

Appellants Patton & Thornburgh, Byrely & Byrely, and Whisler & Whisler separately assign as error to this court the action of the lower court in overruling their separate motions for a new trial. Upon the part of the cross complainants the appellants Patton & Thornburgh, the evidence was to the effect that they were employed by verbal agreement to tear out the third floor joists, overhaul the building, and make it into an opera house on the second floor. This employment was in June, 1896, and they were engaged to do the work by William White. It is admitted of record as to all the cross complainants: That the said William White was the owner of the property described in all the cross complaints up to the 10th day of May, 1897, when the same passed by the assignment to Phillip Matter. The said firm of Patton & Thornburgh continued to work on said building until March 26, 1897, with very little interruption, and without any settlement being had between the parties. That all the work and material charged in the bill of particulars filed with the cross complaint was done and furnished at the direction and instance of the owner of the building, and that there is due said firm the sum of \$1,567.75. There were no plans and specifications to work by, and these appellants Patton & Thornburgh were simply employed by said White, without any agreed price either for labor or material furnished by them, and did the work as they were directed by the owner of the building. The evidence shows that they continued in the

work upon said building up to and including March 26, 1897, and that the notice of their intention to hold a lien for their labor and material was filed within 60 days from said time. Appellee did not introduce any evidence tending to disprove any fact testified to by the witnesses of these cross complainants; in fact, appellee offered no evidence whatever. Upon the part of appellants Whisler & Whisler the evidence was to the effect that they did work on White's Opera House, beginning with some time in November, 1895, and continuing at intervals up to the 12th day of April, 1897; that the work was done and materials furnished at the request of the owner of the building, who, on the 4th day of April, 1896, paid on account \$50, and on the 23d day of May, 1897, \$180, and that there is yet due and unpaid on said account \$459.96. Proof of the filing of a notice by said appellants of their intention to hold a lien on said property was also made. It was also shown that the payments made by the owner of the building on this account were made upon the general account, and not for the purpose of settling any specific item of the bill of particulars. The appellee offered no evidence. Upon the part of appellants Byrely & Byrely the evidence was to the effect that they were employed by William White, the owner of the property described in the cross complaint of these appellants, in the month of October, 1896, and did work upon and furnished material for said White's Opera House under such employment up to the 22d day of May, 1897, and that there is due and unpaid to said appellants, under such employment, the sum of \$586.22; that the work done on the 22d day of May, 1897, was in completion of the original contract entered into by and between said appellants and the owner of the building long prior to the time when said item of work was done. Proper proof of the filing of said appellants' notice to hold a lien upon said property was made. The evidence introduced by appellee supports, rather than contradicts, the evidence of the cross complainants.

The situation in this cause is such that, if any one of the cross complainants is entitled to the relief asked, they are all entitled to such relief. Under the evidence, they all have practically the same case. After a most careful examination of all the evidence in this cause, and of the authorities controlling the questions arising thereon, we are firmly convinced that the finding and judgment of the lower court as to each and all the appellants is contrary to law. The evidence shows that appellants' accounts were open and running accounts, and had not been closed, either by payment, settlement, or completion of the work. They each show an item of labor done, or material furnished, within the statutory period for filing the notice of intention to hold a lien. The contract of employment in each case must be treated as continuous, there being no certain time for pay-

ment, no certain amount agreed to be paid, no certain and specified amount of work to be done, and no certain time when the services should end. The fact that the work was interrupted, or any certain parts of it completed, would not make it necessary, under our statute, for the claimants to file a notice and acquire a separate lien for each part and parcel of the work; and the notice, when filed within the statutory limit of time dating from the last item of work done or material furnished, will reach back and include all the items charged under the general employment. In the case of Premier Steel Co. v. McElwaine-Richards Co., 144 Ind. 614, 43 N. E. 876, one of the findings of the lower court was as follows: "In 1892 said company was engaged in making extensive improvements upon said real estate, and notified appellee that it would need therein a large amount of steam, gas, and water pipes,—material appellee was then engaged in selling,—and that, as it should order from time to time, appellee should supply such materials at the best prices, which appellee agreed to do. In October, 1892, and continuously thereafter until the appointment of said receiver, appellee furnished said company, from time to time, material, each being a separate order, for the construction, erection, and repairing of said plant and all the buildings on said real estate to the amount and value of \$7,716.66, upon which there was paid by said company \$4,220.63, leaving unpaid at the commencement of this suit \$3,496.03, which is still unpaid, and was due May 6, 1893. The material furnished by the appellee was for the use, benefit, and betterment of all said property as a whole, and all said property was used in said construction, erection, and repair as aforesaid, except material to the amount and value of \$212." In the same case the supreme court, in disposing of the appellants' attack upon the quoted finding, say, on pages 620, 621, 144 Ind., and page 878, 43 N. E., of said opinion: "It is objected, also, that, the findings having disclosed that the furnishing the material upon separate orders, beginning in October, 1892, and closing in May, 1893, 'which constituted independent contracts, yet the notice attempted to include all, and was not filed until May 12, 1893, much more than sixty days after the materials had been furnished under most of the contracts.' The error in this contention is in construing the facts found as disclosing a separate contract for each order for material. We think it clear from the special finding that the contract was made in October for the materials to be supplied from time to time, as needed in making the repairs and improvements, the making of which occupied the period between October and May 6th; and, the lien having been filed May 12th, was within the time required by statute. If each order and delivery of material during the progress of an improvement constituted a separate contract, and required a separate lien, it will be readily

seen that, instead of providing a practical, simple, and efficient method of security to the laborer and material man, as the statute certainly intends, a complication would arise requiring many liens, or the delivery of all the material at one time, or the performance of all the labor by continuous and uninterrupted service." And in the case at bar the appellee contends that the evidence shows that the last items in the separate bills of particulars, upon which appellants each claim to hold their liens, are items of labor done and material furnished upon an entirely different and separate contract from the other items in said claims. We cannot so hold. The evidence, in our opinion, shows that each of the firms represented by appellants were employed in the general purpose of changing, repairing, and remodeling the building upon which they are seeking to enforce their liens. It also shows that each item of the indebtedness which goes to make up the several claims was for either labor or material contributed by appellants towards such general purpose, all of which was done at the special instance and request of the owner of the property. This court, in the case of *Trueblood v. Shellhouse*, 49 N. E. 47, following the law as stated by the supreme court in *Smith v. Newbaur*, 144 Ind. 95, 42 N. E. 40, 1094, held that, "when materials were furnished in part to the contractor and in part to his subcontractor, and the notice of the lien was filed by the material man after the expiration of the statutory period of limitations as to one of such bills, but within such period as to the others, the expired claim may be tacked to that of a later date, and thus avoid the statutory limitation." Such being the law, there is much greater reason for holding that a lien will not be defeated because the various items of work done or material furnished at the request of the owner of the building are disconnected as to time, if it is clearly shown, as it is here, that the last item was fairly within the statutory limitation; and it must also be held that, the notice of intention to hold a lien therefor being filed within 60 days from the furnishing of the last item, the lien relates back to and includes the whole account. *Smith v. Newbaur*, supra; *Boisot, Mech. Liens*, § 408. We must therefore conclude that the judgment of the lower court was contrary to law. Reversed, with instructions to the lower court to sustain the separate motions of appellants for a new trial, and for further proceedings not inconsistent with this opinion.

(22 Ind. App. 22)

CASE v. NELSON.¹

(Appellate Court of Indiana. Dec. 13, 1898.)

ADMINISTRATORS—APPEAL WITHOUT BOND.

1. An administrator's right to appeal under *Horner's Rev. St. 1897*, § 645 (*Burns' Rev. St. 1894*, § 657), without giving bond, is not abrogated by an order of removal as administra-

tor, made immediately after the rendition of the judgment against him.

2. *Horner's Rev. St. 1897*, § 645 (*Burns' Rev. St. 1894*, § 657), authorizing an appeal by an administrator without giving bond, does not apply where an administrator, as such, is ordered to charge himself with a certain sum as the assets of the estate, as the interest of the administrator is adverse to the estate he represents.

Appeal from circuit court, Cass county; J. M. Rabb, Special Judge.

In the matter of the estate of Charles B. Case, deceased. Mabel Nelson filed exceptions to the report of Mattie J. Case as administratrix, and the administratrix was ordered to charge herself with a certain sum as the assets of the estate, and she appeals. Dismissed.

G. E. Ross and McConnell & Jenkins, for appellant. M. Winfield and Lairy & Mahoney, for appellee.

COMSTOCK, J. Appellee moves to dismiss this appeal for two reasons: (1) "The appellant was not, at the time this appeal was perfected, and is not now, administratrix of the estate of Charles B. Case, deceased, she having been removed by the circuit court in which said trust was pending on the 16th day of June, 1898, for failure to give bond in compliance with an order of said court." (2) "No bond has been filed by appellant within the time allowed by law." The bond given on the appointment of the executrix was in the sum of \$100. The court ordered an additional bond. With this order appellant has not complied. The appeal is from a judgment of the Cass circuit court ordering appellant, as administratrix of the estate of Charles B. Case, to charge herself with \$3,800, which the court held constituted a part of the assets of the estate. The judgment and order were made upon an issue formed by exceptions of appellee filed to the final report of said administratrix, and were entered on the 16th day of June, 1898. The following is the language of that part of the order: "It is therefore ordered and adjudged by the court that the exceptions of Mabel Nelson to said report be, and they are hereby, sustained, and said administratrix ordered to charge herself with the sum of \$3,800, which sum the court finds the said administratrix received on the 7th day of August, 1891, from the P., C. & St. L. Ry. Co. in settlement of a certain claim against said company for negligently causing the death of her intestate, which said sum said administratrix so received for the benefit of herself, as widow, and the exceptor, Mabel Nelson, and Jesse Case, children of said intestate," etc.; and then follows in the same entry an order removing said defendant as administratrix for failure to comply with the order of the court requiring her to file an additional bond, and the order appointing M. F. Mahey administrator de bonis non, and the recital of the acceptance of his bond, the is-

¹ Rehearing denied.

suing of letters, and his qualification as said administrator. After the rendition of said judgment, to wit, on the 14th day of July, 1898, appellant filed the record in the cause below in this court, together with her assignment of errors. Appellant assigns error in the appeal as administratrix of the estate of Charles B. Case, deceased.

In support of her first reason given to sustain her motion, appellee's counsel contend that the order removing Mrs. Case terminated at once her powers and duties as administratrix, and that whatever she did afterwards was done in her individual capacity, and not as representing any persons or any estate; that, while she may appeal, after her removal, from the order removing her, it would be only in her individual capacity, in which case she is required to give bond,—citing *Erlanger v. Danielson*, 88 Cal. 480, 26 Pac. 505; *Mallory v. Railroad Co.* (Kan. Sup.) 36 Pac. 1059. The appellant in *Erlanger v. Danielson*, supra, had been appointed administrator under section 1383 of the Code of Civil Procedure of California, which reads as follows: "When letters of administration have been granted to any person other than the surviving husband or wife or child, father, mother, brother or sister of the intestate, any one of them may obtain the revocation of the letters and be entitled to the administration by presenting to the probate court a petition praying the revocation and that letters of administration may be issued to him." The facts as set out in the opinion are as follows: Danielson died intestate and unmarried, leaving two brothers in California. March 13, 1890, appellant, who was not related to the deceased, filed a petition asking for letters, together with the written consent of Theodore Danielson, a brother of the deceased, to his appointment. March 24, 1890, Theodore Danielson filed a petition asking for letters for himself. April 7, 1890, the court appointed both petitioners administrators, and both qualified. April 29, 1890, William Danielson, another brother of the deceased, who had been temporarily absent from the state, filed a petition asking that Erlanger's appointment be revoked, and that he be appointed in his stead. July 9, 1890, the court revoked the letters of Erlanger, and appointed William Danielson. From the order of removal Erlanger appealed, without giving bond. The supreme court of California held that such appeal could not be prosecuted without bond, the court holding that appellant was not acting in another's right, in the sense of section 946 of the Code of Civil Procedure. The part of said section referred to is in the following language: "The court below may in its discretion dispense with or limit the security required by this act when the appellant is an executor, administrator, trustee, or other person acting in another's right." The court adds: "Plainly, on this appeal, the appellant is not acting in another's right, in the sense of section 946 of the Code of Civil Pro-

cedure. And we think it equally evident that section 965 has no application to this case. This is not a proceeding had upon the estate of which he was administrator, within the purview of that section. In the first place, he was not administrator. Whatever effect his appeal, when perfected, would have upon the order removing him, it was in full force until then. It follows that when he filed his notice he was not such officer, and then had no administrator's bond. Suppose the contrary were held, and the order removing him was affirmed; how could his sureties be held for costs incurred after his duties as administrator ceased? But the section has reference to matters in which the estate is interested. This is his personal matter. The undertaking of his sureties is that he shall faithfully perform the duties of his office. How can he be said to be discharging official duty in appealing from an order relieving from such duty? It is true, the legislature has the power to provide for obligations not mentioned in the bond, or entirely outside of its apparent scope; and one becoming surety after the law has been enacted will be bound accordingly, for he will be presumed to know the law. But this is a harsh rule, and the legislature will not be presumed to have intended such consequence, unless the intent is clear. Here the intentions are all the other way. We think the appeal should be dismissed." In *Mallory v. Railroad Co.* (Kan. Sup.) 36 Pac. 1059, the supreme court of Kansas held that, when letters of administration had been issued without jurisdiction, and the probate court, upon hearing, declared them null and void, the person illegally appointed as administratrix was not entitled to appeal from such an order without giving the appeal bond required from ordinary appellants, stating that the facts found by the probate court make it clear that it had no jurisdiction to issue letters of administration, and that its action in that respect was void for all purposes; and that at the time when the attempt was made to take an appeal the letters had been recalled, and an order entered declaring all proceedings connected with the administration null and void; that in attempting to appeal, she was not acting as the representative of the estate. The decision was upon two grounds: (1) That there had been no valid appointment; (2) that all proceedings under the void appointment had been annulled. The language of the Kansas statute upon which appellant relied to prosecute her appeal without bond was, "No executor or administrator shall be required to enter into bond to entitle him to appeal." Gen. St. 1889, par. 2977.

In support of the second reason for dismissal urged by appellee's counsel it is contended that this appeal cannot be prosecuted without bond, because the judgment rendered is not such a judgment that an appeal could be taken by an administrator or executor without bond; that judgments from

which an administrator may appeal without bond are such as are rendered against, and payable out of, the assets of the estate. Woerner, in his *American Law of Administration*, at page 1201, says: "The party appealing is always required to give bond, except in cases where the executor or administrator appeals in the interest of the estate, and has given security on his administration bond. An executor is entitled to an appeal without surety where the judgment or decree is to affect only the assets, and because he has already given a general bond; but where he is in a situation in which a personal judgment or decree can be rendered against him which may make him liable out of his own funds, he is no more entitled to appeal without surety than any other person. And in such case the administrator will not be allowed to appeal in forma pauperis, so as to avoid the necessity of giving an appeal bond. It is the character of the suit which determines the question of the right of appeal without bond; not the naming of a party as executor or administrator, but the cause of action as developed by the pleadings." Woerner cites, in this connection, *Pugh v. Jones*, 6 Leigh, 299; *Erskine v. Henry*, Id. 378; *Wade v. Society*, 4 Smedes & M. 670; *Pugh v. Ottenkirk*, 3 Watts & S. 172. In *Pugh v. Jones*, supra, judgment was rendered against the executor personally, and it was held that on appeal a bond should be required. *Erskine v. Henry*, supra, was a suit in equity against defendant executor in his own right as legatee. It was held that on appeal allowed him from the decree an appeal bond should be required. In *Wade v. Society*, supra, it was held that an executor is entitled to an appeal without surety when the judgment or decree is to affect only the assets of the decedent in his hands. Aliter where he is in a situation in which a personal judgment or a lien can be rendered against him, and in which he may be responsible out of his own funds. The learned author uses almost the language of the court in *Pugh v. Ottenkirk*, supra, to the effect that it is the character of the suit, and not the names of the parties, that determines the right to appeal without bond, whether the recovery is sought in a representative or individual capacity. The decision in *Hickman v. Hickman*, 74 Ga. 401, was under section 3622, Code Ga., viz.: "Executors, administrators and other trustees when sued as such or defending solely the title of the estate, may enter an appeal without paying costs and giving bond and security, as heretofore required, but if judgment shall be obtained against such executor, administrator or other trustee and not the assets of the estate, he must pay costs and give security as in other cases." And the court held that where an executor was cited to appear, and settle his accounts, and pay over to the legatees the amounts to which they were entitled, and from the

judgment rendered the executor desired to take an appeal, he could not do so without giving security, and an appeal taken without this requirement was properly dismissed. Appellant claims the right of appeal without bond under section 645, *Horner's Rev. St. 1897* (section 657, *Burns' Rev. St. 1894*): "Executors, administrators and guardians may have an appeal and stay of proceedings in the court below without giving an appeal bond." This appeal is concerning a matter connected with the decedent's estate act. The Civil Code makes no provision for the filing of exceptions to the report of an administrator or executor, nor for a trial of the same. The decedent's estate act provides therefor, and for appeals from judgments thereon; section 2612, *Burns' Rev. St. 1894* (section 2457, *Rev. St. 1881*), of the decedent's estate act being substantially the same as section 645, supra. The language of the judgment which we have set out in the case before us is a judgment against appellant as administratrix. Appellant's learned counsel contend that the decisions of the courts outside of Indiana which have been cited have been based upon the peculiar phraseology of the statutes involved, and are not in point, because section 645, supra, of this state, without qualifications, provides that executors, administrators, and guardians may appeal without bond. The Wisconsin statute, and two decisions thereunder, are cited in support of this position. Section 4032, *Rev. St. Wis.*, provides that: "The party appealing, other than an executor, administrator, guardian, or trustee, shall at the time of filing notice of appeal, and before his appeal shall be effectual for any purpose, file with the county court an undertaking in such sum * * * as the judge shall approve, to the effect that he will diligently prosecute his appeal to effect, and pay all damages and costs which may be awarded against him on such appeal." In construing this section, the court, in *Stinson v. Leary*, 69 Wis. 269, 34 N. W. 63, held that it relieved a guardian from filing such an undertaking on appealing from a judgment on a final account, even though the amount due from him exceeds the amount of his bond as guardian. In said case appellant was cited to make final settlement as guardian. His ward had arrived at the age of 21 years more than two years before the citation was issued, and no settlement of the guardian account had been made. Upon the hearing and examination of the account it was adjudged that the guardian was indebted to his ward in the sum of \$446.91, which he was ordered to pay over to her. He appealed, but gave no undertaking on such appeal. The circuit court, on application, required him to file an undertaking in that court to pay all costs and damages accrued against him, not exceeding \$250, within 20 days, otherwise his appeal would be dismissed. The bond given on his appointment was in the amount of

\$300 only. The case of *Tompkins v. Page*, 70 Wis. 249, 35 N. W. 563, is analogous to *Stinson v. Leary*, supra, in principle. The amount ordered to be paid to the ward in the last case cited was \$1,827.19 and costs, and the bond given by the guardian on his appointment was for \$200. The court held that no bond was required; that section 4032 was general, and embraced all appointments taken by a guardian, and made no exception.

We are of the opinion that the order of removal, following the granting of the appeal from the judgment directing the administratrix to charge herself with \$3,800, which belonged to the estate, could not deprive her, as administratrix, of any right she was entitled to before such order, and we do not reach a conclusion in this case from the consideration of that order. We approve of the law as announced by *Woerner*, supra. The right of appeal without bond is given to the executor or administrator in a representative capacity, with a view of protecting the estate. When the interest of the administrator is adverse to the estate he represents, a bond should not be dispensed with. As said in *Pugh v. Ottenkirk*, 3 Watts & S. 172: "It is the character of the suit that determines the right of appeal without bond. That does not depend upon the mere naming of the parties as executor or administrator in the proceeding or declaration, but upon the cause of action as developed by the pleadings, and whether the recovery is sought in a representative or individual capacity." In the case before us the appeal was clearly in the interest of the appellant alone. It does not matter how she is designated; her interests are antagonistic to the estate. The order directs her to add to the assets of the estate what she claims as her individual money. The appeal is not to save the estate, but to protect herself. It was not the purpose of the statute to give an appellant acting in his own interest, adversely to the trust he nominally represents, a privilege not accorded appellants generally, not acting in such capacity.

The learned counsel for appellant strongly relies upon *Stinson v. Leary*, supra, and *Tompkins v. Page*, supra. They support his position, but are not in harmony with the weight of authorities, and, with all respect to the learned court deciding them, we believe that they should not be followed. While the cases cited from which we have quoted, holding a bond to be necessary upon appeal, are based upon statutes not identical with our own, their reasoning is applicable to the question presented by this appeal. Counsel also cite *Bake v. Smiley*, 84 Ind. 212, and insist that it is decisive of the question. We do not regard that case as in conflict with the conclusion herein reached. The judgment was against the executors, directing them to pay to the said Smiley, administrator; they being ordered to pay as executors, and therefore out of the assets of the es-

tate they represented. The judgment was against the interests of the estate, reducing its assets. An appeal was claimed in the interest of the estate, and the court held that no appeal bond was necessary. In the appeal before us, as before stated, the order directs that an amount claimed by the administratrix as her individual property, and which the court has found is a part of the estate of the decedent, should be added to the estate; not paid to a third party, or to any particular person.

(157 N. Y. 402)

SMITH v. SECOR et al.

(Court of Appeals of New York. Dec. 16, 1898.)

WILLS — CREATION OF TRUST — RIGHTS OF BENEFICIARIES.

1. Land was devised by a testatrix, in trust, during the lives of two specified persons, to receive and apply the rents in equal shares to the use of six of her children, and, upon the termination of the trust, to sell the property, and divide the proceeds "equally among all my said six children, then living, * * * and the descendants of such as may then be dead." If there were no descendant of a deceased child, its share was to be equally distributed among her children then living. One of these children died before the testatrix. *Held*, that there was no partial intestacy, as, upon the termination of the trust, the share of the deceased child would pass with the other shares to those who should then be entitled under the ultimate devise of the will.

2. Beneficiaries of a trust estate cannot defeat the trust, and cut off the rights of unborn children thereunder, by allowing a default judgment for partition to be taken against them; and a purchaser at a partition sale under such circumstances takes no better title than he would by a deed from such beneficiaries.

Appeal from supreme court, appellate division, First department.

Motion by Irving Bachrach to be relieved from his purchase at a partition sale ordered in an action for partition between Mary Elizabeth Smith against Rienzi A. Secor and others. An order of the special term denying the motion was reversed by the appellate term (52 N. Y. Supp. 562, 1150), and the plaintiff Mary Elizabeth Smith appeals. Affirmed.

Appeal from an order of the appellate division of the supreme court in the First judicial department, reversing an order of the special term refusing to relieve Irving Bachrach from his purchase of certain premises upon a sale thereof in partition. Mary A. Secor died June 14, 1894, seised and possessed of valuable real estate in the city of New York, the residuum of which, by her will, she divided into seven parts, and devised six thereof to her executors in trust, to hold one for each of her children. She provided that the trust should continue during the lives of her daughter Adelle and her son Rienzi, and directed the trustees to rent all of said real estate during the continuance of the trust. She required the income of said six-sevenths

to be divided equally among her six children, and directed what disposition should be made of the income on the death of any child during the period of the trust. Upon the death of Adelle and Rienzi the trust was to terminate, and she directed that the trustees should then sell the property, and divide the net proceeds "equally among all of my said six children then living * * * and the descendants of such as may then be dead." If there was no descendant of a deceased child, its share was to be equally distributed among her children then living. Charles A. Secor, one of her children, died before herself, and this action was brought to partition an undivided seventh of the residuum of the real estate upon the theory that she died intestate as to the seventh which would have gone to Charles had he lived until the end of the trust. All living persons interested were made parties, but none appeared except certain infants whose guardians ad litem put in the usual general answer. The trustees made no defense. Judgment of partition was taken in the usual form, practically by default, and no provision was made for unknown owners or after-born children. No suggestion or notice appeared in the terms of sale putting purchasers on guard as to the title that they would get. Irving Bachrach purchased at the sale, but, upon being advised by counsel that a good and marketable title could not be given by the referee's deed pursuant to said judgment, he moved at special term to be relieved from his purchase. The special term denied the motion upon the ground that the testatrix died intestate with respect to the share to be held in trust for her son Charles, and upon the further ground that the final judgment confirming the referee's report and the sale was a full protection to the purchaser. Upon appeal the appellate division held "that it was the evident intention of the testatrix that the trust was to continue during the lives of her daughter Adelle and her son Rienzi, independent of the lives of those children whom she had designated as the ones who should receive the income of the trust during its continuance"; that she "did not die intestate as to the share of a child designated to receive a portion of the income of the trust estate who had died before" herself; "that such share constituted a portion of the trust estate, and that the income thereof, under the provisions of the Revised Statutes (1 Rev. St. p. 726, § 40), devolved on the persons presumptively entitled to the next eventual estate; that, as the final distribution was to be made among those children who survived the trust term, and the descendants of those who had died during that period, a purchaser at a sale in partition, taking place prior to the expiration of the trust term, would not be required to take title, as the judgment would not bind the unborn descendants." From the order of the appellate division reversing the order of the special term the plaintiff appealed to this court.

James Stikeman, for appellant. Julius J. Frank and Myer S. Isaacs, for respondent.

VANN, J. (after stating the facts). We agree with the learned appellate division in its construction of the will and the reasons given therefor, but, as it is urged by the appellant that the judgment in partition made the title marketable, although there was no actual right to partition, we will briefly express our views upon that subject. In *Kilpatrick v. Barron*, 125 N. Y. 751, 26 N. E. 925, the validity of a title tendered under an ordinary contract to sell real estate depended upon the construction of a will, and one question was as to whether descendants of children of the testator, born after his death, and prior to the time appointed for a sale, were entitled under the will; and, although a majority of the court were of the opinion that the title was good, still they held that, as its judgment in support of the title would not bind such descendants, the title tendered did not meet the obligation assumed, and the purchaser was not bound to accept it. In *Kent v. Church of St. Michael*, 136 N. Y. 10, 17, 32 N. E. 705, the court, through Judge Earl, said: "The trustees, children, and grandchildren of Mrs. Stewart could not cut off or affect the title in the land of unborn grandchildren by any conveyance in pais. By such a conveyance they could convey no greater title than they had. * * * If the title to this land had actually been devolved under the will of Mrs. Stewart, and an action were brought to partition it, or to foreclose a mortgage upon it, or in some other way to change or extinguish the title, it would be the duty of the court to protect the rights of unborn grandchildren by setting apart land, or the proceeds of the land, to represent in some form their interests." So, in *Ebling v. Dreyer*, 149 N. Y. 460, 44 N. E. 155, where the future contingent interests of persons not in being were sold under a special act of the legislature authorizing a sale of infants' lands, including such interests, the proceeds of the sale were paid into court, and took the place of the land. In *Monarque v. Monarque*, 80 N. Y. 320, it was held that a judgment and sale in partition only conclude contingent interests of persons not in being, when the judgment provides for and protects such interests by substituting the fund derived from the sale of the land in place of it, and preserving the fund to the extent necessary to satisfy such interests. In that case, prior to the bringing of the partition suit, an action had been brought to obtain a construction of the will to which all living persons interested were parties, and a judgment was taken, practically by default, so construing the will as to support an action of partition, and such judgment was set up in the complaint in the partition suit. Still it was held that, conceding said judgment was conclusive as to the rights of the parties thereto, it did not bind the contingent interests of unborn issue. In this case it cannot be known who will be entitled to the proceeds of the land, when finally sold by the

trustees, until the trust estate has terminated, which may not be for a generation. The persons thus entitled will take their respective shares under the will as purchasers from the testatrix, and not as representatives of any party to the partition action. No provision is made for their benefit by setting apart a portion of the land, or a portion of the proceeds of the land. The judgment has no more effect than would conveyances from all the parties to the partition action, assuming them to be adults. They could not bind after-born children by their deeds, because the power of alienation was suspended. There were no persons in being by whom an absolute fee in possession could be conveyed during the existence of the trust, except by the trustees under the trust, who would be compelled to hold the proceeds in the place of the land. Descendants cannot set aside at will a valid trust created by their ancestor. While they can bind themselves by deed, or by allowing judgment to go by default, they cannot bind persons not in being at the time. In this case the attempt was made virtually to subvert a trust by a judgment in partition to compel a purchaser to take title upon the sale, and pay for the same, without any provision for the benefit of unborn children, but allowing all to be divided between living parties. The trustees did not defend, although they could have made a successful defense. If this can be done, how can a man create a trust in land for the benefit, in a certain contingency, of persons not in esse, as he has an unbounded right to do, without having it subject to the danger of being overthrown, and the property designed for them divided among those for whom it was not intended? The interests of the plaintiff and the defendants are the same, and the effect, if not the object of the suit, is to defeat a trust, so that the living will receive benefit at the expense of those who may be born hereafter. In *Kirk v. Kirk*, 137 N. Y. 510, 33 N. E. 552, which was relied upon by the special term, the court directed the trust fund to be brought into court, and to be held for the precise objects for which the trust was created. The court itself thus carried out the trust, holding the trust funds for the benefit of persons who might come in and be entitled thereto, but no such precaution was taken in the case at bar.

Without elaborating our views, we think the order of the appellate division was right, and should be affirmed, with costs. All concur, except GRAY, J., absent. Order affirmed.

(157 N. Y. 431)

PEOPLE ex rel. WHITE v. BOARD OF ALDERMEN OF CITY OF BUFFALO et al.

(Court of Appeals of New York. Dec. 16, 1898.)

ELECTIONS — COUNT OF VOTES — VOID BALLOTS — MANDAMUS.

Laws 1896, c. 909, § 105, defines a void ballot. Section 110, subd. 3, points out the mode

of dealing with a ballot not void, but marked for the purpose of identification. Section 114 allows any interested candidate to invoke the judicial investigation of either class of ballots by mandamus. *Held*, that where the inspectors of election treated certain ballots as valid, and "marked for the purpose of identification," and counted them, the court has jurisdiction, in a mandamus proceeding, after inspection, which shows them to be void, to pass on them as "void" ballots, within section 105.

Appeal from supreme court, appellate division, Fourth department.

Mandamus by the people, on the relation of John White, against the board of aldermen of the city of Buffalo, constituting the board of canvassers of that city, and John Barry and Thomas Coyle, two of the inspectors of election of the Third election district of the First ward of the city of Buffalo. From a judgment of the appellate division of the supreme court (52 N. Y. Supp. 643), affirming an order awarding a peremptory writ, defendants appeal. Modified.

This is an appeal from a judgment of the appellate division of the Fourth department, affirming an order made by Mr. Justice Lambert at the Erie special term, in a hearing upon an alternative writ of mandamus, determining that eight certain ballots cast at the general election in the Third district of the First ward of the city of Buffalo in November, 1897, were marked for the purpose of identification, and directing that a peremptory writ of mandamus issue to the inspectors of election of such district, commanding them to convene and make a new return excluding from such canvass said eight votes which had been counted as the law requires. The alternative mandamus was issued upon the petition of a candidate for alderman of the First ward of the city of Buffalo; also upon the affidavit of two inspectors of election in the district and ward named. The substance of the petition is that, upon a canvass of the votes, eight ballots were objected to as marked for identification; that the ballots were duly protested for that reason, but counted and marked by the inspectors as counted under protest, and the words "Objected to as marked for identification," or words to that effect, placed upon the back of each of the ballots, and signed by the inspectors. The petition prayed that a writ of alternative mandamus issue, directing the inspectors to convene for the purpose of recounting the votes, and to exclude on the recount all ballots marked for the purpose of identification, after determination by the court, etc. The affidavit of the two inspectors referred to alleged that, as the ballots were being counted, one was discussed which deponents and the Republican watcher claimed should be counted for John White, the Republican candidate for alderman, as against John Sheehan, the Democratic candidate for the office; that the Democratic inspectors stated that they believed this ballot had been improperly marked for identifi-

cation; that it was finally agreed by the board of inspectors that the ballot should be marked as protested for identification, and the canvass of the votes proceeded; that thereafter seven other ballots were objected to by one or more of the inspectors as marked for identification, and were protested for this reason, and counted, as prescribed by law for candidates appearing thereon; that the eight ballots so protested for identification were indorsed "Counted under protest," meaning that the same were counted as prescribed by law, but protested and placed in a sealed envelope, pursuant to statute. The affidavit further avers that the inspectors caused the return to be made as prescribed by law, and that therein the eight ballots referred to were put by clerical error on the blank space as void ballots, when, in fact, they were counted, and it was intended to return them as counted under protest, and marked for identification, and returned in a sealed envelope, as prescribed by law. An inspection of the return discloses this error, but in another place the eight ballots are referred to as marked for identification. Upon this petition and affidavit a writ of alternative mandamus issued, in accordance with the prayer of the petition. John Barry, one of the inspectors of election, made a return to the alternative writ. He denies that the persons named are inspectors of election as alleged; that eight ballots were marked for identification and indorsed as the statute requires, but he does not deny that the ballots were counted as alleged. He avers that the board of inspectors of the election district (failing to name who they are) correctly canvassed the votes in that district, and signed and returned to the proper officers correct statements and returns of the result of the canvass. James Coyle, another inspector in said district, made a similar return. The alternative writ came on for hearing before a special term, and the court, after due consideration and hearing counsel, decided that the eight ballots were marked for the purpose of identification, and therefore void, and that a peremptory writ of mandamus issue, directing the board of inspectors to convene on a day named, and make and sign an original statement, as required by law, giving the true and correct result of the election in said election district, and that the said inspectors exclude in such canvass and return the said eight ballots so protested, and declared by the court as marked for identification, and adjudged void, and count no vote thereon for any person, and that the inspectors file such original statement and copies, as required by law. Thereupon the peremptory writ of mandamus was duly issued, and the defendants Barry and Coyle took an appeal to the appellate division, which resulted in an affirmance and an appeal to this court.

Edward L. Jellinek, for appellants. Seward A. Simons, for respondent.

BARTLETT, J. (after stating the facts). We have a state of facts presented upon this appeal rather unusual in character. A writ of alternative mandamus was applied for upon the allegation that in the Third election district of the First ward of the city of Buffalo, at the election in November, 1897, eight ballots were marked for the purpose of identification, and that they were duly indorsed, counted, and placed in an envelope, as required by Election Law, § 110, subd. 3. After a hearing upon the alternative writ, the special term decided that these eight ballots were marked for the purpose of identification, and consequently void. A writ of peremptory mandamus was thereupon issued, directing the inspectors of election to convene on a day named, and make and sign an original statement, as required by law, and to return the eight ballots as protested, and declared void by the court, and that no vote be counted thereon for any person. The appellate division affirmed the order of the special term, although it was of the opinion that the eight ballots were not marked for identification, but were void, under section 105 of the election law. While we are of opinion that these eight ballots are void, and not marked for the purpose of identification, we prefer to rest our affirmance of the order appealed from upon what we deem a proper construction of sections 105, 110, and 114 of the election law, rather than on the power of the court under the common-law writ of mandamus. Section 105 defines a void ballot; section 110, subd. 3, points out the mode of dealing with a ballot not void, but marked for the purpose of identification; and section 114 allows any interested candidate to invoke the judicial investigation of either class of ballots by writ of mandamus. It was very clearly the duty of the inspectors in this case to have held these eight ballots void, and not to have counted them. They treated them, however, as valid, and marked for the purpose of identification, and counted them. The relator has instituted this proceeding under that alleged state of facts, and we have to deal with the situation as it exists. As already pointed out, the election law has empowered the courts to deal with these two classes of ballots in a mandamus proceeding; and as the ballots in controversy are before us, and subject to inspection, we have jurisdiction to pass upon them as void ballots.

These views lead to a modification of the orders of the special term, and of the appellate division affirming that order, to the effect that these eight ballots are void, and ought not to have been counted; also further modifying the order by directing the board of inspectors to assemble on a day to be named, and then and there make and sign an original statement, as required by law, giving the true result of the election, as ascertained by treating these eight ballots as void, and counting no vote thereon for any

person. It appears in this proceeding that the original inspectors' return and statement of canvass, by error, stated, in filling up the printed blank, that these eight ballots were treated as void, whereas it was designed to have filled them in under another head, as marked for identification. The eight ballots, as sent to us from the clerk's office of Erie county, are contained in an envelope officially indorsed "Ballots protested as marked for identification"; and it is quite evident that the filling in of the printed blank, as above stated, was a clerical error. When the new inspectors' return and statement of canvass is made out as herein directed, the eight ballots should then be returned as void and not counted.

As we are not called upon to deal with these ballots as not void, but marked for identification, the point urged by the appellants' counsel that they were not sufficiently or legally objected to by the board of inspectors, so as to enable the relator to maintain this proceeding, is not of importance; but we feel constrained to say to inspectors of election that when a ballot is not void, but is to be dealt with as objected to because marked for identification, under subdivision 3 of section 110 of the election law, great care should be observed to follow every provision of the statute designed to identify and preserve the ballots for future legal proceedings. The orders of the special term and appellate division should be modified in accordance with the foregoing opinion, and, as so modified, affirmed, without costs to either party. All concur, except GRAY, J., absent. Ordered accordingly.

(157 N. Y. 423)

IN RE HENDERSON'S ESTATE.

(Court of Appeals of New York. Dec. 16, 1898.)

SURROGATE'S COURTS—CLERICAL ERRORS—CORRECTION—LIMITATIONS.

Code Civ. Proc. § 2481, subd. 6, giving the surrogate power to correct clerical errors in final judgments, to "be exercised only in a like case and in the same manner as a court of record * * * exercises the same powers," does not make section 1290, precluding courts of record from making such corrections after the expiration of two years, apply to surrogate's courts.

Appeal from supreme court, appellate division, Second department.

In the matter of the estate of Stephen L. Henderson, deceased, Peter E. Henderson, executor, applied for leave to correct a clerical error. From an order denying the application, he appealed to the appellate division, which reversed the order (53 N. Y. Supp. 957), from which order an appeal was taken. Affirmed.

James Troy, for appellant. Lawrence Kneeland, for respondent.

O'BRIEN, J. The sole question involved in this appeal is whether a surrogate has power,

under the circumstances disclosed, to correct a manifest clerical error, or error in fact, in the records of his own court. There was pending before the surrogate, when the order appealed from was made, an application by the executor for a final accounting. In that proceeding it was discovered that in a prior intermediate accounting, resulting in an order of the surrogate, dated June 11, 1894, settling the accounts of the executor at that date, he was, in consequence of a mere clerical or arithmetical error, charged with over \$10,000 in excess of the true amount. It is said that this error was made by the executor against himself; but, however that may be, there is no dispute as to the fact that it was made by some one, and appears upon the record itself. The executor applied to the surrogate by petition to correct the error in the former decree. The only objection made to this motion was that, as more than four years had elapsed since the entry of the decree containing the error, the surrogate had no power to correct it or change the record. This objection was sustained, and the order denying the application states that it was denied for want of power in the court to grant it after the lapse of such a long period of time; but the appellate division, by a divided court, has reversed the order, and remitted the case to the surrogate for a hearing on the merits.

Limitations upon the power of the courts to do justice to suitors, or upon the right of parties to apply to the court for relief, whether by suit or otherwise, have their basis wholly in some statute or positive law. At common law there was no limitation whatever. The party aggrieved could sue or invoke the aid of the court in his behalf at any time. Ang. Lim. §§ 12, 18; Wood, Lim. Act. pp. 2, 36; Williams v. Jones, 13 East, 439. The general powers of the surrogate's court are wholly statutory, but it certainly must possess such incidental powers as are necessary to a proper exercise of those expressly conferred. All courts, from their very nature and the object of their existence, must possess some inherent power, and the correction of their own records, when affected by some mistake or clerical error, would seem to be about as mild an exercise of such power as can well be imagined. This power is recognized and perhaps regulated by various statutes, but it does not proceed from or rest upon statutes, since it would exist without them. Hatch v. Bank, 78 N. Y. 487; Vanderbilt v. Schreyer, 81 N. Y. 640; Ladd v. Stevenson, 112 N. Y. 325, 19 N. E. 842. This court has held that, in the exercise of the power, the surrogate may vacate his own decree in furtherance of justice, in such a case as this, and that there was no time limitation that barred a suitor upon such an application. Slipperly v. Baucus, 24 N. Y. 46. When and under what circumstances the power may be exercised are questions addressed to the court in which the application is made. The lapse of time may have so affected the rights of other parties that the court, irrespective of any

statute, would be justified in refusing the application. The legislature may, of course, forbid the exercise of the power after the lapse of a definite period of time, and the only question in this case is whether it has, in fact, done so.

It is asserted that two sections of the Code of Civil Procedure, when read together, prohibited the surrogate from opening the former decree and correcting the error; and if it be true, as claimed, that a statute has limited the exercise of the power to two years from the entry of the decree, then, beyond all doubt, the surrogate was right in refusing to hear a question at a time when he was prohibited by statute from entertaining it. But, before the executor can be barred from a hearing upon an application apparently so just and reasonable, he may surely insist that a statute must be produced against him that speaks with no uncertain sound,—that in express terms, or at least by necessary implication, prohibits the court from entertaining the petition. If the language of the statute does not come up to this test, it will not do to imply a prohibition against the exercise of such a useful and necessary power by a loose construction of general terms. If the lawmakers sought to limit the power of a surrogate to correct a very material clerical error in his own decree to two years from the entry, it was an easy thing to say so, and therefore we must expect to find language clearly expressive of such an intention. We ought not to say that they must have meant this or that, or anything not fairly comprehended in the language employed. It is therefore important to read the statute in order to determine how far it forbids the surrogate to exercise the power invoked by the executor. Section 2481 of the Code, enumerating certain powers of the surrogate, provides, among other things, that he shall have the power in court or out of court (6) "to open, vacate, modify, or set aside, or to enter, as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly-discovered evidence, clerical error, or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case and in the same manner, as a court of record and of general jurisdiction exercises the same powers. Upon an appeal from a determination of the surrogate, made upon an application pursuant to this subdivision, the general term of the supreme court has the same power as the surrogate; and his determination must be reviewed, as if an original application was made to that term." Most of the powers here mentioned were exercised by the surrogate before the enactment of the Code, and so far the statute is declaratory of the law as it previously existed. It must be conceded that there is nothing in the language above quoted which limits the power of the surrogate to hear such an application as was made to him by the executor in this case to two years from the date of the decree. It is only by reading with this provision of the Code

another section, relating to such motions in cases in the supreme court, that the argument against the power of the surrogate is supposed to be made out. That section reads as follows (section 1290): "A motion to set aside a final judgment, for error in fact, not arising upon the trial, shall not be heard, except as specified in the next section, after the expiration of two years since the filing of the judgment roll." It is said that, since the surrogate must exercise his powers to open and correct the record only in a "like case" and "in the same manner" as the supreme court, he must necessarily act within the "same time." That is but another way of saying that, unless the surrogate is limited to the period of two years from the entry of the order in which he can entertain an application to correct it, he cannot and does not proceed in the same manner or in a like case as in the supreme court. This reasoning is so obviously faulty that no argument need be made to refute it. The statute, in speaking of a like case, means that the party making the motion must show the existence of the error or mistake in the same way as if the record was in the other court; and, in providing for the exercise of the power in the same manner, all that is meant is that the surrogate shall proceed in the same way to hear the application. Proof must be made, notice given, and a judicial hearing of the parties had; but there is no more limit as to the time within which the application may be entertained since the enactment of the statute than there was before. There certainly is no express limitation of time upon the power of the surrogate contained in the statute, and it is impossible, I think, to show by any correct reasoning process that one is implied.

There is no force in the suggestion that the legislature must have intended to assimilate, in all respects, the power of the surrogate's court over its own records to that possessed by the supreme court. If it did, it is quite sufficient to say that it has not expressed such intention. But there is no reason to suppose that it had any such intention in mind. The functions of the two courts are so radically different that the reason for a limitation in the one has but little, if any, application to the other. Litigants in courts of common law confront each other upon equal terms and upon well-defined issues. They are represented by counsel, who are watchful of their interests, and who have every opportunity to know the contents and scope of every order or judgment entered in the case. Under such circumstances, it is reasonable to suppose that any error or mistake of fact that has crept into the record, such as is involved in the case at bar, will be detected within two years. Not so with proceedings in probate courts. They are quite informal, conducted in many cases without the aid of counsel, frequently ex parte, by the representatives of deceased persons, under such circumstances that a material error may lurk in the papers for many years.

without discovery. A court charged with such powers and duties should have ample authority over its own records for the correction of such mistakes as appear in this case; and, until the legislature shall limit the power by some language clearer and more explicit than it has, it may entertain such an application as was made by this executor. In *re Flynn*, 136 N. Y. 287, 32 N. E. 767. I am aware that what has here been said may seem to be in conflict with the decision in *Re Tilden*, 98 N. Y. 434, and in *Re Hawley*, 100 N. Y. 206, 3 N. E. 68; but the conflict, if any, is with the reasoning, and not with the decision, in those cases. The decision in both of them was doubtless correct, whatever may be said with respect to some of the reasons given.

In both cases the ground for opening the decree was not a clerical error, such as is involved in the case at bar, nor, indeed, any error such as is contemplated by section 2481, regulating proceedings for opening and correcting manifest mistakes, but errors of substance made at the hearing, which should have been corrected by appeal, and not by motion. It was claimed that the surrogate decided certain questions of fact or law erroneously, and that the decree was affected by such errors to the prejudice of the party applying for a rehearing. The other provisions of the Code covering regular appeals afforded the aggrieved party the true remedy. The questions that were involved and decided in those cases are not like the one now before us. They were not to correct a record so as to make it conform to what every one intended, but to review the decision upon the merits. In other words, it was an attempt to appeal by motion from an erroneous decision. In the case at bar the application was to correct a clerical error in the record. It was always a part of the inherent power of a court to supervise its own records, and we think that this particular power, at least, has not been limited or restricted by any statute.

The two-years limitation above referred to applies to applications to correct "final judgments." It seems to be assumed on all sides that the intermediate order of the surrogate, which was sought to be corrected in this case, was a final judgment, within the meaning of the section. It may be said that the order was final as far as it went, but this reasoning would convert almost every interlocutory order into a final one. But, as the question is not presented, we will assume for the purposes of the case that the order is final, within the meaning of the section; and we place our decision on the ground that the statute does not in express words, or by any necessary implication, deprive the surrogate of any power to entertain the motion that he possessed before its enactment.

For these reasons, as well as those stated in the able prevailing opinion below, the or-

der appealed from should be affirmed, with costs, and the question certified answered in the affirmative. All concur, except PARKER, C. J., and VANN, J., not voting, and GRAY, J., absent. Order affirmed.

(157 N. Y. 408)

PEOPLE ex rel. COLER, Comptroller, v.
LORD et al., Commissioners.

(Court of Appeals of New York. Dec. 16,
1898.)

APPEALABLE ORDERS—DISMISSAL OF CERTIORARI.

A dismissal of a certiorari is an exercise of discretion that the supreme court cannot review.

Appeal from supreme court, appellate division, First department.

Certiorari, on the relation of Bird S. Coler, as comptroller of New York City, against Daniel Lord, and others, commissioners. From an order of the appellate division (52 N. Y. Supp. 2) dismissing the writ, relator appeals. Dismissed.

Robert C. Beatty, for appellant. B. E. V. McCarty and Jared G. Baldwin, Jr., for respondents.

PER CURIAM. The relator sued out a writ of certiorari for the purpose of reviewing an award of the commissioners of the change of grade damage commission, who were appointed pursuant to the provisions of chapter 537 of the Laws of 1893, as amended by chapter 567 of the Laws of 1894. Subsequently the appellate division made herein the order that the appellant now seeks to have reviewed by this court. An examination of the order discloses that it does not affirm the proceedings had before the commissioners, or in any way pass upon the questions that it was the purpose of the relator in obtaining the writ of certiorari to have inquired into by the court. On the contrary, it simply dismisses the writ, which that court may do in the exercise of a sound discretion whenever asked for the allowance of a common-law certiorari. It is settled by a long line of authorities, many of which we cite in *People v. Board of Sup'rs*, 153 N. Y. 370-373, 47 N. E. 790, that an order that thus dismisses a common-law writ of certiorari is not appealable to this court, because the dismissal of the writ constitutes an exercise of discretion that this court cannot review. In *People v. City of Kingston*, 101 N. Y. 82, 4 N. E. 348, this court was asked to examine the opinion of the court making the order dismissing the writ, the claim being that thus it would be clearly made to appear that the court had not dismissed the writ in the exercise of its discretion; but it was held that the discretionary character of the order could not thus be altered. The appeal should be dismissed, with costs. All concur, except GRAY, J., absent. Appeal dismissed.

(157 N. Y. 412)

MCCLAVE v. GIBB.

(Court of Appeals of New York. Dec. 16, 1898.)

APPEAL—NEW TRIAL—EFFECT—VERDICT IN EQUITY.

An order granting a new trial on appeal does not nullify an order submitting special issues to a jury in a case triable to the court, and the verdict thereon, so as to preclude the use of the verdict as evidence on the retrial.

O'Brien and Martin, JJ., dissenting.

Appeal from superior court of New York City, general term.

Action by John McClave against John Gibb. A judgment dismissing the complaint was reversed (31 N. Y. Supp. 847), and on a second trial a judgment for plaintiff and an order denying a new trial were affirmed (36 N. Y. Supp. 1127), and defendant appealed. Affirmed.

William B. Ellison, for appellant. Edward M. Shepard, for respondent.

HAIGHT, J. This action was brought to set aside the award of appraisers appointed under two policies of insurance to fix the amount of plaintiff's damage by fire, and to recover the amount of his actual damage. The defendant is one of 40 persons engaged in the fire insurance business under the name of the American Lloyds. The plaintiff is the holder of two policies issued upon the premises known as Nos. 602 to 610 West Twenty-Second street, in the city of New York, which were destroyed by fire on the 12th day of April, 1898. The award of the appraisers was attacked upon various grounds, among which were the charges that the appraiser nominated by the insurer was not disinterested; that the appraisers gave the plaintiff no notice of the time or place of making the appraisal; that they gave him no opportunity to offer evidence or to make representations relative to the nature of the property destroyed; that they refused to consider competent evidence of the nature and value of the property destroyed; and that the award was grossly inadequate. After the joining of issue, an order was made by the special term settling the issues, and directing that they be tried by a jury. The issues so settled were: First. "Was the appraiser selected by the defendant disinterested?" Second. "What was the amount of the loss and damage caused by the fire of April 12, 1898, to the property of the plaintiff described in the complaint?" A trial was had at a trial term of the court before a jury, and upon such trial the jury answered the first question in the negative, and to the second question the answer was \$5,000. A motion for a new trial was then made, upon the grounds stated in section 999 of the Code, and denied. Thereupon the parties submitted to the judge who presided at the trial by the jury the evidence taken upon that trial, with the verdict of the jury, with the understanding that the case should be disposed of by him at the next special term to be held by him,

upon briefs of counsel which were to be then submitted. At a subsequent date, while sitting at special term, the judge rendered a decision containing findings of fact and conclusions of law, in which he found as facts that the defendant's appraiser was not disinterested, and that the damages sustained were \$5,000, as found by the jury, and, as a conclusion of law, that the award should be set aside and held for naught; but he also found that the plaintiff was bound upon the occurrence of the fire to give immediate notice of the loss caused thereby; that he was bound to make a complete inventory of the property, stating the quantity and cost of each article destroyed, and the amount claimed thereon, as conditions precedent to the commencement of the action, which had not been done, and that the plaintiff was not entitled to maintain the action until the expiration of 60 days after the defendant and his associates had received satisfactory proofs of loss. He concluded by ordering judgment for the defendant dismissing the plaintiff's complaint. In the judgment entered upon this decision, it was adjudged and decreed that the award be set aside, and that the complaint be dismissed, but without costs. An appeal was then taken to the general term from so much of the judgment as decreed the dismissal of the complaint. Upon the case being heard in the general term, that court ordered that so much of the judgment as decrees that the complaint be dismissed be reversed, and a new trial was ordered, with costs to the appellant to abide the event. The case was then subsequently moved for a retrial at an equity term of the court, and the plaintiff thereupon produced and offered in evidence the order settling issues, the evidence taken upon the trial before the jury, the verdict and the order denying defendant's motion for a new trial, and the stipulation of the parties made upon the rendition of the verdict, to the effect that the case be submitted to the judge presiding at that trial, to be disposed of by him at the next special term at which he was to preside, and rested. This was received by the trial court under the objection and exception of the defendant. The defendant then offered in evidence the order granting a new trial, and then moved to dismiss the complaint upon various grounds, which it is not necessary here to refer to in detail, but which presented the question contended for by him,—that the plaintiff had failed to present any evidence to sustain the allegations of his complaint. The motion was denied, and an exception was taken.

The question is thus fully and fairly presented whether the order of the general term granting a new trial nullifies the verdict rendered upon the issue formed so as to preclude the court upon the retrial from making use of it. In the examination of the cases made by us, none have been found in which the question here presented has been considered. The appellant called our attention to numerous authorities which, in effect, hold that the grant-

ing of a new trial without qualification sends the case back for a trial upon all of the issues raised by the pleadings, and this, we think, must be considered to be the effect of the order. It is contended, however, that the proceedings had upon the issue before the jury, and its verdict, are no part of the trial, and that inasmuch as the general term has not, by its order, vacated the verdict or set aside the order settling issues, those proceedings stand unimpaired and in full force.

Where a party is entitled by the constitution, or by express provisions of law, to a trial by jury of one or more issues of fact, the finding of the jury is conclusive in the action, unless the verdict is set aside or a new trial is granted; but where the party is not entitled, as of right, to a trial by jury, the verdict is not conclusive upon the parties, and the trial court may adopt it, modify it, or disregard it, and find the facts anew. In the latter class of cases the verdict is treated as an aid to the court to inform its conscience; but it is in no wise bound thereby, for the responsibility of determining the facts rests upon the trial judge, and our Code has not changed the rule in this respect. Code Civ. Proc. §§ 970, 971; *MacNaughton v. Os-good*, 114 N. Y. 574, 21 N. E. 1044; *Learned v. Tillotson*, 97 N. Y. 1, 6; *Jackson v. Andrews*, 59 N. Y. 244; *Colle v. Tift*, 47 N. Y. 119; *Wilson v. Riddle*, 123 U. S. 608, 8 Sup. Ct. 255; *Van Alst v. Hunter*, 5 Johns. Ch. 148. In the case of *Vermilyea v. Palmer*, 52 N. Y. 471, *Church, C. J.*, in delivering the opinion of the court, says: "The order for trial by jury of a specific question of fact, authorized by section 72, was borrowed from the chancery practice, and in terms is introduced as a substitute for the proceeding by feigned issue. * * * There are but three modes of trial prescribed by the Code, and they embrace every possible civil action, viz. by jury, by the court, and by referees. * * * A trial is defined to be the judicial examination of the issues (not a portion of them) between the parties. * * * A jury trial under the Code is only where the jury determines the whole issue by a general verdict, with or without special findings, or by a special finding embracing all the facts. It follows that, when a specific question of fact only is ordered to be tried by a jury, it is not a trial of the issue by jury. It is not, of course, a trial by referees, but it is a trial by the court. The Code declares, in legal effect, that every issue not tried by a jury or referees must be tried by the court. It is said that the questions sent out to the jury may be controlling, and that the judgment is rendered upon such finding, and that section 267, requiring a statement by the court of facts found and conclusions of law separately, is not applicable. This, I think, is a mistake. The facts found by the jury may or may not be controlling in deciding the case; but, whether they are or not, they must be approved by the court before they are made

the basis of a judgment, and, if approved, they become, by adoption, the findings of the court."

In *Birdsall v. Patterson*, 51 N. Y. 43, it is said in the opinion, with reference to issues ordered to be tried before a jury, that "these issues, like feigned issues under the old chancery practice, were ordered to be tried, so that the court could have the findings of the jury upon the final hearing of the whole case for the information of its conscience. * * * After the trial of the issues ordered to be tried by a jury in such a case, the cause is required to be brought to trial or hearing regularly at the special term. Then, if proof is necessary to establish facts not admitted in the pleadings or found by the jury, such proof must be given. If such proof is unnecessary, then, upon the facts admitted and found, the court, using the findings of the jury for the information of its conscience, finds the facts and decides the law substantially as it would if all the issues had been regularly tried before it; and exceptions may be taken just as if none of the issues had been tried before the jury, but the whole case had been tried before the court without the intervention of a jury." In *Acker v. Leland*, 109 N. Y. 5, 15 N. E. 743, *Gray, J.*, in delivering the opinion of the court, quotes, with approval, from *Learned v. Tillotson*, supra, the following: "The Code of Procedure did not change the rule, but left the verdict of the jury as evidence only, and not a determination of the issue."

It is claimed that the trial of special issues before a jury in an equity case constitutes a step in the trial. It is no more so than the taking of evidence upon a commission. It is not a trial where the issues of fact or of law are finally determined. Those questions, as we have seen, must be determined by the trial court, the judge making use of the evidence taken before the jury, or upon commission, together with the findings of the jury, to inform his conscience as to the facts. In this respect, where a trial by jury is not required by the constitution or by express provisions of statute, the verdict is treated as evidence in the case, having no binding force or other effect upon the determination of the trial judge. The Code provides for a review of the determination of the jury of issues formed in equity cases. If the finding is wrong, it may be set aside, and a new trial ordered. In the case under consideration the parties were not entitled to a trial by jury as a matter of right, under the constitution or the express provisions of the statute. The finding therefore is not conclusive upon the trial court. The general term, in ordering a new trial, has not vacated the order settling the issues or the verdict rendered thereon, or in any manner referred to these proceedings. It has merely ordered a new trial. This must be understood to require a retrial of all of the issues. This duty devolved upon the special term. That court, however, we think,

has the right to receive in evidence upon such retrial the evidence taken before the jury and its verdict. It, however, was not bound thereby. It was its duty to find the facts, but it had the right to make use of the verdict for the purpose of informing the conscience of the court. We conclude, therefore, that the exception taken to the admission of the proceedings had upon the issues settled presents no error.

We have carefully considered the other questions raised by the appellant upon the argument of this appeal. We are satisfied that they were properly disposed of below, and that no error was committed which calls for a reversal. The judgment and order should be affirmed, with costs. All concur, except O'BRIEN and MARTIN, JJ., dissenting. Judgment and order affirmed.

(59 Ohio St. 218)

STATE v. HERVEY.

(Supreme Court of Ohio. Nov. 29, 1898.)

CRIMINAL LAW—REVERSAL OF CONVICTION IN CIRCUIT COURT—PROCEDURE BY STATE'S ATTORNEY.

By the provisions of section 7306a, Rev. St., unconditional authority is conferred upon the attorney representing the state to "take proceedings in error in the supreme court" for the reversal of a judgment of the circuit court reversing a conviction for a felony or misdemeanor in any court inferior to it, and leave to file a petition in error in such case need not be obtained from this court.

(Syllabus by the Court.)

At the January term, 1898, of the court of common pleas, one Hervey was jointly indicted with others for burglary. He demanded a separate trial. At the March term he was convicted, and sentenced to imprisonment in the penitentiary for four years. At the October term of the circuit court the judgment was reversed for error in the charge. The state files this motion for leave to file a petition in error for the reversal of the judgment of the circuit court. Stricken from the files.

H. E. Starkey and Charles Lawyer, Jr., for the motion.

PER CURIAM. Section 7306a of the Revised Statutes confers upon this court jurisdiction to reverse a judgment of the circuit court by which, on the petition of one convicted of a crime or misdemeanor, it reverses the sentence imposed upon him in the court of common pleas. It provides that in such cases "the attorney representing the state may take proceedings in error in the supreme court," and that "like proceedings shall be had in the supreme court at the hearing of the petition in error as in other cases." The section does not require an application to the supreme court for permission to file the petition in error. Section 7361, Id., relating to proceedings in error instituted by the accused in case of conviction and final judgment ad-

verse to him, requires a motion for leave to file his petition in error in this court. So, by the provisions of section 7306, Id., the prosecuting attorney is expressly required to obtain permission of this court to file a bill of exceptions for its decision upon points decided adversely to the state by the court below. That proceeding, however, does not contemplate a reversal of the judgment of the court below, the purpose of the proceeding being defined by the statute to be to obtain a decision of this court which shall "determine the law to govern in any similar case." So, by the provisions of section 6710, Id., which relates to the review of judgments and final orders in civil actions and proceedings, there is an express provision that leave shall be obtained to file a petition in error unless the judgment or order whose reversal or modification is sought was rendered or made by the circuit court or the superior court of Cincinnati at general term. It thus appears to have been the purpose of the legislature to indicate by express provision the cases in which it is necessary to obtain permission to resort to this court. The section whose provisions are here invoked (section 7306a) prescribes no condition to the exercise of the authority which it confers upon the attorney representing the state "to take proceedings in error in the supreme court." The motion for leave, not being necessary, will be stricken from the files.

(59 Ohio St. 212)

STATE v. MARTIN.

(Supreme Court of Ohio. Nov. 29, 1898.)

HABITUAL CRIMINAL ACT—EFFECT OF UNCONDITIONAL PARDON.

If imprisonment for a felony is terminated by an unconditional pardon, it is not to be regarded as one of the two former imprisonments for felony required by section 7388-11, 2 Bates' Ann. St., to place the accused in the category of habitual criminals.

(Syllabus by the Court.)

Exception to court of common pleas, Franklin county.

One Martin was indicted for grand larceny committed on the 22d day of December, 1896. The indictment also charged that at the December term, 1877, of the court of common pleas of Wayne county, the defendant, as Elbert J. Anderson, had been convicted of the crime of grand larceny, and sentenced to imprisonment in the penitentiary, and that he was actually imprisoned in the penitentiary under that sentence, and that at the April term, 1893, of the common pleas court of Franklin county, he was convicted and sentenced to the penitentiary for burglary and grand larceny, and underwent the imprisonment imposed by the sentence. The defendant specially pleaded in bar of the allegations of the indictment charging him as an habitual criminal that on the 25th day of June, 1879, the said Elbert J. Anderson "was given an unconditional pardon for said conviction, sen-

tence, and imprisonment by the governor of Ohio." A demurrer to this plea was interposed by the prosecuting attorney, and overruled by the court, to which ruling the prosecuting attorney excepted. Overruled.

F. S. Monnett, Atty. Gen., and George C. Blankner, for the State. J. E. Sater, for defendant.

PER CURIAM. It is provided in section 7388-11, 2 Bates' Ann. St., that "every person who after having been twice convicted, sentenced and imprisoned in some penal institution for felony, whether committed heretofore or hereafter, and whether committed in this state or elsewhere within the limits of the United States of America, shall be convicted, sentenced and imprisoned in the Ohio penitentiary for felony hereafter committed, shall be deemed and taken to be an habitual criminal, and on the expiration of the term for which he shall be so sentenced, he shall not be discharged from imprisonment in the penitentiary, but shall be detained therein for and during his natural life," etc. The question presented by the exception is whether a former conviction and imprisonment for a felony, on account of which the governor has granted an unconditional pardon, may be regarded as one of the former convictions necessary to place the accused in the category of habitual criminals, as defined by the act. It may be that the criminal habit is as certainly indicated by the commission of felonies for which unconditional pardons have been granted as by those whose penalties have been suffered to the end. But we must presume that the legislature enacted this section intending that the language should be construed according to the commonly received view as to the effect of a pardon. That view with reference to legislation of this character is that: "If a second offense is made by statute more heavily punishable than the first, then, if the first is pardoned, it is obliterated. The consequence of which is that a like offense afterwards committed is not a second, and is punishable only as a first." Bish. New Cr. Law, § 919; *Edwards v. Com.*, 78 Va. 39. The case of *Mount v. Com.*, 2 Duv. 93, has not been accepted as a correct statement of the law. Exception overruled.

(59 Ohio St. 189)

RUMSEY v. LENTZ et al.

(Supreme Court of Ohio. Nov. 29, 1898.)

PROMISSORY NOTE—SHARES OF STOCK AS SECURITY—CONTEMPORANEOUS AGREEMENT—CONDITIONAL SALE OF SECURITY—AUTHORITY OF PAYEE AS AGENT—AGENCY.

One who executes a negotiable promissory note, and contemporaneously therewith an instrument by which he transfers to the payee of the note and his assigns shares of the stock in an incorporated company as security for the payment of the note, and designating a price in excess of the amount to become due on the note at its maturity, upon the payment of which the holder may become the absolute owner of the stock, and delivers such note and instru-

ment to the payee with knowledge that he does not furnish the consideration for the note, and with the intent that he shall obtain the same from another, thereby vests such payee with authority to receive such original consideration, but not with authority to receive from the holder at the maturity of the note a tender of the difference between the price of the stock and the amount due upon the note.

(Syllabus by the Court.)

Error to circuit court, Franklin county.

Action by J. B. Rumsey against John J. Lentz and others. From a judgment dismissing petition, plaintiff brings error. Reversed.

The case was tried on appeal in the circuit court, the plaintiff in error being plaintiff there. In his petition plaintiff alleges: That on the 27th of June, 1893, he executed and delivered to the defendant Lentz his promissory note for \$5,000, payable September 1, 1893, with 8 per cent. interest thereon, and to secure the payment thereof at maturity deposited with him, duly indorsed, fully paid up stock of said fuel company of the par value of \$15,000. That said stock, at the beginning of the suit, was of the actual value of \$9,000. That at the time of the execution of the note and delivery of the stock to Lentz plaintiff executed to him the following memorandum: "27th June, 1893. This memorandum witnesseth that I have this day delivered my promissory note for five thousand dollars (\$5,000), due on first of September, 1893, with interest at the rate of eight per cent. (8%) per annum, payable annually, to John J. Lentz, and that I have deposited with said Lentz, as collateral security for the payment of said note, fifteen thousand dollars (\$15,000.00) face value of the stock of the Central Ohio Natural Gas and Fuel Company, being certificates No. 347 for one hundred shares, 585 for thirty shares, and 586 for twenty shares,—one hundred fifty shares in all,—the market value of which is now estimated at seven thousand dollars (\$7,000), with full power and authority to said Lentz, his heirs and assigns, to sell and assign and deliver the whole of the above-mentioned security, or any part thereof, at public or private sale, at the option of said John J. Lentz, his heirs and assigns, on the nonperformance of any of the promises contained in the promissory note aforesaid, or the nonpayment of any of the liabilities assumed in said note at any time or times thereafter, without demand, advertisement, or notice; and, after deducting all legal and other costs and expenses for collection, sale, and delivery, to apply the residue of the proceeds of such sale or sales so to be made to pay any or all of said liabilities as said John J. Lentz, his heirs and assigns, shall deem proper, returning the overplus to the undersigned. In case of deficiency of proceeds fully to discharge said note, I promise to pay John J. Lentz or order the amount thereof forthwith after such sale, with interest at the rate aforesaid. And further, in consideration of the afore-

said loan to me made by said John J. Lentz, and the additional consideration of one dollar to me paid by said Lentz, the receipt whereof is hereby acknowledged, I do hereby promise and agree and covenant to and with said John J. Lentz, his heirs and assigns, that he has and shall have until the first of September, 1893, the right, privilege, and option to purchase said fifteen thousand dollars (\$15,000) face value of the stock of said the Central Ohio Natural Gas and Fuel Company for six thousand seven hundred and fifty dollars (\$6,750), and that at the time of his election to purchase said stock, he, his heirs and assigns, may use in part payment therefor said note of five thousand dollars (\$5,000) hereinbefore mentioned. Witness my signature this twenty-seventh of June, 1893. [Signed] J. B. Rumsey,"—thereby giving him, or his transferee of said note, the option to purchase said stock at \$6,750 on or before the 1st day of September, 1893, but not thereafter. The note so executed by the plaintiff was to be used as a part payment on the purchase of said stock, if said option to purchase should be exercised. Plaintiff further alleges that said option never was exercised, but, on the contrary, it was waived; that at the time of the maturity of said note plaintiff tendered full payment thereof, in lawful money of the United States, the sum of \$5,081.11, and tenders the same in court, demanding the surrender of said certificates; but that the defendants refused, and continue to refuse, to surrender them, Harrison claiming to be the owner thereof. He further alleges that the principal defendant, Harrison, acting in collusion with said Lentz in refusing to permit the plaintiff to pay said promissory note and in refusing to surrender to him said stock certificates, threatens to, and will, unless restrained by order of the court, transfer and dispose of said stock; and that the company, unless restrained, will permit the transfer thereof upon its books, whereby the plaintiff will sustain irreparable damage. Plaintiff therefore prays that the defendants be enjoined from transferring, or in any manner disposing of, the stock, and that the defendants be compelled to surrender the said certificates to him.

Harrison, the principal defendant, answers, admitting the execution of the note, as alleged by the plaintiff, and deposit of stock as collateral security, but denying each and every other allegation of the petition. He further alleges that on the 27th of June, 1893, the defendant Lentz assigned the note and the option contract so executed by the plaintiff to him, and delivered to him the shares of stock, and that on the 31st of August, 1893, before the expiration of the option, he elected to exercise his said right to purchase the stock, and become the owner of it, and did so elect to buy the stock, according to the terms of said contract; and thereupon, on the 31st of August, he notified Lentz, as agent

and attorney of the plaintiff, of said election, and paid to Lentz the balance due as purchase money for said stock, as provided in said option and contract, over and above the amount due upon the note, to wit, the sum of \$1,677.78, and thereby became the owner of the stock.

Lentz, in his answer, alleges that at the time of the execution of the note and the making of the contract he was acting as the agent and attorney for the plaintiff, and that the plaintiff requested him to procure a purchaser for said gas stock, and the plaintiff knew that the defendant was procuring the money advanced to said plaintiff from a third party; that said option and contract were made with the understanding, agreement, and intention and for the express purpose of having them assigned to the party who should furnish the money so advanced; that on the 27th day of June, 1893, Lentz indorsed the option and contract to Harrison, who furnished the money advanced to Rumsey; that on August 31, 1893, Harrison availed himself of the option to purchase said stock according to the terms of said contract, and delivered to Lentz, as the agent and attorney of Rumsey, said \$5,000 note of Rumsey, and paid to him the difference between the amount due upon the note and the agreed price at which the stock was to be sold; that he thereupon notified Rumsey of the election by Harrison, and the payment of said difference to him (Lentz), and that he was ready to deliver the note and said money to Rumsey, less his commission for services in the premises.

In his reply, Rumsey denied that Lentz was acting as his agent and attorney, and denied that Harrison, on the 31st day of August, delivered to Lentz the promissory note, or paid to him the difference between the amount of the note and purchase price of the stock; denies that Lentz had so notified him; denies that Lentz ever offered, tendered, or has been ready to pay to him the difference between the note and the value of the stock.

On the hearing of the evidence, the circuit court made a separate finding of facts as follows: That prior to the 27th of June, 1893, plaintiff employed Lentz as his attorney to negotiate and procure a sale of his stock in the fuel company, or to procure a loan for him of \$5,000, using the stock as collateral, and that on that day, pursuant to said employment, Lentz procured the loan for Rumsey from Harrison; that at the time the loan was procured, and in order to obtain the same, the plaintiff executed to the defendant Lentz and his assigns the option and contract already referred to, with the intent and for the purpose of having the same assigned, by Lentz as the attorney for Rumsey, to the third party who might furnish the money to be loaned to Rumsey; that Harrison paid the money to Rumsey, and said option was assigned to Harrison pursuant to the agreement and understanding, and that in procur-

ing said loan for Rumsey and in conducting the transactions described in the pleadings Lentz acted solely as the agent and attorney of the plaintiff, Rumsey, and that as attorney for Rumsey, on the 27th of June, 1893, and with the knowledge and consent and in the presence of Rumsey, he made an assignment of said contract and option; that, pursuant to said option and contract, on the 31st of August, 1893, and within the time provided by the contract, Harrison elected to buy, and did take, the shares of stock described in the contract, and that he paid to the defendant Lentz, as the agent and attorney of the plaintiff, the balance due the plaintiff under the said option and contract, and turned over to Lentz, as such agent, the promissory note therein described, and fully performed all things required of him under and by virtue of said contract. The court further finds that after the execution of the note there was no communication whatever between the plaintiff and Harrison, nor until the 8th day of September, 1893, was there any communication between Lentz and Rumsey, except the correspondence set out in the record; that on the 8th day of September, 1893, Lentz and Rumsey met, but could not agree as to the rights of Harrison and Rumsey in the premises, and that Lentz then offered to turn over to said Rumsey the promissory note of June 27th, and the balance of the proceeds due him on said sale of stock, but that Rumsey declined and refused to accept anything from Lentz, except his note and the stock, and that Rumsey then tendered to Lentz (Harrison being as yet unknown to Rumsey in the transaction), in gold, the full amount due upon said note; that on the said 8th day of September Lentz went to Harrison's office, and received from him a check of that date for the sum of \$2,675.44, drawn on the Merchants' & Manufacturers' Bank, which Lentz deposited in his bank, and the same was paid on the 9th of September, 1893, by the bank on which it was drawn. As conclusions of law upon the foregoing facts the circuit court found that Lentz acted throughout the transactions as the agent and attorney for the plaintiff, and not for himself or Harrison; that he performed all things required of him in good faith; that Harrison, by virtue of the facts found, became the owner of the stock on the 31st day of August, 1893; and that the plaintiff had no cause of action, and adjudged that his petition should be dismissed. This is a petition in error to reverse the judgment so rendered.

T. E. Powell and Dan Danehy, for plaintiff in error. George K. Nash and J. J. Stoddart, for defendants in error.

SHAUCK, J. (after stating the facts). It is admitted that by the terms of the instrument by which Rumsey transferred his stock to Lentz and his assigns the option to purchase the stock for \$6,750 was required to

be exercised by Harrison as transferee by the 1st day of September, 1893, and that the exercise of the right required the payment or tender to Rumsey of the difference between that sum and the amount then due upon the note. It is also admitted that Harrison did not comply with this requirement otherwise than by notifying Lentz of his election to take the stock at the price named, and agreeing with him that money belonging to Harrison and held by the firm of which Lentz was a member should be devoted to the payment of the difference. This occurred on the 31st day of August, 1893. It is therefore indispensable to Harrison's claim to be the owner of the stock that Lentz was the agent of Rumsey, having authority to receive payment of the difference. The opinion of the circuit court shows that this view was taken there, and it agrees with the briefs of counsel for the defendant in error.

It is said that the fact of such agency is conclusively established by the finding of the circuit court that "in procuring said loan for Rumsey and in conducting the transactions described in the pleadings herein, Lentz acted solely as the agent and attorney of Rumsey." Although this conclusion is stated by the circuit court as one of its findings of fact, and substantially repeated in its conclusions of law, it becomes evident, upon a consideration of the entire entry, that it was an inference drawn by the court from the primary facts in the case. For it is further found that after the execution of the note there was no communication whatever between Rumsey and Harrison, and that from that time until the 8th day of September, 1893, there was no communication between Rumsey and Lentz except the correspondence set out in the record. Moreover, there was no conflict in the evidence concerning any fact affecting the authority of Lentz as the agent of Rumsey. Whether such agency can be inferred from the undisputed facts, including the written communications, is a question which the conclusions of the circuit court do not foreclose. Concerning the written communications which passed between Lentz and Rumsey after the execution of the note and the transfer of stock by the latter, it is sufficient to say that counsel designate no part of them which is supposed to renew or continue the authority given to Lentz at the time of the execution of the note, and that we find in them nothing having that effect. They relate to the application by Lentz of the proceeds of the note received from Harrison in June, to inquiries concerning the intention of the transferee to take the stock under the option, and to Rumsey's refusal, upon inquiry, to extend the time fixed by the contract for the exercise of the option. The authority in question seems to have been inferred from the transaction in June, when Rumsey executed to Lentz or order his promissory note for \$5,000, and executed the transfer of stock to secure its payment, conferring upon the

transferee the right to purchase it within the time and upon the terms fixed therein, with knowledge that Lentz was not himself furnishing the money which constituted the consideration for the note, and that he was procuring it from some one unknown to Rumsey. It is entirely clear that the transactions clothed Lentz with authority to act as the agent of Rumsey. It is quite as clear that his authority was limited to the receipt of the proceeds of the note and their application according to the directions of Rumsey to the discharge of certain obligations which were pressing him. The duty of Lentz in that regard, it is admitted, has been fully performed by him. The present controversy does not concern either his authority or his good faith with respect to that transaction. When the note and stock were transferred to Harrison, he and Rumsey became the adversary parties to the contract whose terms fixed their rights and liabilities. Although Rumsey did not know who held his note and stock, Harrison knew whose note and stock he held. There was no circumstance to excuse him from the duty required by the contract of tendering the difference between the price of the stock and the note either to Rumsey or to some one authorized by him to receive payment of that amount, and within the time limited. Judgment reversed, and judgment for plaintiff in error.

(59 Ohio St. 179)

MASSILLON BRIDGE CO. et al. v. CAMBRIA IRON CO.

(Supreme Court of Ohio. Nov. 29, 1898.)

"RAILROAD"—DEFINITION OF TERM AS USED IN STATUTE—DOES NOT INCLUDE STREET RAILROADS.

The statutes of this state relating to railroads are separate and distinct from those relating to street railroads, and the word "railroad," in section 3208, Rev. St., and in section 1 of the act of March 20, 1889 (86 Laws, p. 120; Bates' Ann. St. § 3231-1), does not include street railroads.

(Syllabus by the Court.)

Error to circuit court, Seneca county.

Action by the Cambria Iron Company against the Tiffin Electric Street-Railway Company and others. From the judgment of the circuit court on appeal from the court of common pleas, the Massillon Bridge Company and others bring error. Affirmed.

On the 1st day of May, 1889, the Tiffin Street-Railway Company executed and delivered to Joseph A. Beauvais, as trustee in trust, its mortgage on its street-railway property for the sum of \$40,000, which mortgage was duly recorded. On the 20th day of August, 1892, the Tiffin Electric Street-Railway Company executed and delivered to Samuel B. Sneath its mortgage on its street-railroad property, for the sum of \$25,000; and on the 5th day of May, 1893, the same company executed to said Sneath, as trustee, its mort-

gage on its street-railroad property for the sum of \$25,000, both of which mortgages were duly recorded. On the 24th day of June, 1893, the Tiffin & Fostoria Electric Street-Railroad Company executed and delivered to Thomas A. Miller, as trustee in trust, its mortgage on its street-railroad property, for the sum of \$25,000, which mortgage was duly recorded. Said street railroad extended from the city of Tiffin to the city of Fostoria, both in Seneca county. On the 1st day of March, 1894, and while all of the above-named mortgages remained unpaid, each of the said street-railroad companies conveyed by their respective deeds, duly executed and delivered, their said street-railroad properties to an incorporated company known as the Tiffin & Interurban Consolidated Street-Railroad Company, which deeds were duly recorded, but none of the purchase money was paid. At the time of said purchase, the Tiffin & Fostoria Electric Street-Railroad was in an unfinished condition, about one mile of the track having been completed, and several miles more graded. After the Tiffin & Interurban Consolidated Street-Railroad Company purchased said three street-railroad properties, it proceeded to construct the street railroad from Tiffin to Fostoria, and, in doing so, incurred an indebtedness to laborers and furnishers of material to something over the sum of \$11,000, due to 74 different persons and companies, who all filed properly sworn accounts in the office of the recorder of Seneca county for the purpose of perfecting liens against said street-railroad property, under section 3208 of the Revised Statutes of Ohio, for work and labor and materials furnished in the construction of said street-railroad line.

An action was commenced by the Cambria Iron Company, in behalf of itself and other creditors, against the Tiffin Electric Street-Railway Company; and, by consolidation, all of the street-railroad companies and all of the creditors were brought in and made parties in one action for the foreclosure of said mortgages and mechanics' liens and sale of the property, which action was carried forward, and the street-railroad properties were sold separately, by order of the court; and on distribution of the proceeds of the sales, after payment of taxes, costs, and receiver's fees, the court of common pleas ordered the proceeds of the sale of the Tiffin Street-Railway Company to be applied to the payment of the mortgage to Joseph A. Beauvais, and the proceeds of the sale of the Tiffin Electric Street-Railway Company to the payment of the mortgages held by Samuel B. Sneath, and of the proceeds of the sale of the Tiffin & Fostoria Electric Street-Railroad Company to the payment, first, of the mechanics' liens, and, second, to the payment of the mortgage to Thomas A. Miller, trustee. A petition in error was filed in the circuit court by the holders of the mechanics' liens to reverse the judgment of the court of common

pleas in the distribution of the proceeds of the sales of the Tiffin Street Railway and of the Tiffin Electric Street Railway, and a cross petition in error was filed by Thomas A. Miller, trustee, to reverse the judgment of the court of common pleas in distributing the proceeds of the sale of said Tiffin & Fostoria Electric Street Railroad. The circuit court affirmed the judgment of the court of common pleas as to the distribution of the proceeds of the sale of the Tiffin Street Railway, and of the Tiffin Electric Street Railway, and reversed the judgment of the court of common pleas in the distribution of the proceeds of the sale of the Tiffin & Fostoria Electric Street Railroad, and ordered that the proceeds of the sale of that road be paid to Thomas A. Miller, trustee, to be by him applied in payment of the bonds secured by the mortgage of which he was trustee, and held that his lien was first and superior to the mechanics' liens, to which the holders of such mechanics' liens excepted, and filed their petition in error in this court to reverse the judgment of the circuit court.

Dore & Dore, Platt & Black, and W. S. Wagner, for plaintiffs in error. Rohn & Baker, for defendant in error Samuel B. Sneath.

BURKET, J. (after stating the facts). Section 3207, Rev. St., makes any person or corporation contracting for the construction of a railroad, depot building, or water tank liable to pay for the labor and materials in the construction of the same, and provides that the railroad company shall provide in its contract for such payments. Section 3208, Id., provides as follows: "A person who performs labor or furnishes materials for or in construction of any railroad, depot buildings, water-tanks, or any part thereof, and a person who furnishes boarding on the order of any contractor or sub-contractor, to persons employed by them or either of them, in furnishing materials, or performing labor for or in construction of such railroad, depot buildings, water-tanks, or any part thereof, in addition to his rights under the preceding section shall have a lien for the payment of the same upon such railroad, and such lien shall have and maintain precedence over any lien taken, or to be taken, and shall subsist for one year from the date of filing the attested account hereafter provided for." On part of the plaintiffs in error it is claimed that the word "railroad," in the above-quoted part of section 3208, includes a street railroad, and that the liens of the laborers and furnishers of materials and boarding are the first and best lien upon all three of the street-railroad properties in this case, and that they have priority over the mortgages which were on said street railroads before the labor was performed or materials and boarding furnished; while the holders of the mortgage liens claim the mortgages to be the first and

best lien; and this is the only question in this case.

The first legislation on this subject was by the act of March 31, 1874 (71 Ohio Laws, p. 51), entitled "An act to secure pay to persons performing labor or furnishing materials in constructing railroads." The provisions of that act were carried into the Revised Statutes, and, with some immaterial amendments as to the question now in hand, constitute sections 3207 to 3211, both inclusive, of the Revised Statutes; but there is nothing in the present statute to change or enlarge the meaning of the words "railroad" or "railroad company," from what those words meant in the original statute when it was first enacted in the year 1874. When the statute was enacted in 1874, street-railroading was in its infancy in this state, and such roads were then operated by horses and mules, and the statute was then understood as applying to steam railroads only. The statute speaks of railroads, depot buildings, water tanks, and railroad companies, all of which are peculiarly applicable to steam railroads; and it is silent as to street railroads, barns, power houses, poles, wires, dynamos, machinery, and car barns, and in fact silent as to everything that is peculiarly applicable to street railroads. If street railroads were intended to be included, the statute, in some of its enactments, revisions, and amendments, would have used some word peculiarly applicable to street railroads. When the act was first passed, there was not much money secured by mortgage upon street railroads, and laborers and furnishers of materials had suffered but little, if any, from being postponed by such mortgages; and there was no necessity for providing at that time that the laborers' and furnishers' liens should have precedence over mortgages on street railroads, and for these reasons no provision was made for their protection as against mortgages on street railroads; and while there may be some reason now for such protection, since electric street railroads and interurban street railroads have come in general use, the general assembly has failed to provide that laborers and furnishers should have a lien on street railroads prior in right to the liens of prior mortgages thereon. Sections 3207 to 3211, inclusive, clearly relate to railroad companies as well as to railroads; and yet the general assembly has provided, in section 3309a, "that nothing in this section [3309a], or in the sections of the Revised Statutes relating to railroad companies prior to section 3437, other than in sections 3287, 3288 and 3289, shall be construed as affecting street railroads." This section (3309a) was passed after sections 3207 to 3211 formed a part of the Revised Statutes, and with full knowledge of them by the general assembly; and thus a clear intention is shown that sections 3207 to 3211 shall not be construed as affecting street railroads. From a careful examination of the course of legislation on the subject of railroads and street railroads, it appears that

the legislation as to each has been carefully kept separate, and the statutes as to railroads do not apply to street railroads unless made to do so by clear reference. The statute as to taxation of railroads has never been applied to the taxation of street railroads, and yet the language used in that statute as clearly includes street railroads as the language of sections 3207 to 3211. While the act of March 19, 1896 (92 Ohio Laws, p. 79), was passed after the rights in this case had accrued, and therefore not controlling, yet it is significant as showing that the general assembly still regards railroads and street railroads as entirely different, and to be controlled by different legislation. Sections 2501 to 2505d, inclusive, are all prior to section 3437, and all affect street railroads, but they do not relate to railroads, thus showing that the general assembly do not regard even interurban street railroads as being included within the word "railroad."

It was held in the state of Missouri that, where an act is passed "in relation to railroads" it will be held to apply to railroads used for carriages drawn by horses, as well as those on which the motive power is steam, unless a contrary meaning can be plainly gathered from the act itself. *Iron Co. v. Donahoe*, 3 Mo. App. 559; 15 Am. & Eng. Enc. Law, 28, 24. While this may be so under the Missouri statutes, the same cannot be held under our statutes, and the rule here is not that the "contrary meaning" must be plainly gathered from the act itself, but from all the statutes on the same subject. When all the statutes on the subject of railroads and street railroads in this state are considered together, the "contrary meaning" plainly appears. In the case of *Railway Co. v. Johnson*, 25 Pac. 1084, 2 Wash. St. 112, it was held that, under a statute giving laborers a lien upon a railroad or any other structure, a lien could not be taken upon a street cable railway. And in *Rutherford v. Railroad Co.*, 35 Ohio St. 559, it was held that our statute which gives a lien upon a "structure" does not thereby authorize a lien upon a railroad, for the reason that a railroad is not a structure, within the meaning of the statute. In the case of *Louisville & P. R. Co. v. Louisville City Ry. Co.*, 2 Duv. 175, it was held that a "street railway," in both its technical and popular sense, is not a "railroad." This is approved by Elliott, Roads & S. 557, and by Ror. R. R. 1422. It seems clear, therefore, that sections 3207 to 3211 are not applicable to street railroads.

It is further urged by plaintiffs in error that, if sections 3207 to 3211 are not broad enough to include street railroads, they are entitled to a "first, immediate, and absolute lien" on all three of the street railroads, under section 1 of the act of March 20, 1889 (86 Ohio Laws, p. 120; Bates' Ann. St. § 3231-1), which reads as follows: "Any person who shall have performed common or mechanical labor upon, or furnished supplies to any railroad, turnpike, plank road, canal or on any public structure being erected, or on any abutment, pier, cul-

vert or foundation for same, or for any side track, embankment, excavation or any public work, protection, ballasting, delivering or placing ties, or track-laying, whether the labor is performed for, or the supplies or material is furnished to any company, corporation, contractor or sub-contractor, construction company or an individual, shall have a first, immediate, and absolute lien on the whole of the property on which said work is done, and to which said supplies have been contributed, and shall hold the railroad, canal, turnpike, plank road or structure to the creation or construction of which the said labor or supplies have been contributed, or so much thereof as may have been in whole or in part created by said labor or supplies, to the exclusion of any railroad, canal, turnpike, plank road, public work or structure, as to operation, occupation or use, until the claim for such labor or supplies is properly adjusted and paid in full." This section is not broader in its terms than sections 3207 to 3211, inclusive, and it does not purport to give a lien upon street railroads. As the word "railroad" does not include street railroads in sections 3207 to 3211, the same word on the same subject in this section does not include street railroads. In this view of the case, it is not necessary to pass upon the constitutionality of this section, and that question is left undecided. Neither is it necessary to consider the question, so ably argued by counsel for plaintiffs in error, as to whether the mechanics' liens should have priority over the three mortgages in case the word "railroad" included street railroads. There is no error in the judgment of the circuit court. Judgment affirmed.

(59 Ohio St. 221)

SECOND NAT. BANK OF BUCYRUS v. MODERWELL et al.

(Supreme Court of Ohio. Nov. 29, 1898.)

PROCEEDINGS IN ERROR—FILING PETITION—MISTAKES AND AMENDMENTS—PRACTICE.

1. Sections 6716, 6723, Rev. St., when construed together, require that a plaintiff in error file in this court, within six months from the rendition of the judgment complained of, "either a transcript of the final record, or a transcript of the docket and journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of." If a paper writing filed in this court as such transcript, etc., is not sufficient to exhibit the error complained of, no amendment thereof or addition thereto can be made after the expiration of such period of six months.

2. Where, however, such transcript, etc., is sufficient to exhibit the error complained of, but the certificate of the clerk of the circuit court or court of common pleas authenticating such transcript is materially defective, such certificate is amendable by virtue of section 5114, Rev. St., and the amendment may be made after the expiration of such period of six months.

(Syllabus by the Court.)

Error to circuit court, Crawford county.

Action between the Second National Bank of Bucyrus and Moderwell and others. From

the judgment the bank brings error. Motion by defendants in error to dismiss petition in error, on the ground that the plaintiff in error has not filed an authenticated transcript of the original papers and journal entries in the cause, denied. Motion by plaintiff in error for leave to correct the clerk's certificate of authentication, granted.

Harris & Sears and Beer, Bennett & Monnette, for plaintiff in error. Dan. Babst, Isaac Cahill, Anson Wickham, and Scofield, Durfee & Scofield, for defendants in error.

BRADBURY, J. The plaintiff in error seeks in this court a reversal of the judgment of the circuit court of Crawford county. It filed herein, with its petition in error, a paper which purports to comprehend a copy of the journal entries in the common pleas and circuit courts,—a copy of the original papers, or of certain substituted copies of original papers, that had been lost. An inspection of this paper discloses that it contains a copy of the petition and such subsequent pleadings in the action as made up the issue on which the cause was tried, first in the court of common pleas, and afterwards, on appeal, in the circuit court. It also sets forth in detail every step taken in the action from the filing of the petition until the final decision of the cause in the circuit court. There appears on the face of this paper nothing to suggest a suspicion that it does not contain a complete transcript of every pleading or paper filed in the cause, and of the journal entries relating thereto to be found in the common pleas and circuit courts. In fact, defendants in error do not contend that this paper is not a complete transcript of the pleadings, journal entries, etc., but base their objection to its remaining on the files of this court on what they claim to be a defective certificate of authentication made by the clerk of the circuit court. The statute (section 6723, Rev. St.) requires proceedings in error to be commenced within six months from the rendition of the judgment complained of. Proceedings in error are commenced by filing a petition in error; and section 6716, *Id.*, requires the transcript, etc., to be filed with the petition in error. The right to institute and carry on proceedings in error is strictly statutory. If, therefore, the plaintiff in error has not complied with the conditions prescribed by the statute as necessary to entitle it to a review of the judgment of which it complains, it has no right to have that judgment reviewed. One of these requirements, as we have seen, is that the petition in error and a transcript of the proceedings must be filed within six months from the rendition of the judgment sought to be reversed. It follows, therefore, as a matter of course, that if an authenticated transcript is necessary, and is not filed within the six months, the petition and transcript should be stricken from the files. As it is now too late to begin proceedings anew, the plaintiff in error has lost its right to a review of the judgment of the

circuit court. It is at least a debatable question whether an authentication of the transcript by the clerk of the court where the judgment is found is necessary in a proceeding in error. In the case of appeals, section 5235, Rev. St., requires the clerk, in direct terms, to "make an authenticated transcript," etc. But section 6716, which prescribes the kind of transcript to file with the petition in error, is silent as to an authentication by the clerk. The statute simply requires "a transcript" to be filed. If an authentication by the clerk is necessary, it is not because of any express statutory declaration to that effect. Of course, a true transcript must be filed. Doubtless, an authentication by the clerk is the most satisfactory as well as the easiest method of establishing the correctness of a transcript; and as section 6717, Rev. St., makes it the duty of the clerk to furnish an authenticated transcript to any one interested in a cause, upon request and the payment of the proper fees, this method of authentication has become quite universal.

Without pursuing further this question as to the necessity of an authentication by the clerk, but assuming that it is necessary, we will briefly consider the sufficiency and amendability of the certificate attached to the paper in question. It is in the following terms:

"The State of Ohio, Crawford County—ss.: I, A. H. Laughbaum, clerk of the court of common pleas within and for said county, and in whose custody the files, journals, and records of said court are required by the laws of the state of Ohio to be kept, hereby certify that the foregoing is taken and copied from the original and substituted pleadings, and that said foregoing copy has been compared by me with the original and substituted pleadings, and that the same is a correct transcript thereof. In testimony whereof, I do hereby subscribe my name officially, and affix the seal of said court, at the court house in Bucyrus, in said county, this twenty-fifth day of March, A. D. 1897.

"[Seal.] A. H. Laughbaum, Clerk."

Section 6716, Rev. St., prescribing what the plaintiff in error shall file with his petition, reads as follows: "Sec. 6716. The plaintiff in error shall file with his petition in error either a transcript of the final record, or a transcript of the docket or journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of; and, if original papers and pleadings are filed, and the final record has not been made, the reviewing court may permit the temporary withdrawal of the originals for a reasonable time, to allow the recording thereof, or direct copies thereof to be made and filed, and the originals to be returned to the inferior tribunal." Now, it is quite clear that one of two things must be done by the plaintiff in error when he files his petition in error: First, he may file a transcript of the final record (that, of course, includes all the pleadings, papers, and proceedings taken in

the cause, from its commencement to its conclusion); or, second, he may file a transcript of the docket or journal entries, and either the original papers themselves, or copies thereof. In the case before us the plaintiff in error adopted the latter method. The paper in question shows on its face that it purports to give a copy of the pleadings and a copy of the journal entries. The certificate above recited, which was attached to this paper, states simply that the paper contains copies of original and substituted pleadings. This phraseology in regard to the pleadings was necessary because a number of the pleadings had been lost, and copies had been substituted, and the paper contained copies of the substituted as well as of the original pleadings which had not been lost. This certificate, therefore, authenticates the correctness of the copies of the pleadings, but entirely fails to state anything concerning the journal entries. The latter, therefore, were wholly unauthenticated. It is just as important that the journal entries which recite the action of the court below should be correctly transcribed and brought before the reviewing court as that the pleadings should be correctly transcribed. The certificate of the clerk failing to do this, it must be held to be defective in a material matter. This brings us to the question of its amendability. Section 5114, Rev. St., reads as follows: "Sec. 5114. The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved; and when an action or proceeding fails to conform to the provisions of this title, the court may permit the same to be made conformable thereto, by amendment." The power of amendment thus authorized is very broad. Where there is nothing on which an amendment may rest, of course none can be made. Here, however, the certificate made by the clerk fails to state that the journal entries of the court of common pleas and circuit court have been correctly transcribed into the paper in question. If, as a matter of fact, that paper contains a correct transcript of such entries, the certificate of the clerk does not state all that it should state. Surely here we have something on which an amendment may rest. We have before us the very instrument—the certificate of authentication—sought to be amended. To permit the amendment to be made is clearly "in the furtherance of justice." The objection to the paper is purely technical. It rests, not upon any ground that goes to its completeness or correctness, but upon the ground that the official certificate of the clerk

of the circuit court does not formally declare it to be complete and correct. As before shown, however, the plaintiff in error is required by section 6716, Rev. St., to file a transcript, etc., within six months from the rendition of the judgment complained of. This, of course, means that a complete transcript shall be filed within that time. After the lapse of that period no material matter can be added to a transcript previously filed. If, however, the paper before us is a correct transcript of the pleadings and journal entries, it is the clear duty of the clerk of the circuit court to so certify, and the plaintiff in error should be permitted to take the paper temporarily from the files of this court for the purpose of having such certificate made. Judgment accordingly.

(59 Ohio St. 122.)

STATE ex rel. PLIMMER v. POSTON et al.
(Supreme Court of Ohio. Nov. 1, 1898.)

CONDUCT OF ELECTIONS—NOMINATION OF CANDIDATES—SUPPORT OF NOMINEE—CONSTITUTIONAL LAW.

The requirement of section 7 of the amendatory act of April 8, 1898 (93 Ohio Laws, p. 93), that papers to secure the nomination of candidates for public offices "shall contain a provision to the effect that each signer thereto pledges himself to support and vote for the candidate or candidates whose nominations are therein requested," operating uniformly and impartially upon all classes of electors, and interposing no unreasonable impediment to the exercise of the elective franchise, is valid.

Spear, C. J., and Minshall, J., dissenting.
(Syllabus by the Court.)

Petition by the state, on the relation of one Plimmer, for a writ of mandamus to Poston and others. Writ denied.

The petition of the relator alleges that he is a qualified elector of Franklin county, Ohio; that defendants compose the board of election of the city of Columbus, and are charged with the duties of deputy state supervisors of election of Franklin county; that on the 19th day of September, 1898, the relator presented to the defendants a nomination paper, signed by more than 300 qualified electors of said county, containing a list of nominations for the several offices of said county to be filled at the general election in November, 1898, including the nomination of the relator for the office of county commissioner. The allegations of the petition show that the paper conforms in all respects to the acts of the general assembly to provide for the mode of conducting elections, etc., except that it does not comply with the requirement of section 7 of the amendatory act of April 8, 1898 (93 Ohio Laws, p. 93), that "such nomination papers shall contain a provision to the effect that each signer thereto thereby pledges himself to support and vote for the candidate or candidates whose nominations are therein requested." The petition shows that, because the paper did not com-

ply with the requirement of the statute in the respect indicated, the defendants refused to receive and file it, and to have the names of said nominees printed on the ballots to be voted at said election. The defendants demurred to the petition, and, for the purpose of final judgment, admit that its allegations are true.

F. M. Mecartney, G. T. Stewart, and Mahlon Rouch, for plaintiff. F. S. Monnett, Atty. Gen., Charles W. Voorhees, Pros. Atty., Florizel Smith, and William J. Ford, for defendants.

SHAUCK, J. (after stating the facts). It is admitted that by the express provision of the act of April 8, 1898, a pledge in a nomination paper that those who sign it will vote for the candidates whose nomination is requested is a condition to their right to have the names of the nominees printed on the ballot. If the prescribed condition is valid, the law does not enjoin upon the defendants the duty of performing the act which the relator asks us to command. It is said, however, that the provision of the act which prescribes this condition is void, because it restricts the right of suffrage as guaranteed by sections 1 and 2 of article 5 of the constitution, ordaining:

"Section 1. Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township or ward in which he resides such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections.

"Sec. 2. All elections shall be by ballot."

It is not doubted that the power of the legislature over the subject is restricted to laws regulating the exercise of the right, nor that such laws "must be reasonable, uniform, and impartial, and calculated to facilitate and secure, rather than to subvert or impede, the exercise of the right to vote." The implied limitation was so defined in *Monroe v. Collins*, 17 Ohio St. 665, and its enforcement is obviously a judicial duty, to the end that the right may not be defeated by indirect means. The application of the limitation to this enactment is the subject of contention. It does not seem to be doubted that the provision in question operates uniformly and impartially on all political parties and sections of voters. Whatever discrimination it makes is on account of numbers solely. It is said, however, that it unreasonably impedes the exercise of the right to vote of the sections of voters to whom it applies. In *State v. Poston*, 58 Ohio St. 620, 51 N. E. 150, we decided that the requirement of section 6, that certified nominations must represent a party which at the next preceding election had polled at least 1 per cent. of the entire vote cast in the state, is valid. This was in view of the alternatives providing for pro-

curing nominations on the ballot by means of petitions or nomination papers, and of every voter to supply the names of all persons for whom he may desire to vote, whether nominees of any party or not. Obviously the same constitutional considerations apply to the requirement as to the number of electors who shall sign nomination papers. The pledge required by the amendment now under consideration is a provision by the legislature to secure good faith on the part of the electors who sign such nomination papers. It was required, in view of the facts that at the preceding election six tickets were printed upon the blanket ballot, which required, to secure their places on the ballot, an aggregate of more than 102,000 votes at the prior election, or signatures to nomination papers, and which six tickets received at the election an aggregate of but 16,321 votes. One nomination paper was signed, as it was required to be, by more than 10,200 electors for the nomination of a state ticket, which at the election received but 477 votes in the entire state. It can hardly be necessary to say that it is not practicable for the state to provide a ballot large enough to afford places for tickets for each of such small sections of its voters, who number more than a million. If the general assembly is without power to enact such provisions as will maintain the practicability of the Australian ballot, it must have been without power to pass the act of April 18, 1892, which provided for it; and the denial of the validity of the amendment now under consideration is a denial of the validity of the original act. This does not seem to conflict with the views of counsel for the relator, for one of them, after speaking of the election of 1897, says: "The next session of the general assembly witnessed the closing plot of a revolution in the voting system commenced in April, 1892, and concluded in April, 1898." In view of the uniformity of the decisions upon the subject of the validity of laws providing for the system, the general acquiescence in it, and the number of cases in which we have enforced it, it does not now seem necessary to enter upon a discussion of the general subject.

It is said that this provision of the act destroys the secrecy of the ballot. The secrecy of the ballot is not preserved or required by the section of the constitution which ordains that all elections shall be by ballot. In some of the states similar constitutional provisions are carried into effect by statutes which require all ballots to be so marked as to identify the persons by whom they are cast. Nor does this provision require any elector to disclose his purpose with reference to the character of his vote, unless he voluntarily does so as a petitioner on a nomination paper. The act merely defines the conditions on which the state will cause tickets to be printed upon the ballot, leaving every elector entirely free to vote a ticket that has otherwise acquired a place on the ballot, or to

supply in secrecy the names of the persons for whom he desires to vote, or become a petitioner by giving the required pledge.

Nor can this requirement be held void because it is not logically consistent with the provisions of the act which prohibit the marking or exposing of his ballot by an elector. The original act and its amendments seem to be the result of a very sincere desire of the legislature to prevent the repetition of frauds upon the elective franchise which were notorious, and the moral coercion of electors which some believed to have been practiced. Can it be said to be inconsistent, in an act passed for such a purpose, that an elector is forbidden to exhibit or mark his ballot for the purpose of showing that he has complied with the condition upon which he is to receive a bribe, and a petitioner is required to give such pledge as to his intention as will show that he signs a nomination paper in good faith? Moreover, the logical inconsistency of the provisions of a statute has never been regarded as a reason for declaring any of them void. Much that is said in the briefs of counsel and most of the cases cited relate, as does *Monroe v. Collins*, to enactments which impede and restrict the exercise of the right to vote. The provisions now under consideration, defining the conditions upon which the state will provide tickets and thus facilitate the exercise of the right, and leaving to every elector an opportunity to vote according to his preference, are within the power of the legislature. In view of the evils to be remedied and the ends to be attained, we cannot say that any of them is unreasonable. Writ refused.

SPEAR, C. J., and MINSHALL, J., dissent.

TOWN OF WHITING v. DOOB.¹

(Supreme Court of Indiana. Dec. 21, 1898.)

APPEAL—DEMURRER—WAIVER BY PLEADING OVER.

The sustaining of a demurrer will not be reviewed where an amended pleading has been filed.

Appeal from circuit court, Lake county; John H. Gillett, Judge.

Action by the town of Whiting against Henry Doob. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

John W. Wartman and John G. Erdlitz, for appellant. F. N. Gavit, for appellee.

HACKNEY, J. The only error assigned is in the sustaining of a demurrer to the complaint. The record discloses the filing of an amended complaint, which, under the repeated decisions of this court, took from the record the original. *Hedrick v. Whitehorn*, 145 Ind. 642, 43 N. E. 842; *Baldwin v. Sutton*, 148 Ind. 591, 47 N. E. 629, 1067. The original not being in the record, and the amended

complaint not being questioned, no question is properly before us. The judgment is affirmed.

(151 Ind. 630)

WORLD BUILDING, LOAN & INVESTMENT CO. v. MARLIN et al.

(Supreme Court of Indiana. Dec. 21, 1898.)

MORTGAGE FORECLOSURE—RIGHT TO RENTS AND PROFITS DURING TIME FOR REDEMPTION—RECEIVER.

1. Under Burns' Rev. St. 1894, § 779 (Horner's Rev. St. 1897, § 767), providing that the owner of property sold on mortgage foreclosure is entitled to possession during the year for redemption, and nowhere providing for payment of rents and profits to the purchaser on failure to redeem, the owner is entitled to possession during such year in person or by tenant or grantee, and is not liable to the purchaser for rents and profits on failure to redeem.

2. The repeal by Burns' Rev. St. 1894, § 779 (Horner's Rev. St. 1897, § 767), of former statutes allowing the purchaser at foreclosure sale to collect rents and profits during the year for redemption, does not enlarge the exemption law as to the owner, since the right of possession during such year is appraised as part of his property in determining his exemptions.

3. Where mortgaged premises sell for enough to pay the debt, no receiver of the rents and profits during the year for redemption should be appointed on application of the purchaser.

4. The appointment of such receiver is a mere interlocutory judgment, and failure to object thereto does not estop the owner from claiming the rents and profits from the receiver at the expiration of the year.

Appeal from circuit court, Jay county; J. W. Headington, Judge.

Action by the World Building, Loan & Investment Company against John C. Marlin and others to foreclose a mortgage. From an order that the rents and profits during the year for redemption be paid over to defendant John C. Marlin, plaintiff appeals. Affirmed.

La Follette & Adair, for appellant. D. T. Taylor, for appellees.

MONKS, C. J. Appellant brought suit in the court below to foreclose a mortgage on real estate in said county. A judgment and decree of foreclosure were rendered in favor of appellant in said action, and said real estate was sold on said decree for the full amount of the judgment, interest, and costs to appellant. A few days after the sale, on application of appellant, a receiver was appointed by the court below, to take charge of and rent the real estate so sold to appellant, and collect said rents during the year appellee John C. Marlin was entitled to redeem the same. Appellees were duly notified of said application, but did not appear thereto, and were defaulted. After the year for redemption expired, and no one having redeemed from said sale, a sheriff's deed was executed conveying said real estate to appellant. When the receiver made his report, showing the rents received for said real estate during the year of redemption, appellee John C. Marlin filed a motion asking that said money be paid to him,

¹ Superseded by opinion, 52 N. E. 759.

on the ground that he was the judgment debtor and the owner of said real estate at the date of the judgment and decree, and at all times since until the sheriff's deed was executed, and was entitled to the possession and rents and profits thereof during the said year of redemption. The court ordered said money paid over to said appellee, and, from the order so made, appellant prosecutes this appeal. Said notes and mortgage were executed, and all of said proceedings had, since the redemption law of 1881 took effect.

Appellant insists that the statute only gave Martin the right to occupy said real estate during the year of redemption, and as he did not occupy the same in person, or redeem the real estate, that appellant, as purchaser at sheriff's sale, was entitled to the rent received by the receiver during said year of redemption. Section 779, Burns' Rev. St. 1894 (section 767, Horner's Rev. St. 1897), provides that "the owner of the real estate or interest therein, sold as aforesaid, shall be entitled to the possession of the same for one year from the date of such sale." It was provided in section 3 of redemption law of 1861 (Acts Sp. Sess. 1861, p. 79; 2 Davis' St. 1876, p. 220) that "the judgment debtor shall be entitled to the possession of the premises for one year after the sale, and in case they are not redeemed at the end of the year, as provided in this act, he shall be liable to the purchaser for their reasonable rents and profits." Under said section of the redemption law of 1861, this court held that neither the grantee or tenant of the judgment debtor, nor any one else except the judgment debtor, was liable to the purchaser of the real estate at sheriff's sale, for the rents and profits during the year of redemption, if the same was not redeemed. *Bryson v. McCreary*, 102 Ind. 1, 3, 4, 8, 1 N. E. 55, and cases cited; *Adams v. Glidden*, 111 Ind. 528-531, 13 N. E. 46. It was held in *Gale v. Parks*, 58 Ind. 117, that the right to recover from the judgment debtor the reasonable rents and profits of the real estate during the year of redemption did not depend upon said section of the redemption law of 1861, but existed at common law, and such liability could be enforced if the statute was silent upon that subject. This holding was based upon the theory that the title of the purchaser under the sheriff's deed related back to the date of sale. It was afterwards held in *Wilson v. Powers*, 66 Ind. 75, citing earlier cases than *Gale v. Parks*, supra, but without referring to the last-named case, that there was no liability except as fixed by statute, and that under the statute no one except the judgment debtor was liable to the purchaser for the reasonable rents and profits. In *Bryson v. McCreary*, 102 Ind. 5, 6, 1 N. E. 55, it was expressly held that, so far as any cases held that the execution purchaser might recover independent of the statute, they should be regarded as overruled. See, also, *Merritt v. Gibson*, 129 Ind. 155, 163, 27 N. E. 136.

In 1879 another redemption law was enact-

ed, section 1 of which provided, in effect, that the owner of real estate sold at sheriff's sale should be entitled to possession thereof during the year allowed for redemption, but, if the same is not redeemed, he shall be liable for the reasonable rents, profits, or use thereof, and "if such owner is not the actual occupant of the premises sold, but the same is occupied by a tenant or other person, such tenant or other person shall be liable to the purchaser for the reasonable rents or use and occupation of the premises, and may be treated in all respects as the tenant of the purchaser, who shall, in case the property is redeemed, allow as a payment upon his judgment the amount of the rent by him collected." It was held in *Bryson v. McCreary*, supra, that the redemption law of 1879 did not impair the obligation of contracts entered into while the redemption law of 1861 was in force, because the main object of the last-named law was accomplished by the law of 1879 in requiring the judgment debtor, if he occupied the premises and did not redeem, to account to the purchaser for the reasonable rents, and by allowing the purchaser to collect the reasonable rents in the first instance from other occupants of the premises, and keep them if the premises were not redeemed, and, if they were redeemed, to allow a credit on the judgment for the amount collected; that this additional authority on the part of the purchaser to collect rents from others than the judgment debtor, as under the law of 1861, operated in the way of security. The redemption law of 1881, of which section 779 (767), supra, forms a part, was held unconstitutional as to sales made after said act took effect, under decree foreclosing mortgages executed before it took effect, whether executed while the redemption law of 1861 or the redemption law of 1879 was in force, for the reason that it impaired the obligation of all contracts made under such laws, in not providing for the recovery by the purchaser at sheriff's sale of the reasonable rents and profits during the year for redemption. *Insurance Co. v. Brouse*, 83 Ind. 62; *Bryson v. McCreary*, 102 Ind. 8, 1 N. E. 55. In *Davis v. Rupe*, 114 Ind. 588, 17 N. E. 163, *Robertson v. Van Cleave*, 129 Ind. 217, 228-230, 26 N. E. 899, and 29 N. E. 781, and *Merritt v. Gibson*, 129 Ind. 161, 27 N. E. 136, the soundness of the proposition, declared in *Insurance Co. v. Brouse*, supra, that a material change cannot be made in a law concerning the redemption of real estate from a judicial sale, as against mortgages executed under previous redemption laws, because it impairs the obligation of the contract, was questioned, and left open for further examination. This was not upon the ground, however, that the case of *Insurance Co. v. Brouse*, supra, was wrong in holding that, under the redemption law of 1881, the purchaser at sheriff's sale was not entitled to recover the rents for the year of redemption if the real estate was not redeemed, which

doctrine was assumed to be correct in said cases, but upon the ground that the change made by the redemption law of 1881 in the law concerning the redemption of real estate affected the remedy only, the question being whether in such cases the right to redeem is a part of the contract, or is a matter affecting the remedy only. Under our decisions, it may be regarded as settled law that, under the redemption laws of 1861 and 1879, the purchaser at sheriff's sale, when the land was not redeemed, recovered from the person named therein the reasonable rents of said real estate by virtue of the provisions of such statutes, and that, independently of the provisions of the statute, he had no right to recover the rents from any one. It will be observed that the redemption law of 1881, which governs the rights of the parties in this case, makes no provision for the recovery of rents for the year of redemption from any one. Section 779 (767), *supra*. It would seem to follow, therefore, that appellant, as purchaser at the sheriff's sale, would not be entitled to the rent for the year of redemption in this case. Moreover, we think that this question has been decided by this court against the contention of appellant, for it has been expressly held under the redemption law of 1881 that the owner or occupant of lands is not required to account for rents received during the year for redemption, and that the purchaser at sheriff's sale cannot recover the same from any one. *Davis v. Rupe*, *supra*; *Adams v. Glidden*, *supra*; *Merritt v. Gibson*, 129 Ind. 162, 163, 27 N. E. 136. In *Davis v. Rupe*, *supra*, real estate of one Hadly was sold on certain judgments against him to Rupe, trustee, and, the said real estate not being redeemed within the year allowed by statute, the sheriff executed a deed to the purchaser as trustee, in June, 1885. Pending the year of redemption, one Davis occupied the real estate as tenant of said Hadly, he having leased the same prior to the sheriff's sale, at a stipulated sum per month. Rupe, trustee, after he received the sheriff's deed for said real estate, sued Davis, the tenant, for the rent during the year of redemption; and this court held that under section 767, Rev. St. 1881 (being section 779, Burns' Rev. St. 1894; section 767, Horner's Rev. St. 1897), said Davis, the tenant of Hadly, was not liable to Rupe, trustee, the purchaser at sheriff's sale, for the rent of said real estate during the year of redemption.

We think it clear, therefore, that the possession for one year from the date of sale provided for in section 779 (767), *supra*, being section 2 of the redemption law of 1881, is not limited to the actual occupancy of the person named in said section, but means that he is entitled to possession in person or by tenant or grantee for such year; and, if the land is not redeemed, the purchaser at sheriff's sale cannot recover the reasonable rents of the land for such year from any one, for the reason that, under the laws of this state,

he is not entitled thereto. Such construction does not enlarge the exemption laws, as claimed by appellant, because the value of such right of possession during the year allowed for redemption must be given in and appraised the same as other property, in case the owner thereof demands execution of property from sale on execution. It was not held in *Merritt v. Gibson*, *supra*, that the purchaser of real estate at sheriff's sale was entitled to a receiver, to rent such real estate, and collect the rents thereon during the year allowed for redemption; but, on the contrary, this court said (on page 174, 129 Ind., and page 142, 27 N. E.) that "we do not decide that any purchaser at sheriff's sale is, as such purchaser, entitled to the appointment of a receiver." It was held, however, in that case, that when lands are sold at a mortgage sale for less than the debt secured by the mortgage, and the mortgage creditor is the purchaser, if he shows that the mortgaged lands are inadequate to secure the debt, that the debtor is insolvent, and that the lands, or a material part of them, are in occupancy of tenants who are to pay rent therefor by a share of such crops as they raise thereon, or otherwise, a court of equity may appoint a receiver to collect the rents accruing from the portion of such lands occupied by tenants, and hold them until the expiration of the year allowed for redemption, subject to the order of the court, to be paid to the mortgage creditor as a payment on the part of the judgment. A decree of foreclosure not paid by the sale of the mortgaged premises, if the debtor does not redeem from the sale. In such case, if the mortgaged premises sell for a sufficient sum to pay the judgment and decree of foreclosure, no receiver should be appointed on the application of the purchaser; and, if such receiver has been appointed before such sale, he should be discharged, and any rents received by him after paying the costs of the receivership should be paid to the one entitled to the possession of such real estate during the year allowed for redemption.

It is next insisted by appellant that it was too late for appellee John C. Marlin to claim said rent when he had suffered a default on the application for the appointment of a receiver. It follows from what we have said that the court erred in appointing the receiver to rent said real estate, and collect the rents therefrom; but no order was made concerning the application of the rents so collected, except to pay taxes thereon, and keep the same insured. The order appointing the receiver was not a final judgment, but a mere interlocutory order, from which, it is true, appellees could have prosecuted an appeal to this court. But a court, in appointing a receiver or in making any other interlocutory order, is not, if the same is erroneous, prevented thereby from rendering a correct final judgment. A court, by making an erroneous ruling or order in a cause, is not thereby

prevented from afterwards rendering a correct order or judgment; and the party in whose favor such error was committed cannot successfully urge a reversal of a correct final judgment on the ground that it is contrary to the erroneous order previously made. The doctrines of collateral attack and res adjudicata have no application to such a case. No error having been committed against appellant, the judgment is affirmed.

EQUITABLE LOAN & INVESTMENT ASS'N v. PEED et al.¹

(Supreme Court of Indiana. Dec. 21, 1898.)

FOREIGN BUILDING AND LOAN ASSOCIATION—RIGHT
TO DO BUSINESS—FAILURE TO COMPLY WITH
STATUTORY PREREQUISITES—USURY.

1. The receiving by a foreign building and loan association of payments on stock loans made before the enactment of Rev. St. 1894, § 4464 et seq. (Horner's Rev. St. 1897, § 3420 et seq.; Acts 1893, p. 274), regulating such companies, is "doing business," within the prohibition of such act against doing business without compliance with its terms.

2. Under Rev. St. 1894, § 4464 et seq. (Horner's Rev. St. 1897, § 3420 et seq.; Acts 1893, p. 274), prohibiting foreign building and loan associations from doing business in the state without complying with its terms, and obtaining a license, but providing that on revocation of such license the association may receive payments on stock loans previously made, an association which has lawfully made stock loans in the state before the passage of the act may receive payments thereon, though it has not complied with the terms of the act so that it can continue business.

3. Such association cannot, however, enforce payment of such loans; the act providing that no foreign association can enforce any indebtedness in the state without compliance with its terms.

4. A mortgage given to a foreign building and loan association before the passage of Rev. St. 1894, § 4464, et seq. (Horner's Rev. St. 1897, § 3420 et seq.; Acts 1893, p. 274), will not be canceled because the association is disabled from enforcing it by failure to comply with the terms of such act, since the debt is not affected by such disability, and may be enforced at any time on compliance with the statutory requirements.

5. Where the members of a building and loan association are partners, sharing the losses and gains, premiums on stock loans to a member, though exceeding legal interest, are not usurious.

Appeal from circuit court, Madison county; John F. McClure, Judge.

Action by Olivia J. Peed and another against the Equitable Loan & Investment Association. Demurrers to the complaint were overruled, a demurrer to the answer was sustained, a motion by defendant to modify the judgment thereupon entered was denied, and defendant appeals. Reversed.

Griffin & Broadbent and Wm. H. Beaver, for appellant. O. A. Armfield and Perry Behymer, for appellees.

HOWARD, J. The appellees, by their five paragraphs of complaint, sought—First, to quiet title to certain real estate; second, to

recover a statutory penalty for failure to satisfy of record a mortgage on said real estate; third, to have said mortgage satisfied by reason of payment of the debt thereby secured; fourth, to have the mortgage canceled for the reason that the appellee Olivia J. Peed is a married woman, and the debt secured by the mortgage was for money borrowed by her husband and co-appellee, James L. Peed; and, fifth, to have the mortgage satisfied because appellees have paid on the debt an amount exceeding the principal sum borrowed and 6 per cent. interest thereon, and because appellant is a building and loan association incorporated under the laws of the state of Illinois, and has not complied with the act of May 18, 1893, relating to such foreign building and loan associations (Acts 1893, p. 274; section 4464 et seq., Rev. St. 1894; section 3420 et seq., Horner's Rev. St. 1897), whereby the contract is usurious and the debt paid. In a special answer, the appellant set out the fact of its incorporation as a building and loan association under the statutes of the state of Illinois; the loan made to appellees by it as such association, with contract as to payment, and mortgage to secure the same,—showing payments made substantially as set out in the complaint, and showing, also, compliance with the act of May 6, 1853, authorizing foreign corporations to do business in this state. Section 3453 et seq., Rev. St. 1894. As exhibits to the answer were set out appellees' bond, or promissory note, and mortgage, with statement of payments made; also, authority of appellant's local agent, under act of May 6, 1853, supra, together with copies of constitution and by-laws of the association.

It is assigned as error that the court overruled a demurrer to each paragraph of the complaint, and sustained a demurrer to the answer; also, that a motion to modify the judgment was overruled. Under these assignments, many questions are discussed, as to misjoinder of parties, release of mortgages, rights of married women, agency, usury, the nature, purpose, and privileges of building and loan associations, etc. We are of opinion, however, that the action of the court in overruling the demurrer to the fifth paragraph of the complaint, and in sustaining the demurrer to the answer, presents the controlling question for consideration; that is, whether the appellant, a foreign building and loan association, has any right, as such association, to do business in the state of Indiana. These rulings of the court, as said in appellant's brief, "present the question about which all parties are most interested," namely, as to the validity of appellant's claim, as a building and loan association, against appellees, as stockholders and borrowers of such association.

From the fifth paragraph of the complaint it is shown that on April 15, 1892, appellees executed to appellant the mortgage in ques-

¹ Superseded by opinion, 54 N. E. 1096.

tion, to secure the payment of \$300, evidenced by their promissory note, and payable in monthly installments of \$7.04 each, to be divided and applied as follows: Dues, \$2.75; interest, \$1.50; premium, \$2.79; that appellant was then, and is now, a foreign building and loan association, organized under the laws of the state of Illinois; that prior to said date the appellant had not, nor has it at any time since, complied with the laws of the state of Indiana relating to foreign building, loan-fund, and saving associations, as prescribed and required by the act in force May 18, 1893; that, since the execution and delivery to appellant of said note and mortgage, appellees have paid upon said indebtedness \$434.15, being the whole of the principal, with more than 6 per cent. interest thereon; that appellees have at divers times requested appellant to release said mortgage of record, but appellant did refuse and still refuses to release the same, which mortgage is a cloud on appellees' title to their said real estate. Prayer that the note and mortgage be declared usurious and void, and be found fully paid, and ordered satisfied of record, and that appellees have judgment and all other proper relief. In the answer the facts are averred substantially as alleged in the complaint, except that the amount paid on appellees' debt is stated to be \$425.15, and there is no statement as to any compliance by appellant with the laws of Indiana in relation to foreign building and loan associations; but it is averred that appellant complied with the general act of May 6, 1853, *supra*, providing in what manner foreign corporations should be authorized to do business in this state. It thus appears that the appellant has complied with the statute authorizing foreign corporations to do business in this state, but has not complied with the statute providing on what terms foreign building and loan associations may do business here. The latter act went into force May 18, 1893. In section 1 it is provided, among other things, "that it shall be unlawful for any corporation, association or society, organized under the laws of any state (other than the state of Indiana), or of any government foreign to the government of the United States, to conduct or engage in the business of a building, loan-fund, savings or investment association * * * without having first filed in the office of the auditor of state a statement," etc. In addition to such statement, it is required, in section 2, that such foreign building and loan association shall file with the auditor of state "a copy of its act of incorporation, properly authenticated by the officer of the state in which said foreign corporation, association or society is incorporated, a copy of the by-laws and rules governing it, and of each of the several kinds of certificates issued to its shareholders or stockholders." In section 3 provision is made that "every such foreign corporation, association or society doing busi-

ness in this state shall conduct the same in accordance with the laws of this state governing domestic associations. It shall also deposit with the auditor of state \$100,000, either in cash or bonds of the United States, or of any state of the United States, or any county or municipal corporation in the state of Indiana, satisfactory to the auditor, or in lieu of any such deposit, any such foreign corporation, association or society, shall file with the auditor of state a written contract or bond executed by a responsible surety and guaranty corporation or company to the approval of the auditor of state. * * * And such foreign corporation, association or society, shall not be entitled to enforce by legal proceedings any evidence of indebtedness against any citizen or citizens in this state or any mortgage against any property in this state until such requirement has been so complied with." At the date of appellees' mortgage, April 15, 1892, the foregoing statute in relation to foreign building and loan associations was not in force; but some time during the year 1892, and prior to the enactment of that statute, appellant did comply with the provisions of the general statute then in force, in relation to foreign corporations doing business in this state. No reason, therefore, appears why the business done by appellant in this state up to the date of the enactment of our present statute in relation to foreign building and loan associations, May 18, 1893, including the making of the loan to appellees, and the taking of the mortgage to secure the same, should not be considered lawful. By the act of 1893, however, it became unlawful for appellant to continue to do business in the state without complying with the terms of the statute then enacted. This appellant does not deny, but expressly concedes, saying, "What we do concede, unreservedly, is that after the law of 1893 went into force this appellant had no further right to do business." It is argued, however, that the receiving of payments on amounts borrowed on stock, including "dues, interest, premium, and penalties," was not "doing business," within the meaning of the act of 1893. With this contention we cannot agree. The payments of "premiums and penalties," at least, were made to appellant, not as a creditor, simply, but as a building and loan association, and the collection of such payments was "doing business" within this state. So, also, would be an attempt, by foreclosure or otherwise, to collect such premiums and penalties. But it is not clear that the receiving of such payments, when voluntarily made, is not permitted by the act itself. It is true that no such payments could be enforced since the act of 1893 went into effect, unless by compliance with the terms of the act; for it is provided in section 3, as we have seen, that, until the requirements of the act have been complied with, such corporation "shall not be entitled to enforce by

legal proceedings any evidence of indebtedness against any citizen or citizens in this state." But in section 4 of the act it is provided that if, on compliance with the act, the auditor shall issue a license to such foreign corporation to do business in this state, and if thereafter, for good cause, the license is revoked, and notice of such revocation is given, "it shall be unlawful for any agent of such foreign corporation, association or society to receive further stock deposits from members residing in this state, except payments on stock on which a loan has been made." Now, if it be thus made lawful to receive payment on stock of borrowers after a license to do business has been revoked, it would seem clear that the legislature intended that, if a loan upon stock were lawfully made in any case, then payments might be received on such loan. The loan in this case, as we have seen, was lawfully made,—being made in compliance with the statute then in force; and we think, under the foregoing exception in section 4 of the act, payments on such loan might lawfully be received. No such payments, however, as also expressly provided, could be enforced until the corporation had complied with the requirements of the statute. Indeed, it is only by the comity between the states that the corporation could collect even its principal debt, with lawful interest. *Guarantee Co. v. Cox*, 148 Ind. 107, 42 N. E. 915, and 44 N. E. 932.

In the answer, appellant, while admitting the payment by appellees of an amount in excess of the principal debt and 6 per cent. interest, yet contends that there is still due, on account of unpaid premium and penalties, under its constitution and by-laws, as a foreign building and loan association, the further sum of \$121.88; and it asks the protection of its mortgage lien to the amount of such claim, "and for costs and all other proper relief." Appellant thus, by way of cross complaint, and without having complied with statutes of the state, seeks the aid of the court for the enforcement of its rights, and the collection of its claim as a foreign building and loan association. This the act in question expressly forbids. The demurrer to the answer was therefore properly sustained.

We are of opinion, however, that the complaint does not state a cause of action to quiet title, or for the cancellation or discharge of the mortgage. In loaning the money to appellees, and in taking the note and mortgage securing the same, appellant proceeded under the statutes of Indiana then in force, permitting all foreign corporations (including then, of course, also all foreign building and loan associations) to do business in this state. While the act of 1893 makes it unlawful for appellant to continue to do such building and loan business in this state without complying with the requirements of that act, yet it provides expressly that the penalty for such failure to comply with the provisions of the law shall be that "such foreign corporation, asso-

ciation or society shall not be entitled to enforce by legal proceedings any evidence of indebtedness against any citizen or citizens in this state or any mortgage against any property in this state until such requirement has been complied with." This provision will effectually prevent appellant from collecting the balance of \$121.88 claimed to be due by reason of its building and loan contract until it has first complied with the requirements of the statute, but appellees are not thereby given the right to a decree to quiet their title to, or release the mortgage on, their real estate. Appellant may comply with the provisions of the act of 1893, and then proceed to enforce its claim against appellees. The statute affects the remedy as to collection of the debt, not the debt itself.

Neither is the complaint good as showing a right to recover by reason of usurious interest paid to appellant under the name of "premium." The complaint does not show that the stockholders are not mutual members or partners in the association. It does not show that all premiums and other payments do not go mutually to the benefit of each stockholder; that is, it is not shown that the stockholders, including appellees, are not, in effect, partners, sharing alike in profits and losses. If all the stockholders are in fact partners, sharing equally in the gains and losses, then each one partakes, pro rata, in the benefit of all payments made by each of the association. It has frequently been held that such equal distribution to all stockholders of amounts paid in from all sources, whether by way of premiums or otherwise, does not constitute the collection of usurious interest. *Silver v. Barnes*, 6 Bing. N. C. 180; *Delano v. Wild*, 6 Allen, 1; *Association v. Thomson*, 52 Ga. 427. See, also, *McLaughlin v. Association*, 62 Ind. 284. Whether it would be different in case all stock did not share equally in all income and outgo, we need not say, as the complaint does not present such a case. Under the laws of this state, consequently, the complaint does not show the contract to be usurious. Whether such contract is an Indiana contract or an Illinois contract, and, if the latter, whether it is usurious under the laws of that state, we need not say, as no such questions arise under appellees' complaint, and none such are discussed in their brief. Judgment reversed, with instructions to sustain the demurrer to the complaint.

(152 Ind. 620)

WARING et al. v. FLETCHER et al.¹

(Supreme Court of Indiana. Dec. 16, 1898.)

ATTACHMENT BONDS — CONSTRUCTION — RIGHT OF RECOVERY — WRONGFUL APPEAL.

1. Though a defective undertaking in attachment may, under *Burns' Rev. St. 1894*, § 1235 (*Horner's Rev. St. 1897*, § 1221), be amended, such an undertaking is, if not defective, to be strictly construed in favor of the obligors.

2. A condition in an undertaking in attachment to duly prosecute the proceeding does not

¹ Rehearing denied.

require the prosecution to be diligent or without delay.

3. The grounds of attachment set out in the affidavit are not thereby conclusively established, but, if put in issue, must be established by plaintiff by a preponderance of evidence.

4. Failure to sustain attachment proceedings is conclusive that they were wrongful and oppressive, while recovery by plaintiff in such proceedings is conclusive that they were rightful; hence, if plaintiff recovers final judgment in the attachment proceedings, no action lies on the undertaking.

5. Failure of plaintiff in attachment to file a new affidavit and undertaking on adding a new cause of action to the complaint cannot be raised, in an action on the undertaking, after final judgment sustaining the attachment as to such new cause of action.

6. Obligor in an undertaking in attachment conditioned that the proceeding should not be wrongful or oppressive are not liable where the proceeding was wrongful and oppressive in part.

7. Where an attachment was sustained as to part of the amount claimed, and plaintiff appealed from the disallowance of the balance, and oppressively delayed the hearing of the appeal, defendant cannot recover on the undertaking for such oppressive conduct of the proceeding, where the judgment sustaining the attachment in part was affirmed.

8. An appeal by plaintiff, with an ordinary appeal bond, from a judgment sustaining an attachment in part only, does not stay the discharge of that part of the amount attached as to which the attachment was vacated; and hence, if the judgment appealed from is affirmed, defendant cannot recover on the undertaking in attachment, on the ground that appeal was wrongful and oppressive.

9. Burns' Rev. St. 1894, § 650 (Horner's Rev. St. 1897, § 638), relating to appeal bonds in actions "for the recovery of real property or the possession thereof," and "for the recovery or return of personal property," has no application to appeals in attachment or garnishment proceedings.

10. An averment in an action on the undertaking in attachment, for an oppressive appeal by plaintiff from a judgment sustaining the attachment in part only, that the payment of the money covered by so much of the attachment as was vacated was suspended by the appeal, without averring the giving of a special supersedeas, which alone would suspend the same, is insufficient.

11. The mere fact that the property covered by the part of the attachment which was vacated was not in fact released pending the appeal does not estop plaintiff to contend that the appeal bond was insufficient to hold the same.

Appeal from circuit court, Marion county; Edgar A. Brown, Judge.

Action by Henry Waring and others against Stoughton J. Fletcher and others. There was judgment for defendants on demurrer sustained to the complaint, and plaintiffs appeal. Affirmed.

McNutt & McNutt, for appellants. Ferdinand Winter, for appellees.

MCCABE, J. Appellants brought this action against appellees on an undertaking in attachment. Appellees' demurrer to each paragraph of the amended complaint was sustained, and, appellants refusing to plead further, judgment was rendered against them on demurrer. The errors assigned call in question the action of the court in sustaining said demurrer. It ap-

pears from the complaint that on January 8, 1887, Fletcher & Co. sued Waring Bros., of London, England, in the Vigo superior court, to recover \$35,000, the proceeds of the sale of certain railroad rolling stock. Affidavits in attachment and garnishment and the undertaking sued upon were filed. It was alleged in the affidavit in attachment that the Warings were indebted to Fletcher & Co. in the sum of \$35,000, as stated in the complaint, and that the claim was just, and that the plaintiff ought to recover \$35,000, and that the Warings were nonresidents of the state. The writ of attachment was returned "No property found." The persons served with the garnishee summons filed an answer admitting that they owed the Warings \$50,000. Said complaint was from time to time amended; and afterwards, on April 30, 1888, a sixth paragraph of complaint was filed in said action, to recover on a claim which was in no manner embraced in the complaint filed in the beginning, when the attachment proceedings were instituted. No new affidavit in attachment or garnishment was filed upon said sixth paragraph, nor was any writ of attachment or garnishment taken out or issued when or after said sixth paragraph was filed. Afterwards, on July 22, 1889, the case was tried; and the court found for the plaintiffs in said action, and against Waring Bros., in the sum of \$2,783, on the claim sued upon in said sixth paragraph, and said sum was ordered to be paid by the garnishee defendants out of said \$50,000. As to the causes of action for the \$35,000, set forth in the other paragraphs of the complaint, the court found for Waring Bros., the defendants. The plaintiffs in said action, Fletcher & Co., filed a motion for a new trial, which was overruled; and they prayed an appeal to this court, and filed their appeal bond. In this court they assigned as the sole error the overruling of the motion for a new trial. Afterwards, on March 4, 1894, the judgment of the court below was affirmed. *Fletcher v. Waring*, 137 Ind. 159, 36 N. E. 896.

It is alleged that the plaintiffs in said attachment proceeding did not duly prosecute said proceeding, but delayed upon various pretexts the due prosecution thereof; that they sued out said attachment upon false and fictitious claims, and by trivial amendments of their paragraphs of the complaint predicated upon such fictitious claims, and by filing from time to time additional paragraphs to said original complaint, setting up other additional false, groundless, and fictitious claims, caused the repeated postponement of said cause and proceeding; that they delayed the trial for more than one year after the filing of said sixth paragraph of complaint, which alone, of all the seven paragraphs of complaint, contained any valid, just, and honest claim and cause of action as against the said Warings; that after the rendition of the final judgment,

on July 22, 1889, and the appeal was perfected to this court, the attention of said attachment plaintiffs (who were appellants in said appeal) was called to the fact that no exception had been reserved to the action of the trial court in overruling their motion for a new trial; but they still continued to insist upon said appeal, and delayed the hearing and the determination thereof by divers groundless proceedings to amend the record of the trial court so as to show an exception to the action of said court in overruling the motion for a new trial, and, failing in that, they insisted upon trivial and theretofore unheard-of and unprecedented and wholly untenable doctrines and rules of practice, because whereof two oral arguments became necessary, the personnel of said court having been changed during the repeated and continuous delays of said hearing by said appellants, so that said cause was not determined until March 27, 1894, more than four years after said appeal was taken, when said court held that said appellants' assignment of error presented no question, because no exception had been taken to the action of the trial court in overruling the motion for a new trial, and the judgment of the trial court was affirmed; that said proceedings in attachment and garnishment were wrongful and oppressive, in this: that the claims for \$35,000, upon which the writs of attachment and garnishment were issued, were false, fictitious, and wholly without merit; that, notwithstanding such fact, the plaintiffs in that proceeding demanded and procured, by means of said proceedings, the sum of \$50,000 of the money of said Warnings to be tied up in the hands of the garnishees, and obliged and compelled said Warnings to incur, in order to protect said funds against said illegal and groundless claims of said plaintiffs in said action, large expenses in counsel fees, in taking depositions, and in paying other numerous expenses of their agents and counsel in and about the proper defense of said cause, amounting in all to more than \$10,000; that the seizure of \$50,000 to secure a claim of \$2,783 was wrongful and oppressive; that, by said wrong and oppression, the Warnings were kept out of the use of \$48,500 of their money for the period of seven years and a half, and the reasonable cost and income of said money was \$20,000. The amended complaint was in four paragraphs. The first and third paragraphs allege breaches of both conditions of the bond, to wit, to duly prosecute the proceedings in attachment, and to pay all damages which should be sustained if the proceedings of plaintiffs should be wrongful or oppressive. The second and fourth paragraphs allege only a breach of the last-named condition.

The theory of appellants is that on account of the failure of the plaintiffs in the proceedings in attachment to sustain their claim for \$35,000, and procure an order against the garnishees to pay the same, they have the

right to recover on the undertaking in attachment, notwithstanding the plaintiffs in said proceeding recovered judgment on the sixth paragraph of complaint for \$2,783, and an order against the garnishees to pay the same, and that they not only have the right to recover for the attorney's fees and other expenses in the trial court, and for the loss of the use of the money during the time the proceeding was pending in the trial court, but also for the same expenses in the supreme court, and for being deprived of the use of the money during the time the case was pending on appeal in this court. The general rule that an undertaking in attachment is to be strictly construed in favor of the obligors has only been modified by section 1235, Burns' Rev. St. 1894 (section 1221, Horner's Rev. St. 1897), to the extent that the bond if defective, on a suggestion of such defect, is to be read, construed, and enforced the same as if it contained all the conditions and provisions required by the statute. But where the omissions, if any, in a bond, are so supplied, the bond so read is *strictissimi juris*. The undertaking in attachment in this case is not defective, but contains all the provisions required by the statute, and the same is to be strictly construed in favor of the appellees, the obligors, the same as a bond containing such provisions would be in the absence of said statute. *City of Lafayette v. James*, 92 Ind. 240, 243, 244; *Burns v. Manufacturing Co.*, 87 Ind. 541, 548; *Faulkner v. Brigel*, 101 Ind. 329, 332, 333; *Irwin v. Kilburn*, 104 Ind. 113, 115, 3 N. E. 650. The condition of the undertaking in attachment, to duly prosecute the proceedings in attachment, is simply a condition to prosecute the attachment proceedings to a final judgment. Applying the rule of strict construction, such condition is not the same as a condition to prosecute without delay or to diligently prosecute. *Sannes v. Ross*, 105 Ind. 558, 561, 5 N. E. 699. In this state the grounds for attachments set forth in the affidavit in attachment are not, as in some states, thereby established or taken as conclusive against the attachment defendant, but the same may be put in issue, and, to sustain the attachment proceedings, the plaintiff must establish one or more of the grounds for attachment set out in the affidavit by a preponderance of the evidence. *McGuirk v. Cummings*, 54 Ind. 246; *Fork Co. v. Lukens*, 38 Ind. 438; *Foster v. Dryfus*, 16 Ind. 158. Under this rule, if the plaintiff fails to sustain his proceedings in attachment, although he may recover judgment in the main action, he is concluded from saying that the proceedings in attachment were not wrongful and oppressive; and, on the other hand, if he recovers judgment upon the proceedings in attachment, as well as in the main action, the defendant is concluded thereby. In the case first stated, the effect of the judgment is that the proceedings in attachment were rightful, and, in the second

case, that they were wrongful and oppressive; and in each case the parties therein are conclusively bound thereby so long as the same remains in force. *Trentman v. Wiley*, 85 Ind. 33, 35; *Mitchell v. Mattingly*, 1 Metc. (Ky.) 237; *Nolle v. Thompson*, 3 Metc. (Ky.) 121; *Boatwright v. Stewart*, 37 Ark. 614; *Crandall v. Rickley*, 25 Minn. 119; *Pixley v. Reed*, 26 Minn. 80, 1 N. W. 800; *Drake, Attachm.* (7th Ed.) § 173, on page 158; *Wap. Attachm.* (2d Ed.) § 1023; 1 Shinn, *Attachm.* pp. 313, 333; 3 Enc. Pl. & Prac. 651, 652. No action can be sustained on an undertaking in attachment in this state, therefore, if final judgment is rendered in favor of the plaintiff on the proceedings in attachment. *Hoshaw v. Hoshaw*, 8 Blackf. 258; *Trentman v. Wiley*, 85 Ind. 35; *Mitchell v. Mattingly*, supra; *Nolle v. Thompson*, supra; *Boatwright v. Stewart*, supra; *Tucker v. Adams*, 52 Ala. 254; *Crandall v. Rickley*, supra; *Pixley v. Reed*, supra; *Eckman v. Hammond*, 27 Neb. 611, 43 N. W. 397; *Kramer v. Light Co.*, 95 N. C. 277; *Sloan v. McCracken*, 17 Lea, 626; *Drake, Attachm.* (7th Ed.) § 173, on page 158; *Wap. Attachm.* (2d Ed.) § 1023; 1 Shinn, *Attachm.* pp. 313, 333; 3 Enc. Pl. & Prac. 651, 652; 2 Am. & Eng. Enc. Law (1st Ed.) § 466.

If it was necessary to file a new affidavit in attachment and garnishment, and a new undertaking in attachment, when the sixth paragraph of amended complaint was filed, in order to give the attachment plaintiffs the same lien and right against the funds therein garnished that they had as to the claims sued upon in the original complaint when the writs were served, which we need not and do not decide, yet when the trial court, without such affidavit and undertaking being filed, made the finding sustaining the attachment and garnishment as to said sixth paragraph, and rendered judgment thereon accordingly, appellants were concluded thereby, and cannot now call in question the correctness of said proceeding and judgment. *Wap. Attachm.* § 1023, and the authorities above cited. It is not material in this case whether or not the court erred in finding against the Warings on the proceedings in attachment, and rendering judgment that the garnishees pay the judgment of \$2,787, recovered against the Warings on the sixth paragraph of the amended complaint, because such judgment, even if erroneous, is binding upon appellants, who were the attachment defendants in said action, until vacated or set aside. The court, having adjudged that this was a debt for which the writ of attachment and garnishment issued, and rendered judgment against the attachment defendants, and ordered the garnishees to pay the same, found and adjudged thereby that the attachment proceedings were rightful, and not wrongful, and said appellants are concluded thereby from asserting the contrary. The provisions of the undertaking in attachment do not, by their terms, include a case where the proceedings in attachment are wrongful and oppressive in

part; and, under the rule of construction applicable to such bonds, we cannot extend the language so as to embrace such a case. To do so would be to impose upon the persons executing such an undertaking a condition beyond the language used therein. As was said in *Marx v. Leinkauff*, 93 Ala. 453, at page 464, 9 South. 820: "The suing out of an attachment cannot be both wrongful and rightful at the same time, or pro tanto wrong. If the suing out of the attachment was not wholly wrongful, plaintiff could not recover for a wrongful suing out of the attachment." See, also, *Sheldon v. Sabin*, 17 N. Y. Wkly. Dig. 105, 106. *Stiff v. Fisher*, 85 Tex. 556, 22 S. W. 577, is cited as holding the contrary doctrine, but we are unable to determine from the report of the case that it was an action on an attachment bond, or that any judgment had been rendered sustaining the attachment proceedings. It would seem that in Texas, as in some other states, there is no trial in the attachment proceedings of the question of whether the grounds of attachment exist; but such grounds are taken as true in the trial of the attachment proceedings, and in an action on the attachment bond the untruth of the grounds upon which the attachment writ was issued must be shown. If such is the rule, the case cited would not be in point here. But if the law is there as here as to conclusiveness of the judgment in the attachment proceeding, and that was an action on the bond, we cannot follow it, because under such conditions it is not sustained by the authorities, and does not meet our approval. It was held in *Bank v. Jeffries*, 73 Ala. 183, 192, that if there is an abuse of process in the execution of the attachment, and the proceedings in attachment were sustained, such an abuse would be a wrong for which no redress could be obtained by a suit on the undertaking in attachment. But, if damages could be recovered in such case on the undertaking or otherwise for suing out the writ for an amount largely in excess of the actual debt where the proceedings in attachment have been sustained, it must be alleged and proven that the same was done maliciously and without probable cause. *Savage v. Brewer*, 16 Pick. 453; *Mody v. Deutsch*, 85 Mo. 237; *Tucker v. Adams*, 52 Ala. 254, 256, and cases cited; *Eslava v. Jones*, 83 Ala. 139, 3 South. 317; *Benson v. McCoy*, 36 Ala. 710; *Whipple v. Fuller*, 11 Conn. 583, 584; *Emerson v. Cochran*, 111 Pa. St. 619, 622, 4 Atl. 498, and cases cited; *Eberly v. Rupp*, 90 Pa. St. 259; *Antcliff v. June*, 81 Mich. 477, 45 N. W. 1019; *Nix v. Goodhill*, 95 Iowa, 282, 63 N. W. 701; note to *Pope v. Pollock* (Ohio Sup.) 4 Lawy. Rep. Ann., on page 256 (s. c. 21 N. E. 356); *Doctor v. Riedel* (Wis.) 71 N. W. 119; *Juchter v. Boehm*, 67 Ga. 534, 538; *Hill. Torts* (4th Ed.) 456. The complaint contains no such allegation.

It is insisted by appellants that, under the facts alleged in the complaint, the proceeding in the supreme court was wholly wrongful and oppressive, and that they are entitled to re-

cover the damage therefor on the undertaking in attachment. It may be true, as contended by appellants, that when the finding and judgment of the trial court are against the defendant in the main action, and also in the proceedings in attachment, and on appeal by said defendant said judgment is reversed, and on return of the cause to the trial court final judgment is rendered on the attachment proceedings in favor of the defendant thereto, the undertaking in attachment would cover the damages on appeal as well as in the trial court; but it does not follow therefrom that appellants are entitled to recover on the undertaking in attachment in this case, if the proceedings on appeal are wrongful and oppressive. The judgment of the trial court against appellants on the proceedings in attachment was not reversed on appeal, but was affirmed; and the final judgment in said case was that of the trial court appealed from, which was against appellants on the proceedings in attachment. *State v. Krug*, 94 Ind. 366, 371, and cases cited. It is evident, therefore, that there is no liability on the undertaking in attachment even if the proceeding on appeal was wrongful and oppressive. Moreover, when the judgment for \$2,783 was rendered by the trial court against the Waring, and the garnishees ordered to pay the same, all of the sum garnished was released and discharged thereby, except an amount sufficient to pay said judgment and costs. Appellants were entitled to receive the same from the garnishees at once, if the same was due. *Lowry v. McGee*, 75 Ind. 508, 510, and cases cited; *Smith v. Scott*, 86 Ind. 348, 350; *Sannes v. Ross*, 105 Ind. 558, 560, 5 N. E. 699; *Emery v. Royal*, 117 Ind. 299, 20 N. E. 150.

In this state an appeal to the supreme or appellate court without filing an appeal bond does not, as in some states, suspend the judgment from which the appeal is taken; nor does the filing of an appeal bond suspend the operation of such judgment, except that it stays execution thereon. For all other purposes, the judgment appealed from, even if an appeal bond is filed, is as effective and binding upon the parties as if no appeal had been taken. *Nill v. Comparet*, 16 Ind. 107; *Burton v. Reeds*, 20 Ind. 87; *Burton v. Burton*, 28 Ind. 342; *Walls v. Palmer*, 64 Ind. 493; *State v. Chase*, 41 Ind. 356; *Randles v. Randles*, 67 Ind. 434, 437-440; *State v. Krug*, 94 Ind. 371, and cases cited; *Central Union Tel. Co. v. State*, 110 Ind. 203, 10 N. E. 922, and 12 N. E. 136, and cases cited. In *State v. Chase*, supra, a temporary injunction had been awarded against Mathews, at the suit of Duncan. From this order, Mathews appealed to this court, and filed his appeal bond within the time allowed by law; and, while said appeal was pending, Mathews violated said temporary injunction, by doing the things forbidden thereby. He was thereupon arrested and punished for contempt of court, and this court held that the order for the injunction remained in full force and effect notwithstanding

said appeal, and that Mathews was properly punished for violating the same. *Central Union Tel. Co. v. State*, supra, is to the same effect. In *Walls v. Palmer*, supra, it was held that one who had by the judgment of a court been suspended from practicing his profession as attorney at law, and had appealed from said judgment to this court, and filed his appeal bond, and otherwise perfected his appeal, was not entitled to practice his profession in said court during the pendency of said appeal. The court, in speaking of the effect of the appeal and appeal bond, said: "It does not reverse, suspend, or supersede the force of the judgment. That remains in all respects the same. The judgment itself requires no further execution than its own terms. It executes itself, except as to the collection of costs, which is stayed by the appeal and supersedeas. The only effect of an appeal to a court of error is to stay execution upon the judgment from which it is taken." In *Randles v. Randles*, supra, it was held that one to whom land has been set off by a decree of partition may recover possession thereof from a co-party in such partition suit during the pendency of an appeal taken by such co-party from such decree to this court, even though an appeal bond has been filed. The court, at page 439, said: "The final judgment in a partition suit, in so far as it awards to each of the parties interested his or her share in severalty of the real estate in controversy, is self-executing. It requires no execution to enforce the terms of the judgment, but the rights of the parties in severalty are thereby fixed and absolutely determined, without process thereon of any kind, unless and until the judgment shall be reversed or set aside. It is very clear, therefore, that the appeal of the appellant and his co-appellants in the partition suit, from the judgment of the circuit court therein to this court, although such appeal had been duly perfected by the filing of the required bond, did not in any manner affect or change the rights in severalty of the parties to such suit in and to the lands assigned to them, respectively, by the terms of such judgment; but, notwithstanding such perfected appeal, each of the parties to such suit, as between him or her and the other parties, owned and held the lands assigned to him or her in severalty in and by such judgment, until the same should be reversed or annulled. In other words, it seems to us that the only effect of the filing of the appeal bond on the appeal to this court from the judgment of the circuit court in the partition suit was to stay the execution upon the judgment for costs of such suit until such appeal was determined; that in all other respects the judgment, until annulled or reversed, was binding upon the parties thereto as to every question directly decided therein." So, in the attachment case the effect of the judgment was to release and discharge all of the indebtedness garnished, except sufficient to pay the judgment for \$2,783 and costs, and no execution or other writ was necessary to ef-

fect such release and discharge; as to this, the judgment executed itself. *Thomas v. Johnson*, 137 Ind. 244, 36 N. E. 893. An appeal by an attachment plaintiff from such a judgment, with the ordinary appeal bond, no matter how large the penalty thereof, conditioned as required by the statute for such bond, could not therefore suspend the operation of said judgment so far as it had the effect to release and discharge the indebtedness in excess of the amount required to pay the judgment and costs. This could only be done, if at all, by a special supersedeas, when a proper bond was filed as provided in such writ or order. The facts alleged in the complaint, however, do not show that any such supersedeas was issued or bond filed.

It is alleged in the complaint that the payment of the money to the Warings was prevented by the filing of the appeal bond. This, however, is a mere conclusion. The facts, from which the conclusion was drawn should have been averred, and from such facts the court would determine whether or not the bond had the legal effect alleged, for there is no presumption that the bond filed was not the ordinary appeal bond provided for by either section 650, Burns' Rev. St. 1894 (section 638, Horner's Rev. St. 1897), or sections 653, 654, Burns' Rev. St. 1894 (sections 641, 642, Horner's Rev. St. 1897). A part of section 650 (638), *supra*, reads as follows: "And if the appeal is taken from a judgment for the recovery of real property, or the possession thereof by the party against whom the judgment for the recovery is rendered, then the condition of the bond shall further provide that the appellant shall also pay all damages which may be sustained by the appellee for the mesne profits, waste or damage to the land during the pendency of the appeal, and if from a judgment for the recovery or return of personal property or for such property or its value, then, that if he deliver or return the property he will also pay the reasonable value of its use and any damage it may sustain during the pending of an appeal." It is claimed by appellants that the appeal bond required thereby was sufficient to hold the funds garnished during the appeal without a special supersedeas. The part of said section above quoted has reference alone to bonds executed when an "appeal is taken from a judgment for the recovery of real property or the possession thereof," or for "the recovery or return of personal property." This is the express language of the part of said section quoted, and it needs no interpretation; the mere reading is sufficient to show that it can have no application whatever to an appeal from a judgment in a proceeding in attachment or garnishment. It is manifest that, notwithstanding the appeal from the judgment rendered by the Vigo superior court and the bond filed therein, the effect of the judgment in releasing and discharging the attachment and garnishment as to the indebtedness in excess of the amount required to pay the

same was not suspended, and appellants were entitled to receive said excess from the persons owing the same at all times after the rendition of judgment by the trial court.

Appellants insist that as the appeal bond accomplished its purpose, and the money was held during the pendency of the appeal, appellees cannot deny that it was sufficient to hold the money while the appeal was pending in this court. This alone is not sufficient to entitle appellants to successfully invoke the doctrine of estoppel. The appeal bond, however, as we have shown, did not hold the money or restrain the garnishees from paying the same to the Warings. If the garnishees retained the money in excess of the amount necessary to pay the judgment and order against them, it was not because appellants were not entitled to collect the same, but because they failed to enforce their rights. If there are any facts which would estop the obligors in the appeal bond from asserting that the same did not prevent appellants from enforcing payment by the garnishees, they have not been set forth in the complaint. The time to determine the question of estoppel suggested will be when it is presented in an action on the appeal bond.

It follows from what we have said, and from the authorities cited, that when the trial court sustained the proceeding in attachment, and rendered judgment for a part of the amount sued for, and that the same should be paid by the garnishee defendants, although the sum was much less than the amount which the attachment plaintiffs stated in their affidavit in attachment that they "believed they ought to recover," this concluded appellants from claiming that any condition of said undertaking in attachment was broken, and from maintaining any action thereon. It may be that, when a party to a judgment prosecutes an appeal to the supreme or appellate court maliciously and without probable cause, an action will lie against him for malicious prosecution, the same as in a civil case so prosecuted in a trial court (*McCardle v. McGinley*, 86 Ind. 538, and cases cited; *Carey v. Sheets*, 67 Ind. 375; *Coffey v. Myers*, 84 Ind. 105; *Lockenour v. Sides*, 57 Ind. 360; 18 Cent. Law J. 242; 32 Alb. Law J. pp. 124, 145); but no such cause of action is stated in the complaint. It is manifest that the remedy, if any, for the alleged wrongs complained of by appellants, is not upon the undertaking in attachment, but must be sought elsewhere. Judgment affirmed.

(151 Ind. 624)

WINSTANDLEY v. BEDFORD STONE-MILL CO.

(Supreme Court of Indiana. Dec. 16, 1898.)

APPEAL AND ERROR—QUESTIONS PRESENTED BY RECORD.

Where a claim of preference filed with a receiver does not show the ground on which the preference is claimed, and the exception to his

report denying the preference refers for the facts to a pleading in the original action, which is not in the record, no issue is shown on which to base a finding, on the hearing of such exception, as to the ground of preference, and the conclusion of law from such finding will not be reviewed.

Appeal from circuit court, Lawrence county; D. M. Alsbaugh, Special Judge.

Claim by Alice M. Winstandley against the Bedford Stone-Mill Company. Claimant's exception to the referee's report was overruled, and she appeals. Affirmed.

S. B. Lowe, for appellant. Chambers, Pickens & Moores, for appellee.

HACKNEY, J. The appellant filed with the receiver of the Bedford Stone-Mill Company a claim for \$1,045.05 against said company, with an allegation "that the said account is due for labor, pay rolls, and money advanced to pay the same, and * * * is a preferred claim." The receiver, in a report of his trust to the court, scheduled the claim for allowance generally and without preference. To this report the appellant filed an exception, for the reason that said claim, "as shown by the original complaint herein," was "a labor and preferred claim," and should be allowed as such. The record recites a hearing upon said exception, and a special finding of facts, with a conclusion of law in favor of the appellee. The questions urged for decision are based upon this conclusion of law.

Many technical questions are suggested as to the manner of presenting the issue in the trial court, as to parties, etc. The exception to the report referred to the complaint upon which the receiver was appointed for the facts entitling her to preference as a creditor of the estate. The complaint is not in the record, and we are not advised by any pleading, except as above quoted, of any ground of preference. The effort is made in this court to sustain the preference by demanding a subrogation to the rights of the laborers whose claims for wages the appellant supplied the funds to the company to pay. If we should look to the findings to ascertain what right of subrogation existed, we should find nothing authorizing the conclusion that the appellant paid claims as a surety, junior lienor, or otherwise in protection of a debt owing by or to her. We would find, however, that, when the appellant loaned to the company moneys to pay the wages of laborers, it was agreed between the appellant and the company that she should hold pay-roll vouchers issued to her for the labor claims paid with said moneys. This agreement is urged as constituting conventional subrogation, upon the theory that, if the laborers held the claims, they would be entitled to preference under the statute (Rev. St. 1894, §§ 7051, 7058; Rev. St. 1881, § 5206), and that this right passed to the appellant. We are unable to evolve this theory out of any issue

presented to the trial court, if we must judge from the record alone. If we look to the exception as defining the issue, we find that it refers for facts to the complaint upon which, we infer, the receiver was appointed; and, that pleading not being in the record, we are unable to consider it. If we look to the claim filed with the receiver, we find no allegation or statement of an agreement upon which to base conventional subrogation. There was therefore no support in the issues for the finding of an agreement for subrogation, if, indeed, it could be said to be sufficient that an agreement was made to issue to her, and permit her to hold "pay-roll vouchers," where, as it was found, the laborers received the pay rolls in full, and made no assignment or other transfer of their claims. See *Jenckes v. Jenckes*, 145 Ind. 624, 44 N. E. 632. The judgment of the circuit court is affirmed.

McFARLAN CARRIAGE CO. v. POTTER.¹

(Supreme Court of Indiana. Dec. 20, 1898.)

MASTER AND SERVANT—ASSUMPTION OF RISK—PROMISE TO REPAIR.

1. Where the master promises to repair a defect, the servant does not assume the risk of injury from such defect by remaining at work with knowledge thereof for a reasonable time to allow such repairs to be made.

2. Where the promise is to repair after the completion of the work on hand, the servant assumes the risk of injury until such time by continuing at work.

Appeal from circuit court, Rush county; John D. Miller, Judge.

Action by William Potter against the McFarlan Carriage Company. A demurrer to the complaint was overruled, and defendant appealed to the appellate court, which transferred the cause to the supreme court with the recommendation that certain decisions of the supreme court should be overruled. Reversed.

Miller & Elam, McKee, Little & Frost, and Smith, Camborn & Smith, for appellant. Conner & McIntosh and Morris, Innis & Morgan, for appellee.

McCABE, J. The appellee recovered judgment against the appellant for a personal injury. The appellant's demurrer to the complaint for want of sufficient facts was overruled. It was shown in the complaint: That the appellant, a private corporation, was engaged in manufacturing carriages. That the appellee, on the 12th of December, 1895, and for six months prior to that date, was an employé of the appellant in its shops. That on that day, and for several days before, the appellee, by order of the appellant, was operating a rip saw in appellant's factory, as its employé. That the table in which the saw was situated, and the saw, at the time of the injury complained of, were defective and out of repair, as follows: that the table

should have been so situated that the top thereof would be level, but the floor on which it stood had given way and sunk down, causing the top of the table to stand in a slanting position; that the slot irons upon the table should have been even with the top of the table, so that the top of the table would have a smooth and even surface, but the slot irons had become raised as much as one-fourth of an inch above the top of the table; that the saw should have stood perpendicular, but its top stood one-fourth of an inch from a perpendicular line. That said defects in the saw and table had existed for several days, and the appellant had full knowledge of said defects. That by reason of said defects the hazards of operating the saw were greatly increased. That on said day, while the appellee was operating the saw, by the orders of the appellant, as its employé, the piece of timber that he was then cutting with the saw was, by reason of said defects in the saw and table, caught by the saw in such manner as to quickly turn said piece of timber, and the piece of timber being thus unexpectedly and quickly turned, the appellee's hand was thereby thrown against the saw, whereby his hand was cut and mangled by the saw to such extent that the hand and the use thereof were entirely and forever destroyed, and he had suffered, and still suffered, great pain from the injury. It was further alleged that the appellant, from time to time before the appellee received said injury, promised him that it would cause the saw and table to be repaired; that appellee had not been operating the saw for several days prior to the happening of said injury; that on the morning of said day the appellant promised the appellee that it would repair said saw and table as soon as the job of work that the appellee was then working on was completed; that the appellee, relying upon said promise, by order of the appellant commenced to operate said saw, and was injured within two hours thereafter, and before said job of work was completed; that the appellee, relying upon said promises to repair the saw and table, and at the request of the appellant, continued to operate the same until he received said injury, believing from day to day that the appellant, in pursuance of its promise, would repair said defects in the saw and table; that at the time he received said injury he was operating the saw with due care, and was free from any fault or negligence on his part; that said injury was occasioned wholly by said defects in said saw and table and the negligence of the appellant; that by reason of said injuries the appellee was damaged in the sum of, etc.; wherefore, etc. The correctness of the ruling on the demurrer is called in question by the assignment of errors. This appeal was taken to the appellate court, where the jurisdiction thereof primarily belonged, the amount of the judgment being only \$2,000.

Rev. St. 1894, § 1336 (Horner's Rev. St. 1897, § 662a). Section 25 of the appellate court act provides: "That in any case pending in the appellate court, in which said appellate court shall conclude that any decision of the supreme court should be overruled or modified, it shall be their duty to transfer said cause with their opinion of what the law should be held to be, to the supreme court, and the supreme court shall thereupon have jurisdiction of and decide the entire case, the same as if it had original jurisdiction thereof and it may either modify, overrule or affirm its former decision on that question as it shall deem right." Rev. St. 1894, § 1362; Acts 1893, p. 29. Under this provision the appellate court transferred this appeal to this court, saying, in their opinion transferring the cause, that: "In the argument before us there has been much discussion of two comparatively recent cases in our supreme court. *Burns v. Manufacturing Co.*, 146 Ind. 261, 45 N. E. 188, and *Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. 14." After much discussion, the citation of numerous authorities, with copious quotations therefrom, the appellate court says: "With such conclusion [reached in those cases] we cannot find ourselves able to agree. These cases seem from the claims of counsel in argument to be regarded as establishing a new rule of exception in this state, which, as we think, is not supported by sound reason or good authority;" and therefore the appellate court recommends the overruling of those cases.

The numerous authorities cited and quoted from in the opinion of the appellate court are not inconsistent or in conflict with the two cases it recommends to be overruled. In the last one of those cases,—*Oil Co. v. Helmick*, supra,—being to some extent founded on the first one, it is said: "Appellee, however, has placed most of his reliance on the claim put forward that the facts found bring him within the exception to the general rule that the employé who continues in the service of his employer after notice of a defect in machinery, tools, or working place, augmenting the danger of the service, assumes the risk as increased by the defect, the exception being that he does not assume such increased risk if the master expressly or impliedly promises to remedy the defect. * * * The promise of the master is the basis of the exception. *Railroad Co. v. Watson*, 114 Ind. 20-27 (14 N. E. 721, and 15 N. E. 824), and authorities there cited on latter page. The ground on which the exception rests is the inducement held out to and influencing the servant by the master's agreement to repair. If he remains in the service of his master after knowledge of the danger, in the absence of a promise of the master to repair, he assumes the risk. *Railroad Co. v. Watson*, supra. In case of such promise to repair by the master, relied upon by the servant, inducing him to remain in the service, the servant may recover for an injury caused

by such defect within such period of time after the promise as would be reasonable to allow for such repairs to be made. *Corcoran v. Light Co.*, 81 Wis. 191, 51 N. W. 328; *Railroad Co. v. Watson*, supra; *Power Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; *Burns v. Manufacturing Co.*, 146 Ind. 261, 45 N. E. 188. But here the promise was not to repair generally, which would imply that it was to be done within a reasonable time. The promise was to repair as soon as the present order was run out. How long that would take—whether a week, thirty days, six months, or a year after the promise was made—is not found in the special verdict. For aught that appears, it may have required thirty days or six months to run out that order. At the end of that time the promise was to repair. That being so, there could have been no inducement influencing the appellee to remain in the service, and work with the alleged dangerous machine during that thirty days or six months, expecting the danger to be obliterated, as is the case where the promise is to repair generally, implying it is to be done within a reasonable time. In *Railway Co. v. Watson*, it was said on page 30, 114 Ind., and page 726, 14 N. E.: 'Now, if there had been a promise to furnish a lantern at the end of the thirty days, that would not relieve plaintiff from the risk incurred by working without a lantern for that thirty days, when, as he says, he had no expectation that a lantern would be furnished.' So, in the case before us, there could be no expectation on the part of the appellee that any repairs were to be made during the time required to run out the order on which appellee was at work at the time the promise was made. And hence, during that time, whatever its length was, the promise would not relieve plaintiff from the risk incurred by working without such repairs." The present case is controlled by the rule just stated, if it be sound and good law. It only differs from the case quoted in that the promise to repair was as soon as the job the servant was then working on was completed, without any showing how long it would take to complete the job, but showing that the injury occurred before the completion of the job.

The appellate court points out no specific reasons why the two cases referred to ought to be overruled, except the general statement that they are regarded as establishing a new rule of exception in this state, which that court thinks is not supported by sound reason or good authority. *Oil Co. v. Helmick*, supra, is certainly directly supported by the cases therein cited, among which is the case in 114 Ind., 14 N. E., and 15 N. E. No reason is suggested why the appellate court regards that case not good authority, or why it regards the other cases cited in the *Oil Co. Case* as not good authority. Nor is any rea-

son suggested by the appellate court why the two cases referred to establish a new rule of exception in this state. It is not a new rule of exception unless the *Watson Case*, in 114 Ind., 14 N. E., and 15 N. E., is new. That case was decided about 11 years ago. The substance of all the authorities on the subject is to the effect that a servant who works with tools, machinery, or appliances so defective as to augment the danger of the service, with full knowledge of such defect, is held thereby to impliedly agree that he will run the risk of danger, or that he impliedly agrees to continue in the service at his own risk of injury to himself from such augmented danger. The only exception to this rule is where the master agrees to repair or remedy the defect. Such promise has the effect, by all the authorities, to relieve the servant from the implied agreement, which the law raises against him from his continuance in the service with knowledge of the defect, that he will so continue at his own risk. But that relief is not unlimited. The promise to repair only has the effect of relieving him from his implied assumption of the risk for such length of time as would be reasonably sufficient in which to make the repairs or remedy the defect, and in which he might reasonably expect the same to be done. If the injury occurs within that period, the injured servant may recover, because he is relieved during that period from his agreement, implied by law from his knowledge, that he will serve on at his own risk. This relief is afforded to him because he may during that time reasonably expect the repairs to be made, or the defect remedied. Where, however, the agreement to repair or remedy the defect is, as in this case, not to be begun until after the job on which the servant is then at work, the agreement is not operative until that time arrives, because during the time which intervenes between the making of the promise and the time when the promise is to be performed the servant has no reason to expect the repairs to be made or the defect remedied. And hence, during that time, there is nothing to relieve him of his agreement implied by law from his continuance in the service with knowledge of the augmented risk caused by the defect, any more than during the time prior to making the promise to repair. In this case the complaint shows that the injury occurred before the time had arrived in which the repairs were promised to be made. It therefore shows that at the time the injury occurred the injured servant had no reasonable ground to expect the repairs to be made, and hence that he was not relieved by the promise from his implied assumption of the risk. The circuit court therefore erred in overruling the demurrer to the complaint. The judgment is reversed, with instructions to sustain the demurrer to the complaint.

(152 Ind. 204)

SCHNECK v. CITY OF JEFFERSONVILLE
et al. ¹

(Supreme Court of Indiana. Dec. 28, 1898.)

MUNICIPAL CORPORATIONS—BONDS FOR LOCATION OF COUNTY SEAT—CURATIVE ACT—VALIDITY.

1. A municipality receives such special benefits from the location of the county seat within its limits as authorize the imposition on such municipality of the entire cost of procuring such location, and of the necessary public buildings.

2. The location of the county seat within a city, and the erection of the necessary county buildings, are not "public improvements or public works," in aid of which cities are authorized by Rev. St. 1881, § 3152 (Rev. St. 1894, § 3612), to donate money or bonds.

3. Rev. St. 1881, § 3152 (Rev. St. 1894, § 3612), authorizing cities to donate money or bonds in aid of public works or improvements, affords such color of authority for a donation towards the erection of county buildings that it will be presumed that the common council of a city, in authorizing such bonds, acted under the supposed authority of such statute, and on the petition of a majority of taxpayers, as therein provided.

4. The legislature has power, unless vested rights have intervened, to legalize by curative act bonds issued by a city for an unauthorized purpose.

5. A curative act passed after the adoption of Const. art. 13, § 1, as amended March 14, 1881, which prohibits the creation of city debts beyond a certain limit, legalizing city bonds issued before the adoption of such constitutional provision, is not in conflict therewith, though the city indebtedness, with such bonds, exceeds the constitutional limit; the creation of such bonded indebtedness dating from the issuance of the bonds.

6. A curative act legalizing city bonds issued for an unauthorized purpose does not take the property of the taxpayers without just compensation, in violation of Bill of Rights, art. 1, § 21.

7. Nor does it deny to taxpayers of such city privileges enjoyed by other taxpayers, in violation of Bill of Rights, art. 1, § 23.

8. Though city bonds have been judicially held to be invalid, a curative act is not, as respects an action involving the validity of the bonds commenced after its passage, an attempt by the legislature to exercise judicial power, in violation of Const. art. 7, § 1.

9. An act to legalize city bonds not being among the cases enumerated by Const. art. 4, § 22, in which special legislation is forbidden, it is within the legislative discretion whether a general act could be made applicable.

Hackney, J., dissenting.

Appeal from circuit court, Clark county; G. H. Gibson, Judge.

Action by Louis Schneck against the city of Jeffersonville and others. Demurrers to the complaint were sustained, and plaintiff appeals. Affirmed.

Merrill Moores, O. H. Montgomery, J. K. Marsh, and O. P. Ferguson & Son, for appellant. M. Z. Stannard and W. A. Ketcham, for appellees.

JORDAN, J. Appellant is a resident of this state, and the owner, as alleged, of valuable real property situated in the city of Jeffersonville, Clark county, Ind., and a taxpayer of said city. On March 30, 1897, in his own behalf, and, as averred in the com-

plaint, in the behalf of other numerous taxpayers of that city, he instituted this action to obtain an injunction enjoining the city and the members of its common council, and others of its officials, from issuing and selling certain bonds of the city in order to refund an indebtedness of the city of Jeffersonville evidenced by outstanding bonds previously issued and negotiated by the proper authorities. Each of the defendants separately demurred to the complaint on the ground that the facts therein alleged were not sufficient to constitute a cause of action. These demurrers were sustained, and the lower court thereby denied the right of appellant, under the facts, to the relief demanded; and this decision is challenged by appellant, under his assignment of errors, and presents the questions involved by the facts set forth in the complaint. The latter discloses the following facts: The city of Jeffersonville is duly incorporated as a city under the general laws of this state relating to the incorporation of cities; and prior to August, 1876, it incurred an indebtedness amounting to \$87,000, which was created by the city, and in part arose out of the expenses and costs incident to the removal of the county seat of Clark county from Charlestown, and locating the same in the said city of Jeffersonville, and in part was incurred and created by the city in the purchase of real estate within its limits for a court house and jail, and the construction thereon of these public buildings, rendered necessary by the change or removal of the seat of justice to its new site. On August 8, 1876, this indebtedness existed in the character of notes, accounts, and city warrants; no part thereof at that time having been funded. On the date last mentioned the common council adopted an ordinance whereby the funding of said indebtedness of \$87,000 was authorized; and negotiable bonds of the city to that amount were directed, under the ordinance, to be issued and negotiated for the purpose of raising money to pay off said indebtedness as it then existed. Accordingly, on August 9, 1876, in pursuance of said ordinance, the city, through its proper officials, issued its negotiable bonds, maturing in 20 years from said date, bearing interest at 7.3 per cent. per annum, and sold them to raise funds for the purpose directed by said ordinance. On April 21, 1896, in order to refund, at a lower rate of interest, these bonds, which were then still outstanding, and about to mature, the common council, under the provisions of the act of the legislature approved March 2, 1895 (Acts 1895, p. 87), passed an ordinance which is set out in full in the complaint. This latter ordinance recites the facts in regard to the issuing and sale by the city in August, 1876, of the bonds in question, and further states that these bonds were issued and sold for the purpose of raising money to pay off certain obligations of the city, which indebtedness it had incurred for public improvements

¹ Rehearing denied.

in said city prior to the amendment of the state's constitution on March 14, 1881, which prohibits any political or municipal corporation in this state from becoming indebted in any manner or for any purpose to an amount in the aggregate exceeding 2 per cent. of the value of the taxable property within such corporation. It is further recited in this ordinance that these bonds were a just and legal indebtedness of the city, and that their validity had never been called in question. The ordinance also states that the rate of interest which the bonds bear is excessive, and as they will become due and payable on August 9, 1896, it is provided and ordained therein that in order to refund the bonds at a lower rate of interest, and extend the time of payment, the proper city authorities are authorized to issue other bonds to a like amount of those outstanding, to bear date of August 9, 1896, drawing 5 per cent. interest, etc. The complaint proceeds to aver that the city, in pursuance of this last-mentioned ordinance, unless enjoined, will issue and sell these refunding bonds, as provided by the ordinance, in order to raise money to pay off and redeem the bonds issued in 1876; and it is further alleged that on April 21, 1896, the city of Jeffersonville was, and continuously since that date has been, indebted in excess of 2 per cent. of the valuation of the taxable property therein. The further charge is made by the pleading that the city had no right or authority to issue the bonds which it is attempting now to refund, and that it has no right or power to refund the same as it is now proposing to do. It is charged in the complaint that the power or authority of the city to issue and negotiate the bonds in question, under the facts, as it originally did, and its right to refund them, as it is proposing to do, were denied by this court in the case of *Myers v. City of Jeffersonville*, 145 Ind. 431, 44 N. E. 452, decided on June 18, 1896. The complaint then alleges that after the decision in the latter case the legislature enacted a statute, approved March 2, 1897, which is entitled "An act to legalize certain bonds issued by the city of Jeffersonville, and to permit said bonds to be refunded, and declaring an emergency." This statute, which professes to legalize and validate in all respects the bonds in controversy, is set out in the complaint, and the latter then proceeds to assail the validity of this law: First, that the legislature did not possess the power, under the circumstances, to legalize the bonds in dispute, and to authorize the refunding thereof; second, that the act, by legalizing the bonds, creates a new debt, and thereby renders the city's indebtedness in excess of 2 per cent. of its taxable property, in violation of the said amendment to the constitution of March 14, 1881; third, that this statute is special and local, and for this reason is violative of the constitution. The complaint closes with a prayer that the city and its

officers be perpetually enjoined from refunding the bonds, etc. After the cause had been appealed to this court, Michael Ronan, a holder of one of the bonds, applied for and was granted leave by this court to intervene as a party appellee, pro interesse suo, and through his counsel he has filed a brief in support of the decision of the lower court.

The questions presented and so ably argued, pro and con, by counsel for the respective parties, may be said to be embraced within two propositions: First, the validity of the bonds, under the authority, if any, which the city had to issue the same for the purpose which it did; second, the validity of the curative statute of 1897, and its effect upon the bonds in controversy, as an indebtedness of the city of Jeffersonville.

In the case of *Myers v. City of Jeffersonville*, 145 Ind. 431, 44 N. E. 452,—being the same case mentioned in the complaint,—the validity of the bonds now in dispute, and the right of the city to refund them, were involved. Their validity, under the facts then existing, and the right of the city to refund them, were, by the unanimous decision of this court in that case, denied; and the judgment of the lower court, sustaining the legality of the bonds, and denying the prayer of the complaint for a writ of injunction to prevent the city from refunding them, was reversed. None of the holders of the bonds were made parties to that action, and it seemingly was a friendly suit, instituted and prosecuted in order that the opinion of this court might be obtained relative to the legal status at that time of the bonds in controversy. At the next session of the legislature following that decision the statute legalizing the validity of these bonds was passed. See Acts 1897, p. 108. This court, in *Myers v. City of Jeffersonville*, supra, in the course of its opinion, speaking in reference to the validity of these bonds, said: "Counsel for the appellees cite us to no express authority from the legislature for the issue of bonds for the purpose of defraying the expense of litigation incident to the removal of a county seat, and the cost of a lot and a court house and jail for a county, made necessary by such removal. Nor have we been able to find any such express authority." It is insisted by the learned counsel for Ronan, the intervener, that it was within the province of the legislature in 1876, and prior thereto, under the constitution of this state, by appropriate legislation, to have authorized the city of Jeffersonville, through its common council, to render financial aid or incur the indebtedness which it did, under the circumstances, in the removal of the county seat from Charlestown, and its location in the said city of Jeffersonville; or, in other words, that the legislature might have authorized the common council of the latter city, previous to August 8, 1876, to exercise the power which it assumed to exercise under the ordinance of that date in issuing the bonds for the purpose in question. In sup-

port of this insistence, we are referred to the holding of this court in the appeal of Board Com'rs Jackson Co. v. State, 147 Ind. 476, 46 N. E. 908, and the authorities there cited. In that case, which pertained to the removal of the county seat of Jackson county, we said: "The special benefits and conveniences which will result to those residing within the immediate locality in which a county seat is located and maintained, by reason of the enhancement of the value of their property, are facts which are well recognized by all, and generally serve to stimulate the inhabitants of such localities in their earnest efforts to secure the location of the county seat in their own vicinity; and no doubt it was the knowledge of this fact which prompted the legislature in requiring the inhabitants of the particular township to bear the burden of this special tax for the purpose designated. This court, in Marks v. Trustees, 37 Ind. 156, recognized the doctrine that the lawmaking power may impose the expense of a public improvement upon a particular locality which will receive benefits derived therefrom. * * * On no view of the question can it be asserted that the statute conflicts with the fundamental law for the reason that it creates a special district out of the township wherein the new county seat is to be located, and confines the assessment of the tax to construct the new buildings to this particular locality. Cooley, Tax'n, 149. The legislature, in its wisdom, having authorized the entire tax for the construction of these new buildings to be assessed against the taxable property of those whom in reason it considered would be immediately benefited by the relocation of the county seat, we are aware of no provisions of our constitution, under the circumstances, which would deny it the power to place the whole burden where it deemed it proper to rest." We concur with counsel in their contention; and, in view of the principles asserted in the case from which we have quoted, and those affirmed in the well-considered cases therein cited,—especially in that of Marks v. Trustees, 37 Ind. 156,—their claim or contention in this respect is amply supported by the authorities. It would certainly seem that the same principle which permits municipal corporations, by legislative authority, to make donations or incur indebtedness in aid of the location within their limits of railroads and other public improvements of a like nature and benefit to the public is applicable, and serves to sustain the doctrine for which counsel contend. The power of taxation must be exercised for a public purpose, and unless restricted, however, by some provision of fundamental law, it may be exercised or conferred by the legislature to an unlimited extent. It is certainly a fact, and one well recognized, that the location of a county capital or seat of justice at a particular town or city, and the erection therein of the necessary county buildings, and the administration thereof of all the affairs or public business of the coun-

ty, are matters of public concern, and much to be desired by the inhabitants of such town or city, immediately and especially benefited thereby in many respects. The location of a county seat therein, in view of all the incidental benefits and advantages derived therefrom by the citizens of the place in general, may certainly be considered of such benefit to and enhancement of all the property therein as, under the circumstances, would justify the legislature, in its discretion, in authorizing the entire burden of the expenses incident to such location to be laid upon the property of the particular district composed of the territory within the limits of such municipal corporation, by providing for the discharge or payment thereof by taxes levied upon all the property in such district subject to taxation. That this right or power is vested in the state, to be exercised or conferred by it through its legislature in the light of the principles advanced or asserted in Board Com'rs Jackson Co. v. State, supra, and the authorities therein cited, cannot be successfully denied. A city, like other municipal corporations, serves but as an agency or instrumentality in the hands of the legislature to carry out its will in regard to local governmental functions and internal concerns. Dill. Mun. Corp. §§ 20, 21; Beach, Pub. Corp. §§ 5, 478; 15 Am. & Eng. Enc. Law, pp. 952, 953; Center School Tp. v. State, 150 Ind. 168, 49 N. E. 961. Subject to the restrictions of the state and federal constitutions, the legislature would seem to have complete power and control over municipal corporations. Especially is this true in reference to authorizing them to contract debts, and to issue and sell negotiable bonds and other evidences of such indebtedness. Simonton, Mun. Bonds, § 284.

Counsel for appellees assert that in view of the fact that this is the first opportunity that a holder of any of these bonds has had to be heard in regard to their validity, and in consideration of the contention of appellant's counsel, whereby they assail the bonds as incurably invalid, and ask this court to adjudge, in effect, that the holders thereof are without remedy in the premises, and that the citizens of Jeffersonville are entitled to enjoy the benefits which they have received as a result of the expenditure of the money for which these bonds were issued and sold, and at the same time be permitted to repudiate what, under the circumstances, they ought to consider as just and binding obligations, therefore, in view of all this, they feel justified in citing us to a statute which they insist is not shown to have been considered in Myers v. City of Jeffersonville, supra. The provisions of this law, they contend, will sustain the acts of the city in incurring the indebtedness in aid of the construction of the public buildings rendered necessary by the removal and location of the county seat. It is then claimed that by an act approved March 9, 1875 (Acts 1875, p. 34; 1 Davis' Rev. St.

1876, p. 378), which relates to public grounds and public buildings on the relocation of county seats, under the provisions of section 2, the county authorities of Clark county were given the right to accept donations towards the expenses of constructing public buildings in connection with the relocation of the county seat. Section 2 provides as follows: "Whenever * * * there shall be paid or donated towards a court-house and the necessary offices at the new county-seat," etc. The further claim is then advanced by counsel that the provisions of section 60 of the general system of laws relating to the incorporation of cities (see 1 Davis' Rev. St. 1876, p. 298; section 3152, Rev. St. 1881; section 3612, Rev. St. 1894) must be construed along with the provisions of section 2 of the act of March 9, 1875, supra; and, when so construed, it is contended that this latter section must be held sufficient to have empowered the city of Jeffersonville to make donations in money or bonds to aid in the construction of the court house and other public buildings of the county at said city, which, as insisted, ought to be held public improvements, within the meaning of section 60, supra. The greater part of the provisions of this section of the statute deals with the power conferred by the legislature upon an incorporated city, on the petition of a majority of its resident freeholders, to subscribe to the stock of railroads and other roads, or to make donations in money or bonds to aid in the construction of such works. It also permits donations by a city, in money or bonds, in aid of "public improvements or public works." Without elaborating upon the question thus presented by counsel, in regard to the construction or interpretation of the statute mentioned, we are of the opinion that their contention is not tenable, and cannot be sustained. When the scope of this statute is considered, the clause "public improvements or public works" cannot be so extended or construed as to authorize the city to render aid, by donation in money or bonds, in locating therein the seat of justice and constructing the necessary county buildings; and we are compelled to adhere to the exposition of the law given in *Myers v. City of Jeffersonville*, supra,—that the city was not invested at the time with legislative authority to incur the indebtedness and issue the bonds in question. But it may at least be said, we think, that the provisions of this section afford a semblance or color of legal authority for the action of the city in issuing its bonds for the purpose as it did. In view of this feature of the case, nothing being disclosed to the contrary, it will not be unreasonable to presume that the common council of the city of Jeffersonville relied on this statute, and, upon the petition of a majority of the resident freeholders thereof, exercised thereunder the power which it did. It is more reasonable to indulge in this presumption, under the circumstances, than in one that would place the city authorities in

the attitude of exercising authority without any color or semblance of law whatever.

Granting the power of the legislature, under our constitution, as we must,—for no sufficient reason is shown for denying it,—to have originally authorized the common council of the city of Jeffersonville to issue and negotiate bonds to obtain money for the payment of the indebtedness incurred by the city as a donation, to effectuate the purpose or object heretofore mentioned, we may next proceed to inquire in regard to the power of the legislature, under the circumstances, to subsequently ratify, confirm, and legalize that which it originally might have empowered the city to do, and whether such legislation may, in effect, be considered the equivalent of legislative authority in the first instance, and to operate with like effect. There can be no doubt in regard to the intent or meaning of the ratifying act of 1897. The legislature, in the first section, distinctly declares that certain bonds or instruments, to the amount of \$87,000, issued under an ordinance of the common council of the city of Jeffersonville on the 8th day of August, 1876, due and payable 20 years after date, "are hereby ratified, confirmed and declared to be legal and valid obligations of such city and the said ordinance of the common council and all acts done in respect to the issue of such bonds are hereby ratified, confirmed and made legal." Section 2 provides that the common council of said city may refund said bonds by issuing in exchange therefor other bonds of equal amount, and may fix the time and place of payment, and the rate of interest. It is then declared that, when refunding bonds have been issued, no action or proceedings shall be instituted by the city, or any other person or persons, the object of which shall be to impair the validity or security of such refunding bonds; nor shall any defense be interposed to any action by the city, or other persons, the object of which defense shall be for a like purpose. Section 3 dispenses with notice in the event refunding bonds are issued, unless required by the common council. Section 4 declares an emergency for the immediate taking effect of the act. It is conceded by counsel for appellant that there is no constitutional restriction in this state against a passage by the legislature of what is denominated a curative or legalizing statute; but it is insisted, however, that, as there was an entire lack of legislative authority upon the part of the city of Jeffersonville to incur the debt and issue the bonds as it did, therefore the statute in controversy cannot, in effect, operate to supply the original authority which was lacking, but can only operate to cure irregularities and dispense with certain formalities, etc. Appellant's counsel further contend that the act in question virtually creates the indebtedness in dispute, and, as the facts in the case disclose that the city of Jeffersonville on and after April 21, 1896, was indebted in ex-

cess of 2 per cent. of the value of its taxable property, therefore the statute is violative of article 13, § 1, Const., as amended March 14, 1881. The purpose or object of the act plainly was to legalize and validate the acts of the city,—the latter, as heretofore stated, being but an agency or instrumentality in the hands of the legislature,—by ratifying and confirming the authority assumed, which, as we have seen, might have been originally conferred, and the exercise thereof lodged in the city's common council; it being a matter over which the latter would have had jurisdiction in the event such authority had been originally conferred upon the city. The object or intent of the legislature in the enactment of the statute was to fully validate the bonds in all respects, and to make them binding obligations, so far as the legislature could, whether their invalidity consisted in the absence of authority to issue them for the purpose mentioned, or existed on account of any irregularities or informalities by which they might be affected. This purpose or object, we are constrained to hold, was accomplished by the act in controversy, and that the law-making power thereby ratified, confirmed, and made legal the unauthorized power or authority which the city, through its council, assumed to exercise. In its effect and operation the act must be held equivalent to conferring original legislative authority upon the city of Jeffersonville, which would have authorized it to incur the indebtedness and issue the bonds to obtain the necessary means to defray the debt; and these obligations must therefore be considered in the same light as though they were valid *ab initio*, unless the curative statute can be said to be open to the objections urged against it by appellant. That the legislature has the power to enact legislation of the character of that in question, in the absence of constitutional restrictions, either federal or state, where vested rights have not intervened, is well affirmed and settled by many decisions, not only in this jurisdiction, but elsewhere. Among the number, we cite the following: *Walpole v. Elliott*, 18 Ind. 258; *Sithin v. Board*, 66 Ind. 109; *Marks v. Trustees*, supra; *Gardner v. Haney*, 86 Ind. 17; *Cookerly v. Duncan*, 87 Ind. 332; *Bank v. Miller*, 91 Ind. 441; *Kelly v. State*, 92 Ind. 236; *Johnson v. Board*, 107 Ind. 15, 8 N. E. 1; *Bronson v. Kinzie*, 1 How. 331; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Thompson v. Lee Co.*, 3 Wall. 327; *City v. Lamson*, 9 Wall. 477; *New Orleans v. Clark*, 95 U. S. 644; *Mattingly v. District of Columbia*, 97 U. S. 687; *Pompton v. Cooper Union*, 101 U. S. 186; *Read v. City of Plattsburgh*, 107 U. S. 568, 2 Sup. Ct. 208; *Quincy v. Cooke*, 107 U. S. 549, 2 Sup. Ct. 614; *Jonesboro City v. Cairo & St. L. R. Co.*, 110 U. S. 192, 4 Sup. Ct. 67; *Anderson v. Santa Anna Tp.*, 116 U. S. 356, 6 Sup. Ct. 413; *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. 736; *City of Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Lycoming v. Union*, 15 Pa. St.

166; *Sharpless v. Mayor, etc.*, 21 Pa. St. 147; *State v. Mayor, etc.*, of Charleston, 10 Rich. Law, 491; *Simonton, Mun. Bonds*, §§ 256, 257; *Cooley, Const. Lim.* 466; *Beach, Pub. Corp.* § 904.

The supreme court of the United States, it will be seen upon the examination of its decisions, has repeatedly affirmed and adhered to the doctrine that where municipal corporations have issued bonds, or other evidences of indebtedness, which at the time of their issue were unauthorized, it is within the power of the legislature to validate and legalize such issue by subsequent curative legislation. Such ratifying or legalizing act of the legislature, as the authorities assert, is of the nature of, or, rather, analogous, to, a ratification by the principal of the unauthorized acts of the person who assumed to be his agent. The act of the latter had no validity of itself, but the ratifying act of the principal is of the same and equal import in all respects as original authority. *Marks v. Trustees*, supra; *Sithin v. Board*, supra; *Beloit v. Morgan*, 7 Wall. 619; *Grenada Co. Sup'rs v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125; *Mattingly v. District of Columbia*, supra; *Pompton v. Cooper Union*, supra; *Persons v. McKibben*, 5 Ind. 261; *Express Co. v. Rawson*, 106 Ind. 215, 6 N. E. 337; *Bolton Partners v. Lambert*, 41 Ch. Div. 295. In *Marks v. Trustees*, supra, the board of commissioners of Tippecanoe county made an order donating \$50,000 for the purpose of securing the location of an agricultural college in that county. This action of the board of commissioners was subsequently ratified by the legislature, and the questions in regard to the invalidity of the order of the board, on account of lack of legislative authority, and also in respect to the effect of the curative legislation, were presented to the consideration of this court in that appeal. In the course of the opinion in that case, *Worden, J.*, speaking as the organ of this court, said: "We come to the question as to the power of the board to make the order. No statute has been cited, and we are not aware of the existence of any, in force at the time, that authorized the making of the order. It follows that the order was made without legislative authority. Still, it was not void in that absolute sense that made it incapable of ratification. If a party, without authority, but professing to act as the agent of another, does an act in the name of his supposed principal, the act is not absolutely void, but may be ratified by the supposed principal; and, when so ratified, it is as valid as if the pretended agent had had full authority when the act was done. That an order of the board of commissioners, made without authority of law, may be ratified and rendered valid and effectual, is established by the numerous cases in this court upholding the act of March 3, 1865 (3 Davis' Ind. St. p. 565), legalizing bonds, orders, and appropriations made for the purpose of pro-

curing or furnishing volunteers and drafted men," etc. In *Johnson v. Board*, supra, this court said: "There is no inhibition in the constitution against the passage of retrospective statutes. That such statutes may be passed by the legislature, in the absence of a constitutional inhibition, is well settled. And especially is this so, if the effect of the statute is in accord with justice, equity, and sound public policy. And hence such statutes have been sustained where their effect was to render valid contracts which but for them would have been void. * * * It is settled by our decisions, and the authorities elsewhere, that curative or retrospective statutes may cure defects and irregularities in proceedings, even though the defects and irregularities are so flagrant as to render the proceedings, for all practical and enforceable purposes, null and void." Again, on page 23, 107 Ind., and page 4, 8 N. E., of the opinion in this case, it is said: "Applying the above rulings, and the rule upon which they rest, to the case before us, it may well be said that as the legislature might, in the first instance, have provided by general law for the location and opening of free gravel roads by the county boards at any session, so it can by subsequent curative or retrospective general law legalize and validate all such proceedings taken and had at any session of such boards. The curative act of 1885, therefore, is not objectionable on the ground that it is retrospective." In the case of *Mattingly v. District of Columbia*, supra, Justice Strong, speaking as the organ of the supreme court of the United States, in the opinion on page 689, said: "Were it conceded that the board of public works had no authority to do the work that was done at the time when it was done, and consequently no authority to make an assessment of a part of its cost upon the complainants' property, or to assess in the manner in which the assessment was made, the concession would not dispose of the case, or establish that the complainants have a right to the equitable relief for which they pray. There has been congressional legislation since 1872, the effect of which upon the assessments is controlling. There were also acts of the legislative assembly of the District which very forcibly imply a confirmation of the acts and assessments of the board of which the bill complains. If congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority." In *Pompton v. Cooper Union*, 101 U. S., on page 202, the same court again said: "In cases like this, legislative ratification is the equivalent of original author-

ity, and what is clearly implied in a statute is as effectual as what is expressed. * * * Whether this statute was a ratification of the sale of the bonds as made, if such ratification were needed, is a point which the view we take of the case renders it unnecessary to consider. It was certainly a clear recognition of Pompton as one of the townships authorized to issue bonds in aid of the railroad company,—a legislative construction entitled to great respect." In *Beloit v. Morgan*, 7 Wall., on page 624 of the opinion, it is said: "Whenever it has been presented, the ruling has been that, in cases of bonds issued by municipal corporations under a statute upon the subject, ratification by the legislature is in all respects equivalent to original authority, and cures all defects of power, if such defects existed, and all irregularities in its execution. The same principle has been applied in the courts of the states. This court has repeatedly recognized the validity of private and curative statutes, and given them full effect, where the interests of private individuals were alone concerned, and were largely involved and affected." The ratifying act of 1897 cannot be said to fasten unwillingly upon the city the indebtedness, and thereby compel its payment. In a sense, it simply gives effect to the will of the city, as expressed by it in 1876, through its common council, and, no doubt, also ratifies the desire of a large majority of the resident freeholders, expressed, presumably, to the common council, by means of petition or otherwise. The council, as we have seen, in the refunding ordinance of April 21, 1896, declared the bonds to be just obligations of the city, and that their validity had never been called in question. These bonds had existed unchallenged for a period of nearly 20 years after their execution, and after the city had derived the benefits of their proceeds, and not until the institution of the suit in the *Myers Case*, so far as we are apprised, was their validity assailed.

The contention of appellant's counsel, that the legislature was not empowered to enact the statute in dispute, for the reason that it creates a debt, and thereby the city at the time of its passage became indebted in excess of the constitutional limit fixed by section 1, art. 13, as amended March 14, 1881, is not tenable. The legislature by the act in question neither created nor professed to create a debt. It simply recognized the indebtedness and bonds as having an existence in 1876, and ratified, confirmed, and legalized them. The appellant recognizes in his complaint that the statute did not create the debt, for therein he avers that the indebtedness for which the bonds were issued was incurred by the city prior to August 9, 1876. While it is true that the bonds which evidenced the indebtedness in dispute, strictly speaking, were not at the time of their execu-

tion and sale, in 1876, impressed with such validity as to make them binding and enforceable obligations of the city, still they were not invalid to the extent of rendering them incapable of ratification by the principal, the lawmaking power of the state; and in a sense, at least, they did exist as an indebtedness of the city from the time of their issue and sale, subject, however, to the required ratification by the legislature, and this act of the latter must be deemed to make them, from the beginning, a valid and subsisting indebtedness. This indebtedness was not incurred, nor the bonds issued, in defiance of law. They were simply impressed with the lack of authority of the issuing party, which, as we have seen, might have been previously conferred. As heretofore said, a curative act, under such circumstances, is analogous to the ratification by the principal of the assumed authority of his agent, which ratification relates back and binds the principal in like manner and to a like extent as though the authority assumed had been given in advance. In the case of contracts by the agent, under an authority assumed by him, no new or additional consideration is required to support the ratification by the principal; for by adopting the contract he accepts it as duly authorized by him from the beginning, with the original consideration. 1 Am. & Eng. Enc. Law (New Ed.) p. 1181; *Express Co. v. Rawson*, supra. Such ratification or confirmation by relation back affects the original unauthorized contract or transaction, so that, as between the parties, their rights and interests are considered, in legal contemplation, as arising at the time of the original act or contract, and not merely from the time of ratification. A suit to enforce the obligation assumed by the ratifier is founded upon the original transaction or contract, and not upon the act of ratification. *Grant v. Beard*, 50 N. H. 129; *Drakeley v. Gregg*, 8 Wall. 242. In reason, and in the light of the authorities to which we have referred, the bonds ratified, legalized, and made valid by the curative act of the legislature must be considered, in legal contemplation, to all intents and purposes, as though they had been valid and subsisting obligations of an indebtedness against the city at the date of their issue, in August, 1876. At that time there existed no constitutional provision limiting the indebtedness of cities; and, to reaffirm what we have heretofore said, there was nothing in our fundamental law which would have prohibited the city of Jeffersonville, under legislative authority, from incurring the bonded indebtedness for the particular purpose as it did. It is settled that the constitutional amendment of March 14, 1881, is prospective, and not retrospective; and it does not, in terms, forbid the legislature from legalizing previous acts of political or municipal corporations. Neither does it operate so as to affect the bonds of such cor-

porations issued prior to its taking effect, nor to prohibit the refunding thereof; and the act in question, under the facts, cannot be said to be in conflict therewith. *Powell v. City of Madison*, 107 Ind. 106, 8 N. E. 31; *Myers v. City of Jeffersonville*, supra; *Cooley*, Const. Lim. 77. In the appeal of *Powell v. City of Madison*, supra, this court, speaking in regard to the operation of this amendment of our constitution, said: "Its operation was only prospective. Where the limit of a two per centum indebtedness had already been reached, it prohibited the contracting of any new or further indebtedness; and, where that limit had not been reached, it simply restrained municipal corporations from incurring new debts in excess of such limit. Consequently the only effect which the adoption of the constitutional amendment now before us had upon the sections of the statute under consideration was to limit their application to the indebtedness of a city or town which had been contracted prior to the 14th day of March, 1881, and to such as has been since incurred, not in excess of the two per centum limit upon the value of its taxable property. As the ordinance set out in the complaint proposes to fund only indebtedness which had been contracted prior to said 14th day of March, 1881, it applies to a class of debts not affected by the constitutional amendment in question, and is, in consequence, not in conflict with any of the provisions of that article of the constitution."

We have examined and given due consideration to the cases cited by counsel for appellant to uphold their contention in respect to the invalidity of the legalizing act in controversy. It would unnecessarily extend this opinion, were we to elaborate in the consideration of these authorities. It is sufficient to say that, in the main, under the circumstances, they are not applicable to the question involved in the case at bar. The case of *Sykes v. Mayor*, etc., 55 Miss. 115, at first blush would seem to lend some support to appellant's insistence; but under the facts in this appeal, and the law applicable thereto, it in reality cannot be said to sustain the questions which counsel for appellant advance. The facts in the case, briefly stated, are: In November, 1869, the mayor and aldermen of the town of Columbus caused to be issued, to the Memphis, Holly Springs, Okolona & Selma Railroad Company, a large number of the town's bonds, with coupons of interest attached. The plaintiff in error in that case brought an action of debt on certain ones of said coupons, which were overdue, and of which he was a bona fide holder for value. A demurrer was sustained to the plaintiff's declaration on the ground that the town of Columbus had no power to issue, or cause to be issued, the said bonds and coupons. In December, 1869, a new constitution was adopted by the state of Mississippi, which, among other things, forbids any city or town

to become a stockholder in, or lend its credit to, any corporation, etc., except on the condition that at an election two-thirds of the electors of the city assented thereto. After the adoption of this constitution, the legislature, in 1872, passed a statute which declared that all subscriptions to the capital stock of said company made by any county, city, or town, not made in violation of the constitution of the state, "are hereby legalized, ratified and confirmed." Laws Miss. 1872, c. 75, § 4. It was conceded that these bonds, before the passage of the curative act, were invalid, by reason of lack of legislative authority in the town to issue the same. The holding in the Sykes Case was to the effect that after the issue of the bonds, and before the curative act of 1872 had been passed, the new constitution had intervened, and placed the legislature under a disability which prevented it from ratifying the act, and thereby dispensing with the condition requiring that two-thirds of the electors must give their assent. In the case at bar, however, we have seen that at the time the bonds were issued there existed no constitutional inhibition, conditional or otherwise, against the right of the legislature to confer upon the city the authority which it assumed to exercise. Neither has any fundamental restriction intervened since the issue of the bonds which can be construed to prevent the legislature from ratifying and legalizing the acts of the city leading up to and including their issue and sale; for when they are viewed as an indebtedness existing since 1876, as they must be, for the reasons heretofore stated, the constitutional amendment of 1881 is not applicable.

In addition to the objections which we have already passed upon, it is said that the statute of 1897 is also invalid for other reasons: First, that it, in effect, permits the property of the taxpayers of the city of Jeffersonville to be taken without just compensation, and is therefore violative of article 1, § 21, of the constitution; second, it denies to the taxpayers of the city privileges and immunities enjoyed by all other taxpayers of the state, and hence is in conflict with article 1, § 23, of the bill of rights, recognized by the constitution; third, that it is a legislative attempt to reverse or interfere with the judgment of this court in *Myers v. City of Jeffersonville*, supra, and for this reason is antagonistic to article 7, § 1, of the constitution. It is so evident that the first and second contentions are so devoid of merit that the mere statement thereof will fully expose that fact, and they may be dismissed without further consideration. In respect to the third objection, it may be said that at and before the time appellant commenced this action the invalidity of the bonds in question had been fully cured by the act of 1897, then in full force and effect; and his rights in the premises must be determined under the law as it existed then, and now ex-

ists, and not by the law as it stood prior to the time he instituted this suit. *Price v. Huey*, 22 Ind. 18; *King v. Course*, 25 Ind. 202; *Johnson v. Board*, supra.

It is also suggested, or mildly insisted, that the statute is prohibited by the constitution, because it is local and special, instead of being general and of uniform operation. It certainly does not fall within any of the cases enumerated in section 22 of article 4 of the constitution, and therefore it was within the discretion of the legislature to determine whether a general law was applicable. *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727; *Board Com'rs Jackson Co. v. State*, supra; *City of Indianapolis v. Navin* (Ind. Sup.) 47 N. E. 525.

If the question of vested rights is in any way involved by reason of this statute, it is not presented in this appeal; and, if it arises in favor of any party, it may be considered when duly presented to this court. In our judgment, the validity of the bonds, and the right of the city to refund them, for the reasons stated in this opinion, must be sustained; and appellant's right to the injunction which he seeks was properly denied, and the judgment of the lower court is therefore affirmed.

HACKNEY, J. (dissenting). Conceding that ordinarily the ratification of an unauthorized act has the effect to confer authority for the act at the time it was done, I am not satisfied that the rule, as strongly as I have stated it, can be applied in this case. The bonds in question, at the time of their execution, and continuously up to the time of the passage of the act of 1897, were void. They were as no obligations. As sometimes said, they were as so much blank paper. The act of 1897 gives them the first life or validity possessed by them. Its practical effect is to create, for the city, a debt in the amount of the bonds. I do not dwell upon the question of legislative power to create a debt for a city; but where the debt is given life and vigor at a time when, under the constitution, a debt could not be created by the city, even with express legislative authority, I do not feel satisfied that they could be rendered a debt valid by relation back to the time of their execution. Before the act, the city did not owe the amount of the bonds. The bonds did not represent a debt. To make them a debt is an act exceeding the limits prescribed by the constitution. I firmly believe that, if the debt could not have been validly created in 1897 by authority of the general assembly, there could exist no power to ratify or create a debt by relation back to a time when power did exist. This question relates to the power of the general assembly, as it is limited by the constitution. Under that instrument there is no power to create the debt, and, as I believe, no power to ratify it and give it relation back to a time when power did exist. In other words,

the power to ratify exists only where the power exists to authorize the act sought to be ratified.

(151 Ind. 587)

KRENZER v. PITTSBURGH, C., C. & ST. L. RY. CO.

(Supreme Court of Indiana. Dec. 16, 1898.)

CONTRIBUTORY NEGLIGENCE — NEGLIGENCE AFTER KNOWLEDGE OF PLAINTIFF'S PERIL—GENERAL AND SPECIAL FINDINGS.

1. Though an injured person is placed in peril by his own negligence, he can recover if the person inflicting the injury could, after discovering the situation, have prevented the injury by ordinary care.

2. Such rule does not apply where plaintiff was injured by a train while asleep on the track, and the persons in charge of the train, though negligent in proceeding at excessive speed, and in failing to ring the bell, did not know of his presence in time to have avoided the injury.

3. Special findings that plaintiff, a boy 7½ years old, went to sleep on a railroad track, and that he knew that trains were run thereon, and had capacity sufficient to understand that, if he remained on the track, he was liable to be run over, show contributory negligence so conclusively as to prevail over a general verdict for plaintiff.

McCabe, J., dissenting.

Petition for rehearing. Overruled.

For former opinion, see 43 N. E. 649.

Beckett & Doan, Christian & Christian, and Smith & Korbly, for appellant. Sam'l O. Pickens, for appellee.

HOWARD, J. We have given careful consideration to the learned argument of counsel in support of the petition for a rehearing. Nothing said, however, has been sufficient to convince us that the rule heretofore enforced by this court in relation to contributory negligence in injury cases should not be maintained. There is no doubt, and never has been, that, if a person is injured by the act of another, the injured person will thereby have a right of action for damages, even though he was himself not free from fault, provided only the person injuring him knew of his condition, and could, with ordinary care, have avoided the injury complained of. In the recent case of *Railway Co. v. Stick*, 143 Ind. 449, 41 N. E. 365, it was said, citing *Railway Co. v. Phillips*, 112 Ind. 59, 13 N. E. 132: "If the employes see a man bound to the rails in time to check the train, they must use reasonable measures to check it, and not suffer it to run upon the helpless man." This would be true, although the man had himself been wholly at fault, even so far as to have caused himself to be tied upon the track. So, it is said in *Louisville & N. R. Co. v. East Tennessee, V. & G. Ry. Co.*, 9 C. C. A. 314, 60 Fed. 993, cited by appellant: "If, with a knowledge of what the plaintiff has done or is about to do, the defendant can, by ordinary care, avoid the injury likely to result therefrom, and does not,

defendant's failure to avoid the injury is the last link in the chain of causes, and is, in law, the sole proximate cause. The plaintiff's conduct is not, then, a cause, but a condition, of the situation with respect to which the defendant has to act. The principle is established by a long series of cases,"—citing *Davies v. Mann*, 10 Mees. & W. 546, and many other cases. The statement so cited with approval in appellant's brief is quite consistent with the rule established in this state. If, "with knowledge" of the plaintiff's condition, whether that condition has been brought about by plaintiff's fault or not, defendant can, by ordinary care, prevent the threatened injury, he must do so, or become liable for the injury.

We think that counsel are perhaps right in calling in question the propriety of an attempted distinction made by a dictum in *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, between what is there called the English doctrine, illustrated by the case of *Davies v. Mann*, *supra*, and the doctrine accepted in this state. We do not perceive any difference in principle between what are called the two doctrines, however difficult it may be to apply the accepted rules of the law of negligence to particular cases. In every case, one who has himself contributed to his own injury must suffer the consequences of his own want of due care, unless it should appear that the one injuring him knew of his condition in time to have avoided the injury, and could with ordinary care have avoided it. To knowingly injure another, when, with ordinary care, such injury could be avoided, is not, however, mere negligence, but rather willful wrongdoing, or, at least, such a wanton disregard of consequences as amounts to willfulness. In some cases, we readily admit, it may be hard to draw the line between simple negligence on the one side and willfulness or wantonness on the other. Carelessness may be so gross as scarcely to be distinguishable from wantonness, or from a willingness to do any act, no matter what the consequences. But, in principle, the injury suffered, if wrongful, must always be due either to a willingness to do wrong, or to a want of care to avoid such wrong. The act done is either positive or negative in its character; that is, either willful or negligent. Contributory negligence is not a sufficient answer as to willful wrongdoing, but it is as to simple negligence or want of ordinary care.

In the case before us, the injured boy, after playing upon the railroad crossing, sat upon the rail of the track, and there fell asleep, and was hurt by the passing train. It was between 7 and 8 o'clock of a summer evening, though still daylight. The engineer was at the time looking out ahead, but neither he nor any one else on the train saw the boy. It is not claimed that these facts show any willful injury on the part of the employes of appellee, or any wanton disre-

gard of plaintiff's rights, though it is admitted that the employes were negligent in running the train faster than allowed by ordinance, and without ringing the bell or sounding the whistle. Here, then, is a case where the injured person was himself guilty of negligence contributing to his injury, and where the persons injuring him did not see him, although the engineer was looking out ahead, and did not, of course, know of his condition. Under these circumstances, even accepting the authority of the cases cited by appellant, there could be no recovery. No willful or even wanton injury is shown, and the contributory negligence of appellant is undoubted. In a note to *Railroad Co. v. Humphreys* (Tenn.) 15 Am. & Eng. R. Cas., at page 478, the rule in cases of this kind is, as we think, well stated. It is there said: "The act of falling asleep or being drunk and incapable upon a railroad track is generally held to be such contributory negligence as will preclude recovery in case of accident,"—citing many cases, and adding: "It is, of course, to be understood that, when the servants of the company fail to exercise due care after becoming aware of the plaintiff's dangerous position, the company is liable, notwithstanding plaintiff's contributory negligence." See, further, *Railroad Co. v. Huffman*, 28 Ind. 287; *Wright v. Brown*, 4 Ind. 95; *Coal Co. v. Shaw*, 16 Ind. App. 9, 44 N. E. 676; *Railroad Co. v. Adams*, 43 Ind. 402; *Conner v. Railroad Co.*, 146 Ind. 430, 45 N. E. 662; *Elliot, R. R.* §§ 1251, 1257.

But it is said that as the injured party in this case was at the time but 7½ years of age, and as a general verdict was returned in his favor, it follows conclusively that all the facts necessary to entitle him to judgment, including the fact as to his having sufficient capacity to comprehend and realize the danger incurred by him in sitting down to play upon the railroad track, were found for him by the jury, unless it should appear from answers to interrogatories that facts specially found were in irreconcilable conflict with such general verdict. There is no question that this is the law. It is, however, shown in the original opinion that such irreconcilable facts as to the capacity of the injured boy were found by the jury. The jury found specially that the boy was 7½ years old; that he was "of usual and ordinary intelligence and judgment for his age," and "of ordinary physical strength and activity for his age"; that he knew "that the track at the place where the accident happened was used to run cars and engines over"; that, just before he was hurt, he was playing jackstones upon the track, and sat "down upon the rail of the track with his feet between the rails," and that, "while sitting there in that position, he fell asleep, and remained asleep until he was hurt"; that, when the engine struck him, he was "lying with one leg over the rail, body off north side of rail"; that "the plaintiff, when he sat down upon the track, had sufficient intelligence to know

that the track was used to run cars over," and "that engines and cars were liable to pass over said track"; and that, "at the time he sat down upon the track, he had sufficient intelligence to know that if he remained on the track, and an engine or car passed over it, he would be run over and injured." The capacity of the plaintiff to comprehend the danger thus incurred by him, as so found by the jury, cannot be distinguished from the capacity of an adult in the same circumstances which would make such adult chargeable with contributory negligence. We think it absolutely clear that the negligent conduct of the plaintiff, and his full appreciation of the possible consequences of such conduct, as found by the jury, must make him, as well as any other person, chargeable with negligence contributing to his injury. There is therefore no room here for the application of the rule laid down in *Railway Co. v. Grames*, 136 Ind. 39, 34 N. E. 714, and like cases,—that, where it is uncertain whether the primary facts found show negligence, the jury are permitted and required to find as an ultimate fact whether the plaintiff has or has not exercised such care as an ordinarily prudent person would have exercised under the circumstances. The facts here found by the jury disclose beyond question that the plaintiff was guilty of conduct showing him to be chargeable with negligence contributing to his own injury, and that he was at the time possessed of sufficient intelligence to know and appreciate the danger thus incurred by him.

Neither can it be that the company could be liable under the circumstances as for willful wrongdoing, unless, indeed, those in charge of the train knew that the boy was upon the track. But here, again, the jury find expressly that the engineer was "looking out ahead of the engine at and before the time plaintiff was run over," and also that neither "the engineer nor fireman nor any one on the engine saw the plaintiff before he was run over." There was therefore no willful or wanton injury. Indeed, none is charged in the complaint. But, as already said, in order to charge the company with responsibility, there must have been either willfulness or wantonness on its part, or else negligence; and in the latter case the plaintiff must himself have been free from contributory negligence, which, as we have also seen, was not the case. Under any possible view, therefore, the plaintiff could not recover. Petition overruled.

McCABE, J. (dissenting). After a careful and painstaking examination of the questions presented on the petition for a rehearing in this case, I find myself wholly unable to agree with the majority of the court in holding that the petition for a rehearing ought to be overruled. I concur in that part of the original opinion holding that the appellee railroad company was guilty of negligence in running its engine at the time and place it ran over appellant's leg, and inflicted the injuries com-

plained of, and I also concur in the original opinion in holding that appellant, at the time and place, being at and on a highway crossing of the railroad track, was not a trespasser. But I do think this court erred in the original opinion in holding that the appellant was guilty of such contributory negligence as defeated his right of recovery.

The general verdict in favor of appellant is a finding of every material fact averred in his complaint. Among such material averments were the allegations of defendant's negligence, and the plaintiff's freedom from fault or contributory negligence. *Railway Co. v. Trowbridge*, 128 Ind. 391-393, 26 N. E. 64; *Rogers v. Leyden*, 127 Ind. 50-59, 26 N. E. 210; *Town of Poseyville v. Lewis*, 126 Ind. 80, 81, 25 N. E. 593. Now, unless the answers to the interrogatories are in irreconcilable conflict with this general verdict, that plaintiff was free from contributory negligence, the general verdict must stand; that is, if any supposable state of the evidence would or could show that the answers to the interrogatories could be true, and the general finding that appellant was free from contributory negligence was also true, then the general verdict must stand. *Railway Co. v. Trowbridge*, supra; *Railroad Co. v. Adams*, 131 Ind. 38-40, 30 N. E. 794; *Town of Poseyville v. Lewis*, supra; *Rogers v. Leyden*, supra; *Western Assur. Co. v. Studebaker Bros. Mfg. Co.*, 124 Ind. 176-179, 23 N. E. 1138; *Allemon v. Simmons*, 124 Ind. 199-204, 23 N. E. 768.

There are two principal reasons why, in my opinion, the answers to the interrogatories do not conflict with the finding in the general verdict that the plaintiff was free from contributory negligence. The first of those reasons is that the answers to the interrogatories show that the plaintiff was a boy of only 7½ years of age, and fails to show such additional facts as would make him responsible for contributory negligence on account of his acts shown, which would in case of an adult amount to contributory negligence. These answers further show that he was a boy of usual and ordinary intelligence, and of average physical strength and activity for his age; that he knew that the track at the place in question was used to run cars and engines over, and had sufficient intelligence to know that engines and cars were liable to pass over the track, and that if he remained on the track, and an engine or car passed over it, he would be run over and injured; that, just before the injury, he was upon the track at the highway crossing, playing jackstones; that he sat upon the rail of the track with his feet between the rails, and, while so sitting, fell asleep; that, when the engine struck him, he was lying with one leg over the rail, and his body outside; that the time was between 7 and 8 o'clock in the evening of July 12, 1892, it being still daylight. While these facts show that the boy was of usual and ordinary intelligence for one of his age,

it does not show what that degree of intelligence was. That was a matter of fact, and not a matter of law, because the law fixes no average or ordinary intelligence to be possessed by all boys of 7½ years of age, or any other age. He may have had knowledge that engines and cars were liable to run over the track, and, if they did so while he was on the same, he would be run over and injured. But that is certainly a different thing from the possession of prudence and the power to appreciate and realize the seriousness of the danger he incurred.

In the case of *City of Pekin v. McMahon*, 154 Ill., at page 154, 39 N. E. 487, the supreme court of Illinois said: "Whether, as matter of law, a child seven years old or under that age can be justly held to be incapable of negligence, it is not necessary to decide. But where a child has passed the age of seven years, as was the case with appellee's deceased intestate, we are of the opinion that he is bound to use such care as children of his age, capacity, and intelligence are capable of exercising, and that the question whether he has done so or not should be submitted to the jury." The court cites, in support of the foregoing proposition, authorities to the same effect, as follows: *Railway Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899; 2 *Thomp. Neg.* pp. 1181, 1182; *Railroad Co. v. Stout*, 17 Wall. 657; *Birge v. Gardner*, 19 Conn. 507; *Daley v. Railroad Co.*, 26 Conn. 591; *Transit Co. v. Rourke*, 10 Ill. App. 474; *Evanisch v. Railway Co.*, 57 Tex. 123; *Railway Co. v. Fitzsimmons*, 22 Kan. 477. The following cases are also to the same effect that the question whether a person of tender years, of seven or eight years of age, has or has not been guilty of contributory negligence by failing to exercise ordinary care, is a question of fact, which must be determined by the jury. *Railway Co. v. Perriguet*, 138 Ind. 414, 34 N. E. 233, and 37 N. E. 976; *Mangum v. Railroad Co.*, 38 N. Y. 455; *Railroad Co. v. Van Steinburg*, 17 Mich. 99; *Stone v. Dock Co.*, 115 N. Y. 104, 21 N. E. 712; *Railway Co. v. Grablin*, 38 Neb. 90, 56 N. W. 798, and 57 N. W. 522; *Huff v. Ames*, 16 Neb. 139, 19 N. W. 623; *Avey v. Railway Co.* (Tex. Sup.) 16 S. W. 1015; *Schmitz v. Railway Co.*, 119 Mo. 256, 24 S. W. 472; *Railway Co. v. Rylee*, 87 Ga. 491, 13 S. E. 584; *Railroad Co. v. Young*, 81 Ga. 397, 7 S. E. 912; *Moynihan v. Whidden*, 143 Mass. 287, 9 N. E. 645; *Rosenberg v. Durfee*, 87 Cal. 545, 26 Pac. 793; *Railway Co. v. Welsch*, 155 Ill. 511, 40 N. E. 1034; *Pierce v. Connors* (Colo. Sup.) 37 Pac. 721; *McGuire v. Railway Co.*, 37 Fed. 54; *Swift v. Railroad Co.*, 123 N. Y. 645, 25 N. E. 378; *Baker v. Railroad Co.*, 68 Mich. 90, 35 N. W. 836; *Bostwick v. Railway Co.* (N. D.) 51 N. W. 781; *Atwood v. Railway Co.* (Me.) 40 Atl. 67; *Railway Co. v. Cooney* (Md.) 39 Atl. 859; *Adams v. Railway Co.*, 28 C. C. A. 404, 84 Fed. 596; *Railroad Co. v. Morlay*, 30 C. C. A. 6, 86 Fed. 240; *Satinsky*

v. Brewing Co. (Pa. Sup.) 40 Atl. 821. As said in the latter case, one for a negligent injury to a boy $7\frac{1}{4}$ years of age: "When we have considered them all [answers to interrogatories], I do not think the case was one wherein the court should have directed the verdict. It was still left for the jury to say, under proper instructions from the court, whether or not the evidence satisfied them that this lad had such judgment and such comprehension as enabled him to appreciate the danger, and subject him to the consequences of negligence if he failed to use his reason and sense to avoid it. This question, I think, clearly remained for the jury to pass upon."

The jury passed upon the question of the child's negligence in the case now under consideration in their general verdict, finding, as we must presume from the evidence, that the boy's prudence and discretion, his appreciation and apprehension of danger, were not, in the estimation of the jury, sufficiently matured to enable him to exercise judgment discreetly, so as to subject him to the consequences of negligence. At all events, the answers to the interrogatories fail to show that his acts which endangered him, under all the circumstances of his tender age, discretion, power of reflection, forethought, and judgment, amounted to negligence, and hence such answers are not inconsistent with the general verdict finding him free from contributory negligence. This case, by the authorities above cited (and I know of none to the contrary), belongs to the class of cases where the question of negligence or no negligence becomes a question of fact to be passed on and determined by the jury, and not a conclusion of law to be drawn from the facts found by the jury; because the question whether a child $7\frac{1}{4}$ years of age has sufficient experience, discretion, and judgment, power of forethought and reflection, to enable it to adequately appreciate danger, so as to enable it to exercise caution and prudence in guarding against such danger, is a question upon which one sensible impartial man might infer that such child had a sufficiently matured mind and judgment to make it responsible for failure to exercise due care for its own safety, and that due care had not been exercised by it, while another man equally impartial might infer that the child had not sufficient capacity to make it responsible for failure to exercise such care. In that class of cases, this court, by a long line of decisions, has established that the jury must find whether, under all the facts and circumstances found by them, the party whose acts are in question was guilty of negligence or not, as a question of fact. *Railroad Co. v. Collarn*, 73 Ind. 261; *Woolery v. Railway Co.*, 107 Ind. 381, 8 N. E. 226; *Smith v. Railroad Co.*, 141 Ind. 92, 40 N. E. 270; *Railroad Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37; *Shoner*

v. *Pennsylvania Co.*, 130 Ind. 170, 28 N. E. 616, and 29 N. E. 775; *De Pauw Co. v. Stubblefield*, 132 Ind. 182, 31 N. E. 796; *Faris v. Hoberg*, 134 Ind. 273, 33 N. E. 1028; *Railway Co. v. Grames*, 138 Ind. 39, 34 N. E. 714; *Railway Co. v. Moneymun*, 146 Ind. 147, 44 N. E. 1106. The jury, in the answers to interrogatories, wholly fail to find or show, as a question of fact, whether the plaintiff was or was not guilty of contributory negligence. This court, in the original opinion, drew the inference, from the facts shown by the answers to the interrogatories, that the child had been guilty of contributory negligence, thereby affirming the action of the trial court in drawing such inference. But it was the province of the jury to draw that inference, in the absence of which their general verdict cannot be overthrown by the answers to the interrogatories.

The second reason why the answers to the interrogatories do not conflict with the general verdict as to appellant's freedom from contributory negligence is that, even though the child be held responsible and guilty of negligence in falling asleep upon the railroad track with one leg across the rail, yet that negligence is shown by the findings of the jury to have been antecedent and prior to the established negligence of appellee's engineer. For 300 feet before reaching the child thus sleeping on the track, the engineer had a clear, unobstructed view of the child's situation and peril, and, as the findings show, could, by the exercise of ordinary care, have avoided running his engine over and crushing his leg. That being the case, the plaintiff's negligence was not proximate, and not a proximate cause of his injury, and did not proximately contribute thereto, according to long-established legal principles both in this country and in England. The definition of "contributory negligence" is given in an article on that subject in 4 Am. & Eng. Enc. Law, 17. See same in 7 Am. & Eng. Enc. Law (2d Ed.) pp. 371-382, thus: "Contributory negligence is a want of ordinary care upon the part of the person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." The same definition is given by *Shear. & R. Neg.* § 61; *Beach, Contrib. Neg.* § 7; *Whart. Neg.* §§ 300, 323. The number of adjudicated cases affirming the same definition is so great that their citation would needlessly extend this opinion. That same article goes on to apply the definition of contributory negligence as follows: "In the application of the principle that the law looks to the proximate, and not the remote, cause of an injury, lies the great difficulty in the law of contributory negligence. No general rule for determining when causes are proximate, and when remote, has been formulated. But the principles that govern the determination of the question are well settled. When it is once es-

tablished that a person injured by the negligence of another has been guilty of a want of ordinary care, it becomes necessary to determine whether such want of ordinary care proximately contributed to the injury, as an efficient cause, or only remotely as a condition or remote cause thereof. If it proximately contributed, there can be no recovery; but, if it was only a remote cause or condition of the injury, a recovery can be had. A want of ordinary care may be said to contribute proximately to an injury when it is an active and efficient cause of the injury in any degree, however slight, and not the mere condition or occasion of it. But it is not a proximate cause of the injury when the negligence of the person inflicting it is a more immediate efficient cause; that is, when the negligence of the person inflicting the injury is subsequent to and independent of the carelessness of the person injured, and * * * the person inflicting the injury discovered the carelessness of the person injured in time to have avoided its effects, and prevented injuring him, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation. In such a case the want of ordinary care on the part of the injured person is held not a juridical cause of his injury, but only a condition of its occurrence." 4 Am. & Eng. Enc. Law, 25-27, and numerous cases there cited. Wharton on Negligence (sections 323-325) states the rule substantially the same, and, at the conclusion of the latter section, uses the following language: "And, no matter how negligent I may have been in putting myself in a particular position, I can recover for injuries inflicted on me by a party who could have avoided injuring me by the exercise of the ordinary care which, as has been just stated, is usual with prudent persons under the circumstances." Shearman & Redfield on Negligence state the rule substantially the same, in sections 61 and 99. To the same effect is Beach, Contrib. Neg. § 34, and cases there cited.

It will be difficult, if not impossible, to find any adjudicated case either in this country or England holding to a contrary doctrine; and the cases affirming the rule as above stated are so numerous that a citation of them would serve no useful purpose. *Isbell v. Railroad Co.*, 27 Conn. 393, is one of them. That was a suit by the plaintiff against the defendant to recover damages on account of the railroad company killing the plaintiff's cattle, which he had negligently permitted to stray onto the railroad. It is there said that "the defendants place their defense on the doctrine of the books that, where a plaintiff seeks to recover for the negligence of a defendant, it must appear that the negligence of the plaintiff did not essentially contribute to the injury,—a doctrine which has long been recognized as a sound one here and elsewhere. * * * But to this general doctrine there are important qualifications,

and this case is claimed by the plaintiff to present one of them; or, rather, in this and kindred cases it is said, and we think correctly, that there is an important distinction to be observed, and that great injustice would be done by the indiscriminate application of the rule of law to which we have referred. * * * The plaintiff has not forfeited his cattle because they have strayed away, but may justly demand of the defendants conduct as the circumstances at the moment require, doing no unnecessary injury to his property, and carrying out the spirit of the golden rule, which, applied to a case like the present, is as good law as it is sound morality. * * *

Then the court quotes the celebrated donkey case of *Davies v. Mann*, 10 Mees. & W. 545. The Connecticut court then goes on: "The same is held in *Trow v. Railroad Co.*, 24 Vt. 494. The court there say: 'Where the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems now to be settled in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if, at the time the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and diligence, an action will lie for the injury. So, in this case, if the plaintiff were guilty of negligence or even positive wrong, in placing his horse in the highway, the defendants were bound to the exercise of reasonable care and diligence in the use of their road and management of their train and engine; and, if the injury arose from a want of care, they are liable.' "

The same principle was applied in *Knowles v. Crampton*, 55 Conn. 336, 11 Atl. 593, a case very much like the present. The plaintiff stopped her vehicle in the highway, and the defendant, coming up behind, and attempting to go around, caught the rim of the plaintiff's wheel with the hub of defendant's carriage, and tipped up the plaintiff's carriage, threw her out, and caused the injury sued for. A recovery was upheld on the ground that the contributory negligence was not proximate. *Hays v. Railroad Co.*, 70 Tex. 602, 8 S. W. 491, is another case of the same kind. The plaintiff, Hays, negligently got in front of the defendant's street car, which was being drawn by a mule; but the driver saw him in time to have stopped the car in time to have avoided injuring the plaintiff, but negligently failed to do so, and the plaintiff's foot was crushed. It is there said: "We are also of the opinion that the proposition announced in paragraph 6, and repeated in paragraph 7, of the charge, to the effect that, if the plaintiff was guilty of contributory negligence, he cannot recover, unless the car driver willfully or intentionally inflicted the injury upon him, should not have been given, except upon the theory that the driver failed to discover the plaintiff's peril in time to avoid injuring him, by the use of such means

as a prudent and careful man would have employed under the same circumstances; for, if the driver could thus have avoided the injury after discovering the plaintiff's peril, his want of ordinary care was the proximate cause of it, and defendant would be liable for damages. The reason why a person who is guilty of contributory negligence contributing to his own injury cannot recover is because the policy of the law will not ordinarily permit one to recover who is himself at fault; but, although the negligence of such person may contribute to his own injury, yet if the person inflicting it discovers the peril of the other in time, by the reasonable exercise of the means at hand, to have prevented the injury, the law considers the failure to use such means as the immediate cause, and will permit a recovery, notwithstanding the injured party was guilty of contributory negligence." The same rule is recognized and enforced in *Hurt v. Railroad Co.*, 94 Mo. 255, 7 S. W. 1; *Troy v. Railroad Co.*, 99 N. C. 298, 6 S. E. 77; *Railroad Co. v. Cadow*, 120 Pa. St. 559, 14 Atl. 450; *Railroad Co. v. Davis*, 37 Kan. 743, 16 Pac. 78; *Baltimore & O. R. Co. v. State*, 33 Md. 542; *Railroad Co. v. White*, 84 Va. 498, 5 S. E. 573; *Deans v. Railroad Co.*, 107 N. C. 686, 12 S. E. 77; *McDonald v. Railway Co.*, 86 Tex. 1, 22 S. W. 939; *Zemp v. Railroad Co.*, 9 Rich. Law, 84; *Kerwhaker v. Railroad Co.*, 3 Ohio St. 172; *Northern Cent. Ry. Co. v. State*, 31 Md. 357; *Railroad Co. v. Patton*, 31 Miss. 156; *Adams v. Ferry Co.*, 27 Mo. 95; *Northern Cent. Ry. Co. v. State*, 29 Md. 420; *Kline v. Railroad Co.*, 37 Cal. 400; *Needham v. Railroad Co.*, Id. 409; *Davies v. Mann*, 10 Mees. & W. 545; *Dowell v. Navigation Co.*, 5 El. & Bl. 195, 206; *Tuff v. Warman*, 5 O. B. (N. S.) 573; *Radley v. Railway Co.*, 1 App. Cas. 754; *Scott v. Railway Co.*, 11 Ir. C. L. 377; *Coasting Co. v. Tolson*, 139 U. S. 551, 560, 11 Sup. Ct. 653; *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; *Austin v. Steamboat Co.*, 43 N. Y. 75; *Trow v. Railroad Co.*, 24 Vt. 493; *Werner v. Railway Co.*, 81 Mo. 368; *Scoville v. Railroad Co.*, Id. 434; *Welsh v. Railroad Co.*, Id. 466; *Frick v. Railway Co.*, 75 Mo. 595, 610; *Railway Co. v. Ryan*, 131 Ill. 474, 23 N. E. 385; and many other American and English cases, too numerous to cite. In *Baltimore & O. R. Co. v. State*, supra, it is said: "By 'proximate cause' is intended an act which directly produced, or concurred directly in producing, the injury. By 'remote cause' is intended that which may have happened, and yet no injury have occurred, notwithstanding no injury could have occurred if it had not happened. No man would ever have been killed on a railway if he had never gone on or near the track. But if a man does imprudently and incautiously go on a railroad track, and is killed or injured by a train of cars, the company is responsible, provided the circumstances were not such, when the party went on the track, as to threaten direct injury, and provided

that, being on the track, he did nothing positive or negative to contribute to the immediate injury." The illustration in this quotation from the Maryland case is about the aptest of all the illustrations as to what is proximate cause and what is remote cause. The plaintiff's act in the present case in going on to and falling asleep upon the railroad track may have happened a half-dozen times, and yet no injury have occurred, notwithstanding no injury could have happened if he had never done so. Therefore, if negligence it was for him to have done so, it was not a proximate cause of, nor did it proximately contribute to, his injury, but was only a condition or remote cause of such injury. The findings of the jury clearly show that the driver of the engine was in plain view of the appellant in ample time to have avoided the injury by the exercise of ordinary care by stopping the engine. Therefore, under the unbroken current of authority, wherever the English common law prevails, already alluded to above, the appellee's engineer having knowledge of the appellant's antecedent negligence, and his perilous situation caused thereby, before the engineer did the negligent act causing the appellant's injury, that act became the sole proximate cause of appellant's injury, and appellant's antecedent negligence became the remote cause or a mere condition of such injury; that is, after the engineer came in plain view, as he did, of appellant's antecedent negligence, and peril caused thereby, in time to have avoided the injury in the exercise of ordinary care, then whether appellant was to be injured or not depended wholly and solely on whether appellee's engine driver exercised such ordinary care; and, as he failed to do so, such failure was the sole proximate cause of appellant's injury, and appellant's act, if negligent, was a mere remote cause or condition of his injury.

From this conclusion there seems, to my mind, absolutely no logical or moral escape, unless the authorities I have cited do not declare the law as it is in this state. It is said that, while these authorities express the law as it is in other courts of last resort, such rule has been expressly rejected, and the contrary rule has been adopted, in this state, by this court. Should that prove to be so, I should respectfully bow to the authority of this court, though not without much regret at finding the court committed to a rule so fraught with injustice. To the claim that this court is committed to a doctrine contrary to the current of authority elsewhere on this subject, I have given much patient, and, as I trust, impartial, consideration; and I have reached the conclusion that no greater mistake could be well made than the supposition that this court is committed to the opposite rule from that for which I contend, and which prevails in other states on the question before us. The principal case supposed to have committed this court to the opposite doctrine is *Pennsylvania Co. v. Sinclair*, 62 Ind. 301. There is language

used in that case which, if it had not been, as I think, purely obiter dictum, would justify the claim made that it commits this court to the opposite doctrine. But there was no question involved in that case calling for such a remark. The suit was for damages for killing appellee's intestate by a passing train; and the case was decided in this court on the evidence. The evidence showed that the appellant's train was running through the city of Ft. Wayne at a high rate of speed, sufficient to make the company guilty of negligence; and, as it neared the street crossing where deceased was about to cross, it gave the usual alarm of bell and whistle; and though it was in broad daylight, about 2 o'clock in the afternoon, the approaching train in plain view and hearing of the decedent, and he being possessed of good eyesight, hearing, and all his faculties, and could, and doubtless did, hear the signals and the noise of the train, yet he paid no attention thereto, and stepped on the track at the street crossing, just immediately in front of the moving engine. There was no claim made that those in charge of the train had any reason to apprehend that the decedent could not both see and hear, or that he would not use these faculties to prevent him from stepping onto the track in front of the engine, or that the company was liable because it did not stop the train in time to avoid the injury, or that, by the exercise of ordinary care, its servants could have done so. So that there was nothing in the pleading or evidence calling for the obiter dictum remark made by the learned justice delivering the opinion. It was as follows: "We are aware that there is a line of decisions establishing what is known as the English doctrine, to the effect that the plaintiff may recover notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, could, by the exercise of ordinary care and diligence, have avoided injuring him. *Radley v. Railway Co.*, 18 Moak Eng. R. 37; *Shear. & R. Neg.* § 36; *Whart. Neg.* § 388. But we do not feel justified in disturbing what has been long accepted in this state as the better doctrine, after much discussion and consideration."

It is not, and was not, true that the contrary doctrine had "been long accepted in this state as the better doctrine, after much discussion and consideration." There was not a single case in this court up to that time either expressly or by implication holding that the contrary was the better doctrine; nor is the doctrine known as the English doctrine. Turning to the section of *Shearman & Redfield on Negligence* cited in support of the assertion that it is known as the English doctrine, I find that it does not state that it is known as the English doctrine; nor is any such statement found in the entire work that I have been able to find. *Whart. Neg.* § 388, is also cited as authority for the statement. Turning to that section in *Wharton*, I find it states the doctrine just as it is stated in the

other section of *Wharton*, I have already cited above, and substantially as the other authorities I have cited above, but not a word about it being known as the English doctrine. On the contrary, it cites a long list of American decisions holding that doctrine. Among them are the New York court of appeals, New Jersey equity, the supreme court of Pennsylvania, Illinois, Iowa, Missouri, supreme court of the United States, Connecticut, Ohio, Maryland, Wisconsin, Georgia, and other states, and but one English decision. And last, but not least, it cites the supreme court of Indiana, as holding to the doctrine which the learned judge delivering the opinion we are reviewing denominates the English doctrine, and which he, in substance, stated had been rejected in Indiana after much discussion and consideration for what he calls the better doctrine. The case thus cited by *Wharton* in support of the section cited in the dictum is *Railroad Co. v. Caldwell*, 9 Ind. 397. That was a suit by *Caldwell* against the railroad company to recover damages for negligently killing his cattle. *Caldwell* recovered in the trial court, and the company appealed, and sought to defeat the recovery, on the ground that *Caldwell* was guilty of contributory negligence in permitting his cattle to run at large in the vicinity of the railroad. It was held that the common law was in force in this state upon the subject, and required the owner of cattle to keep them inclosed on his own land, in the absence of proof of an order of the board of commissioners of the county permitting them to run at large. So that it was held by this court in that case that the plaintiff was guilty of negligence in so permitting his cattle to run at large. It was there said: "This case, then, will be decided in accordance with the previous rulings of this court in like cases, which are (1) that, where an injury happens to a party proximately through his own wrong, he cannot recover for it; but (2) that, where such injury happens by the proximate wrong of another, he shall be liable for it, even though the remote negligence of the injured party may have contributed to produce it. [Citing *Wright v. Brown*, 4 Ind. 95.] This principle runs through every branch of the law." This court held that, notwithstanding *Caldwell's* antecedent contributory negligence in suffering his cattle to run at large in the vicinity of the railroad, he had a right to recover for the negligence of the railroad company in killing his cattle, and affirmed the judgment.

This does not look as if this court had at that time accepted as the better doctrine that contributory negligence on the part of the plaintiff would in all cases defeat his action for the defendant's negligence, whether plaintiff's negligence was proximate or not. The case of *Wright v. Brown*, supra, cited in *Railroad Co. v. Caldwell*, supra, was a case where the owner of a flatboat sued *Wright* and others, owners of the steamboat *Wisconsin*, for negligently running too fast and too close to plaintiff's flatboat, laden with a cargo of

goods insecurely and carelessly moored to the wharf at Madison, on the Ohio river, by which it was sunk, and with its cargo destroyed. The right of recovery was upheld, notwithstanding the plaintiff's antecedent negligence in mooring his boat. In passing judgment upon the case, this court there said: "At common law, however, the general principle is that a party cannot recover anything for an injury which his own fault directly contributes to produce. *Halderman v. Beckwith*, 4 McLean, 286, Fed. Cas. No. 5,907; *Strout v. Foster*, 1 How. 89. But there is a class of cases establishing this doctrine: That, where the wrongful act immediately causing the injury is the work and through the fault of one party alone, he shall be liable for it, even though the damage such act occasions may be increased or entirely result through some previous neglect of the other party in respect to the thing injured, and especially if the party committing such wrongful act knows, at the time, of the previous neglect of the opposite party." Then the court goes on to quote the celebrated English donkey case of *Davies v. Mann*, 10 Mees. & W. 545, with full approval, and the citation of numerous American cases declaring the same doctrine, winding up in upholding the plaintiff's recovery notwithstanding his antecedent contributory negligence, and affirmed the judgment. But that is not all. In the following cases the question was squarely presented and unequivocally decided by this court, adjudging the law to be as in the other cases cited. *Wright v. Gaff*, 6 Ind. 416-420; *Railroad Co. v. Hiatt*, 17 Ind. 102; *Railway Co. v. Wright*, 22 Ind. 376-382; *Neal v. Scott*, 25 Ind. 440. And the same was directly adjudged to be the law in the Indiana appellate court in *Stone Co. v. Stewart*, 7 Ind. App. 563-566, 567, 34 N. E. 1019; *Coal Co. v. Shaw* (Ind. App.) 44 N. E. 676, 678, 679. This shows that the learned justice delivering the opinion in the *Sinclair Case* gravely erred in his obiter dictum by overlooking the Indiana cases cited above, because at that very time this court had established the exact opposite doctrine to that which he said it had, and which he denominated the better doctrine; and no such doctrine as he denominates the better doctrine had ever up to that time been declared or adjudged by this court to be the law. It has been so often decided by this court that the language used in the opinion is always to be restricted to the case before the court, and is authority only to that extent, and that it is only the points arising in the case and that are decided that are deemed as authority, that I scarcely need cite the decisions. *Lucas v. Board*, 44 Ind. 524. Therefore the dictum quoted from the *Sinclair Case* is no authority whatever. Hence the law as declared in the six early cases in this court I have quoted from and cited has been the law for 40 years in this state, in harmony with the uniform current of authority elsewhere, unless

this court has since either directly or indirectly overruled those cases.

I am told that this court has established a different rule in a later case than any of those to which I have referred, and that case is *Evans v. Express Co.*, 122 Ind. 362, 23 N. E. 1039. It is true that was a suit by Evans against the express company for the negligence of the driver of its express wagon in driving the same against Evans while he was standing out in the street, devoted to the use of vehicles and horses. It is true that a recovery was denied in that case in the trial court on the ground of the plaintiff's contributory negligence, which was affirmed in this court. The facts there were that the collision occurred after dark, in one of the streets in Princeton. The plaintiff was standing and talking with two other men, about eight feet from the curb, near the margin of the traveled track over which horses and vehicles were accustomed to pass, there being, however, about 30 feet of space in the street over which horses and wagons might have been driven without coming in contact with the plaintiff. It was not so dark but that persons standing, or a horse and vehicle approaching, on the street, could be seen. The boy driving the express wagon had another boy in the driver's seat with him, and, within about 12 feet of the place where the plaintiff and his friends were standing, observed them. Seeing two of them move out of the way, and his attention being attracted in another direction, he did not afterwards see the plaintiff until the wagon wheel struck and threw him to the ground, inflicting painful injuries on his person. The jury found, in answer to special interrogatories, that the plaintiff was not in the exercise of ordinary care when he was injured. That finding was upheld by the trial court, and by this court on appeal. The driver, though negligent, in failing to see the plaintiff in time, made the negligence of the two persons concurrent, and hence the negligence of each was a proximate cause of the injury. The attempt was made to have this court adjudge that, as the negligence of the plaintiff was antecedent to that of the express driver, the plaintiff's negligence was not proximate, and hence did not proximately contribute to his injury. This court decided the question thus presented, and, in doing so, squarely and unequivocally adjudged the law to be as laid down in the six cases cited above, in 4 Ind., 6 Ind., 9 Ind., 17 Ind., 22 Ind., and 25 Ind., supra, in the following language: "We quite agree that, if the driver of the express wagon saw the appellant standing in the street, it was his duty to turn out, and not drive his wagon upon him; and if the facts presented a case in which it appeared that the driver, after seeing the appellant, had any reasonable ground to apprehend that he was not aware of the approaching wagon, and was unconscious of the danger that was imminent, a recovery would have been just-

fied, notwithstanding the antecedent negligence of the appellant. *Railway Co. v. Long*, 112 Ind. 166, 13 N. E. 659; *Railway Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70; *Shear. & R. Neg.* (4th Ed.) § 61. One whose negligence has contributed to an accident from which he has sustained injury will not be debarred the right to recover if the defendant, after having discovered his peril, having also reasonable ground to believe him unconscious of danger, or unable to avoid it, might himself, by the exercise of ordinary diligence, have prevented the mischief which followed. The ground upon which a plaintiff may recover notwithstanding his own negligence is that the defendant, after becoming aware of the danger to which the plaintiff was exposed, failed to use a proper degree of care to avoid injuring him." But this court held that, because the express driver did not see the plaintiff in time to avoid injuring him, that made the negligence of both parties concurrent or proximate, and the case fall within the general rule that the plaintiff's proximate contributory negligence will defeat a recovery by him. Thus, we find it to be distinctly adjudged to be the law in that case that there may be a recovery by the plaintiff, notwithstanding his own antecedent negligence, if the defendant discovered such antecedent negligence in time to enable him, in the exercise of ordinary care, to avoid injuring the plaintiff, precisely as it had been adjudged 36 years before by this court, in *Wright v. Brown*, supra.

As indicating that the court so intended to adjudge in the *Evans* Case, I turn to the section of *Shearman & Redfield on Negligence*, involved in the citation quoted, and find the following language used: "Sec. 99. It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is any longer disputed, although the same rule, in substance, but inaccurately stated, has been made the subject of strenuous controversy." Thus, we see that this court is as thoroughly committed to the doctrine for which I contend as it well can be, notwithstanding the remarks in the *Sinclair* Case, supra. But that is not all. This court has not only not accepted the contrary doctrine at all, but has in many other cases either expressly recognized and upheld the rule laid down in the *Indiana* cases I have referred to. For instance, that rule is expressly recognized in *Railroad Co. v. Karns*, 13 Ind. 87. And such rule is expressly recognized in *Railway Co. v. Bryan*, 107 Ind., at page 53, 7 N. E. 808, in the following language: "Where one person negligently comes into a situation of

peril, before another can be held liable for an injury to him, it must appear that the latter had knowledge of his situation in time to have prevented the injury; or it must appear that the injurious act or omission was by design." The rule was expressly recognized in *Pennsylvania Co. v. Meyers*, 136 Ind., at page 261, 36 N. E. 37, by the use of the identical same language. And the rule has been indirectly recognized by this court and the *Indiana* appellate court in holding that the plaintiff's contributory negligence cannot defeat his recovery, unless it was a proximate cause of his injury, in the following cases: *Korraday v. Railway Co.*, 131 Ind., at page 264, 29 N. E. 1069; *Matchett v. Railway Co.*, 132 Ind., at page 341, 31 N. E. 792; *Railroad Co. v. Krapf*, 143 Ind. 665, 666, 36 N. E. 901; *Improvement Co. v. Teter*, 1 Ind. App., at page 327, 27 N. E. 635. And these cases, expressly or impliedly holding that the plaintiff's contributory negligence cannot exonerate the defendant's negligence unless the plaintiff's negligence was a proximate cause of his injury, must be construed and understood in the light of the unbroken current of authority as to what is proximate cause, both in this court and elsewhere. That current of authority is perfectly harmonious with the definition of proximate cause already stated above; and I have been wholly unable to find a single case in either of the two courts of last resort in this state asserting a contrary rule, except the obiter dictum in the *Sinclair* Case, supra.

But it is said that *Railroad Co. v. Graham*, 95 Ind. 286, holds the contrary rule. But an examination of that case will demonstrate that that is a grave mistake. There were no facts or pleadings in that case calling for a decision on such a question. It is a plain case of a plaintiff walking on a railroad track in broad daylight, in the same direction that the train was going; and, though the engineer gave the usual signals of warning, the plaintiff, being possessed of good eyesight and hearing, could have both seen and heard the train; yet he heedlessly walked on until the train overtook, struck, and injured him. There were two reasons why the company was adjudged not liable, independently of plaintiff's negligence; and they are that the engineer had a right to presume that the plaintiff would step off the track before struck, and, when the engineer found that he would not, it was impossible to stop the train in time to avoid injuring him. Like the *Sinclair* Case, there was nothing in the case calling for the determination of the rule I am contending for. In quoting from the *Sinclair* Case, supra, on the subject of the difference between gross negligence and willfulness, the obiter dictum in that case already quoted above is also quoted in the *Graham* Case, supra; but there is not a word in the latter case attempting to apply the dictum to any part of the case, for there is no point decided in the case to which it is

applicable. So, that case furnished no authority for the principle asserted in the dictum. I am also told that Railroad Co. v. McClaren, 62 Ind. 566, holds the same rule as stated in the dictum in the Sinclair Case, supra. But that is a serious mistake. That was a case in its facts much like the Graham Case, supra, except that it contains no such dictum as is quoted in the Graham Case; and, except that, it was conceded by the plaintiff in that case that his contributory negligence would preclude his recovery, unless the facts showed that those in charge of the train ran it against him willfully and purposely. The facts being as they were in the Graham Case, supra, it was held that they did not show a willful and intentional killing. But there was no holding either pro or con as to the rule I am discussing.

I therefore, with profound deference for the opinion of the majority of my brothers, feel deeply impressed with the belief that there is no logical or moral escape from the conclusion that the rule is well established, and has been for over 40 years, in this state, that a plaintiff may recover for a negligent injury, notwithstanding his own antecedent negligence, provided the defendant discovered such antecedent negligence in time to have avoided injuring the plaintiff by the use of ordinary care, and that such rule, in the language of Shearman & Redfield, is no longer disputed in any court of last resort. I therefore sincerely deplore the departure therefrom, not only because it unsettles a long-established rule, but because the rule commends itself to the dictates of an enlightened sense of justice, and the contrary rule is harsh, unjust, and cruel.

But it is said the answers to the interrogatories show that the engineer did not discover the perilous situation of the sleeping boy on the track until the engine ran onto him, and inflicted the injury, and hence it is claimed the rule I have been discussing has no application to the case. It is true those answers show that neither the engineer nor fireman saw the plaintiff before he was run over and injured by their engine. But the findings of the jury also show that it was daylight, and in a populous city, approaching a crossing, where children were liable to be, and that the sleeping child was in plain view from the engine for a distance of 300 feet before it reached him, and could have been seen by the engineer and fireman if they had looked. It has long been established law in this court that a railroad track is an indication of danger, and, where one attempts to go upon or cross the same, he must listen for signals, notice signs put up as warnings, and look attentively up and down the track, in order to his freedom from negligence. Mann v. Stock-Yard Co., 128 Ind. 138, 26 N. E. 819; Hathaway v. Railway Co., 46 Ind. 25; Railroad Co. v. Butler, 103 Ind. 31, 2 N. E. 138; Smith v. Railroad Co., 141 Ind. 92, 40 N. E. 270; Railway Co.

v. Frazee (Ind. Sup.) 50 N. E. 576. It is also established in this court that such person "is presumed in law to have seen what he could have seen if he had looked attentively, and have heard what he could have heard if he had listened attentively. The reason of this presumption is that it was the travelers' solemn duty to look attentively when approaching such a crossing, and listen attentively for a coming train." Railway Co. v. Frazee, supra; Cones v. Railway Co., 114 Ind. 328, 16 N. E. 638. It was no less the solemn duty of the engineer to look attentively as he ran his engine through a populous city, approaching a highway crossing, where children were liable to be. The only difference between the negligence of the defendant and the negligence of the plaintiff is, one is contributory, while the other is original and independent. They are exactly alike in their essential elements, the same being a failure to exercise ordinary care under all the circumstances. The law imposes the same solemn duty on plaintiff and defendant to exercise due care,—the one to avoid injury to himself, and the other to avoid inflicting such injury. Therefore there is no reason why the one should be presumed in law to have seen or heard what he might have seen or heard had he looked or listened that does not equally apply to the other, where the circumstances are such as to make it his solemn duty to look or listen. So, the defendant is under the same solemn obligation to look or listen where the circumstances require it as the plaintiff is, in order to escape responsibility for negligence. Therefore I think it quite clear that the law presumes that the engineer did see the sleeping child on the track in time to avoid running over it, because he might have seen it had he looked (Railway Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70); and hence his negligence in running over it was the proximate cause of the injury to the boy, and his negligence in going and falling asleep on the track, if negligence it was, was not a proximate cause of such injury, but was a remote cause or a mere condition of such injury.

For these reasons, I am of opinion that the answers to the interrogatories are not in conflict with the general verdict, and that we erred in the original opinion in holding that they were, and in affirming and in not reversing the judgment. Hence I am of opinion that a rehearing ought to be granted.

(21 Ind. App. 270)

WHISNAND v. FEE.

(Appellate Court of Indiana. Dec. 14, 1898.)

WILLS—ELECTION BY WIDOW.

Where testator, in his will, gives his widow and others specific real and personal property, and provides that the residue of his estate shall be equally divided between her and his grandchildren, and does not provide that such provisions for her benefit are in lieu of

any of her statutory rights, she may accept the provisions of the will, and still be entitled to the \$500 of personalty, or, in lieu of personalty, cash, allowed the widow, by Horner's Rev. St. 1897, § 2269, out of the husband's estate.

Appeal from circuit court, Monroe county; William H. Martin, Judge.

Action by Margaret E. Whisnand against William I. Fee, as executor of the will of John C. Whisnand, deceased. From a judgment in favor of defendant, plaintiff appeals. Reversed.

J. E. Henley and J. B. Wilson, for appellant. R. W. Meyers and Edwin Carr, for appellee.

WILEY, J. This cause was transferred to this court by the supreme court, and under the statute such transfer is final. The only question presented by the record is the right of appellant, as the widow of John C. Whisnand, to have paid to her the \$500 allowed by section 2269, Horner's Rev. St. 1897, notwithstanding the fact that she elected to take under the will of her deceased husband. The case was presented to the court below upon an agreed statement of facts, where a judgment was rendered against appellant. She excepted to the judgment, and the question is properly presented for decision. The agreed facts, so far as they are pertinent, are as follows: That John C. Whisnand, died testate August 20, 1897, leaving surviving him his widow (appellant), who was a childless second wife, and Armlna Ousler, his only child by a former marriage; that the will of the decedent was duly probated, and appellee was appointed executor, and was qualified as such August 31, 1897; that by said will he bequeathed to appellant one note for \$750, one note for \$200, also \$1,250 in cash, also certain real estate, and also certain personal property, describing it. In the agreed statement of facts it also appears from the will, which is copied bodily as part of the facts, that the decedent made certain bequests to his daughter and his grandchildren. The seventh subdivision of the will is as follows: "Seventh. All the residue of my property, real and personal, not herein disposed of, I hereby give, devise, and bequeath to my wife, Margaret Whisnand, and to my grandchildren Golda May and Roy H. Ousler, share and share alike." It was further agreed that on September 18, 1897, the appellant elected to take under the will, which election was in writing, and duly acknowledged, and filed in the office of the clerk of the Monroe circuit court. It was further agreed that after the payment of all specific bequests in said will, and all debts of said estate, there remains for distribution \$2,500, and that on October 23, 1897, appellant demanded of the executor the payment to her of \$500 by virtue of the statute in such cases made and provided. The statute (section 2269, *supra*) provides that "the widow of the decedent, whether he die testate or intestate, may at

any time before the sale, select and take articles therein named [in the inventory] at the appraisement, not exceeding in the aggregate \$500." The statute further provides that if the widow refuses or fails to take all or any part of the articles, etc., she shall be entitled to the deficiency in cash. Under the latter provision of the statute, if the widow does not select the articles inventoried to the value of \$500, she is entitled to the residue or whole amount in cash out of the first money coming into the hands of the administrator. *Leib v. Wilson*, 51 Ind. 550. In several cases it has been held that this allowance of \$500 to the widow is independent of debts, dower, or testamentary provisions in her favor. *Cheek v. Wilson*, 7 Ind. 354; *Schneider v. Plessner*, 54 Ind. 524; *Nelson v. Wilson*, 61 Ind. 255; *Loring v. Craft*, 16 Ind. 110; *Dunham v. Tappan*, 31 Ind. 173; *Bratney v. Curry*, 33 Ind. 399. In the case last cited, in discussing the provision of the statute under consideration, it was held that the right to the sum therein provided gives the widow "a credit for the necessaries of life at once upon the husband's death, and the means of decent burial should she die before the amount comes to her hands. The statute requires a liberal, instead of a narrow, interpretation, in order to accomplish the purposes of the legislature in enacting it." In *Langley v. Mayhew*, 107 Ind. 198, 6 N. E. 317, and 8 N. E. 157, *Nelson v. Wilson*, *supra*, and *Whiteman v. Swem*, 71 Ind. 530, were criticized, in which the court said: "Some of the cases cited * * * have gone to the extreme limit in holding that widows were respectively entitled to receive a specific sum of money, under the law, in addition to provisions made for them by their husbands in their wills, and, in consequence, we feel it incumbent upon this court hereafter to limit, rather than extend, the doctrine of these cases." In *Morrison v. Bowman*, 29 Cal. 337, it was held that if, by the general scope of the will, it appeared that the husband intended to dispose of all the property under his control, half of which, under the law of that state, belonged to his wife, and that the assertion by her of her half interest in the property must defeat the provisions of the will, her acceptance of the provisions of the will was a relinquishment of all claim by her under the law. This doctrine was quoted with approval by the supreme court in *Langley v. Mayhew*, *supra*. It is an old rule in equitable jurisprudence, to which the administration of estates is closely allied, that a person shall not claim an interest under an instrument, whether it be a deed or will, without giving full effect to such instrument as far as he can. This rule has been treated as one of universal application without exception. It applies to the interests of married women; to the interests immediate, remote, or contingent; to the interests of value or not of value. *Langley v. Mayhew*, *supra*; 2 Madd. 47; 2 Story, Eq. Jur. § 1075; Pom. Eq. Jur. §§ 395, 461. In *Shafer v.*

Shafer, 129 Ind. 304, 28 N. E. 867, it was said: "Whatever may have been the rule of construction in this state prior to the decision of *Langley v. Mayhew*, 107 Ind. 198, 6 N. E. 317, and 8 N. E. 157, it is now settled that where a husband has made specific provision for his widow, and has also disposed of all his other property in such a way as to make it apparent that the assertion by the widow to take both under the law and under the will would defeat the manifest purpose of the testator, she will be confined to the provisions made by the will, if she elects to take the provision made for her." In *Hurley v. McIver*, 119 Ind. 53, 21 N. E. 325, it was held that where a husband made specific provision for his widow, and has disposed of all his other property in such a way as to make it apparent that the assertion by the widow of the right to take both under the law and under the will would defeat the manifest purpose of the testator, she will be confined to the provision made by the will, after she has effectually elected to take the benefits so provided. In the case last cited the court, by Mitchell, J., said: "While a testator may not have the power to dispose of property which the law casts upon his widow, nor to deprive her of the five hundred dollars to which she is entitled by law, yet if it plainly appears that it was his purpose to do so, and the widow has accepted a testamentary provision made for her, such acceptance is a confirmation of the testamentary disposition, and waives her right under the law." The court also approves and adheres to the decision in *Langley v. Mayhew*, supra. In *Snodgrass v. Meeks*, 12 Ind. App. 70, 38 N. E. 833, in construing section 2269, supra, this court, by Reinhard, J., said: "It would seem, from the reading of this statute, that the widow is entitled to her \$500 absolutely, without regard to the fact whether the decedent died testate or intestate. * * * There is, however, one exception to the rule that she may take the \$500, will or no will, and that is where the provisions of the will are inconsistent with her taking the statutory allowance of \$500, and she accepts under the will. In that case the acceptance is a waiver of her claim to the personalty under the statute, as otherwise she would be enabled, by the assertion of both claims, to defeat the will of the testator." In the case from which we have just quoted it was not claimed that the widow made an election to take under the law, and to reject the provisions of the will, but it appears that she made no such election; and, this being true, under the statute, she will be deemed to have taken under the will. See *Fosher v. Williams*, 120 Ind. 172, 22 N. E. 118. If a widow elects to take under a will, she is bound to give effect to all of its provisions, and perform the burdens attached to the benefits. See *Snodgrass v. Meeks*, supra; *Moore v. Baker*, 4 Ind. App. 115, 30 N. E. 629. From all the authorities it seems that the rule is

firmly settled in this state that, if it appears from the will that it was the manifest intention of the testator that the provisions of the will affecting the rights of the widow were intended in lieu of her statutory rights, and that by the will all of the testator's property was specifically disposed of, and that the widow elects to take under the will, then she is estopped from claiming under the statute. This is a wholesome and just rule, and rests upon the ground that in such case, were she permitted to take both under the will and the statute, she would defeat the manifest intention of the testator, and this the courts will not sanction.

In *Shipman v. Keys*, 127 Ind. 353, 26 N. E. 896, the supreme court, it seems to us, have passed upon and settled the exact question before us. In that case the testator's will consisted of three items. In item 1 he bequeathed to his wife (appellant) certain real estate. In item 2 he bequeathed to her \$1,250 in cash. Item 3 was as follows: "Item 3. After paying all my debts and the above legacy to my wife, I will and bequeath that the residue of my property be equally divided between my said wife and my children, she taking an equal share with each child." Appellant elected to take under the will, and also filed a petition to require the administrator to pay her the \$500 allowed by statute, in addition to the bequests made to her. In this case, speaking of *Langley v. Mayhew*, supra, and *Hurley v. McIver*, supra, the court says: "These cases must not be understood, however, as going further than to merely limit the rule in the manner indicated. It was not the intention of the court in these cases to swing to the opposite extremity, and hold that in all cases when provision is made by the will for the wife her acceptance of such provision is a relinquishment of her right to the statutory allowance." Continuing, the court said: "In the case now under consideration, the husband, by the will, did make specific provision for his widow. He did not, however, in terms declare that such provision was to be in lieu of the provision which the law made for her. Would the assertion made by her of her right to the allowance of \$500 defeat the purpose of the testator as shown by the disposition which he has made of the residue of the property?" It was held that such assertion by the widow to take under the will would not defeat the purpose of the testator. It was held in that case that the widow's right to the allowance of \$500, in some of its incidents, was analogous to the right of dower. After ably discussing the question, showing that the husband could not, by any act, deprive the widow of dower against her will, and that she could take it, and, in addition, could take that which the will gives, the court concludes as follows: "If a decedent, by his will, makes provision for his widow, and specifically disposes of all the residue of his estate, so that the assertion by the widow of her statutory

claim would defeat some material provision thereof, she will be required to elect, and cannot take both. A general disposition of all the residue of his property by residuary devise or bequest, not purporting to be in lieu of such absolute claim, is not enough, however, to compel an election. Such devise will be construed as made in view of her absolute statutory rights, and subject thereto, and only operates on the residue after payment of debts and expenses of administration, and the satisfaction of specific devises, legacies, and rights. There is nothing in the will in this case inconsistent with the widow's claim to take both the statutory allowance of \$500 and the provision made for her by the will." Following the rule laid down in *Shipman v. Keys*, supra, are the cases of *Richards v. Hollis*, 8 Ind. App. 353, 35 N. E. 572, and *Blake v. Blake*, 15 Ind. App. 492, 44 N. E. 488. We do not deem it necessary to quote from these cases, but they are directly in point. The recent case of *Pierce v. Pierce* (decided by this court Nov. 22, 1898) 51 N. E. 954, is in harmony with the authorities above cited, and strongly supports appellant's contention in the case before us. It follows from the authorities that the court erred in rendering judgment against appellant. The judgment is therefore reversed, with instructions to the court below to render judgment for appellant for \$500 upon the agreed statement of facts.

(22 Ind. App. 121)

INDIANA NATURAL & ILLUMINATING GAS CO. v. MARSHALL.¹

(Appellate Court of Indiana. Dec. 20, 1898.)

INJURY TO EMPLOYE—DEFECTIVE APPLIANCES—ASSUMPTION OF RISK—EMPLOYMENT OUTSIDE OF CONTRACT—VARIANCE—INCONSISTENT FINDINGS.

1. Where a servant is injured through using defective appliances furnished by his master, he need not show, in order to entitle him to recover, that he had not the same means as defendant of knowing of the defect, as he is not bound to make a critical examination of such appliances for the purpose of discovering defects not obvious.

2. A servant's implied assumption of risks does not extend to more hazardous work outside of his contract of hiring, and where he is required to do the more hazardous work, and is injured while using defective tools furnished by the master, he will be entitled to recover, although the defects were such that an experienced person would have discovered them by using care.

3. Defects in spurs used in climbing electric light poles, in that they are set at an improper angle, and the material is so soft that it will bend under a man's weight, are not such defects as an inexperienced servant is obliged to know, where he is required to use such appliances outside his regular employment.

4. In an action by a servant against his master for injuries received while climbing an electric light pole, the complaint alleged that the spurs furnished by defendant were defectively constructed, in that the parts intended to be stuck into the pole were set at an improper angle, and that they were of such soft material that the points would bend under a man's weight. The jury, in special answers, found that the spurs were defective, in that they

were beveled on the wrong side, and set too low on the shank. Held, that the variance was not fatal.

5. In an action by a servant against his master for injury received from the use of a defective tool, which he was required to use outside his regular employment, and in the use of which he was inexperienced, a special finding of the jury that plaintiff had used the tool prior to that time is not inconsistent with the conclusion in the general verdict that he was ignorant of the defect.

6. If a master instructs his servant not to do a particular dangerous work, and the servant thereafter obeys the order of a foreman, and does the work, he does it at his own risk, notwithstanding, by a previous order, he was instructed to obey such foreman.

Appeal from circuit court, Clinton county; J. V. Kent, Judge.

Action by Albert G. Marshall against Indiana Natural & Illuminating Gas Company. From a judgment for plaintiff, defendant appeals. Reversed.

John C. Farber, for appellant. Palmer & Palmer, for appellee.

ROBINSON, J. Appellant appeals from a judgment awarding damages for personal injuries sustained by appellee. The errors assigned call in question the overruling of the demurrer to the complaint, the overruling of appellant's motions for judgment on the interrogatories notwithstanding the general verdict, for a venire de novo, for a new trial, and in arrest of judgment.

The complaint alleges that on and since March 1, 1896, appellant has operated an electric light plant in the city of Frankfort, Ind.; that on said date appellee entered the employ of appellant as a "trimmer"; that his duties were to visit appellant's lamps each day, examine them, and see that they were in proper condition, to replace carbon in lamps when necessary, and to inspect said lamps once each hour when lighted, to see that they were burning properly, and, if any lamp was found not in proper condition, to report that fact to appellant's electrician; that appellee continued in such employ until the 23d day of July, 1896, when appellant was putting up a new wire, which required adjusting at the top of a pole extending 25 feet above ground; that appellee was ordered and required by one George B. Marshall, who was appellant's agent and electrician, and whose duty it was in part to maintain the poles and wires in proper condition, to climb said pole to adjust said wire; that such work was no part of his duty as trimmer, and no part of the duties for which he was employed, and that it was more dangerous and unsafe than such duties, and that he was inexperienced in climbing electric light poles, and in the proper construction of spurs for use in such climbing; that said pole was planted in a leaning position, and extended upward through the limbs of a tree, which limbs were so around and about said pole as to compel him to climb upon the under side thereof; that appellant furnished appellee spurs to attach to his feet with which to climb said pole by

¹ Rehearing denied.

striking said spurs into said pole; that said George B. Marshall was authorized to command all employes except one Harry Natcher, who was superintendent, and that said Natcher had notified appellee to obey the orders of said Marshall; that the spurs so furnished by appellant were defectively constructed in that the parts intended to be stuck into the pole by the wearer in climbing were set at an angle of 45 degrees with the body of iron strapped to the wearer's leg, when they should have been at an angle of 5 degrees only; that they were constructed of soft metal, so that the points would bend under a man's weight, thus making the angle greater, and causing the spurs to loosen from the pole; that in obedience to said orders he climbed said pole, using said spurs, and when about 20 feet from the ground the spurs lost their hold, and appellee fell, causing injuries which are described, and which are alleged to be permanent. It is further averred that appellee fell because the pole was leaning, and the spurs were defectively constructed, which fact appellant knew; that appellee did not know the spurs were defectively constructed, and did not know it was more hazardous to climb a leaning pole than one standing upright; that the duties of trimmer were not hazardous or dangerous, and that climbing poles and adjusting wires thereon is, and especially so to persons unaccustomed to such work; that appellant knew appellee was unaccustomed to climbing poles and adjusting wires; that said injury resulted from the wrongful conduct of appellant in permitting said pole to remain in a leaning position surrounded by the limbs of a tree and in requiring appellee to use said defectively constructed spurs, and that said injury was without fault or negligence on appellee's part.

It is argued by appellant's counsel that, while the complaint avers generally that appellant knew that the spurs were defectively constructed, and that appellee did not know that fact, it does not aver that appellee did not know of the defect, and had not equal means of knowing with appellant. This is not a case where a proper appliance was furnished, which afterwards became defective while being used by the servant, but the appliance was defective when first furnished, and of such defect appellant is chargeable with knowledge. The duty of inspection does not lie equally upon the servant and the master, because the servant has the right to rely upon the master doing his duty in the furnishing of safe appliances, unless the defect is such that an ordinarily prudent person would observe it. The complaint alleges that the spurs were not only set at a wrong angle, but that the material was soft, and would bend under a man's weight. In such case the master undertakes that the appliance is fit for the use to which it is to be put, so far as ordinary care and prudence can discover. *Railway Co. v. Amos*, 49 N. E. 854, 20 Ind. App. 378. Thus, in *Railway Co. v. Buck*, 116 Ind. 566, 19 N. E. 453, the court said:

"While the employer may expect that an employé will be vigilant to observe, and that he will be on the alert to avoid, all known and obvious perils, even though they may arise from defective tools and machinery, * * * yet the latter is not bound to search for defects, or inspect the appliances furnished him, to see whether or not there are latent imperfections in or about them which render their use more hazardous. These are duties of the master, and, unless the defects are such as to be obvious to any one giving attention to the duties of the occasion, the employé has a right to assume that the employer has performed his duty in respect to the implements and machinery furnished. *Bradbury v. Goodwin*, 108 Ind. 286, 9 N. E. 302; *Railway Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50; *Railroad Co. v. Gildersleeve*, 33 Mich. 133; *Hughes v. Railroad Co.*, 27 Minn. 137, 6 N. W. 553; *Wood, Mast. & Serv.* § 376." And in *Railroad Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, it is said: "An employé is required to observe and avoid all known or obvious perils, even though they may arise from defective machinery and appliances; but he is not bound to search for defects, or make a critical inspection of the appliances which are provided for his use. These are duties of the employer." *Railway Co. v. Woodward*, 9 Ind. App. 169, 36 N. E. 442. It is true, as argued by counsel, that, if the leaning pole was dangerous, it was a danger open and obvious, and appellee had equal means with appellant of knowing such danger. But it is alleged that the injury resulted from the leaning pole and from the defective spurs. It is also alleged that the spurs were defectively constructed, and that this fact was known to appellant, but was not known to appellee. It is further averred that appellee was inexperienced in climbing electric light poles, and that appellant knew that appellee was unaccustomed to the climbing of poles and adjusting wires thereon. It might be that the defectively constructed spurs would suggest to a person experienced in their use that it would be unsafe to use them, but we cannot say that the defects as described in the complaint were such as would suggest themselves to an inexperienced person about to use them. A defect in the construction of a tool might be obvious to a person experienced in its use, and to one inexperienced it might appear to be properly constructed, and especially is this true of an appliance whose defects are of the nature described in the complaint. It must be borne in mind that the complaint shows appellee was not required to use them in the work which he was regularly employed to do, but that, when injured, he was engaged in work different from his regular employment, and work to which he was unaccustomed. His implied assumption of the risks incident to the particular work he is employed to do does not extend to more hazardous work outside of his contract of hiring, unless he voluntarily goes

into such hazardous work. *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. 187. Appellant's counsel has cited a number of cases to the effect that, where the apparent danger is such that a person of ordinary prudence, exercising that prudence, would refuse to encounter it, he proceeds at his peril, although ordered to do work out of the line of his employment. But, as we have said, we cannot say in the case at bar that the defects in the spurs as described in the complaint were such as a person unaccustomed to their use would be held to have known. There was no error in overruling the demurrer to the complaint.

With the general verdict the jury answered certain interrogatories to the effect that appellee, by the use of his eyesight, could have discovered that the pole was leaning, and that branches of a tree obstructed free passage up the pole on the upper side; that he had as good an opportunity to discover this as appellant, and that he knew the pole was leaning and obstructed as aforesaid; that the spurs used by appellee were not sound and fit for the purpose intended, so far as ordinary prudence could discover; that appellee did not have as good opportunity to see and observe the character and the then present condition of the spurs as appellant; that appellee had had very little experience in climbing electric light poles; that the spurs used were defective, in this: "spurs were beveled on wrong side, and set too low on shank"; that appellee had used the same spurs in climbing poles for appellant prior to the time of his injury; appellee could not, by the use of ordinary intelligence, have seen the defects in the spurs prior to the time of his injury; appellant had knowledge of the defect in the spurs; that on the 23d day of July, Harry Natcher was superintendent of appellant, and had full control of and authority to direct the work of all the employés of appellant; that Natcher did not, on the 22d day of July, direct George Marshall and appellee to go out next day, and bring in a circuit, and did not direct that George Marshall should climb the pole and appellee work on the ground; appellee was not, during the first week of July, ordered by Natcher to come down from a pole, and take off the climbing spurs, and in the future work on the ground; that Natcher notified and directed appellee subsequent to May 1, 1896, and prior to the injury, that he should work upon the ground; that George Marshall had authority from appellant at the time of the injury to command appellee and direct him in his work; that at the time he was injured appellee was not doing the kind of work covered by his contract of hiring.

It is argued by counsel for appellant that his motion for judgment on the answers to the interrogatories should have been sustained, for the reason that the answers show that the general verdict is based upon a different state of facts than those alleged in the complaint; that the jury found that the defects in the spurs, as

alleged in the complaint, did not exist, because in specifying the defects they specify other and different ones. The rule is well settled that a plaintiff, in order to recover, must prove all the material allegations of his complaint, and that he cannot recover upon a state of facts different from those alleged, although the facts proven may make a case; that a plaintiff must recover *secundum allegata et probata* or not at all. The reason for such a rule is that a defendant cannot be brought into court and required to disclose his grounds of defense to one state of facts, and a judgment rendered against him upon a different one. He is entitled to know what he is required to meet. But in the case at bar, upon the particular matter, the appellant was charged with having furnished an employé with defective spurs. It is true, the defect the jury finds existed in the spurs is different from the defects alleged in the complaint. The complaint charged that the defect, in part, was the manner in which the spurs were set on the iron shank, and the jury finds, in effect, the same thing. The complaint charges, and the jury finds, that the spurs were not properly set on the iron shanks. Appellant's attention was called, by the complaint, to the fact that the spurs were not properly set, and the jury so finds. The defect is not described in exactly the same way, but it would be a strained construction to say there was a fatal variance. It would not be contended by appellant's counsel that appellee must prove all the different defects in the spurs alleged in this complaint. He must prove the spurs defective substantially in the manner alleged, and this the jury finds he did. As we have seen, the complaint alleges that appellee was inexperienced in climbing poles, and ignorant of the use of spurs. In answer to interrogatories, the jury found that appellee had had very little experience in climbing electric light poles prior to the injury, and that he had used the same spurs in climbing poles of appellant prior to the injury. It is argued that by these answers it is shown appellee knew of the defects in the spurs, if they existed, because he had used them, and had equal means with the master of knowing of the defects, if they existed. The appellee himself testified that he had noticed this particular pole several times, and knew that it was leaning, and, knowing this, he put on the spurs, and tried to go up it. He further testified that between the 1st of March and the 23d day of July he had climbed eight or ten poles, "not over ten poles"; that these particular spurs were the only pair he remembered of ever having on, and that every time he had climbed he had climbed with these spurs. He further testified that he was ordered to put the spurs on, that he knew nothing about the shape the spurs ought to be, or their quality, and that he had never paid any attention to spurs at all. The witnesses are all agreed that the defects in the spurs—the position in which the spurs were set—caused them to pull out of the wood when in use, and that the metal was

soft, causing the points to blunt, thus preventing them from readily entering the wood. In other words, the effect of all the evidence upon that point is that in the use of the spurs their defects would probably become apparent. It does not appear that appellee made any objection to using these spurs. He did object to climbing the leaning pole. For four or five days prior to the injury appellee was not working as a trimmer, but was working on the line, helping to stretch wire; and he testifies that once in a while before that he had helped at putting up lines and adjusting wires. There is no evidence in the record showing that appellee, when using these spurs as he testified, ever objected to them on account of their defective construction, or that he ever experienced any trouble in their use. But an inexperienced person might for a time use a defective tool, of which defect he was ignorant, without experiencing any trouble in its use, and without discovering its defect. From the evidence it is clear the spurs could be used, and had been used for some time, and it was possible for appellee to use them a number of times without discovering anything wrong in their construction. The fact that the jury find that he had used the spurs prior to that time is not necessarily inconsistent with the jury's conclusion in the general verdict that he was ignorant of the defect. Due regard must be had in such cases concerning the intelligence and experience of the person employed in relation to the implement with which he is required to work.

Whether appellee, when injured, was not engaged in work he had been instructed not to do presents a more serious question. The jury found that Harry Natcher, on the 23d day of July, 1896, and for more than six months prior to said date, was appellant's superintendent, and had full control of and authority to direct the work of all employes of appellant during the time from July 19 to July 26, 1896; and that Natcher, subsequent to May 1, 1896, and prior to the injury, notified and directed appellee that he should work upon the ground. Natcher testified that about the first week in July appellee was assisting in putting up a line, and had climbed a pole, and that he (Natcher) saw he could not climb, and ordered him to come down, and take off the spurs, and give them to another workman, which he did; and that he (Natcher) told appellee at that time that in the future he was to work on the ground. Three other witnesses testified to the same thing. Appellee admits that Natcher told him to come down from the pole, and take the spurs off, and give them to another workman, and that he did so; but said he had no knowledge of Natcher saying anything about working on the ground in the future. So that there was abundant evidence upon which to rest these answers by the jury. It thus appears from these answers that appellee, when injured, was engaged in work which he had been instructed not to do by appellant's superintendent.

It is argued, however, by appellee's counsel, that George Marshall, who ordered appellee to climb the pole when injured, was a vice principal, and had authority to give instructions to employes by reason of a notice which had been posted in appellant's building, which read: "On and after May 1st, all employes of the electric light company will look to George Marshall for instructions. [Signed] H. D. Natcher." Appellee testified, in answer to a question whether Natcher gave him orders to obey anybody else, that "he didn't give me orders directly himself." The evidence is undisputed that if George Marshall had authority to direct appellee to do certain work, and the jury answered that he had, he got the authority from Natcher. The question then arises whether the general instructions given all the employes by the superintendent on May 1st to look to George Marshall, who had charge only of certain work, for instructions, or the special instructions given appellee by the superintendent afterwards as to particular work, should control as to that particular work. It is not shown by the jury's answers, or by any evidence, that the special instructions given appellee about the 1st of July, that he should work on the ground, were ever rescinded, or in any way modified. The authority Natcher gave Marshall over appellee could be revoked in whole or in part, and the verdict certainly shows that appellee had instructions from the superintendent himself not to do the very work he was doing when injured. Appellee knew that Marshall's authority was derived from Natcher, and from the jury's answers we must conclude that Natcher had given him special instructions to work on the ground. If a master employs a servant, and instructs him personally not to do certain dangerous work, it is his duty to disregard an order of a vice principal to do that particular work; and if he chooses to disregard the instructions of the master, and follow the orders of the vice principal, he does so at his own risk, so far as the master is concerned. An employer may have good reason for directing a particular employe not to do certain work, and, when such instructions have been given, the employe has no cause of complaint if injured in consequence of such disobedience. A foreman or vice principal has no authority to place a liability upon the principal which the principal has expressly declined to assume. And, if an employe, as in the case at bar, chooses to disregard special instructions of his principal, and follow those of a vice principal under authority previously given, he must do so at his own risk. It is true that ordinarily the employe has the right to look to his immediate superior for directions in his work, but this rule cannot be held to apply to a certain kind of work, where the master has given the employe personal instructions not to do that particular work. Taking the answers to the interrogatories together with the evidence upon which they are based, we do not believe that the general verdict and the answers to

the interrogatories should stand, but that the interests of justice would be best subserved by granting a new trial. Judgment reversed, with instructions to sustain appellant's motion for a new trial.

HENLEY, J., absent.

(21 Ind. App. 307)

OLDFATHER v. ZENT.

(Appellate Court of Indiana. Dec. 20, 1898.)

APPEAL—REVIEW—MALICIOUS PROSECUTION—EVIDENCE—SURPRISE—RECEPTION OF INCOMPETENT EVIDENCE.

1. No question upon the action of the trial court in overruling a motion to strike out testimony can be considered on appeal, unless the record shows what reason was presented to the court below as ground for the motion.

2. In an action for malicious prosecution, plaintiff, after testifying that owing to the prosecution he was obliged to surrender a contract under which he was employed, was asked to state what he said, and what his employer said, in reference to canceling the contract. *Held*, that the question was proper, for the purpose of showing the reason for the surrender.

3. Where a party is surprised by the testimony of his own witness, it is proper, for the purpose of allowing him to explain the inconsistency, to ask him why he made certain previous statements, inconsistent with such testimony; impeachment not being the purpose, but the unavoidable incidental result, of such question.

4. Where the trial court admitted evidence over objection, and immediately thereafter sustained a motion to strike it out, saying, "I will strike it out for the present," there is no available error.

Appeal from circuit court, Porter county; John H. Gillett, Judge.

Action by John S. Zent against Samuel W. Oldfather. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Johnston and Jacob S. Slick, for appellant. Charles P. Drummond, for appellee.

BLACK, C. J. The appellee sued the appellant for malicious prosecution, and recovered judgment, which was reversed on appeal; the cause being remanded for a new trial. *Oldfather v. Zent*, 14 Ind. App. 89, 41 N. E. 555. The venue was changed to the court below, where the complaint was amended, and issues were formed, which were tried by jury, and a general verdict for the appellee was returned. The overruling of a motion for a new trial is alone assigned as error.

The appellant first presents for our consideration the overruling of his motion to strike out certain testimony. The record shows that "counsel for defendant moved the court to strike out the testimony of the plaintiff concerning the contents of a written contract between himself [plaintiff] and the New York Life Insurance Company, which motion the court overruled, to which decision and ruling of the court the defendant, by counsel, then and there excepted." Upon

looking into those portions of the record to which we have been referred by counsel, containing the testimony of the appellee referred to in the motion to strike out, we find that the testimony in question, some upon examination in chief, and some upon cross-examination, introduced at another stage of the trial, and on a prior day, was admitted without objection. The motion does not state any ground of objection to the testimony, or reason for striking it out. If it properly can be said that in this motion the testimony in question is designated with sufficient definiteness, yet no question upon the action of the trial court in overruling a motion to strike out testimony can be considered, unless the record shows that a reason for striking out the testimony was pointed out to the court below as the ground of the motion, and also what reason was thus presented. *Bernhamer v. Dawson*, 124 Ind. 126, 24 N. E. 743; *McIlvain v. State*, 80 Ind. 69.

In the appellee's complaint it was stated, among the averments relating to damages, that, at the time of his arrest under the criminal prosecution (the particulars of the arrest being set forth), he was in business for the New York Life Insurance Company, working as its agent, under and by virtue of a special contract, by which he was to receive from said company, and was receiving from it, \$300 per month at the time of his arrest; that his character and standing for honesty and integrity had theretofore been good; that by reason of the arrest, and of the serious charge made against him (which was alleged to be that of the crime of obtaining money under false pretenses), he became nervous, prostrated, and sick in body, and so distressed in mind that he was compelled to remain at his house, and for that reason could give no attention to his business, and from the fact that his mind was so distressed and worried that he could not give any attention to his business, and as a consequence of such bodily illness, distress, and worry of mind, he was compelled to lose, abandon, and give up his contract with said company for a period of four months; that his time was worth during such period, and he would have received for such time, but for the wrong of the appellant done him, the sum of \$1,200. It appeared in evidence that one Frank B. Davenport was said company's supervisor for this state, that said contract was surrendered, and that the appellee had a conversation with Mr. Davenport in relation to giving up the contract. The appellee, testifying as a witness, was asked by his attorney to "state what Mr. Davenport said, and what you said, in reference to canceling that contract whereby you were to receive three hundred dollars per month for your services." The court overruled appellant's objection to this interrogatory, and this ruling was assigned as a cause for a new trial. The conversation about which the inquiry was

made was had between the representative of the company and its agent, at the time of the discharge of the agent. It was material to show, not merely the surrender of the contract, but also the reason for the surrender. If the conversation which showed the discharge might also characterize the thing done, by indicating the reason for the discharge, this did not render the question to the witness improper; the language so giving character to the act being part of the *res gestæ*.

George W. Ray, a witness produced by appellee, testified that he was a lawyer, and in December, 1889, and January, 1891, was the prosecuting attorney for Kosciusko county, where the criminal prosecution was instituted against the appellee; that the appellant called to see the witness in December, 1889, and talked with him about the appellee and the transaction between him and the appellant; that thereupon the attorney wrote a letter to the appellee. The court would not permit this letter, which was identified by the witness, to be introduced in evidence. No exception was taken to this ruling, and no question is made before us relating to this action of the court, which appears, from a statement of the court on the trial, to have been based on the ground that the evidence did not sufficiently connect the appellant with the letter. Counsel for appellee, having reference to this letter, asked the witness Ray: "Why did you make this statement in the letter? 'Mr. S. W. Oldfather has placed in my hands for collection a certain judgment which he holds against you and Mr. L. B. Weaver.' Why did you make that statement in the letter to Mr. Zent?" To this question counsel for appellant objected, "on the ground that it is an effort to impeach a party's own witness, and on the further ground that it is not shown to have been authorized in any way by defendant in the case, or that he had any connection with it." The court overruled the objection, and the witness, after some pressing, admitted that the judgment was placed in his hands for "adjustment." Before being asked the question so objected to, he had testified that Mr. Oldfather had not placed the judgment in his hands for adjustment and collection. It appears from the record that the learned judge at the trial placed his ruling upon the ground that, the witness having disappointed the party calling him, it was competent to thus call his attention to his other conflicting statement. Counsel have discussed the statute (section 507, Horner's Rev. St. 1897; section 515, Burns' Rev. St. 1894) providing that "the party producing a witness shall not be allowed to impeach his credit by evidence of bad character, unless it was indispensable that the party should produce him, or in case of manifest surprise, when the party shall have this right, but he may in all cases contradict him by other evidence, and by showing that he has made statements differ-

ent from his present testimony." The witness Ray had not testified to any fact prejudicial to the appellee, but had merely failed to testify as the appellee expected. The statutory provision for proof of contradictory statements only relieves a party in respect to prejudicial testimony of his own witness. *Hull v. State*, 93 Ind. 128; *Conway v. State*, 118 Ind. 482, 21 N. E. 285; *Miller v. Cook*, 124 Ind. 101, 24 N. E. 577; *Rhodes v. State*, 128 Ind. 189, 27 N. E. 866. But no inquiry is raised here, as a question either under the statute or at common law, as to whether it would have been allowable to contradict the witness by introducing in evidence the portion of the letter containing his conflicting statement, after calling his attention thereto. The letter was not admitted in evidence, nor was any part of its contents admitted; but the court, in permitting such question, impressively indicated that it was because the witness had merely disappointed the party calling him, and for the purpose of giving the witness an opportunity to make explanation why he made the statement to which the interrogatory related. It appears that the interrogatory to the witness was not permitted for the purpose of laying the foundation for the impeachment of the witness by showing his contradictory statement, but it was permitted as being allowable under a common-law rule of evidence,—that, where a party is surprised by the testimony of his own witness, he may interrogate the witness in respect to his previous statements inconsistent with his present testimony, for the purpose of proving his recollection, and showing him that he is incorrect in his testimony, and giving him an opportunity to explain the inconsistency. Without any reference to any statutory provision on the subject, it cannot be regarded as a sufficient objection to such a course of examination that the answer of the witness, by reason of its contradiction of his testimony already given, may tend to weaken confidence in the memory or the truthfulness of the witness; this being, not the sole purpose and effect, but only an unavoidable, incidental result in seeking by a reasonable and natural method to arrive at the truth, which should be the object of rules of evidence. Such a beneficial result appears to have followed in the case before us. See *Bullard v. Pearsall*, 53 N. Y. 230; *Griffith v. State*, 90 Ala. 583, 8 South. 812; *Humble v. Shoemaker*, 70 Iowa, 223, 30 N. W. 492; *Hildreth v. Aldrich*, 15 R. I. 163, 1 Atl. 249; *Syrup Co. v. Carlson*, 42 Ill. App. 178; *McNerney v. Reading City*, 150 Pa. St. 611, 25 Atl. 57; *Hurley v. State*, 46 Ohio St. 320, 21 N. E. 645; *Walker v. State*, 136 Ind. 663, 36 N. E. 356.

The appellant assigned as cause in his motion for a new trial the admission of certain evidence, and the overruling of his motion to strike out the same evidence. Upon reference to the record, it appears that, while the court admitted the evidence in question,

the appellant immediately thereafter made a motion to strike it out, which the court sustained, saying, "I will strike it out for the present." It seems sufficiently plain from the statement of the matter, that there was here no available error, as against the appellant.

We have been unable to find sufficient ground for disturbing the verdict in the criticisms of the appellant relating to the instructions, or in any suggestion concerning the evidence or the amount of the damages. The judgment is affirmed.

(21 Ind. App. 303)

DOUGLAS v. STATE.

(Appellate Court of Indiana. Dec. 15, 1898.)

INTOXICATING LIQUORS—ILLEGAL SALE—PROSECUTION—ARGUMENT TO JURY—IMPROPER REMARKS OF COUNSEL—HARMLESS ERROR.

1. In a prosecution for an illegal sale of beer, it is not necessary for the jury to determine whether the liquor sold was intoxicating, in addition to finding that it was beer, since beer, which is judicially known to be a malt liquor, is an intoxicating liquor, under Horner's Rev. St. 1897, § 5313 (Burns' Rev. St. 1894, § 7277), providing that the words "intoxicating liquor" shall apply to any malt liquor.

2. Defendant excepted to objectionable remarks of the prosecuting attorney on his argument to the jury, whereupon the court instructed the jury to pay no attention to them, and directed the attorney to keep within the record, to which defendant took no exception. *Held*, that on appeal it will be presumed that any injury was cured by the instruction.

Appeal from circuit court, Morgan county; David E. Beem, Special Judge.

George C. Douglas was convicted of the illegal sale of intoxicating liquors, and appeals. Affirmed.

A. M. Bain and O. Matthews, for appellant. W. A. Ketcham and Merrill Moores, for the State.

BLACK, C. J. Under the provision of the statute (section 5320, Horner's Rev. St. 1897; section 7285, Burns' Rev. St. 1894) that "any person not being licensed according to the provisions of this act, who shall sell or barter, directly or indirectly, any spirituous, vinous, or malt liquors in a less quantity than a quart at a time, * * * shall be deemed guilty of a misdemeanor," etc., the appellant was indicted for a sale of "Intoxicating liquors, to wit, beer," and was convicted. The overruling of appellant's motion for a new trial is the only alleged error discussed before us. The evidence showed that the liquor was sold as and under the name of "hop ale," from a bottle having thereon a label bearing that name. There was evidence (contradicted by other evidence) that the liquor was, in fact, beer, and that it was intoxicating. The court, in one of its instructions, adopting a definition approved in *Myers v. State*, 93 Ind. 251, stated that "beer," in the estimation of the law, is fermented liquor, made from any malted grain, with hops or other bitter flavoring mat-

ter. In the same instruction the court indicated to the jury that only a sale of beer as charged in the indictment could sustain a verdict of guilty. In a subsequent instruction, to which objection is made, the court said: "It is claimed by the defendant that the liquor on the occasion referred to in the indictment was hop ale, which is not intoxicating. As heretofore stated, the question for you to determine is not whether hop ale was sold, or whether hop ale is intoxicating, or whether beer is intoxicating, but your attention must be directed to the fact whether the liquor called hop ale was, in fact, beer, and whether it was sold as charged in the indictment." It is provided by the statute (section 5313, Horner's Rev. St. 1897; section 7277, Burns' Rev. St. 1894) that "the words 'intoxicating liquor' shall apply to any spirituous, vinous or malt liquor, or to any intoxicating liquor whatever, which is used or may be used as a beverage." "When, in an act, it is declared that it shall receive a certain construction, the courts are bound by that construction, though otherwise the language would have been held to mean a different thing." *Smith v. State*, 28 Ind. 321, 325; *State v. Harrison*, 116 Ind. 300, 306, 19 N. E. 146; *Black, Interp. Laws*, 191. In *Wilkes v. State*, 33 Ind. 206, concerning proof that the liquor sold was ale, it was said: "The statute declares that the words 'intoxicating liquors,' as used in the act, apply to any spirituous, vinous, or malt liquors, etc.; and the courts will judicially recognize the fact that ale is a malt liquor, and its sale by retail inhibited without a license." The courts take judicial notice that whisky, beer, and gin are intoxicating. *Wasson v. Bank*, 107 Ind. 206, 219, 8 N. E. 97; *State v. Jones*, 3 Ind. App. 121, 29 N. E. 274. In *Myers v. State*, supra, it was said that when a witness testifies to the sale or giving away of beer, under circumstances which make a sale or giving away of intoxicating liquor unlawful, "the prima facie inference is that the beer was of that malted and fermented quality declared by the statute to be an intoxicating liquor, and the court trying the cause ought to take judicial notice of the inference which thus arises from the use of the word 'beer' in its primary and general sense"; that, under the statute, "malt liquor must be held to be an intoxicating liquor"; and that the word "beer," as used in ordinary parlance, is to be taken, as matter of law, in its primary meaning of a malt liquor. See, also, *Mullen v. State*, 96 Ind. 304; *Stout v. State*, Id. 407; *Dant v. State*, 106 Ind. 79, 5 N. E. 870. In *Welsh v. State*, 126 Ind. 71, 25 N. E. 883, the affidavit charged a sale of "beer" without alleging that it was intoxicating or that it was malt beer. It was held that the affidavit charged a sale of "malt liquor, which is declared by our statute to be within the words 'intoxicating liquor.'" There was evidence in the case now before us that the liquor sold was "hop ale," and was not, in fact, intoxicating, and some witness testified that it was

not beer. There was no evidence otherwise that it was not of malted and fermented quality. The testimony that it was beer furnished evidence that it was a malt liquor, and the jury, by the verdict of "Guilty as charged in the indictment," found that it was beer; and, under the statute, a sale of beer,—that is, of malt liquor,—as described in the indictment, is unlawful. The statute says, in effect, that any malt liquor must be regarded as a liquor whose sale as described in the indictment is punishable. The mere question, then, as to whether beer is an intoxicating liquor, is not one for the determination of the jury in a case arising under this statute. If the court, as matter of law, must know that beer is a malt liquor, it is not necessary to a conviction for the jury, besides finding a sale of beer, to find also, as a matter of fact, that beer—that is, malt liquor—is intoxicating. Upon an examination of the evidence as to its sufficiency, and of the instructions given and those refused, we do not find any available error or any matter which seems to be of sufficient importance for further discussion.

One of the causes assigned in the motion for a new trial was misconduct of the prosecuting attorney in his closing argument to the jury, "wherein he made the following statement to the jury: 'He [meaning defendant] run a notorious quart shop. Citizens of your town and community had to mortgage their homes, and the county was put to great expense in sending to Dakota to bring back an absconding fugitive from justice.'" A bill of exceptions shows that, during the closing argument of the prosecuting attorney, he made the statement above quoted to the jury, "to which statement of the prosecuting attorney counsel for defendant, at the time, excepted, and the court, at the time, admonished the prosecuting attorney to keep within the evidence, and cautioned the jury not to consider anything said by the prosecuting attorney or attorneys for the defendant outside of the record." This is all that is shown in the record concerning the matter. When the objectionable remark was made by the prosecuting attorney, the appellant "excepted," not stating any ground of objection; but thereupon the court responded by the admonition to the prosecuting attorney and the caution to the jury. No exception was taken to this action of the court, and nothing further was requested by the appellant in the premises. It does not appear that the prosecuting attorney did not obey the admonition, and it must be presumed that he did obey, and also that the jury observed the advice of the court. The conduct of the prosecuting attorney in referring to matters not in evidence was unwarranted and reprehensible; but it is shown that action of the court which the appellant does not appear to have regarded as inadequate was taken at the time, which was proper and adapted to prevent the injury which the misconduct would probably produce, the court responding to the appellant's "exception" in such manner and with such

fullness as he desired, so far as appears. It is not error of the court that is assigned in the motion, but the misconduct of the prosecuting attorney, which was corrected by the court, to the apparent satisfaction of the appellant; and we cannot conclude that the injury which might otherwise be presumed was not averted by the action of the court. We need not decide whether any further action of the court would have been proper, if asked by the appellant. We will not suppose that the appellant was prevented from having a fair trial of this matter. See *Combs v. State*, 75 Ind. 215; *Morrison v. State*, 76 Ind. 335; *Bessette v. State*, 101 Ind. 85; *Epps v. State*, 102 Ind. 539, 1 N. E. 491; *Brow v. State*, 103 Ind. 133, 2 N. E. 296; *Shular v. State*, 105 Ind. 289, 4 N. E. 870; *Norton v. State*, 106 Ind. 163, 6 N. E. 126; *Coleman v. State*, 111 Ind. 563, 13 N. E. 100; *Jackson v. State*, 116 Ind. 464, 19 N. E. 330; *Grubb v. State*, 117 Ind. 277, 20 N. E. 257, 725; *Drew v. State*, 124 Ind. 9, 23 N. E. 1098. Judgment affirmed.

(21 Ind. App. 502)

CROMER v. STATE.¹

(Appellate Court of Indiana. Dec. 15, 1898.)

OBSTRUCTION OF HIGHWAY—PROSECUTION—TRIAL—INSTRUCTIONS—LIMITING ARGUMENT—OBJECTIONABLE REMARKS BY COURT AND COUNSEL—DEDICATION—APPEAL AND ERROR—ASSIGNMENTS OF ERROR—REVIEW.

1. Errors in admitting and excluding evidence, giving and refusing instructions, limiting time of argument to the jury, and misconduct of the court and counsel during the trial, must, on appeal, be assigned as reasons for the granting of a new trial, and not assigned as independent errors.

2. In a prosecution for obstructing a public highway, evidence showing a continuous and undisputed public use of the way for over 20 years is sufficient to show that it is a public highway, though there is no evidence of a dedication.

3. A judgment will not be reversed for insufficiency of evidence if there is evidence on every material point to support the verdict.

4. Where an instruction is correct as far as it goes, it is not erroneous as not including another proposition, as appellant could have asked a specific instruction covering the omitted point.

5. It is not necessary to the validity of the dedication of a highway that it be evidenced by a written conveyance, but it is sufficient if the landowner, by open, visible acts, unequivocally indicates to the public his intention to open a way, and the public acts upon the faith of such acts.

6. Since implied dedication is founded on the doctrine of equitable estoppel, a dedication of a highway may be shown by evidence of its undisputed use and improvement by the public, without objection by the owner.

7. If an instruction taken as a whole states the law correctly, the fact that certain parts of the instruction are objectionable is not ground for reversal.

8. If several instructions, when taken together, correctly state the law, the fact that some of them, standing alone, are incomplete, does not make such instructions erroneous.

9. It is not error to refuse instructions on points covered by instructions which have been given.

10. Errors in instructions given by the court on

¹ Rehearing denied.

its own motion will not be considered on appeal, where such instructions are not numbered or signed by the judge, and no exception was taken to them at the trial.

11. Objectionable remarks by the court and by counsel in his argument to the jury will not be considered on appeal, where such remarks have not been pointed out in the record, and there is nothing to show that an exception was taken at the trial.

12. Since limiting the time of argument is within the discretion of the trial court, an order limiting the argument is not ground for reversal, if no abuse of discretion appears.

Appeal from circuit court, Cass county; S. P. Thomson, Special Judge.

Robert Cromer was convicted of obstructing a highway, and appeals. Affirmed.

Frank Swigart, for appellant. W. A. Ketcham and C. C. Hadley, for the State.

ROBINSON, J. Appellant appeals from a judgment assessing a fine against him for obstructing a highway. The place obstructed is an alley in the city of Logansport. A number of errors have been assigned and discussed at length in appellant's brief.

The first, second, third, fourth, eighth, ninth, and tenth errors assigned question the court's action in admitting certain evidence, and refusing to admit certain evidence offered by appellant. The fifth, sixth, seventh, and fifteenth errors assigned question the action of the court in giving certain instructions, and refusing to give certain other instructions. The eleventh error assigned is misconduct of the court during the trial, and the twelfth is misconduct of counsel in the argument of the case to the jury. The thirteenth error is the action of the court in limiting the time of appellant's argument to the jury. These assignments of error present no question. Such matters should be stated as causes for a new trial, in a motion therefor, and cannot be assigned independently as errors. See *Bailey v. Boyd*, 59 Ind. 292; *Baecher v. State*, 19 Ind. App. 100, 49 N. E. 42, and cases there cited.

The fourteenth and only remaining error assigned is overruling appellant's motion for a new trial. The first four reasons in the motion for a new trial are that the verdict of the jury is contrary to the law and the evidence, and is not sustained by sufficient evidence. Appellant's counsel has discussed at some length the evidence on the question as to whether or not there was a public highway at the point where the obstruction was placed. No good purpose could be subserved by setting out the evidence of the various witnesses. A number of witnesses testified that the alley in question, prior to the obstruction complained of, had been used continuously by the public for more than 20 years. In such cases it is not necessary to show a dedication. There is evidence which shows a continuous, uninterrupted use by the public for more than 20 years, and that during that time the use of the way was not disputed by any owner of the real estate.

It is a well-settled rule in this state that a judgment will not be reversed either in a civil or a criminal case where there is evidence which fairly supports the verdict of the jury on every material point. In such case the appellate tribunal cannot assume to weigh the evidence and interfere with the result reached by the trial court. *McCarty v. State*, 127 Ind. 223, 26 N. E. 665, and cases there cited; *Winslow v. State*, 5 Ind. App. 306, 32 N. E. 98, and cases there cited.

The fifth reason for a new trial is the giving of certain instructions requested by the state. It is said by appellant's counsel that the first instruction, while in some parts correctly stating the law, does not go far enough. It is a well-settled rule that, where an instruction is correct so far as it goes, the fact that it does not go further, and include some other proposition, will not make it erroneous. If a party thinks the instruction incomplete, he should ask a special instruction covering the omitted matter, and reserve an exception on the court's refusal to give the same. *Railroad Co. v. Smock*, 133 Ind. 411, 33 N. E. 108; *Du Souchet v. Dutcher*, 113 Ind. 249, 15 N. E. 459; *Powers v. State*, 87 Ind. 144.

The fifth and sixth instructions were upon the question of reasonable doubt. These instructions correctly state the law, and one of them seems to be a verbatim copy of an instruction which has often been expressly approved by the supreme court.

The eighth instruction correctly told the jury what is necessary to establish a highway by dedication. The instruction simply undertook to state an abstract principle of law, and no reference is made in it to any fact or facts in controversy in the case being tried.

The court correctly told the jury, in the twelfth instruction, that, in order to constitute a dedication, it is not necessary that there be a grant or conveyance by deed or writing on the part of the owner of the land. "A dedication of land need not be evidenced by a written conveyance." *City of Indianapolis v. Kingsbury*, 101 Ind. 200.

There was no error in giving the thirteenth instruction, in which the jury was told that "if a landowner, by open and visible acts, unequivocally indicates to the public and its citizens an intention to throw open a street or alley to the public, and the citizens and the public have acted upon the faith that there was a dedication, the law will treat the acts of the owner as constituting a dedication." *Faust v. City of Huntington*, 91 Ind. 493.

The fourteenth and sixteenth instructions were upon the question of implied dedication, and that certain acts of the landowner, if shown to exist, would estop the landowner from asserting that there was no intention to dedicate; that an implied dedication was founded upon the doctrine of equitable estoppel; and that it might be established by evidence of conduct such as allow-

ing the undisputed use of the land by the public, and by standing by and without objection seeing improvements made with reference to it as a street or alley. There was some evidence upon which to base these instructions, and, so far as they undertook to state principles of law, they were certainly correct. *City of Indianapolis v. Kingsbury*, 101 Ind. 200.

The court told the jury, in the twenty-fourth instruction, that "the unopposed use of a highway by the public over the land of an individual who is cognizant of the fact, for a short space of time, may be sufficient to raise the presumption of a dedication. Indeed, the use of land for a highway for such a length of time that public accommodations and private rights might be materially affected by an interruption of the enjoyment would be evidence that the landowner intended to dedicate to the public." The principles of law set forth in this instruction have been recognized to be the law in this state, in *Mauck v. State*, 66 Ind. 177. See *Town of Marion v. Skillman*, 127 Ind. 130, 26 N. E. 676.

Counsel for appellant, in many of the instructions given by the court, finds fault with certain sentences contained in certain instructions. The rule is well settled that the instructions must be considered as a whole, and not in detached portions; and if, taken together, they state the law of the case correctly, the fact that some clause therein, considered separately, is doubtful or erroneous, will not constitute ground for reversing the judgment; and if, when taken together, they fairly and correctly state the law, the cause will not be reversed, even if some of the instructions, considered alone, may seem incorrect; and when two or more instructions, taken together, state the law accurately, no error is committed in giving them, though either one may not state it fully enough when considered alone. See *Stout v. State*, 96 Ind. 407; *Boyle v. State*, 105 Ind. 469, 5 N. E. 203; *Kennedy v. State*, 107 Ind. 144, 6 N. E. 305. We have examined all the instructions given by the court, and can but conclude that they state the law fully and fairly. Taking them as a whole, they contain nothing that would warrant a reversal of the case. They are quite lengthy, and cover every phase of the case. Some of the instructions requested by appellant, and refused, correctly state the law, but they were fully covered by instructions that were given. No good purpose can be subserved by a repetition of instructions on the same point. The instructions are applicable to the evidence, and there is nothing in them of which appellant can rightfully complain.

The eighth reason for a new trial questions the correctness of the instructions given to the jury by the court on its own motion. These instructions are not numbered, nor are they signed by the judge. Neither does it appear that any exception was taken to the

giving of these instructions. There are no marginal exceptions, nor does the bill into which they are copied show that any exceptions were taken at any time to the giving of the same. It follows that no question is presented upon the instructions given by the court on its own motion.

The ninth reason for a new trial is error of the court in this: that during the trial of the cause, while the state was giving evidence upon the proposition whether there was or had been any public travel on said claimed alley, the court said, in the presence of the jury, "You have evidence enough on that point." Counsel have not referred to the page of the record where the objectionable words may be found. We cannot undertake to hunt through a record of nearly 300 pages to see whether it contains such a remark, and what was done at the time. Appellant's counsel have failed to comply with rule 25 of this court (27 N. E. vi.). *State v. Winstandley* (Ind. Sup.; decided Nov. 29, 1898) 51 N. E. 1054. Besides, the question has not been brought into this court by any bill of exceptions, and we are not informed whether any exception was taken at the time, or was ever taken, to the objectionable words.

The tenth and eleventh reasons for a new trial question certain remarks made to the jury by the state's attorney, in his argument of the case to the jury. The motion for a new trial, together with an affidavit in support of the tenth and eleventh reasons for a new trial, have been set out in what is denominated "Bill of Exceptions No. 4." But nowhere does it appear that appellant objected and excepted to the objectionable language at the time it was made, or at any time. It is well settled that the misconduct of counsel can be made available error on appeal only by an objection made at the time, and invoking the intervention of the court, and, if the court refuses to interfere, by reserving an exception. The trial court must be given some opportunity to correct the error, and, upon its refusal, an exception duly reserved will present the question on appeal. *Coble v. Eltzroth*, 125 Ind. 429, 25 N. E. 544; *State v. Taylor*, 5 Ind. App. 29, 31 N. E. 543; *Railroad Co. v. Wrape*, 4 Ind. App. 100, 30 N. E. 428; *Douglas v. State* (Ind. App.; decided Dec. 15, 1898) 52 N. E. 238.

The twelfth reason for a new trial was the court's action in limiting the argument of counsel to the jury. It appears by a bill of exceptions that the court limited the argument of counsel to one hour and a half to each side. This was a matter within the sound discretion of the trial court. Thus, in the case of *Cory v. Silcox*, 5 Ind. 370, the court said: "Matters of this kind must necessarily be left to the sound discretion of the court trying the cause, and, unless that discretion is grossly abused, we will not interfere." See *Priddy v. Dodd*, 4 Ind. 84; *Baldwin v. Burrows*, 95 Ind. 81. We cannot say from this record that there was any abuse

of discretion in limiting the time for the argument, but it appears to us that one hour and a half was ample time to properly present the case in all its phases to the jury.

We have examined all the questions presented by appellant's counsel in his brief, and find no error authorizing a reversal of the judgment. Judgment affirmed.

(22 Ind. App. 601)

ROGERS v. CITY OF BLOOMINGTON.¹
(Appellate Court of Indiana. Dec. 16, 1898.)
GENERAL VERDICT—CONFLICTING FINDINGS—INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

1. Where the general verdict of a jury is irreconcilably in conflict with their answers to special interrogatories, the latter will control.

2. Where a person, knowing of an obstruction in the street, its location and relation to the street and sidewalk, attempts to pass it in the dark, without taking any precaution to avoid it other than by "feeling with his feet and searching with his eyes," he is guilty of contributory negligence which will bar recovery for any injury he may receive.

Black, C. J., and Comstock, J., dissenting.

Appeal from circuit court, Orange county; S. B. Voyles, Judge.

Action by Rachael Rogers against the city of Bloomington. From a judgment for defendant, plaintiff appeals. Affirmed.

John R. East and Bayless & Harvey, for appellant. Duncan & Batman, for appellee.

WILEY, J. Appellant sued appellee to recover damages resulting to her by falling into a ditch in one of the public streets of appellee city. The negligence charged in the complaint against appellee was that it caused to be constructed a deep ditch in Madison street, in said city; maintained the same in a dangerous and unsafe condition, in that it failed to place any guard rails on either side thereof, and failed to keep any lights or other danger signals in the vicinity, as warnings, etc.; and that appellee, long prior to the time appellant received her injuries, knew of the unsafe and dangerous condition of said street on account of said ditch. The complaint avers that appellant, while walking along said street at 9 o'clock at night, "without any knowledge, and without being able to see the location of said ditch, and without any fault on her part whatever, and without the aid of any lights or guard rails, she stepped and fell to the bottom of said ditch, * * * to her injury," etc. There was a trial by jury, a general verdict for appellant, and with the general verdict the jury answered and returned certain interrogatories submitted to them by the court. Each party moved the court for judgment on the answers to the interrogatories, notwithstanding the general verdict. Appellee's motion was sustained and appellant's motion overruled, and such ruling presents the sole question for decision under the assignment of error.

¹ Rehearing denied.

This is the third appeal in this case. City of Bloomington v. Rogers, 9 Ind. App. 230, 86 N. E. 439; *Id.*, 13 Ind. App. 121, 41 N. E. 395. In the former appeals the judgment in each instance rested upon a special verdict, and a reversal was ordered because the special verdicts did not show that appellee was free from negligence contributing to her injury. By the special interrogatories in this appeal the same question is presented, and for that reason it is necessary for us to show in this opinion the interrogatories and answers submitted to and returned by the jury. For brevity, we will do this in narrative form, and the facts established by the interrogatories and answers are the following: That appellant received her injuries by falling into a ditch on the west side of Madison street in the city of Bloomington, between Third and Fourth streets. Said ditch was about 12 feet wide, and about 6 feet deep, walled with stone with a solid stone bottom; was without guard rails or other barriers, and without danger lights or signals or lights of any kind to show its location. That said ditch was about 2 feet from, and parallel to, the space on the west side of the street, intended for a sidewalk. That said sidewalk was, at the time, being improved by putting crushed stone and cinders on it preparatory to paving the same with brick. That such sidewalk space extended from the southeast corner of appellant's lot north past the front thereof, to where it crossed an alley 132 feet north of the northeast corner of said lot. That said ditch extended south from said alley about 90 feet. That on the night appellant was injured said ditch was dangerous to persons passing near the same at night without any guard rails or signal lights. That appellant's home was near the southeast corner of her lot, just north of Third street and west of Madison street. That at the time appellant fell into said ditch, and prior thereto, she knew of the condition of the street, the location of the ditch, and its condition as to guard rails, danger signals, and lights. That on the night of her injury, when it was dark, without the aid of any light, she undertook to pass along said sidewalk space on the west side of said ditch, going southward to her home, and in so doing she fell into the ditch, whereby she was injured. The following interrogatory and answer we quote in full: "(13) On said night, was there not a route by which plaintiff could have reached her home, known to her, on which there was a good sidewalk, by going to Third street at some point east of Madison street, and then going west on the north side of Third street to her home? Answer: There was proof of a good sidewalk from southeast corner of the Public Square south to Third street, and along the same to the southeast corner of plaintiff's lot, but no proof that she knew the whole route." That appellant received her injuries about 9 o'clock at night. That just

previous to receiving her injuries appellant was standing at an open window, talking to one Brogan, looking into a room in which there was a light burning. That at the time she fell into the ditch she could not see its exact location. That immediately before falling into the ditch she did not know its exact location. That at the time of her fall she did not know its exact location. Interrogatory 20, and answer thereto, are as follows: "(20) What effort, if any, did the plaintiff make to ascertain the location of said ditch while approaching the same, and before she fell into it? Answer: Feeling with her feet, and searching with her eyes." That on the night appellant was injured, and while she was on her way home, she could not see the exact location of the ditch; and that as she proceeded home she did not find the exact location of the ditch, prior to falling into it. It was upon these facts, found specially, that the court below rendered judgment for appellee, notwithstanding the general verdict in favor of appellant. By the general verdict there was a finding for appellant on every material issue necessary to a recovery, and, in the absence of the evidence, or any question of error or irregularity at the trial, such general verdict should be upheld, unless the interrogatories and answers, or some of them, are so irreconcilably in conflict with the general verdict that they cannot possibly stand together. The court will indulge every reasonable presumption in favor of the general verdict. *McCallister v. Mount*, 73 Ind. 559; *Block v. Haseltine*, 3 Ind. App. 491, 29 N. E. 937; *Vance v. City of Franklin*, 4 Ind. App. 515, 30 N. E. 149; *Railroad Co. v. Gilmore*, 1 Ind. App. 468, 27 N. E. 992; *Railroad Co. v. Creek*, 130 Ind. 142, 29 N. E. 481; *Railway Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530. But where the interrogatories propounded to the jury, answered by them, and returned with their general verdict are irreconcilable with the general verdict, the former will control. In other words, a general verdict will be upheld unless the facts stated in the answers to special interrogatories are so antagonistic as to preclude reconciliation. *Railway Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. 64; *Railroad Co. v. Adams*, 131 Ind. 88, 30 N. E. 794; *Railroad Co. v. Sumners*, 131 Ind. 241, 30 N. E. 873; *Town of Poseyville v. Lewis*, 126 Ind. 80, 25 N. E. 593; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210; *Western Assur. Co. v. Studebaker Bros. Mfg. Co.*, 124 Ind. 176, 23 N. E. 1138; *Allemong v. Simmons*, 124 Ind. 199, 23 N. E. 768; *Lockwood v. Rose*, 125 Ind. 538, 25 N. E. 710; *Barnes v. Turner*, 129 Ind. 110, 28 N. E. 822.

We are therefore to determine whether or not the answers to the special interrogatories are so antagonistic to the general verdict as to preclude a reconciliation with it. If the two can be construed together, so as to not irreconcilably conflict, then the general verdict should control; but, on the other hand,

if they are so antagonistic as to preclude reconciliation, the special verdict must be upheld. In the light of authorities in this state, it seems to us that the question is not of difficult solution. To entitle the appellant to recover, it was essentially necessary for her to aver and prove that appellee was negligent in the manner charged, and that she was without fault or negligence contributing to her injury. By the general verdict, we must, under the authorities, indulge the presumption that she established both of these essential requisites by a fair preponderance of the evidence. When we look to the interrogatories and answers, it is clear, without argument or the citation of authorities, that appellant firmly established the negligence of appellee, so that it leaves the naked question of the negligence or freedom of negligence of appellant for our consideration, and this we must determine from the facts specially found. If such facts show that appellant was guilty of negligence which contributed to her injury, then the answers to the interrogatories would be so antagonistic to the general verdict so as to preclude reconciliation with it; for the general verdict cannot be reconciled with appellant's contributory negligence on the theory that, if she negligently contributed to her injury, she cannot recover. Recurring to the answers to the interrogatories, we are confronted at the threshold with the facts that appellant knew of the ditch, its location and relation to the street and sidewalk; that the sidewalk was in the course of construction, by having placed on the space intended for it crushed stone and cinders, preparatory to laying the brick; that the ditch was about two feet from the sidewalk; that the ditch was six feet deep, with a precipitous stone wall and a solid stone bottom; that she knew it was a dangerous place; that it was a dark night; that she had just been looking into a house through a window, where there was a light; that the only precaution she took to avoid falling into the ditch was to feel with her feet and search with her eyes while she was walking; that, even though she "searched with her eyes," she was unable to determine the exact location of the ditch; and that under these circumstances it is shown that she undertook to pass along and over the space intended for a sidewalk without any light, and in so doing fell into the ditch. These facts clearly establish contributory negligence on the part of appellant, and the authorities so hold. Mr. Beach lays down the rule that if one who knows of a dangerous place or obstruction in a sidewalk or street, and undertakes to pass it in the darkness, and is injured, he cannot recover. *Beach, Mun. Corp.* § 154. Again, in his work on *Contributory Negligence*, at section 248, he tersely and forcibly states the rule in this state as follows: "But it has been held in Indiana that a person injured by an obstruction in the highway, of which he has knowledge, and

which he attempts to pass in the night, where it was too dark for him to see it, has no remedy, such conduct being negligence per se;" citing *Trustees v. Desouchett*, 2 Ind. 586. In *Bruker v. Town of Covington*, 69 Ind. 33, where appellee fell into an open cellar way as he was passing it at night, adjacent to the street, of which he had knowledge, the court said: "To sustain the defense in this case, it was sufficient to show that the plaintiff had knowledge of the obstruction. Having such knowledge, it was for the plaintiff to judge for himself as to the dangerous character of the obstruction, and take the risk accordingly if he ran upon it." See, also, *Kelly v. Doody*, 116 N. Y. 575, 22 N. E. 1084; *McGinty v. City of Keokuk*, 66 Iowa, 725, 24 N. W. 506; *Parkhill v. Town of Brighton*, 61 Iowa, 103, 15 N. W. 853. In *Riest v. City of Goshen*, 42 Ind. 339, appellant's servant was driving a team of horses, and passed over a bridge which was defective, and the servant had knowledge of such defect. The court said: "It is well settled that, if the plaintiff or his servant knew of the true condition of the bridge when the team and wagon were driven upon it, he cannot, under such circumstances, recover." Where one goes upon a structure voluntarily, with full knowledge of its dangerous condition, and of the perils that attend the venture, he will be deemed to have done so at his own risk. "The law accounts it negligence for one, unless under compulsion, to cast himself upon known peril from which a prudent person might reasonably anticipate injury." *Morrison v. Board*, 116 Ind. 431, 19 N. E. 316. In *Town of Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256, appellee was injured by reason of a defective sidewalk while attempting to pass over it, with a knowledge of the defect. The court said: "One who knows of a dangerous obstruction in a street or sidewalk, and yet attempts to pass it, when, on account of darkness or other hindering causes he cannot see so as to avoid it, takes the risk upon himself." In the same case it was said: "The authorities, however, lend no countenance to the notion that a person having knowledge of an obvious defect or of a place on a highway which naturally suggests to a person of common understanding that it is dangerous, may nevertheless cast himself into or upon the defect, upon the theory that he is not obliged to forego travel upon the highway." In the first appeal of this case (9 Ind. App. 230, 36 N. E. 439) it was held that, if appellant passed along the street in question with a knowledge of its dangerous condition, she did so at her peril. The court, by Ross, J., said: "She knew it [the ditch] was in the street, and she knew when it was dark she could not see it; hence she had no right to cast herself upon it." In *Town of Salem v. Walker*, 16 Ind. App. 687, 46 N. E. 90, appellee was riding a horse through a public street in appellant town, when his horse frightened at an obstruction in the

street, and suddenly turned in the opposite direction. Appellee saw and knew what frightened his horse. Notwithstanding that, he turned his horse about, and attempted to ride him past the obstruction at which he frightened, when the horse, being still frightened, reared up, falling backward, throwing appellee to the ground, whereby he was injured. This court held he could not recover, because of his own negligence in trying to ride his horse by the obstruction, after knowing of it, and that his horse was frightened by it. Robinson, J., speaking for the court, said: "But, even if the municipality has neglected to keep its streets in a reasonably safe condition, the appellee is not excused from the use of ordinary care for his own safety." "It is equally well settled that, because one has knowledge that a highway or sidewalk in a town or city is out of repair, or even dangerous, he is not, therefore, bound to forego travel upon the same. But the care in such case to avoid injury must be in proportion to the danger the traveler might encounter by reason of the defect or obstruction." The case from which we have just quoted is an instructive one, and many authorities are collected and cited. In *Sale v. Turnpike Co.*, 147 Ind. 324, 46 N. E. 669, appellant was a physician, and was called to see a patient on a dark night. He drove along and over appellant's turnpike in a buggy drawn by one horse. He was familiar with the highway, and knew that at a certain point in it there was a bend, or turn, immediately in front of which was a precipitous embankment, 100 feet long and 5 feet deep; that immediately on the opposite side of the turnpike for 100 feet was a ditch 3 feet wide and 3 feet deep, and the space between the ditch on the south side and the embankment on the north side was only 20 feet. In making said turn, appellant's horse walked over said embankment, and he was injured. It was so dark he could not see. After citing and quoting from many authorities applicable to the facts, Monks, J., said: "Applying the doctrine declared in the cases cited, if the night was dark, and appellant could not, while driving his horse, distinctly see the twenty-foot space, the curve of the road, and the ditch on one side, and the embankment and pitfall on the other, as alleged in the complaint, ordinary care required that he provide a light of some kind, or that he alight and lead his horse over that part of the road. Not taking these precautions, under the circumstances, was greater negligence than driving upon a railroad crossing without either looking or listening when the view was obstructed, that danger might be thus avoided." The learned judge has stated the proposition clearly and strongly, and what he has said applies with great force to the facts in the case we are considering. *Town of Boswell v. Wakley*, 149 Ind. 64, 48 N. E. 637, is directly in point here, and is the last expression of the courts of last resort in this

state applicable to the question we are now considering. There appellee was injured in passing over a sidewalk at night, with which walk he was familiar, and knew it was out of repair. He was walking with his hands in his pockets, when a loose board, upon which he stepped, tipped up, and threw him. It was held that he could not recover, because he did not use ordinary care commensurate with the known danger. In that case the court quoted approvingly from the case of *City of Bedford v. Neal*, 143 Ind. 425, 41 N. E. 1029, the following: "But the doctrine to be extracted from these cases is that a person with knowledge of the defect or danger must, in attempting to pass, exercise care proportional to the known danger to avoid injury. And, as a consequence, the appellee in the case before us having a knowledge of the defective and unsafe condition of the sidewalk when she entered upon it the last time in the dark, she was required to exercise more care than she would have been required to exercise had she been ignorant of the defect, or there then had been no defect, and it had been daylight." Mr. Beach states the rule as follows: "The law imposes upon the traveler the duty of ordinary care, and this is the measure of his obligation when he brings his action for damages for an injury sustained by reason of an obstacle or defect in the highway. Accordingly, in proportion as the risk of injury increases, must his care and diligence to avoid injury be increased. It is therefore held that a traveler is bound to exercise greater care and attention in passing over a highway while it is undergoing repairs, by which it is greatly obstructed, than he would be required to exercise under ordinary circumstances, and more care in going about in the darkness of the night than in the daytime." *Beach, Contrib. Neg.* § 249. See, *Jacobs v. Inhabitants of Bangor*, 16 Me. 187; *Parkhill v. Town of Brighton*, supra. We might multiply authorities of the same tenor, for there are many, but we do not see any necessity for so doing. As the facts found specially by the jury show beyond all controversy that appellant was guilty of negligence which contributed to her injury, it follows, as we have shown, that such facts are irreconcilable with the general verdict, and must control. The court did not err in rendering judgment for appellee on its motion, and the judgment is affirmed.

BLACK, C. J., and COMSTOCK, J., dissent.

(21 Ind. App. 287)

SPONHAUR v. MALLOY.

(Appellate Court of Indiana. Dec. 15, 1898.)

BILLS AND NOTES—RENEWAL NOTE—CONSIDERATION—PLEADING—VERDICT—SPECIAL INTERROGATORIES—JUDGMENT—APPEAL AND ERROR—WAIVER OF ERROR—HARMLESS ERROR.

1. An answer alleging that a note of a third person was renewed by the giving of a note executed by plaintiff and defendant is not defec-

tive on the ground that a note cannot be renewed except by a note executed by the same parties.

2. Plaintiff, as surety, executed a note with defendant's husband, and, after the husband's death, plaintiff and defendant executed a note in renewal of the husband's note, which renewal note plaintiff paid. In an action to recover the amount paid on the renewal note, on the ground that plaintiff executed it as surety for defendant, *held*, that allegations in defendant's answer showing that her husband died insolvent were not superfluous, since they tended to show that, on the death of the husband, plaintiff became primarily liable on this note, and that defendant was therefore but a surety on the renewal note.

3. Plaintiff executed a note as surety for defendant's husband, after which the husband died insolvent, and defendant at the request of plaintiff, signed a note with him in renewal of the husband's note. *Held*, that the wife did not thereby assume the husband's debt and become liable as principal on the renewal note.

4. In an action to recover of defendant the amount paid on a note executed by plaintiff and defendant, and claimed by plaintiff to have been signed as surety for defendant, an answer alleging that defendant, after her husband had died insolvent, executed, at the request of plaintiff, the note in suit in renewal of a note of her husband on which the plaintiff was surety, is not defective on the ground that it omits to allege that fraud was practiced on defendant in inducing her to sign, and does not show that defendant did not know the legal consequences of her acts, since the defense is not founded on fraud, but want of consideration.

5. A surety who voluntarily pays a note on which his principal is not liable cannot recover of the principal the amount paid.

6. Where a widow whose husband died insolvent executes a note in renewal of a note of the husband, the renewal note is without consideration.

7. In an action to recover the amount paid by plaintiff on a note claimed by plaintiff to have been executed by defendant as principal and plaintiff as surety, the jury, in answer to special interrogatories, found that plaintiff was surety on a note given by defendant's husband; that, after the husband had died insolvent, defendant signed the note in suit with plaintiff in renewal of the husband's note, for the purpose of enabling plaintiff to gain more time to pay it; that, when the renewal note was presented to the bank which held the husband's note, the bank, for convenience in keeping its accounts, credited her with the amount of the renewal note, and had her draw a check, which was applied to the payment of the husband's note. *Held*, that there was no conflict between the facts found and a general verdict for defendant.

8. Reasons for a new trial which are not discussed on appeal will be treated as waived.

9. Where, from the record, it appears that there is no liability on the part of defendant, the fact that instructions were unduly favorable to her will not justify a reversal on plaintiff's appeal.

Appeal from superior court, Allen county; C. M. Dawson, Judge.

Action by Welder S. Sponhaur against Frances Malloy. There was a judgment for defendant, from which plaintiff appeals. Affirmed.

Breen & Morris, for appellant. W. & E. Leonard, for appellee.

COMSTOCK, J. The complaint in this action alleges that on the 11th day of February, 1892, appellee and appellant executed a note

for \$600 to the Old National Bank of Ft. Wayne; that he signed the same as surety, and received no part of the consideration thereof; that appellee failed to pay said note when due; that he paid the same, and that appellee has failed to repay to him any part of the sum so paid by him.

Appellee's answer is in four paragraphs. The first paragraph is the general denial. In the third paragraph she says that it was she who signed the note mentioned in the complaint as surety. In the fourth paragraph she says that she is the widow of William Malloy, who died intestate on the 17th day of October, 1891, leaving as his only heirs at law this defendant and one child about three years of age; that after the death of her said husband it was discovered that his estate was wholly insolvent, and worth less than \$500, and, upon the application of this defendant, all of the property of his said estate was duly inventoried and appraised, and, by and under the order of the circuit court of Allen county, was on the 16th day of November, 1891, set off and given to this defendant, as the widow of said William Malloy, free from all debts of her said husband, and that she have possession of all of said property, all of which was well known to this plaintiff. Appellee further says that, some time prior to the death of her said husband, he, the said William Malloy, borrowed from the Old National Bank of Ft. Wayne, Ind., the sum of \$1,000, for which he gave his promissory note, this plaintiff executing the same as his surety; that afterwards said Malloy renewed said loan, from time to time, up to the time of his death, this plaintiff signing each of said renewal notes as his surety, and, at the time of his (said Malloy's) death, there was yet owing said bank from him the sum of \$600, no part of which had been paid, which sum was secured by a promissory note given to said bank and executed by said Malloy as principal and this plaintiff as surety; that after the death of said William Malloy, and when said last-mentioned note became due, this defendant, at the request of the plaintiff herein, together with plaintiff, executed a promissory note to said bank in renewal of the note so signed by said William Malloy and this plaintiff, and upon said note, so executed by said plaintiff and defendant, falling due again, this defendant, at the request of the plaintiff herein, joined with plaintiff in executing a second note, being the note set out in plaintiff's complaint, to said bank in renewal of said former note, all these last-mentioned notes being for the same amount, to wit, \$600, and when said last-mentioned note, being the one set out in plaintiff's complaint, fell due, it was taken up and paid by this plaintiff. This defendant further says that she signed said notes as surety for this plaintiff, and not otherwise, and received no part of the consideration thereof. In her amended second paragraph of answer, appellee repeats the allegations of her fourth paragraph,

but says, in addition, that she signed these notes with appellant, at his request, and upon his representation that he could thus gain time to pay her husband's note; that the bank was well aware of these facts; and that, therefore, so far as she is concerned, her notes were without consideration.

Appellant filed a reply in two paragraphs to the amended second, third, and fourth paragraphs of answer. The first paragraph is the general denial. In the second paragraph it is averred that "on the 9th day of November, 1891, the plaintiff and the defendant executed to the Old National Bank of Ft. Wayne, Ind., their promissory note for the sum of \$600, identical in all respects with the note set forth as Exhibit A to plaintiff's complaint, except as to the date; that on said day said last-mentioned note was taken to said Old National Bank by the defendant, and by her delivered to said bank, who paid to the defendant thereon, as a loan to her, the sum of \$600, by depositing to her credit in said bank said sum of \$600, less the interest thereon for 93 days, amounting to the sum of \$12.40; that at said time said Old National Bank held a note dated the 7th day of September, 1891, executed to said bank by William Malloy, the husband of the defendant, and this plaintiff, for the sum of \$600, with 8 per cent. interest until paid, and due 90 days after date, the form of said note being in all respects like the note set forth in plaintiff's complaint, except as to date thereof and the parties executing the same; that the interest on said note had been paid to maturity; that plaintiff had executed said note simply as surety for the said William Malloy, the whole consideration thereof having been paid to the said William Malloy, and no part thereof being received by this plaintiff; that said William Malloy died on the 17th day of October, 1891, and the defendant, his widow, being desirous of paying her husband's said debt to said bank, and feeling under moral obligation so to do, on said 19th day of November, 1891, paid to said bank \$12.40 cash, and executed and delivered to said bank her check for the sum of \$587.60 in payment of said note executed to said bank by the said William Malloy, and this plaintiff and her said check was accepted by said bank in payment of said note, and said note was delivered by said bank to said defendant as paid. And the plaintiff further avers that, at the maturity of said note executed to said Old National Bank by the defendant and this plaintiff for the sum of \$600, the defendant executed to said bank her check for the sum of \$600 in payment thereof, and said check was received and accepted by said bank in payment of said note; that on said 11th day of February, 1892, defendant and the plaintiff executed to said Old National Bank the note set forth in plaintiff's complaint; that the defendant delivered said note to said bank, and received from said bank the consideration therefor, to wit, the sum of \$600, less the interest thereon for 93

days, to wit, the sum of \$12.40, which interest the defendant paid on said note in advance, and the balance of said sum of \$600, to wit, \$587.50, was deposited to the credit of the defendant in said Old National Bank of Ft. Wayne, Ind., and no part of the same was deposited to the credit of the plaintiff nor received by him; that plaintiff intended to and did execute all the notes herein mentioned as surety, and not otherwise; that the defendant paid said note of her said husband on account of the moral obligation she felt she was under to pay and discharge the just and proper obligations of her husband."

A trial of the case resulted in a general verdict for appellee. Appellant's motions for judgment on the answers of the jury to interrogatories and for a new trial were overruled and exceptions reserved. Appellant assigns as errors the action of the court (1) in overruling the demurrer to the third paragraph of appellee's answer; (2) in overruling the demurrer to the fourth paragraph of answer; (3) in overruling the demurrer to the amended second paragraph of appellee's answer; (4) in overruling appellant's motion for a new trial; (5) in overruling appellant's motion for judgment in his favor for \$601.20, with 6 per cent. interest thereon from the 23d of May, 1892, upon the answers of the jury to the special interrogatories, notwithstanding the general verdict.

Appellant's learned counsel first discuss the second assignment, the overruling of the demurrer to the fourth paragraph of answer. It is averred in said paragraph that William Malloy, husband of appellee, in his life executed a note for \$600 to the Old National Bank; that appellant executed this note as surety for Malloy; that, after Malloy's death, appellee and appellant executed a note for \$600 to said bank in renewal of said William Malloy's note, and that this second note was renewed by the note mentioned in the complaint; that appellee was surety on the notes so executed by her. Counsel contend that a person cannot, by giving his own note, renew the note of another person, because "to renew is to make new again," "to re-establish," "to restore to vigor," etc., and that the note of William Malloy could not have been made new or re-established by the note of appellee and appellant. This objection is based on phraseology rather than substance. Anderson's Dictionary of Law defines "renewal" as "the substitution of a new right or obligation for another of the same nature." The same author says: "It is not a word of art; it has no legal or technical signification." Bouvier defines it to be "a change of something old for something new." Within these definitions, the word is not improperly used.

Counsel further charge as superfluous the allegation in said answer that appellee's husband died, leaving appellee as his widow with an estate worth less than \$500, all of which was set off to her under the statute,

and that the note of her husband is not shown to have been worthless. The averments show, as to the appellant, the estate of the maker was insolvent; that the note was worthless. This paragraph is manifestly intended to set out the facts attending and reasons for the signing of the notes from appellee's standpoint. Its evident purpose was to show that, after her husband's death, appellant was primarily liable, because William Malloy did not leave an estate sufficient to pay the same or any part of it. When appellant requested appellee to join with him in a new note, to be substituted for that debt, he asked her to secure, not her debt, but his own. Appellee signed the note to substitute for the one upon which he was liable. She did this at the request of appellant, who at the time he made the request knew, as is alleged, that the estate of his principal was worthless, and that he alone was liable therefor. As between these parties, appellant alone secured the benefit of the consideration, that of time within which to pay his own debt. Such new note did not secure appellee's debt or one which she was bound to pay. The averments make appellee surety.

It is true, as claimed by appellant's counsel, if appellee desired to pay her husband's note, she "had the right to do so; and if in doing so she had borrowed of the bank \$600, and gave her note therefor to the bank signed by appellant, he would only be liable in the capacity in which he signed it. The disposition of the proceeds after the contract was made would not alter the contract between the parties made at the time, and, if the appellant signed the note as surety for appellee, the fact the husband's estate was worth less than \$600, and that she used the money obtained on the note to pay her husband's debt, could not affect appellant's relation to the note." In this connection appellant's counsel cite *Young v. McFadden*, 126 Ind. 254, 25 N. E. 284; *Rinn v. Rhodes*, 93 Ind. 389. The first case cited supports the position of appellant's counsel that the relation to the note and the capacity in which they contracted depend upon the contract, and not solely upon the signatures to the instrument; that the mere fact that a wife joined her husband in executing a promissory note does not imply that she was not a principal, for, in a note signed by husband and wife, both may be principals,—indeed, the husband may be the surety of the wife. It is pertinent to say here that the court approved an instruction "that while it was competent for Mrs. Young to contract on her own behalf, or jointly with her husband, to pay Mr. McFadden or attorneys for defending her husband, it was not competent for her to contract as surety to pay the account of her husband." But we are unable to see that the averments of the answer showed that appellee assumed the payment of her husband's debts. In *Rinn v. Rhodes*, supra,

the court held that the assumption of a married woman of the debt of her husband, for which she was surety, was a valuable consideration for the sale to her of personal property by her husband. It is not in point. In *Crumrine v. Crumrine's Estate*, 14 Ind. App. 641, 43 N. E. 322, a note for \$500, signed by Jacob Crumrine and Susanna Crumrine, husband and wife, was filed against a decedent's estate. Upon exemption of appellant (claimant) under the statute, it was decided that the \$500 note was given in renewal of one for \$400 signed by Jacob Crumrine. The evidence showing indebtedness upon the part of the maker, the court held that the jury were justified in finding that as to Susanna Crumrine the note was executed without consideration and merely as surety. The trial court did not err in overruling the demurrer to the fourth paragraph of answer.

Counsel next discuss the third specification in the assignment of error, the overruling of the demurrer to the amended second paragraph of answer. The appellant's counsel point out as defects in the answer that it contains no averment that there was any fraud practiced upon appellee, nor any reason suggested why she did not know the legal consequences of her acts; again denying that her note could have been a renewal of her husband's, and asserting that, if a consideration passed from the bank to her or appellant, both are liable on the note to the bank, —citing *Wheeler v. Barr*, 7 Ind. App. 381, 34 N. E. 591. It is apparent that this paragraph does not proceed upon the theory of fraud. It counts only upon a failure of consideration to bind appellee. In *Wheeler v. Barr*, supra, *Owendorff*, a surety on the note in suit, answered that "he executed the note sued on without any consideration whatever to him moving." The court held the answer insufficient, because the issue tendered was personal (citing *Anderson v. Meeker*, 31 Ind. 245; *Bingham v. Kimball*, 33 Ind. 184; *Moyer v. Brand*, 102 Ind. 301, 26 N. E. 125); adding that "if there was a consideration moving to the appellee *Owendorff* or not is immaterial. If there was a sufficient consideration for the note, whether the same moved to *Owendorff* or the principal maker or any other person, it is all the law requires." If the answer shows a failure of consideration, and it should be admitted that appellant was surety for appellee, and he paid the debt without request from appellant, and the demurrer so admits, then appellant cannot recover the money voluntarily paid by him, for the reason that a surety cannot pay a debt for which his principal is not liable, and then sue for reimbursement from that principal. 1 *Brandt*, Sur. p. 340, § 225; *Opp v. Ward*, 125 Ind. 241, 24 N. E. 974; *Hollinsbee v. Ritchey*, 49 Ind. 261.

The facts pleaded show that appellee's husband borrowed of the bank \$600. Before the debt matured, he died intestate, leaving ap-

pellee his widow, with an insolvent estate. After his death she executed her note for that debt. That she is not bound by that obligation has been settled by numerous decisions. The case of *Ferrel v. Scott*, 42 Am. Dec. 371, is one where a widow with an insolvent estate executed her note for the debt of her deceased husband. On page 374 the court says: "It cannot be pretended that the defendant derived any benefit from her incurring a liability to pay \$300, from which she was entirely exempt before she gave her note. It was not urged that she gave her note to relieve herself from any legal obligation. Place it in the most favorable point of view, it was a voluntary undertaking on her part to pay a debt for which she was not liable, and for the collection of which the plaintiff had no possible legal remedy. And the question recurs, did the plaintiff give up any right that was worth anything or suffer any loss by discharging a demand against a deceased pauper? It seems to me it was no more than discharging a debt against a fictitious person, against whom it might have been charged, by way of exercise, in a book kept for the purpose of learning the art of bookkeeping. The demand was utterly unavailable, and not worth the ink and paper employed in perpetuating it. The defendant's undertaking must therefore be regarded as voluntary, and without benefit, so far as she was concerned, and one which subjected the plaintiff to no possible loss or detriment, and, being thus without consideration, must be regarded as *nudum pactum* and void." In *Williams v. Nichols*, 10 Gray, 83, the same question was passed upon, the court saying: "As regards the legal question now before us, we must take the case to have been that of a widow who, at the solicitation of a creditor of her deceased husband, gives to him a promissory note to pay him the amount of his debt due from her husband, in a case where no possible benefit can result to the party giving such note, and no possible damage is suffered by the payee. In the case supposed, the widow would derive no benefit from the discharge of a debt due by her deceased husband. Nor do we perceive how any possible damage to such creditor could arise from having given a receipt to the widow purporting to discharge such demand. The giving of the receipt would not, under the circumstances here offered to be shown, establish a legal consideration for the note. In the opinion of the court, upon the facts offered, if shown to exist, the case would be that of a voluntary promise, not founded on any legal consideration." *Hetherington v. Hixon*, 46 Ala. 297, a case analogous to the one before us, was one in which Mrs. Hetherington, as surety with her husband, executed a note for one executed by him. After his death leaving an insolvent estate, she executed to Mrs. Hixon a note for \$1,000, the consideration of which was the note signed by her and her husband and another for \$200, signed by her husband

alone. On being pressed by the payee, Mrs. Hixon, she substituted for the last obligation the note and mortgage in suit, out of which the note for \$200 was omitted. The court said: "Mrs. Hetherington entered into this contract about five years after her husband's estate had been declared insolvent, and at the solicitation of complainant, on her supposed existing liability. The insolvency of the husband's estate was a positive, though not conclusive, evidence that she did not mean to purchase his notes. While a note upon an insolvent person or estate may be a sufficient consideration for a promise to pay money, yet where it was obtained, not as an inducement to the promises, but as a substitution of papers, and at the request of the promisee, the mere fact of loss subsequently sustained on account of a failure to file it as a claim against the estate cannot create a consideration, although the nonclaim was in consequence of the creditor's belief that he had otherwise secured its payment. As a note given for a pre-existing debt is not payment or extinguishment of such debt, unless it was so agreed between the parties, and the taking of such a note does not even raise the presumption of payment or extinguishment, so a note given for the debt of another is not a purchase of the debt, unless it was so agreed. The complainants cannot recover unless they can relieve their case from the condition of an obligation to pay the debt of another without an original, concurrent consideration, agreed to by the parties at the time." The case of Paxson v. Nields, 20 Atl. 1016, is also in point. In that case the husband died, leaving appellee, his widow, with an estate which paid to his creditors but 5 per cent. of their claims. They prevailed upon the widow to execute to them a note for the entire indebtedness. The note was renewed from time to time, and payments made thereon. Appellants brought suit to recover the balance on the widow's note, and the supreme court of Pennsylvania, in passing up the question, said: "It is clear that the appellants lost, and the appellee acquired, nothing by the transaction. It was a one-sided affair, and exclusively for the benefit of the former; but, as a promise to pay the pre-existing debt of another requires a new consideration to support it, they can take nothing further by it. What they have received by virtue of it they may retain, but the law would not help them more." French v. French (Iowa) 59 N. W. 21; Stockton v. Reed, 2 Mo. App. Rep'r, 1176; Kircher v. Sprenger, 4 Pa. Dist. R. 144; Weir v. Sanders, 124 Ind. 391, 24 N. E. 980. Vide, also, Keadle v. Siddens, 5 Ind. App. 8, 31 N. E. 539. The demurrer to the amended second paragraph of answer was properly overruled.

The action of the court in overruling appellant's motion for judgment in his favor for \$601.20, with interest from May 23, 1892, upon the answers of the jury to the interrogatories, is challenged by the fifth, sixth, and

seventh specifications in the assignment of errors. The verdict and answers to interrogatories were returned, and judgment rendered, under Acts 1897, p. 128. This verdict is not a special verdict. Neither party was bound to propound interrogatories with a view of eliciting all the facts relied upon. In their answers to interrogatories the jury found that on the 11th day of February, 1892, appellee and appellant signed a note for \$600, payable to the Old National Bank, and due in 90 days; that, after said note was thus signed, appellee took said note to, and delivered it to, said bank; that the bank thereupon paid to her \$600 by deducting \$12 as interest on the note for 93 days, and by depositing \$587.68 to her credit in the bank; that appellee drew her check against said deposit, and that the same was paid; that appellant owned no part of the money so loaned by said bank to appellee; that said bank entered said note on its discount book as the note of appellee; that said note became due on the 14th day of May, 1892, and on the 23d day of May, 1892, appellant gave to the bank \$601.20, in full payment of said note. These are the facts found pointed out by appellant; but it also appears from the answers to the interrogatories that the note set out in appellant's complaint was a renewal of the former note, dated November 12, 1891, representing the same debt. The same defenses existed to the one as to the other. The answers of the jury applicable to one note were applicable to the other. Reeder v. Nay, 95 Ind. 165; Morrison v. Kendall, 6 Ind. App. 216, 33 N. E. 370. Appellant, however, is not suing upon a note, but is asking to be reimbursed for money paid for appellee's use and benefit. Interrogatories will not control a general verdict unless they irreconcilably conflict with it. In City of Ft. Wayne v. Patterson, 3 Ind. App. 36, 29 N. E. 167, the rule is thus stated: "If, taking all the special findings together, and adding to them any other fact that might have been proved under the issues, an irreconcilable conflict with the general verdict can be avoided, the answers to interrogatories will not be allowed to control;" citing Cook v. Howe, 77 Ind. 442; Davis v. Reamer, 105 Ind. 318, 4 N. E. 857; Pennsylvania Co. v. Smith, 98 Ind. 42. In substance, the jury found, in answer to interrogatories, that appellee is the widow of William Malloy, who died intestate, leaving an estate worth less than \$500, which was set off to her; that at his death he owed the bank \$600, for which debt appellant was surety; that, by request of appellant, appellee joined with him in a new note to take the place of the husband's note, and that the only purpose she had in doing so was to aid him in securing more time within which to pay it; that appellee did not receive from the bank for the note she and appellant executed any part of said \$600 for her own separate use; that the note set out in the complaint was a renewal of the note first made by these parties for this

debt, and that the only consideration for these notes merging to any one was the extension of time thereby gained, which appellant received; that, at the time the new note was presented, the bank noted on its books a deposit to credit for \$600, and required her to draw a check to "demand" on the same; that this form was followed, in observance of a custom of the bank in case of renewal of notes or substitution of new for other notes, and was done solely for the convenience of the bank in keeping its own accounts straight. There is no irreconcilable conflict in the facts found and the general verdict, and the court did not err in overruling appellant's motion for judgment.

The fourth specification of the assignment of errors, the overruling of appellant's motion for a new trial, is the last error discussed. The reasons for a new trial, numbered from 1 to 6, are not discussed, and, under the rule, are therefore waived. The reasons numbered from 6 to 26, inclusive, relate to instructions given by the court at the request of appellee. The instructions contain some repetitions not to be commended, but, upon the facts found, appellee was not liable, and therefore, even if the instructions complained of were clearly favorable to her, we would not be justified in disturbing the judgment. Judgment affirmed.

(176 Ill. 238)

GILLESPIE et al. v. PEOPLE.

(Supreme Court of Illinois. Oct. 24, 1898.)

CRIMINAL LAW—TRIAL—TIME—JOINT DEFENDANTS—JURY—CHALLENGES—EVIDENCE—WITNESSES—PRESENCE—COMPETENCY—SENTENCE—APPEAL—RECORD—REVIEW—BURGLARY.

1. The affidavit of accused in support of a motion in arrest, that he had never been arraigned or pleaded to the indictment, cannot prevail over the record, which recites that on a certain date he was formally arraigned, and pleaded not guilty, and announced himself ready for trial.

2. The provision of Rev. St. 1881, div. 13, c. 38, § 18, that accused shall be discharged unless tried by the second term after commitment, excludes the term at which indictment is found.

3. A trial resulting in a hung jury is not a failure to prosecute, within Rev. St. 1881, div. 13, c. 38, § 18, providing that accused shall be discharged unless tried by the second term after commitment.

4. Refusal to grant separate trials to those jointly indicted will not be reviewed unless there is a clear abuse of discretion.

5. It is not abuse of discretion to refuse a separate trial to one jointly indicted with another, where his only grounds are that part of the testimony competent against the other was not competent against him, that the separate counsel of the accused had different ideas about conducting the defense, and that he could prove an alibi inapplicable to the other.

6. Objection cannot be made to the court's refusal to allow challenges for cause, where the peremptory challenges were not then or afterwards exhausted.

7. Where accused consents that the testimony of one who testified against him on a former trial and was cross-examined by his counsel may be read to the jury on a subsequent

trial, he cannot then object that he does not meet the witness face to face, as provided in Const. art. 2, § 9.

8. The wife of one of the accused was offered to impeach a witness who had testified that both of the accused had been at her house the night of the crime, by showing that she had stated that neither of the accused had been at her house that night, and that witness had stated that the accused other than the husband had not been at her house that night. *Held*, that the evidence was properly refused, since its effect would be to aid the husband.

9. In a prosecution for larceny of wheat, evidence that the owner had made a fraudulent mortgage of the wheat, and had been indicted therefor, is not competent.

10. Where the record recites that neither accused nor his counsel said anything why judgment should not be pronounced, the presumption is that opportunity for such objection was given.

11. Failure to ask accused if he has anything to say why judgment should not be pronounced is not ground for reversal.

Error to circuit court, Johnson county; A. S. Vickers, Judge.

James Gillespie and Charles Dunn were convicted of burglary, and they bring error. Affirmed.

Thos. H. Sheridan and David J. Cowan, for plaintiffs in error. E. C. Akin, Atty. Gen., and Geo. B. Gillespie, State's Atty., for the People.

CARTWRIGHT, J. Plaintiffs in error, James Gillespie and Charles Dunn, were convicted in the circuit court of Johnson county of the burglary of a house owned by William H. Craig, and the larceny therefrom of a quantity of wheat. Several of the questions raised by the assignment of errors and the argument of counsel relate to rulings of the court prior to the November term, 1897, at which the trial was had. Those things which are not part of the record proper can only be made so by a bill of exceptions, and these questions were attempted to be preserved in that way by making the proceedings a part of the record by means of two bills of exceptions. Those bills were stricken from the transcript of the record for the reason that they were not taken at the respective terms at which the proceedings excepted to took place, and that there was no order of court, in either instance, extending the time for signing, sealing, or filing the same beyond the term. The argument was doubtless prepared before these bills of exceptions were stricken from the record, but that order eliminated from the case all questions attempted to be raised thereby.

There was a motion to quash the indictment, which was overruled. The indictment was sufficient on its face, and the grounds upon which the motion was based were set forth in an affidavit contained in a bill of exceptions stricken from the record. The record, as it stands, does not show any illegality, and no objection founded upon the affidavit can be considered. The record shows a legal organization of a grand jury

of 17 persons, and the return by them of the indictment. The statute requires that a full panel of the grand jury shall consist of 23 persons, 16 of whom shall be sufficient to constitute a grand jury. The grand jury which returned this indictment contained more than that number, and it was legally authorized to find the indictment. *Beasley v. People*, 89 Ill. 571. It is also urged that there is no record of the return of this indictment into open court by the grand jury. But this is an error. The record, as certified to this court, shows the return of the indictment by the grand jury on March 23, 1897. Of the same character is the complaint by the defendant Charles Dunn that he was never arraigned, and never pleaded to the indictment. The record recites that at the November term, 1897, previous to the commencement of the trial, the defendants, James Gillespie and Charles Dunn, on November 12, 1897, were formally arraigned, and pleaded not guilty of the charge in the indictment, and both announced themselves ready for trial upon the issue made by the pleas. This record must prevail over the affidavit of the defendant Charles Dunn, filed in support of his motion in arrest of judgment, that he had never been arraigned or pleaded to the indictment.

The defendants were first tried at the August term, 1897. The trial resulted in a disagreement of the jury, and at the November term, 1897, each made a motion, based upon his affidavit, for his discharge because he had not been admitted to trial or tried within the time provided by the statute. Rev. St. 1881, div. 13, c. 38, § 18. The statute could not be applied to the case of the defendant Gillespie in any event, since he was not committed for this offense. He pleaded guilty to another felony at the March term, 1897, of the same court, and has been in the state penitentiary at Chester ever since, except when brought into court and tried on this charge. This was sufficient answer to his application, in any event. The defendant Dunn was committed during the March term, 1897, at which the indictment was returned. That term is not to be included in the limit fixed by the statute, but the time is exclusive of said term, which is not to be counted as the first term. *Ochs v. People*, 124 Ill. 399, 16 N. E. 662. At that time, the next term of court in that county fixed by statute would be held in November, 1897. Subsequently, by an act in force July 1, 1897, a term was created for the third Monday of August. At that term there was an adjournment of the case to a later date in the term, but the case was tried during the term. The trial was complete up to the verdict, but at that point came to an end prematurely, for the reason that the jury failed to agree, and were discharged. The cause was then continued to the November term, 1897. The intent of the statute is that the right to discharge shall result from a want of prosecu-

tion, and a defendant is admitted to trial and tried although a verdict may not be reached, as happened in this case. The defendants were tried at the next term after the indictment was returned, and the fact that the jury did not agree did not show a want of prosecution. A construction of the statute which would lead to the absurd result that, if a trial resulted in a disagreement, it should not be regarded as a trial, and the defendants should be discharged under the statute, of course would not be adopted.

It is next complained that the court erred in not giving defendant Charles Dunn a separate trial. The motion was based upon his affidavit and that of his attorney, setting forth that part of the testimony competent against his co-defendant, Gillespie, was incompetent as to him; that the separate counsel of the defendants had different ideas, in many ways, about the management of the defense; and that he could prove an alibi which was inapplicable to the other defendant. A party indicted with others cannot insist upon a separate trial as a matter of right, but upon a proper showing the court may, in its discretion, award a separate trial. An application of that kind is addressed to the discretion of the court, and it has generally been said that the refusal cannot be assigned as error. In *White v. People*, 81 Ill. 333, this court, under the very peculiar circumstances of the case, directed the circuit court to give the parties separate trials. But, whatever the correct rule may be, it is at least certain that the action of the court will not be reviewed here unless there is a clear abuse of discretion. *Maton v. People*, 15 Ill. 536; *Johnson v. People*, 22 Ill. 314; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, and 17 N. E. 898; *Doyle v. People*, 147 Ill. 394, 35 N. E. 372. In this case the reasons offered would apply in almost every case where there are separate counsel, and there was no abuse of the discretion.

The next complaint is that upon the examination of the jurors three of them showed that they were not competent, by reason of an opinion that the indictment was some evidence of the defendant's guilt. The court overruled challenges for cause upon this ground, and the defendants challenged peremptorily two of the jurors and accepted the third. No advantage can be taken of the rulings or of the disqualification, if it existed, for the reason that the record does not show that the peremptory challenges were exhausted. In order to be ground of reversal it must appear that an objectionable juror was forced upon the defendants. If the court holds a juror competent, and the objector can exercise a peremptory challenge, no harm results to him. In order to render the disallowance of a challenge for cause available to the accused on error, the bill of exceptions must show that he had exhausted, or subsequently exhausted, all his peremptory challenges. *Collins v. People*, 103 Ill. 21; *Spies*

v. People, *supra*. The record shows only a partial examination of these jurors, but the answers of the juror who was accepted and sat in the case, when taken together, amount to no more than that the fact of an indictment being found would raise in his mind some natural suspicion that it had some foundation. When he understood that the indictment was not evidence of guilt, he said that he would consider it no evidence. The court was satisfied that he would consider the indictment merely as a charge against the defendants, to be established by evidence on the trial, and defendants apparently thought so too, for they accepted him.

By an agreement of record between the parties the testimony of Frank Webb, given on the part of the defendants, and of William F. Sullivan, on behalf of the people, on a former trial, was read to the jury. Notwithstanding this agreement, it is now objected that the court erred in permitting the testimony of William F. Sullivan to be read on behalf of the people. There was, of course, no exception taken, and the defendants did not call upon the court to act, but it is insisted that the court erred in not preventing a consummation of the agreement because defendants had a constitutional right to meet their accusers face to face. Const. art. 2, § 9. The defendants had a right to meet the witness Sullivan face to face, and to hear him testify; but this was done on the former trial, and their counsel cross-examined him. So far as the constitutional provision is concerned, this is all that is required to satisfy it. Cooley, Const. Lim. 318; Bish. Cr. Proc. c. 31; 1 Greenl. Ev. § 363. The question whether such testimony given on a former trial is admissible in evidence depends upon certain facts, such as the witness being dead or out of the jurisdiction. This evidence was given face to face with the accused, and with a full opportunity for cross-examination, which defendants availed themselves of, so that no constitutional right was in any way violated, and they could certainly agree to the admission of the evidence where no such right was involved. So, also, they could plainly agree to the manner in which it was presented, which was by the testimony of the official reporter that he took down the testimony of the witness in shorthand, and correctly transcribed the same in longhand. It was this which defendants agreed should be read to the jury.

The court refused to permit Elizabeth Gillespie, wife of James Gillespie, to testify, and this is assigned as error. Martha Thornton had testified that on the evening of the burglary the defendants came to the home of her husband, William Thornton, and found him and his brother, James Thornton, there; that defendant Dunn had a private talk with her husband, and shortly after dark they all four went away, and that her husband came home late that night. An attempt was made to impeach the credibility

of this witness by proof of different statements out of court. A stepdaughter of the defendant Gillespie testified that this witness (Martha Thornton) had stated that James Gillespie and Charles Dunn were not at her house the night the wheat was stolen. The witness Elizabeth Gillespie, wife of one of the defendants, was also offered for the same purpose of impeachment, and it was first offered to prove by her that Martha Thornton had said that neither James Gillespie nor Charles Dunn was at her house on the evening of the burglary, and afterwards it was offered to prove that she said Dunn was not at her house at all the night the wheat was stolen. This evidence was offered ostensibly on behalf of Dunn alone. It will be remembered that the reasons given for a separate trial of Dunn did not include the existence of any testimony admissible as to him and not admissible as to his co-defendant, so that this evidence did not come to the notice of the court on the motion for a separate trial. It was offered to impeach the credibility of a witness who testified against the husband of the offered witness. It did not merely affect the credibility of the witness, but it concerned a statement which included the defendant Gillespie, and it equally tended to overthrow what Martha Thornton testified to about Gillespie as well as Dunn. The matter was inseparable in the state of the case, and the inevitable tendency would be directly to the husband's acquittal. If the grounds of defense are several and distinct, and not dependent upon each other, the wife of one defendant may be admitted to testify for the other, but the wife is not a competent witness where the direct effect is to aid the husband, and where the testimony concerns him. Greenl. Ev. § 335.

It is objected that the court refused to permit the defendants to prove that the prosecuting witness had made a fraudulent mortgage on the wheat alleged to have been stolen, and that said witness had been indicted; but there is no argument of the question, and we know of no ground upon which the evidence was admissible.

General objections are made to the action of the court in giving and refusing instructions, but the only instruction pointed out in the argument is one given by the court on its own motion, and this is objected to generally, as having a tendency to aid the theory of the prosecution. We can see no fault in it. The jury were very fully and liberally instructed on behalf of the defendants.

It is claimed that after the trial the court erred in not asking defendants if they had anything to say why sentence should not be passed. The record recites: "And now the said defendants, nor their counsel for them, saying anything further why the judgment of the court should not now be pronounced against them on the verdict of guilty heretofore rendered in the case, there-

fore," etc. This implies that opportunity was afforded the defendants to offer any reason why judgment should not be entered. It is a proper practice to ask a defendant if he has anything to say why he should not be sentenced, but the omission is not ground for reversal in any case. *Gannon v. People*, 127 Ill. 507, 21 N. E. 525; *Harris v. People*, 130 Ill. 457, 22 N. E. 826.

It is insisted that the evidence is insufficient to sustain the verdict. It is circumstantial, but was sufficient to satisfy the understanding and conscience of the jury, and the trial court approved of the verdict. As before stated, the first trial at the August term resulted in a disagreement. At the November term defendants were twice tried, and each time were found guilty. The first verdict of guilty was set aside, not because of anything connected with the facts of this case, but on account of the admission of evidence of a former conviction of the defendant Gillespie. The incidents of a trial, and the appearance and manner of the witnesses, cannot be preserved in the record, and, after giving our best attention to the testimony as it appears in the record, we are not prepared to say that the verdict was wrong. The judgment of the circuit court is affirmed. Judgment affirmed.

(176 Ill. 471)

BALTIMORE & O. S. W. RY. CO. v. ALSOP.
(Supreme Court of Illinois. Oct. 24, 1898.)

TRIAL—WAIVER OF OBJECTIONS—JUDGMENT—MOTION IN ARREST—APPEAL—ASSIGNMENTS OF ERROR—MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISK—EVIDENCE—RAILROADS.

1. A defendant who, after a denial of his motion for a verdict, introduces evidence, and at the close of the case fails to renew his motion, waives it.

2. It is negligent of a railroad company to run a train without a headlight, on a dark night.

3. If one count in a declaration be good, a motion in arrest of judgment will not prevail.

4. An assignment of error in excluding evidence must show what evidence was excluded.

5. Under a declaration for damages for death of a track-walker employed by defendant, caused by running a train ahead of schedule time on a dark night without a headlight, while evidence that the train crossed a highway shortly before it overtook deceased, without whistling, does not show a substantive right of recovery, it is admissible as tending to show that deceased was not aware or notified of the train's approach.

6. Whether the running of a train ahead of schedule time at night is negligence as to a track-walker whose duties require him to pass over the road on a velocipede, at night, is a question for the jury.

Appeal from appellate court, Fourth district.

Case by Mary Alsop, as administratrix of James H. Alsop, deceased, against the Baltimore & Ohio Southwestern Railway Company. A judgment in favor of plaintiff was affirmed by the appellate court (71 Ill. App. 54), and defendant appeals. Affirmed.

* For dissenting opinion, see 52 N. E. 732.

Palmer, Shutt, Hamill & Lester and Wood Bros., for appellant. James W. & Edward C. Craig and E. N. Rinehart, for appellee.

PHILLIPS, J. This was an action on the case, brought in the circuit court of Effingham county by appellee against appellant, to recover damages consequent on the death of James H. Alsop, who was killed on the night of February 11, 1895, by a train on appellant's road, where he was employed as a track-walker and watchman.

The declaration alleges, in the first and fourth counts, that the deceased was employed by appellant as night watchman, and avers "that his duty as such night watchman was to go each and every night from one end of a division or section, to wit, six miles long, along defendant's railroad track, to wit, three miles each way from said Beecher City to the other end thereof"; and that on February 11, 1895, as he was returning in the nighttime from the south end of such section, using due care and diligence for his own safety, a freight train of appellant, which was running a half hour ahead of time, ran into, struck, and killed him, through the negligence of defendant's servants, who were not fellow servants of the deceased, and who carelessly, improperly, and negligently ran said freight train ahead of time. The second and third counts contained similar averments, except, instead of alleging that such train was running ahead of time, the averment was, "then and there the headlight of said locomotive engine was not burning, although it was the duty of the defendant to have the said engine provided with a good and sufficient headlight, and that the defendant, through the carelessness and negligence of its servants whom it had placed in charge of the said engine, in not having the said engine provided with a headlight," ran over and killed James H. Alsop. In the several counts of the declaration it is averred that the deceased left a widow and children, who, by reason of his death, were deprived of their means of support.

Defendant pleaded the general issue, and a trial was had. At the close of plaintiff's evidence, the defendant moved the court to instruct the jury to return a verdict for the defendant, which motion was refused, and the defendant excepted, and this ruling of the court is assigned as error. After the motion made at the close of plaintiff's evidence was overruled, the defendant introduced evidence to meet that offered by the plaintiff, and did not renew the motion, at the close of all the evidence, to instruct the jury to find for the defendant, and asked for instructions covering the various phases of the case. Where a defendant moves to instruct the jury, at the close of the plaintiff's evidence, to find for him, and that motion is overruled, and he fails to stand by it, but introduces evidence to contradict that of plaintiff, and fails to renew the motion at the close of all the evidence, then the motion made at the close of plain-

tiff's evidence must be considered as waived. *Railway Co. v. Velle*, 140 Ill. 59, 29 N. E. 706; *Railway Co. v. Van Vleck*, 143 Ill. 480, 32 N. E. 262; *Ames & Frost Co. v. Strachurski*, 145 Ill. 192, 34 N. E. 48; *Harris v. Shebek*, 151 Ill. 287, 37 N. E. 1015. The defendant being thus in the position of having waived its right to assign error in overruling the motion made at the close of plaintiff's testimony, the question is not before us on this record.

From the facts it appears that about 11 o'clock on the night of February 11, 1895, the deceased was returning from the south end of his section, towards Beecher City, on a railroad velocipede, and while passing over a long line of trestlework, which had been filled in with earth to within about two feet of the top, was overtaken, run over, and killed by a freight train of appellant, which was running at the speed of about 20 miles an hour, and was about half an hour ahead of time. There was evidence also showing that at Altamont, the first station south of Beecher City, the headlight on the locomotive was not burning. On this question there was conflict in the evidence. Plaintiff recovered a judgment for \$4,500, which was affirmed by the appellate court for the Fourth district, and this appeal is prosecuted.

A demurrer was interposed to the declaration, which was withdrawn and plea filed. After verdict a motion for a new trial was entered, which was overruled. A motion in arrest of judgment was then entered, which was also overruled, and judgment entered on the verdict. The point made on the motion in arrest of judgment was that the declaration failed to state any cause of action. The second and third counts of the declaration alleged there was no headlight burning on the locomotive. This was an averment of a fact which would be sufficient to constitute negligence on the part of the company, and the rule is that if one count in a declaration is good a motion in arrest of judgment will be overruled. It is a high degree of negligence to run a train without a headlight on a dark night, as this was shown to be. *Burling v. Railroad Co.*, 85 Ill. 18. It was not error to overrule the motion in arrest of judgment.

Appellant assigns eight errors on this record, the first of which is that the court erred in admitting improper evidence for plaintiff, and the second is that the court erred in refusing to admit proper evidence for defendant. Appellant fails to point out any evidence excluded, and the second assignment of error is therefore not well taken.

A witness who lived 27 rods east of a road crossing, and a quarter of a mile south of where the accident occurred, was permitted to testify that he saw the freight train when it crossed the public highway, and heard no whistle. This evidence would not be material as showing a substantive right of recovery under the averments of this declaration,

but would be admissible as tending to show that the deceased was not aware of the approach of the train and was not notified of its approach. The assumption of risk by a track-walker in the discharge of the duties for which he is employed includes all risks incident to his employment. But such assumption of risk does not release the railroad company from the discharge of a duty imposed upon it by the statute, which provides that, on approaching a street or road crossing, a bell must be sounded. The discharge of this statutory duty by the corporation might give notice to one, situated as was the deceased, of the approach of the train, and cause him to use a degree of care and caution commensurate with his danger, and for this purpose the evidence would be admissible. The first assignment of error is therefore not well taken.

The third assignment of error is that the court erred in refusing to instruct the jury to find a verdict for the defendant at the close of the plaintiff's evidence. The seventh assignment of error is the overruling of the motion in arrest of judgment. What we heretofore have said disposes of these assignments adversely to appellant's contention.

It is insisted that there was error in giving instructions for the plaintiff. The first instruction was to the effect that if the deceased, in the discharge of his duty, was going along the track on a velocipede, using care and caution such as would be used by an ordinarily prudent man, and was killed by defendant's engine and train, which were running ahead of schedule time, and as a result of so running ahead of time, and if the running of the train ahead of time was negligence, the plaintiff could recover. *Railroad Co. v. George*, 19 Ill. 510. The duties of the deceased required him to pass over the road in the nighttime, and it is but reasonable to assume that he knew of the schedule time of trains. A man on a hand car or a velocipede of this character would not ordinarily hear an approaching train, and his situation would be rendered exceedingly dangerous if each train crew might, at their pleasure, run their train ahead of schedule time. Whether such acts on the part of the train crew constituted negligence, under the circumstances, could properly be submitted to a jury. We hold it was not error to give the first instruction.

Objection is taken to the second instruction, which was to the effect that if the train which caused the injury was running without a headlight, and by reason thereof the injury was caused, and that to so run the same without a headlight was negligence, then the plaintiff could recover. In the discussion of the motion in arrest of judgment we have, in effect, disposed of the objection to this instruction, and it was not error to give the same.

A discussion of the other instructions given for the plaintiff, with reference to the care and caution that must be used, as to the de-

gree of proof required of each particular fact, and as to the measure of damage, would unduly extend this opinion. From a careful examination of the instructions we find no reversible error. The facts having been settled by the appellate court, by the questions of law herein determined the judgment of the appellate court for the Fourth district must be affirmed. Judgment affirmed.

(176 Ill. 215)

OSTERTAG v. EVANS et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

DEEDS—EQUITY IN LAND—CONFLICTING ASSIGNMENTS.

Defendant, who held the legal title to property in which S., B., and himself each had a one-third interest, executed and delivered to S. a declaration of trust for his third interest. A part of the property being allotted to S., the three entered into a written agreement, in triplicate, showing the contract of the parties, the obligations assumed by S. to make certain payments to the other parties, and reciting that the declaration of trust which defendant had signed, and which constituted the sole evidence of S.'s right in the property, should be assigned by S. to the father of B., as security for the performance by S. of his undertakings set forth in the agreement. Afterwards S. contracted to, and did, sell to defendant's grantor his entire interest in the property, and delivered a written order directing the father of B. to deliver the declaration of trust to defendant, which was done. Thereafter S. executed a writing, which he attached to the written agreement in his possession relative to the allotment of the property, and thereby transferred to the attorney of plaintiff, to secure an antecedent debt, all his interest in the property mentioned in said agreement, subject, however, to the contract previously entered into with defendant's grantor, a copy of which was attached. Plaintiff bought such interest at a sale by her attorney on S.'s failure to pay his debt. *Held*, that defendant's equities in the property are not only prior in time, but are superior, to those of plaintiff.

Appeal from circuit court, St. Clair county; William Hartzell, Judge.

Bill in chancery by Mary H. Ostertag against Daniel Evans and others. From a decree for defendants, complainant appeals. Affirmed.

Fred. B. Merrills and Robert A. Mooneyham, for appellant. John Boyle and J. W. Bartholomew, for appellees.

PER CURIAM. This was a bill in chancery filed by the appellant for a decree establishing title in her to an undivided one-third interest in a number of city lots in East St. Louis, the legal title to which rested in the appellee Evans. Her case was that Evans held title for himself, one John Boyle, Jr., and one French R. Sessions in equal one-third parts, and that she became the owner of the interest of Sessions. The defense was that Sessions disposed of his interest to Evans, and that he thereby became the owner thereof. Both had purchased from Sessions, and which obtained his interest was the sole question. Evans, who held the legal title, had

executed in writing, and delivered to Sessions, a declaration evidencing that he held the title to one-third of said lots in trust for Sessions. This declaration of trust Sessions assigned and delivered to John Boyle, Sr., to secure the performance on his part of certain agreements and obligations which he entered into with Evans and Boyle, Jr., in order to induce them to convey to him (Sessions) certain of the lots, 1,010 feet in frontage. Afterwards Sessions assigned and sold to one J. W. Bartholomew his entire interest in the property, and Bartholomew assigned and sold the same to Evans, to whom Sessions executed and delivered a written order directing Boyle, Sr., to deliver to Evans the declaration of trust which Evans had issued in order to evidence the rights of Sessions in the premises. The declaration of trust was delivered to Evans on presentation of the order. When said 1,010 feet of the said lots was allotted to Sessions, a written agreement was entered into between Sessions, Evans, and Boyle, Jr. (a copy of which was held by each of them), showing the contract of the parties and the obligations assumed by Sessions to the parties to make certain payments, and reciting that the declaration of trust which Evans had signed, and which constituted the sole evidence of the right and interest of Sessions in the property, should be assigned by Sessions to Boyle, Sr., to hold as security for the performance by Sessions of his undertakings set forth in the agreement.

After Sessions had entered into the contract with Bartholomew to sell and assign all interest in the lots to the latter, in order to secure the payment of a demand due from him to appellant, Sessions executed an instrument in writing, which he attached to the agreement which had been entered into relative to the allotment of 1,010 feet of the property to him, assigning and transferring to one Collins "all my right, title, and interest in and to the property mentioned and described in the attached contract," subject, however, to the contract before that time entered into between said Sessions and said Bartholomew, a copy of which was also attached. Collins, as attorney for the appellant, held a claim in her favor against Sessions for collection, and took the assignment for collateral security. Sessions failed to pay, and Collins offered the collateral for sale. Appellant became the purchaser, and she asserted she thereby received better right than that possessed by Evans. The chancellor held adversely to her, and our investigation has convinced us the holding is correct.

Sessions' assignment to Bartholomew, upon which Evans relies, was prior in point of time to that to Collins, upon which appellant relies. The assignment to Collins was with full notice of the prior assignment to Bartholomew. The contract which Collins accepted as evidence of Sessions' right and interest set forth fully the obligation thereby imposed upon Sessions, and the agreement of

Sessions to deposit with Boyle, Sr., the declaration of trust, which constituted, as the contract clearly shows, the only evidence of his right and title, as security for the performance of the conditions of his contract. Sessions did not fulfill his contract, and the burden of doing so fell upon Evans. He bore the burden, and his equities are not only prior in point of time, but are superior in point of equity, to those of appellant, who paid nothing, having taken the assignment from Sessions as mere collateral to secure the payment of an antecedent debt. The decree is correct, and is affirmed. Decree affirmed.

(176 Ill. 270)

ALTON PAVING, BUILDING & FIRE-BRICK CO. v. HUDSON.

(Supreme Court of Illinois. Oct. 24, 1898.)

MASTER AND SERVANT—EXTRAORDINARY RISKS—NEGLIGENCE—INSTRUCTIONS—APPEAL—REVIEW.

1. Under Prac. Act, § 89, providing that the supreme court shall examine cases before it on appeal or error as to questions of law only, and prohibiting assignments of error which call in question a determination on controverted facts, etc., defendant, by requesting, at the close of plaintiff's evidence, an instruction for a verdict, and, when it was refused, introducing his own evidence, and then requesting an instruction, in submitting the case to the jury, to find for defendant, cannot raise the question on appeal that there was no evidence to go to the jury in support of the declaration.

2. A person employed about a steam shovel in excavating a substratum of an embankment was inexperienced, and was not made acquainted with the peculiar dangers of the work. He had no control over the removal of the top stratum. *Held*, that he was not bound to know of the danger from falling earth.

3. Whether a servant was guilty of contributory negligence, or the master was negligent, or the servant assumed the risk of a falling bank of earth, or it was the master's duty to apprise him of the danger, are questions of fact, which the supreme court will not therefore consider on appeal.

4. An instruction that the master is not bound to provide a safe place for his servant to work, where all the danger arises from the hazardous character of the work, which the servant by ordinary care might avoid, is properly refused as inapplicable, where the servant was inexperienced, and the master might have avoided the accident causing the injury.

5. The refusal of requested instructions was not error if they were substantially embodied in others given.

Appeal from appellate court, Fourth district.

Action by William Hudson against the Alton Paving, Building & Fire-Brick Company. A judgment for plaintiff was affirmed in the appellate court (74 Ill. App. 612), and defendant appealed. Affirmed.

Wise & McNulty, for appellant. J. E. Dunnegan and Travous & Warnock, for appellee.

WILKIN, J. This suit originated in the circuit court of Madison county upon a declaration in case by William Hudson against the Alton Paving, Building & Fire-Brick

Company, to recover damages for an injury to his person, alleged to have been received through the negligence of the defendant. There were two counts in the declaration. The first alleged that plaintiff was employed by the defendant to operate and oil the machinery of a certain steam shovel used by the defendant for the purpose of removing shale from an embankment; that the embankment was about 18 feet high, about 10 feet of the lower portion of it being composed of shale, and the balance of clay, the shale portion being removed by the use of the steam shovel, and the clay portion by hand shovels; that the plaintiff was without experience in working in and about embankments, and so notified the defendant before entering into its employment; that it was the duty of the defendant to keep the embankment in a reasonably safe condition, so that plaintiff, in performing his duties, would not be endangered by clay falling upon him; that it carelessly and negligently failed to keep the embankment in a reasonably safe condition, but carelessly and negligently undermined the clay portion of it to such an extent that it became unsafe and insecure; that, by reason of plaintiff's inexperience in working in and about clay embankments, he was not aware of the dangerous condition of the same, and while performing his duties, oiling the machinery, and exercising due care, a large part of the clay portion of the embankment, by reason of its being so insecure, broke, and fell upon him, causing him to be injured, etc. The second count is not materially different from the first, except that it avers the plaintiff was directed by the defendant to perform his duties in manipulating and oiling the machinery under the direction of one Aaron Borden, the foreman, and to obey all orders given by him; that while the embankment was in an unsafe condition, as alleged in the first count, he was ordered by Borden to oil a portion of the machinery of the steam shovel, and in obeying said order, while exercising due care, a large part of the clay portion of the embankment, by reason of its being insecure, as aforesaid, fell from over the shale portion thereof, and upon the plaintiff, permanently injuring him, etc. The plea was not guilty. A trial by jury resulted in a verdict for the plaintiff, assessing his damages at \$7,500. A motion for new trial was overruled, and judgment entered upon the verdict, which judgment, on appeal to the appellate court for the Fourth district, was affirmed.

The argument of counsel for the appellant is devoted chiefly to a discussion of the evidence. It appears from the record that, at the close of the plaintiff's evidence, the court was asked to instruct the jury to find for the defendant, which request was denied. Thereupon it proceeded to introduce its evidence. There was no instruction asked to find for it at the close of all the evidence,

nor was the court requested in any way to withdraw the case from the consideration of the jury. In the series of instructions asked on behalf of the defendant upon the final submission of the case, an instruction to find for the defendant was presented and refused. Notwithstanding this state of the record, counsel insist that it is the duty of this court to review the testimony, and determine whether there is any evidence in the record fairly tending to support the allegations of the declaration. If this position is to be maintained, not only section 89 of the practice act must be ignored, but a long line of decisions by this court overruled. We have uniformly held that, in order to bring before this court for review the evidence in a case of this kind coming from the appellate court, the defendant must move the court to take the case from the jury at the close of all the evidence, and before its submission to the jury. These decisions proceed upon the theory that such a motion raises the question in the trial court whether, as a matter of law, there is any evidence fairly tending to support the plaintiff's cause of action, or, if made by the plaintiff, whether there is any evidence tending to support the defense. Counsel admit that such is the rule announced by the court, but it is said it is not consistent with sound reasoning. What is said in support of this contention has failed to convince us that we have been in error, and the authorities cited as conflicting with the rule of practice we have adopted have no bearing upon the question. Treating the controverted questions of fact in the case as conclusively established in favor of the plaintiff, it only remains to be seen whether such errors of law intervened upon the trial as should work a reversal of the judgment below.

An extended argument of what is said to be the law of the case is presented by counsel for the appellant, but wherein the court below refused or failed to apply correct principles on the trial of the case does not appear. The sufficiency of the declaration was not questioned, either by demurrer or motion in arrest of judgment. In fact, we are at a loss to perceive upon what theory it can be seriously contended that a good cause of action was not stated in either count of the declaration. One of the duties which a master owes to his servant is to make such provision for his safety as will reasonably protect him against the dangers incident to his employment. We said in *Coal Co. v. Haenni*, 146 Ill. 614, on page 626, 35 N. E. 165: "As to the master's duty to give notice, the law is that if there are latent defects or hazards incident to an occupation, of which the master knows or ought to know, and which the servant, from ignorance or inexperience, is not capable of understanding and appreciating, it is the master's duty to warn or inform the servant of them,"—citing authorities. While it is true that an employé assumes

such risks of his employment as are usually incident thereto, and of the extraordinary hazards of which he has notice, or which, in the usual exercise of his faculties, he ought to have noticed, he does not take the risk of dangers known to the master which can be avoided by him in the exercise of reasonable care. "He assumes the risk, more or less hazardous, of the service in which he is engaged; but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and preventable by ordinary care and precaution on the part of his employer." *Buzzell v. Manufacturing Co.*, 48 Me. 113. According to the plaintiff's declaration, he was inexperienced in the matter of his employment, and especially he had no information as to the danger of the clay falling upon him. Nor was he in any way connected with the removal of the clay, so as to prevent its falling. It could not, we think, in any view of the record, be said that he was bound, in the exercise of his faculties, to know the peril which caused his injury. The case, in principle, is not materially different from *Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572, and *Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876.

Whether the plaintiff was in the exercise of due care, whether defendant was guilty of the negligence charged, whether the plaintiff assumed the risk of the falling bank, and whether it was the duty of the defendant to notify him of the danger, are all questions of fact conclusively settled by the verdict of the jury, the judgment of the circuit court, and its affirmance by the appellate court, unless it can be said that the finding of the jury was the result of some error of law committed upon the trial contributing to the result.

It is objected that the trial court misdirected the jury in the giving of instructions on behalf of the plaintiff, in the modification of defendant's nineteenth instruction, and in the refusal of several instructions asked by it. We think the instructions given on behalf of the plaintiff correctly embody the rules of law applicable to the case as above indicated, and are unable to see any substantial ground for the contention that appellant's nineteenth instruction was improperly modified. The first refused instruction is that the rule as to the duty of the master to furnish a safe place for a servant to work does not apply when the place is made unsafe solely by reason of the hazardous character of the work which the servant has undertaken to do, and where the servant is advised, or by the exercise of his faculties may, with ordinary care, become fully advised, of the character of the work and the surroundings. Whatever may be said of this instruction as stating an abstract proposition of law, it was not applicable to the case, and for that reason was properly refused. It assumes

that the place was made unsafe solely by reason of the hazardous character of the work, and that, under the facts of the case, the plaintiff, by the exercise of his faculties, might, with ordinary care, have become fully advised of the character of the work and the surroundings. The other refused instructions, in so far as it may be said they correctly state the law, were embodied in others given. A large number of instructions were asked by the defendant, most of which were given; and, upon a full consideration of the whole series, we are convinced that they are so eminently fair, not to say favorable, to it, that no just ground of complaint can be made as to the giving, modifying, or refusing of instructions. On the whole record, the judgment of the appellate court is right, and will be affirmed. Judgment affirmed.

(176 Ill. 247)

BOARD OF TRADE TEL. CO. v. BLUME et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

APPEAL—REVIEW—TRIAL—EVIDENCE—OBJECTIONS—EMINENT DOMAIN—DAMAGES—INSTRUCTIONS.

1. Where the evidence is in direct conflict, a verdict will not be disturbed, unless for error of law of the court.

2. Where evidence went in without objection, and no motion was made to strike it out, its competency cannot be determined on appeal.

3. Where counsel did not object to the admission of evidence at the time, nor move to exclude it, it was too late to make a general objection to it at the conclusion of the witness' entire testimony.

4. A party cannot object to evidence called out by himself on cross-examination.

5. A charge that the jury, in assessing damages to owners of land, are justified in considering the value of land actually taken, and all facts tending to produce damage to the lands not taken, is not objectionable as assuming that there are damages outside the evidence.

6. A charge that the jury, in assessing damages to owners of condemned land, are justified in considering the value of the land taken and all facts tending to produce damage to the lands not taken, is not objectionable as not limiting the jury to the evidence, when read in connection with a previous instruction which requires the jury to ascertain the damages according to the facts in the case as the same may appear from the evidence, and not to ignore the evidence, or fix compensation contrary to it, but to consider and be guided by the facts and evidence in the case.

Appeal from circuit court, Madison county; W. P. Early, Judge.

Condemnation proceedings by the Board of Trade Telegraph Company against Henry L. Blume and others. There was a judgment awarding damages, and the petitioner appeals. Affirmed.

E. C. Springer and W. P. Bradshaw, for appellant. Travous & Warnock, for appellees.

CRAIG, J. This was a proceeding to condemn lands for the use of a telegraph company, instituted in the county court of Madison county.

The petition, as originally filed, was in the name of the Postal Telegraph Cable Company, and sought to condemn a strip of land six feet wide along the entire front of defendants' lands, on what is known as the "Hillsboro Road." Prior to the hearing the petition was amended by substituting the name of appellant, the Board of Trade Telegraph Company, and asking for strips of land two feet wide by six feet long at each telegraph pole then standing, together with the right to erect cross arms, insulators, etc., and to string and maintain wires upon the same, along said entire six-foot strip. Upon looking into the evidence, it appears that 10 poles are to be erected and maintained along the land of defendant Blume, 17 on land of defendants Fred Kording and Amelia Redeker, 21 on land of the Mize heirs, 5 on land of Martha Blackburn, 12 on land of Thomas W. Morrison, 9 on land of Henry A. Eaton, 15 on land of Daniel Stubbs, 12 on land of Isaac A. Davis, and 9 on land of Anson Barnett. Much evidence was introduced by the respective parties in regard to the value of the land taken, and the damages to land not taken; and the jury returned a verdict fixing the amount due the defendants, as follows:

| Owner. | Value of Land Taken. | Damages to Contiguous Lands. |
|---|----------------------|------------------------------|
| Henry L. Blume..... | \$.25 | \$ 40.00 |
| Fred Kording and Amelia Redeker.... | .40 | 118.00 |
| Nancy J. Mize, Sarah E. Mize, Robert M. Mize, Hanlan M. Mize, Edith E. Mize, Roy A. Mize, and Wilbur R. Mize..... | .50 | 84.00 |
| Thomas W. Morrison..... | .30 | 50.00 |
| Henry A. Eaton..... | .20 | 36.00 |
| Daniel Stubbs..... | .35 | 60.00 |
| Isaac A. Davis..... | .30 | 50.00 |
| Anson Barnett..... | .20 | 36.00 |
| Martha Blackburn..... | .15 | 28.15 |

It is claimed in the argument that the evidence does not sustain the verdict. In a case of this character, where the amount of the damages has to be determined by the opinions of witnesses, there is always a conflict in the evidence. This case was not an exception to the rule. Eighteen witnesses, who were familiar with the lands and the location of the telegraph line, testified for the defendants, placing the damages much higher than the jury allowed. On the other hand, six witnesses or more were called by the petitioner, who testified that in their opinion the lands of the defendants would not be damaged by the construction and operation of the telegraph line. Where there is such a conflict in the evidence, under the uniform decisions of this court the verdict of the jury will not be disturbed, unless it appears that the court has erred on questions of law, to the prejudice of the appealing party against whom a judgment was recovered.

It is, however, contended that the court admitted improper evidence, and that upon this ground the judgment should be reversed.

Under this head it is said in the argument the trial judge permitted evidence of the following character to go to the jury over the objection of appellant: Edward Barnett testified: "According to the law that has been established lately, we can extend our fences out, and take in thirteen feet more of ground along the road; and, if you do that, you have got your poles in your field about ten or twelve feet, which makes it very inconvenient in farming." C. P. Smith testified: "I have learned something here to-day about the law that I didn't know before: That a farmer anywhere can claim— For instance, a road is sixty-six feet wide, a farmer can claim thirteen feet outside of the present line. That would cut quite a figure; and if these poles are setting near the line, and a farmer claims that strip, it makes it more objectionable, on account of its being in the field, than if the poles are setting on the line. If one had to work clear around the poles, that is quite a nuisance, and I would consider the damages under this light at \$10 per pole." Edward L. Gillham testified: "I think the damages from the inconvenience of all and any telegraph poles along land that is farmed is at least \$7 per pole; and if, on account of, as Mr. Smith spoke of, the land would be abandoned, the road narrowed, it would be at least \$12 a pole. Should the road be abandoned, it would be greater, on account of having to cultivate around them, and because farmers would remove their fences." Edward L. Fahnestock testified: "In the first place, the road will not continue that way. The time will come when they will take the road away and farm that land. You have got the poles there, and you have got to contend with these poles. You have got to work around them. You have got to cut your wheat around them. And, if they abandon the road, it goes to the man that cultivates next to it." H. A. Eaton testified: "If any part of the highway was abandoned, so that the land would reach out into the public highway beyond the poles as now located, they would be a damage."

Upon referring to the abstract, it will be found the first witness, Barnett, whose testimony is complained of, testified to the amount of damages which in his judgment would result to the lands by the construction and operation of the telegraph line. He was then asked the following question: "State to the jury what elements you have considered in arriving at your conclusion as to how much these poles deprecate the value of the property." No objection was made to this question, so far as is shown, and we can conceive of no well-founded objection that could have been made to it. The witness, however, in answer to the question, after detailing various things growing out of the construction of the telegraph line which in his opinion would damage the property, stated the fact in regard to the right of the property owner to extend his fence, and take in

13 feet of the road. If this part of the answer of the witness to the question propounded to him was incompetent, and if appellant's counsel desired to preserve an exception to the evidence, he ought to have moved the court to strike out that portion of the answer which was not competent. But that was not done, and, so far as appears, the court did not pass upon the competency of the evidence. Under such circumstances no question in regard to the admissibility of the evidence is presented by the record.

In regard to the objection to the evidence of the witness Smith, he was asked this question: "State in a general way what damages, if any, it would be to these lands, in their market value, to construct this line as proposed in this petition." No objection was interposed to the question, and the witness gave the answer heretofore set out, without any objection being made to his evidence from any quarter; but, after the witness had concluded his evidence, we find in the record the following: "All the foregoing evidence was objected to. Objection overruled, and exception taken." When the witness commenced to answer the question, if appellant desired to call in question the admissibility of his evidence, he ought to have objected to it, and obtained a ruling of the court upon it, or, if the witness answered before appellant had an opportunity to object, a motion to exclude the evidence should have been made. Had the course indicated been pursued, appellant would have been in a position to complain; but, as the record stands, no question has been preserved to the ruling of the court on the evidence. What has been said in regard to the objection to the evidence of the witness Smith also applies to the objection to the evidence of the witness Gillham.

As to the objection to the evidence of Fahnestock and Eaton, it will be found, upon examination of the record, that the evidence objected to in the argument was called out on cross-examination. Appellant, having called out the evidence, cannot object to its competency.

It is also insisted that the court erred in giving defendants' last instruction. It is said that the instruction is erroneous because it assumes that there are damages outside of the evidence given, and that it is further objectionable because it tells the jury to take into consideration all facts which contribute to produce damages, without limiting them to the evidence. We do not think that the instruction, when closely examined, assumes that there are damages either within or outside of the evidence. It merely directs the jury that, in assessing the damages to the owners of land, they are justified in taking into consideration the value of land actually taken, and all facts which tend to produce damage to the lands not taken. The instruction may be slightly inaccurate, in not in express terms limiting the jury to the facts as found in the evidence; but, in the instruction

preceding the one complained of, the court directed the jury in such plain terms that they must be controlled and guided by the evidence, and the evidence alone, that they could not have been misled by the instruction complained of. That instruction declares that the jury are required to ascertain and report compensation and damages to lands taken and damaged, if any, "according to the facts in the case as the same may be made to appear from the evidence, and that you have no right arbitrarily to disregard or ignore the evidence introduced before you, and fix the compensation or damages contrary to the evidence, but you should consider and be guided by the facts and the evidence in the case in fixing such compensation and damages."

The court refused an instruction on behalf of the petitioner which was as follows: "The court instructs the jury that willow trees in the public highway are declared by the statutes of this state to be a nuisance." Section 7 of the road law (Starr & C. Ann. St. p. 2138) provides: "Where willow hedges, or a line of willow or cottonwood trees, have been planted along the margin of the road so as to render tiling impracticable, the commissioners may contract with the owner for their destruction, and they shall be destroyed before tiling. The planting of these trees hereafter on the margin of roads is hereby declared a public nuisance, unless the same are planted by the consent of the commissioners." It is claimed that the instruction was authorized by this section of the statute. This statute does not make willow trees in a highway necessarily a nuisance, but the statute is only aimed against willow hedges or a line of cottonwood trees planted along the margin of the highway so as to prevent tiling the highway. It is therefore apparent that the instruction was erroneous, and properly refused. We find no substantial error in the record, and the judgment will be affirmed. Judgment affirmed.

(177 Ill. 49)

LOCKWOOD v. MOFFETT et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

DESCENT AND DISTRIBUTION—WHO ARE KINDRED.

Hurd's St. 1897, p. 629, § 1, subd. 6, provides that "if any intestate leaves a widow or surviving husband and no kindred, his or her estate shall descend to such widow or surviving husband." Subdivision 3 provides that the real estate of one dying intestate without issue shall descend one-half to the surviving husband or wife, and the other half as provided elsewhere in said section. *Held*, that the surviving husband of a woman dying intestate, without issue, but leaving uncles and aunts, inherits one-half only of her real estate, as provided by subdivision 3, and not the whole thereof, as provided by subdivision 6.

Appeal from circuit court, Adams county; J. C. Broady, Judge.

Bill for partition by George A. Moffett and others against William R. Lockwood. From a decree awarding partition, the defendant appeals. Affirmed.

This was a bill in equity brought by George A. Moffett, Ann B. West, and Emily C. Sibert, in the circuit court of Adams county, against William R. Lockwood, to partition certain real estate situated in Quincy and Chicago. There is no controversy between the parties in regard to the facts. They are substantially as follows: Ella M. Lockwood, the late wife of appellant, William R. Lockwood, died intestate on the 25th day of February, 1897, at her residence, in Quincy, Ill., seised in fee of all of the lands in controversy, leaving no child or children, or descendants of a child or children, and no parent, brother, or sister, or descendants of any such, surviving, but leaving her said husband surviving, and also leaving the complainants, George A. Moffett, an uncle, and Ann B. West and Emily C. Sibert, her two aunts, as her sole and only next of kin, surviving; all of her other kin and relatives being cousins of the first, or still more remote, degree. The circuit court found that the uncle and two aunts inherited and owned, and decreed to them, an equal half of all of the lands in controversy, and decreed to appellant the other half of the lands, and also a homestead and dower out of the half decreed to said three complainants. From that decree William R. Lockwood, the surviving husband, appeals to this court. The errors relied on for a reversal of the decree are, that the circuit court erred in finding that said complainants have any interest in the lands in controversy, and in decreeing to them an equal half of the said lands, or any interest therein, and in not dismissing their bill for want of equity, and also in not holding and decreeing that the appellant was and is the sole owner of all of the lands in controversy.

W. L. Vandeventer and S. B. Montgomery, for appellant. A. C. Braxton, for appellees.

CRAIG, J. (after stating the facts). The decision of this case necessarily involves the construction of the statute of descent, section 1 of which is as follows (Hurd's St. 1897, p. 629): "Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that estates, both real and personal, of residents and non-resident proprietors in this state dying intestate, or whose estates, or any part thereof, shall be deemed and taken as intestate estate, after all just debts and claims against such estates are fully paid, shall descend to and be distributed in manner following, to wit: First. To his or her children and their descendants in equal parts, the descendants of the deceased child or grandchild taking the share of their deceased parents in equal parts among them. Second. When there is no child of the intestate nor descendant of such child, and no widow or surviving husband, then to the parents, brothers and sisters of the deceased and their descendants, in equal parts among

them, allowing to each of the parents, if living, a child's part, or to the survivor of them, if one be dead, a double portion; and if there is no parent living, then to the brothers and sisters of the intestate, and their descendants. Third. When there is a widow or surviving husband, and no child or children or descendants of a child or children of the intestate, then (after the payment of all just debts) one-half of the real estate and the whole of the personal estate shall descend to such widow or surviving husband as an absolute estate forever, and the other half of the real estate shall descend as in other cases where there is no child or children or descendants of a child or children. Fourth. When there is a widow or a surviving husband, and also a child or children or descendants of such child or children of the intestate, the widow or surviving husband shall receive, as his or her absolute personal estate, one-third of all the personal estate of the intestate. Fifth. If there is no child of the intestate or descendant of such child, and no parent, brother or sister or descendant of such parent, brother or sister, and no widow or surviving husband, then such estate shall descend in equal parts to the next of kin to the intestate in equal degree, (computing by the rules of the civil law,) and there shall be no representation among collaterals, except with the descendants of brothers and sisters of the intestate; and in no case shall there be any distinction between the kindred of the whole and the half blood. Sixth. If any intestate leaves a widow or surviving husband and no kindred, his or her estate shall descend to such widow or surviving husband. Seventh. If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to and vest in the county in which said real or personal estate, or the greater portion thereof, is situated."

The question to be determined is, to whom does the real estate of Ella M. Lockwood, the intestate, go? she leaving no child or children, or descendants of a child or children, and no parent, brother, or sister, or descendants of a parent, brother, or sister, surviving, but leaving William R. Lockwood, her husband, surviving, and complainants, George A. Moffett, an uncle, and Ann B. West and Emily C. Sibert, her aunts, as her sole and only next of kin, surviving. Under clause 3 of section 1, after the payment of all debts one-half of the real estate and the whole of the personal estate shall descend to such widow or surviving husband as an absolute estate forever, and the other half of the real estate shall descend as in other cases where there is no child or children, or descendants of a child or children. As to the one-half of the real estate, there can be no question but that the husband, William R. Lockwood, inherited the same as an absolute estate. But the controversy here is over the other half; the uncle and two aunts,

the appellees, as next of kin, claiming one-half of all the real estate of the intestate, Ella M. Lockwood, while the surviving husband, William R. Lockwood, claims all the real estate. In construing statutes the intention of the lawgiver is to be deduced from a view of the whole and every part of the statute, taken and compared together. 1 Kent, Comm. 462. The ordinance of July 13, 1787, for the government of the territory northwest of the Ohio river, relating to the descent of intestate estates, saved, in all cases, to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate. Purple's Real-Estate St. 30, 31. The statute remained the same until the act of January 23, 1829, which gave the widow of the intestate one-half of the real estate when there was no child or children, or descendants of a child or children, of the intestate. While the widow was provided for in case of the death of the husband intestate, leaving no child or children, or their descendants, there was no provision for the husband in case of the death of the wife intestate, leaving no child or children, or their descendants. The legislature, by an act in 1845 (Rev. St. 1845, c. 109, § 47), extended this right of the wife to the surviving husband, as follows: "Sec. 47. When any feme covert shall die intestate, leaving no child or children or descendants of a child or children, then one-half of the real estate of the decedent shall descend and go to her husband, as his exclusive estate forever." At common law, collateral kin took to the exclusion of a surviving spouse. Indeed, the spouse never was regarded as "next of kin," or one of the "kindred." In *Townsend v. Radcliffe*, 44 Ill. 446, this court said: "He [the husband] cannot claim to be next of kin to his wife, for in no sense is he such; nor is the wife next of kin to the husband. *Watt v. Watt*, 3 Ves. 247; *Garrick v. Lord Camden*, 14 Ves. 386; *Bailey v. Wright*, 18 Ves. 49; *Kent, Comm. (5th Ed.)* 136."

It is contended that, under the sixth clause of the statute of descent, appellant, Lockwood, took the entire real estate. The sixth clause directs that if there be a widow or surviving husband, and no kindred, the entire real and personal estate shall descend to the widow or surviving husband. In construing this section, appellant insists that the word "kindred," in this sixth clause, should be restricted to "parents, brothers, and sisters, and their descendants"; thus excluding next of kin, other than those named, in favor of the surviving spouse. He cites *Webber v. City of Chicago*, 148 Ill. 313, 36 N. E. 70, "that, where an enumeration of specific things is followed by general words or phrases, the latter are held to refer to things of the same kind as those specified." But in the same connection we further said: "But this is only one of many rules of construction, all of which are to be employed for the attainment of the same end, viz. that of

ascertaining the intention of the legislature or the contracting parties, as expressed in the statute or contract sought to be construed; and where, from the whole instrument, a larger intent may be gathered, the rule under consideration will not be applied in such manner as to defeat such larger intent. Bish. Cont. § 409." By application of the rule that a general expression may be limited by the specific words preceding, appellant would make the word "kindred," in said sixth clause of section 1, mean only "parents, children, brothers, and sisters, and their descendants." This construction, in view of the language used, cannot be sustained. The word "kindred" is used in a larger sense, and must be held to include the phrase "next of kin." The phrase "next of kin" is used in the fifth clause of the statute, and if "kindred," as used in clause 6, is to be limited to such kindred as are specified and provided for in the preceding clauses, then "next of kin" must be included as among the "kindred" so expressly specified and provided for. As appellee says, if the word "kindred," as used in the sixth clause of the statute, must, for the reasons alleged by appellant, be held to mean only "parents, children, brothers, and sisters, and their descendants," then for the same reasons must the word "kindred," as used in the seventh clause, receive the same construction, because, as said in *Reeve, Des.*, 32, "the same words ought certainly to receive the same construction in both parts of the statute." If, under clause 6, the spouse inherits all the realty, to the exclusion of "next of kin," then it follows that under clause 7, there being no surviving spouse, the county would take by escheat the whole of the property, to the exclusion of the "next of kin," which would cause the disinheritance of "next of kin" in all cases, and is inconsistent and irreconcilable with section 5.

In *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, which was a bill filed asking for a partition of 116 acres of land, Alexander Wunderle, the owner of the land, died intestate, leaving no issue, but leaving, him surviving, a widow and one brother and sister, who were nonresident aliens at the time of the intestate's decease. This court said (page 67, 144 Ill., and page 201, 33 N. E.): "Inasmuch, therefore, as the appellants cannot inherit from their deceased brother by reason of their alienage, the interest in the land which would otherwise have gone to them descends to the next of kin competent to take under the statutes of Illinois. We are of opinion that under the facts of this case, as presented by the record, the appellee must be regarded as such next of kin. Our statute of descent provides that, 'If any intestate leaves a widow or surviving husband and no kindred, his or her estate shall descend to such widow or surviving husband.' Rev. St. c. 30, § 1, cl. 6. The kindred here referred to are evidently such kindred as are capable of inheriting. It not appearing that the deceased had any other kindred than his nonresident alien brother and

sister, his widow is entitled to take the whole of the land in controversy." The construction placed upon the word "kindred" in this case is contrary to the construction claimed by appellant. The case of *Beavan v. Went*, 155 Ill. 592, 41 N. E. 91, cited by appellant as a case where this question was considered, is not authority, for the reason that this question was not before the court. It was a mere dictum of the judge who wrote the opinion, and he expressly states that he expresses no decided opinion upon the question, but places the decision upon another ground. The act of 1877, which added to the concluding portion of the third clause of the statute these words, namely, "and the other half of the real estate shall descend as in other cases where there is no child or children or descendants of a child or children," must be regarded as merely declaratory of the law as it had previously been acted upon,—that the surviving spouse took only one-half of the realty where there were kindred of the intestate living, other than nonresident aliens. In construing the words, "and the other half of the real estate shall descend as in other cases," they must be held to mean that, as under clause 3 there is a spouse surviving, the other cases must be those where there is no spouse. In examining the statute to see which of the clauses provides for the "other cases" referred to in clause 3, we are necessarily limited to those clauses where there is no spouse. Clauses 2, 3, and 5 cover the only "cases" of intestacy with no lineal descendants surviving, and, therefore, when clause 3 refers to "other cases where there is no child or children or descendants of a child or children," it evidently refers to the cases provided for by clauses 2 and 5. The statute of descent also makes a distinction between the inheritance by a surviving spouse of a legitimate and that of an illegitimate intestate. In the case of the surviving spouse of a legitimate intestate, under clause 3 of section 1, as we have seen, the surviving spouse takes one-half of the real estate, and the whole of the personal. Clause 3 of section 2 provides: "An illegitimate intestate leaving no child or descendant of a child, the whole estate, personal and real, shall descend to and absolutely vest in the widow or surviving husband." If the legislature had intended to give all the realty to the surviving spouse of the legitimate intestate, is it probable they would have said he or she should take half? But, if such was the intention, would not the legislature have said, as in the case of the surviving spouse of the illegitimate intestate, he or she should take the whole of the real estate? Under clause 6, where the intestate leaves a surviving husband, and no kindred, her estate descends to the husband. This is the section under which appellant claims all of the real estate in question, but it is manifest that his claim cannot be sustained, for the reason that the intestate left kindred. We are, therefore, of opinion that appellant did not inherit all the real es-

tate, but that he inherits one-half as his absolute estate, and the other half must descend to the "next of kin," the appellees, under the third clause of section 1 of the statute, subject to the dower and homestead of appellant in said half. The decree of the circuit court is affirmed. Decree affirmed.

(177 Ill. 229)

CHICAGO & A. R. CO. v. BALDRIDGE,
Treasurer.

(Supreme Court of Illinois. Dec. 21, 1898.)

**MUNICIPAL TAXATION—ASSESSMENT—VALIDITY—
LIBRARY TAX—COURTS—JUDICIAL NOTICE.**

1. Under Rev. St. c. 24, art. 8, § 1, and chapter 120, § 127, requiring the county clerk to determine the rate per cent. which will produce the sum directed to be levied on city property by ordinance, and the rate on the assessed valuation of taxable property that will produce not less than the amounts certified to him, he may, in fixing the rate for the taxation of city property, consider the amount payable to the collector of taxes for his services, as fixed by statute, though it is not included in the amount directed to be levied by ordinance.

2. Rev. St. c. 24, art. 8, § 1, prescribing the manner of levying general city taxes, and restricting the aggregate taxes to be levied for cities, not including that levied to pay bonded indebtedness, to 2 per cent. of the assessed valuation of the preceding year, does not preclude an assessment of a library tax, according to section 1, in a city whose population exceeds 10,000 inhabitants, on the valuation of the current year, at the maximum rate allowed by law, as Act July 1, 1895, amending Library Act, § 1, provides that the annual library tax in cities of such population should not be included in the aggregate of city taxes as limited by article 8, § 1.

3. The courts will take judicial notice of the federal census.

Appeal from McLean county court; Roland A. Russell, Judge.

Application by William J. Baldrige, treasurer and collector of McLean county, against the Chicago & Alton Railroad Company, for a judgment against defendant's land for taxes. From an order overruling certain objections to the application, defendant appeals. Affirmed.

Chas. L. Capen and William Brown, for appellant. William R. Bach and Sigmund Livingston, for appellee.

BOGGS, J. Objections presented by the appellant company to the application of the treasurer and ex officio collector of taxes for McLean county for a judgment against the property of the appellant company within the city of Bloomington for the taxes levied by the city council of the said city for the year 1897 were sustained in part by the court, and in part overruled, and judgment entered against the appellant company accordingly. This appeal questions the correctness of the rulings of the court in two respects.

It appeared the county clerk so estimated and determined the rate per cent. upon the value of the property within the city, as assessed for taxation for the year 1897, as that

it would produce the amount of the taxes levied and certified to him by the city council, and also, in addition thereto, an amount sufficient to pay the commission allowed by the statute to the collector of taxes for making the collection. The court sustained the action of the clerk, and this ruling is first of the two errors assigned by the appellant company as for error. Section 1 of article 8 of chapter 24 of the Revised Statutes, entitled "Cities," etc., provides that a certified copy of the ordinances of cities making appropriations, and directing the levy and collection of taxes, shall be filed with the county clerk, and that it shall thereupon become the duty of such county clerk to ascertain the rate per cent. which, upon the total assessable valuation of property within the city, will produce a net amount not less than the amount directed to be levied by the ordinance, and that he shall extend the tax therefor upon the books of the collector of taxes. Section 127 of chapter 120 of the Revised Statutes, entitled "Revenue," provides that the county clerk shall estimate and determine the rate per cent. upon the assessed valuation of taxable property that will produce not less than the net amount of the several sums certified to him according to law. Section 120 of the same chapter provides that the auditor of state shall compute and certify to the different county clerks in the state such rates per cent. as will produce the net amount of state taxes authorized to be levied. It will be observed that all these statutory provisions require the rate per cent. of the levy shall be so estimated as that it will produce the net amount required by the taxing power. In *Edwards v. People*, 88 Ill. 340, we had occasion to determine the power and duty of the auditor of public accounts under the provisions of section 120, before mentioned; and the conclusion reached was, that officer was vested with power, and it was his duty, to determine the rate per cent. which would produce the net amount required to be raised, exclusive of the cost of collection, and the amount of losses and deductions which would probably occur. This construction of the section was approved in *Trust Co. v. Weber*, 96 Ill. 346. No reason is perceived why the authority given the county clerk by said section 1 of article 8 of chapter 24, and in said section 127 of the revenue act, should not be deemed at least sufficiently broad to require him to so compute the rate per cent. of the levy as that the amount produced would be sufficient to meet the sums required by the appropriation ordinance, and the commissions which the statute provides may be retained by the collector out of the amounts by him collected. The commissions allowed the collector are established by law, and the inclusion of them by the clerk does not involve the exercise by that officer of any judicial function or taxing power, or even discretion or judgment. The alleged error is not, therefore, well assigned.

Section 1 of chapter 81, entitled "Libraries,"

authorizes the city council of the city of Bloomington to maintain a public library and reading room for the inhabitants of the city, and to levy a tax for that purpose, not to exceed two mills on the dollar, annually, upon all of the taxable property of the city; such tax to be levied and collected in like manner with the general taxes of the city. The city council of the said city of Bloomington in the year 1897 appropriated a certain sum for library and reading-room purposes, and certified the same to the county clerk. That officer determined the rate per cent. required to be extended on the assessed valuation of taxable property in the city for the year 1897, and extended the tax on such property as so valued. The aggregate of this tax exceeded 2 per cent. of the assessment of the preceding year. The appellant insisted in the county court, and such is its second assigned error in this court, that as the statute authorizing the imposition of the tax for library and reading-room purposes provides that such tax shall be levied and collected in like manner with the general city taxes, and that as, under the provisions of the proviso to said section 1 of article 8 of chapter 24, the amount of the aggregate taxes to be levied for city purposes, not including that levied to pay the bonded indebtedness of the city and the interest thereon, is restricted to 2 per cent. of the assessment of the preceding year, the tax to be levied and collected for library and reading-room purposes in 1897 cannot exceed the sum which would be raised by the levy of a tax of two mills upon the dollar of the valuation of the property within the city as equalized for the preceding year. This position is not tenable. Section 1 of the library act was amended by an act of the general assembly in force July 1, 1895, by the addition of a proviso to the effect that the annual library tax in cities of over 10,000 inhabitants should not be included in the aggregate amount of city taxes as limited by the proviso to said section 1 of article 8 of chapter 24 of the Revised Statutes. We will take judicial notice of the federal census, and that it appears from said census that the city of Bloomington has more than 10,000 inhabitants. Hence it follows that the limitations or restrictions of the proviso to said section 1 of article 8 of chapter 24 have no application or reference to taxes levied for library and reading-room purposes, or for the payment of bonded indebtedness of the city, or interest on such bonded indebtedness. Section 1 of article 8 of chapter 24 (the proviso excluded) directs the manner in which all city taxes shall be levied and collected. The proviso to the section limits the amount which the city council may appropriate and lawfully levy for certain purposes, but does not prescribe or attempt to prescribe the manner or mode of levying and collecting such taxes. Taxes are levied on the property according to the valuation for the current year. *People v. Lake Erie & W. R. Co.*, 167 Ill. 285, 47

N. E. 518. Finding neither contention of the appellant to be well grounded, the judgment is affirmed. Judgment affirmed.

(177 Ill. 27)

ROYAL NEIGHBORS OF AMERICA v. BOMAN.

(Supreme Court of Illinois. Dec. 21, 1898.)

INSURANCE—STATEMENTS BY MEDICAL EXAMINER.

The medical examiner of a mutual benefit society is the agent of the society, notwithstanding conditions to the contrary in the application and certificate; and where he fails to insert the answers to questions in the application as given by the assured his act is the society's, and not the assured's.

Appeal from appellate court, Third district.

Bill in chancery by Joseph E. Boman against the Royal Neighbors of America. A decree for the complainant was affirmed in the appellate court (75 Ill. App. 566), and the defendant appeals. Affirmed.

Appellant is a fraternal beneficiary society, organized as a corporation under the laws of the state of Illinois, and has a local camp at Quincy, known as "Queen of the West Camp No. 51." On February 7, 1895, Sarah F. Boman, wife of appellee, being then a member of the local camp, made application for a benefit certificate at the office of Dr. F. S. Meacham, who was at that time the duly-elected regular medical examiner of appellant. As such, the doctor made a medical examination of Mrs. Boman, and at the same time filled out the answers to the questions in the application blank. On May 10, 1895, a benefit certificate was issued to her on her life, by appellant, in the sum of \$1,000, payable at her death to Joseph E. Boman, appellee. Mrs. Boman died May 29, 1896, in good standing in the order. The required proof of death was made, but appellant refused to pay the money provided for in the policy. Appellee then filed his bill in chancery in the Adams county circuit court to compel the order to levy and collect an assessment, and pay to him the amount of the certificate. Appellant answered the bill, and interposed as an affirmative defense that Mrs. Boman, in her application for the benefit certificate, had made untrue and fraudulent answers to questions in relation to her previous condition of health, such as, under the terms of the contract, would forfeit all rights to the benefits promised in the certificate. The application signed by Mrs. Boman contains the following clause: "(34) I have verified each of the foregoing answers and statements, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete, and literally true, and I agree that the exact, literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers, and I hereby constitute and make the officers of the local camp of the Royal Neighbors of America who have aided in making this application my agents for such

purpose. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and the Royal Neighbors of America, and are offered by me as a consideration for the contract applied for, and hereby made a part of any benefit certificate that may be issued on this application, and shall be deemed and taken as a part of such certificate; that this application may be referred to in said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract; and I further agree that, if any answer or statement in this application is not literally true, or if I shall fail to comply with and conform to any and all of the laws of said Royal Neighbors of America, whether now in force or hereafter adopted, that my benefit certificate shall be void." The certificate issued to Mrs. Boman contains the following: "First. That the application and medical examination, which is made a part hereof, of said Sarah F. Boman for membership in the beneficiary department of this order, and which is on file in the office of the beneficiary recorder, and is hereby referred to and made a part of this contract for benefit, is true in all respects, and that the literal truth of such application, and each and every part thereof, shall be held to be a strict warranty, and to form the only basis of the liability of this order to such member and to his beneficiary or beneficiaries, the same as if fully set forth in this benefit certificate. Second. That should said application, and each and every part thereof, not be literally true, then this benefit certificate shall, as to the member, his beneficiary or beneficiaries, be absolutely null and void." It appears from the evidence that after the medical examiner had filled up the blanks in the application Mrs. Boman signed it without reading it. The answers, as written by the doctor, to some of the questions, were untrue; but the chancellor. In passing upon the facts upon the hearing, found that Mrs. Boman made truthful answers to the questions, but that the answers inserted by the doctor were not those given by her, and that he was acting as the agent of the defendant. The circuit court rendered a decree against appellant for the sum of \$1,043.50. On appeal to the appellate court the decree was there affirmed, and appellant now prosecutes this further appeal.

J. G. Johnson and J. W. White, for appellant. Hamilton & Woods, for appellee.

WILKIN, J. (after stating the facts). The questions presented for decision in this cause arise upon the construction and effect to be given, under the circumstances of this case, to the foregoing clauses contained in the application and certificate. It is contended on behalf of appellant that by the terms of the application appellee is estopped from asserting that Dr. Meacham was the agent of the order, and not of the applicant for the certifi-

cate. Evidence was admitted on the hearing, over the objection of appellant, to establish the real position of the medical examiner in relation to applications for benefit certificates. The question as to whose agent Dr. Meacham was is one of fact, to be determined from all the evidence bearing on that subject, and not merely from the statement in the application that he was the agent of the assured. The question is open to inquiry, and may be shown by parol, notwithstanding the express stipulation that he was to be regarded as the agent of appellant. *Insurance Co. v. Bell*, 166 Ill. 400, 45 N. E. 130; *Insurance Co. v. Horton*, 170 Ill. 258, 48 N. E. 955; *Insurance Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408. The supreme court of Tennessee, in a case very similar to this, held that one who acts as a medical examiner for an insurance company, which ratifies his examination of an applicant, is its agent in respect to such examination, notwithstanding a recital in the application that he shall be regarded as the agent of the applicant as to all statements made by the latter. *Knights of Pythias v. Cogbill* (Tenn. Sup.) 41 S. W. 343. While such stipulations are now usually inserted either in the application or in the policy, yet they cannot change the facts, and where a duly-appointed agent of the company acts in its behalf, within the scope of his authority as otherwise determined, his acts are binding upon the company. See 11 Am. & Eng. Enc. Law, 334, and cases there cited. We perceive no sound ground, on the testimony, to reverse the finding of the chancellor that Dr. Meacham, at the time he received Mrs. Boman's application, was the agent of appellant.

Appellant contends that it was the duty of the applicant to read the application, and to know what she signed, and, failing to do so, the beneficiary is estopped from questioning the truth of the answers therein contained; and the case of *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, is cited in support of this view. The case cited, and all cases which follow its doctrine, proceed upon the ground that the assured cannot escape the duty of reading the application, which must be the basis upon which his insurance will rest; but the majority of the various state courts, for good reasons, as we think, seem not to have adopted the views therein expressed. Whether the beneficiary should be estopped from questioning the truth of the answers contained in the application also depends upon the peculiar facts of each case, and the relation of the parties. As is well said on this subject in a note to *Wheaton v. Insurance Co. (Cal.)* 9 Am. St. Rep. 234 (s. c. 18 Pac. 758): "The ground thus taken, though defensible when viewed in connection with ordinary contracts and writings, is more questionable when used to support the claim that the assured, rather than the insurer, shall suffer from the fraud of the latter's agents. It is notorious that contracts of insurance are, on the part of the assured, entered into with-

out the advice of counsel, and chiefly upon the representations of the agents of the insurer. Such agent is justly looked upon as the accredited agent of the company, in whom it has confidence, and holds out as worthy of the confidence of its patrons. Furthermore, the assumption is perfectly natural that he knows just what information his principal desires, and in what language it may be best expressed; and human nature must be far different from what it is now before the average applicant for insurance can be taught that he must be deaf to the representations of the agent while he sharpens his comprehension and applies it to the careful scrutiny of the insurance stationery, which, even without the suggestion of the agent, it is impossible for him to regard as other than a mere 'matter of form.' So, in this case, when, in answer to the question as to whether or not she had ever had bronchitis, Mrs. Boman told him she had had an attack of "acute bronchitis," and Dr. Meacham said "it was of no consequence," and inserted "No" in answer to the question, she had a right to rely on his statement, on the theory that he knew just what information his principal desired, and how it should be expressed. He was acting in the interests of the order, and his knowledge must be held to be the knowledge of the principal. It was his duty to ascertain the actual facts about this risk, and his report to the company must, where no fraud or intent to deceive on the part of the applicant is shown, be conclusive upon it. Where one makes true answers to the questions in an application for insurance, the validity of the insurance is not affected by the falsity of the answers inserted by the agent of the company, even though the application contained a stipulation that the agent took the application as the agent of the insured. *Bernard v. Insurance Ass'n* (Sup.) 39 N. Y. Supp. 356; *Clubb v. Accident Co.*, 97 Ga. 502, 25 S. E. 333; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Fish*, 71 Ill. 620. Under the circumstances of this case the beneficiary is not estopped to question the truth of the statements made in the application, and the finding of the chancellor in that respect was correct. We are satisfied the decree of the circuit court finding in favor of appellee, and its affirmance in the appellate court, are right. Decree affirmed.

(176 Ill. 555)

BURKE v. CARLINVILLE WATER CO.

(Supreme Court of Illinois. Dec. 21, 1898.)

EJECTMENT—WHEN LIES.

Ejectment will not lie where defendant deepened, by a dam below plaintiff's land, the channel of a creek crossing it, on the theory that such damming of the water back was a taking of plaintiff's land.

Appeal from circuit court, Macoupin county; Robert B. Shirley, Judge.

Ejectment by Don A. Burke against the Carlinville Water Company. From a judgment for defendant, plaintiff appeals. Affirmed.

F. H. Chapman, for appellant. Bell & Burton, for appellee.

CARTWRIGHT, J. The appellant brought this suit in ejectment against the appellee to recover possession of the bed and banks of Macoupin creek across the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 3, township 9, range 7, in Macoupin county. Appellee pleaded the general issue, and further pleads that it was not in possession of the premises sought to be recovered, that it claimed no title or interest therein, and that no demand for possession was made by appellant before suit. The jury was waived, and on a trial before the court it was proved that plaintiff was the owner of said tract of land, including Macoupin creek, which flowed across it; that said creek was of a width of from 3 to 6 rods, and the banks were from 5 to 12 feet high; that defendant had built a dam across the creek about 2 miles down stream from plaintiff's land; and that in consequence of the erection of the dam the water was deeper in the channel of the creek across plaintiff's land, and was more difficult to cross. Plaintiff submitted to the court propositions of law based upon these facts, and stating that such damming of the water back was a taking of his land, and that he was entitled to a judgment for its possession. The court refused said propositions, found the defendant not guilty, and rendered judgment against plaintiff for costs.

The only effect of the dam was that the water stood in the channel of the creek on plaintiff's land, within the banks of the creek, at a greater depth than before the dam was built. Neither the water nor the land was in the possession of the defendant, and it neither had nor claimed any right to the same. If the writ of possession provided by the statute in case of a recovery in ejectment should be issued, it would be impossible for the sheriff to deliver possession by reducing the water in the channel to its former level. The land and water were already in the possession of the plaintiff. It is plain that there could be no remedy by ejectment. The finding and judgment were clearly right, and the judgment is affirmed. Judgment affirmed.

(177 Ill. 110)

ILLINOIS CENT. R. CO. v. DAVENPORT.

(Supreme Court of Illinois. Dec. 21, 1898.)

CARRIERS—FREIGHT TRAIN—EJECTION OF PASSENGER—THESPASSER—PLEADING—PROOF—INSTRUCTIONS—REVIEW—WAIVER OF ERROR—COURT OF APPEALS—CONCLUSIVENESS OF JUDGMENT.

1. Where the briefs of counsel make no reference to the rulings of the court in admitting evidence, all errors of that nature will, on appeal, be considered as waived.

2. On appeal from a judgment in an action

for wrongful ejection of a passenger, the supreme court will not determine whether the evidence was sufficient to show that the relation of passenger and carrier existed.

3. One who, on purchasing a ticket, was informed by the station agent that it entitled him to ride on a freight train, which, under the company's regulations, was not allowed to carry passengers, was not, on entering such train, a trespasser, whom the trainmen could forcibly eject after the train had started, without advising him of the regulation, and giving him an opportunity to alight.

4. The verdict of a jury, accepted by the court of appeals, is, on appeal to the supreme court, conclusive on questions of fact, unless the verdict was the result of erroneous instructions.

5. In an action for wrongful ejection of a passenger from a freight train, and assault by the trainmen, in which the question of the duty of a passenger to comply with the company's regulations in entering a car provided for passengers, and at the door for the use of passengers, was not involved, it was not error to omit to instruct on that issue.

6. In an action for wrongful ejection from defendant's train, it is not essential to a recovery that the plaintiff prove that the train was running at the speed alleged in his declaration.

7. An instruction reciting allegations comprising the material allegations of the declaration, and directing the jury to find for plaintiff if they believe that material allegations of the declaration are true, does not submit to the jury the question of law as to what are the material allegations.

8. An instruction that if the plaintiff was wrongfully ejected from the train, as charged in the declaration, and the ejection was wrongful, plaintiff is entitled to exemplary damages, does not assume that the ejection was wrongful, as charged in the declaration.

9. In an action for wrongful ejection from a train and assault by the trainmen an instruction that "in actions of this kind, where a wanton and cruel assault is made, exemplary damages may be allowed," is not erroneous, as assuming that an assault was made.

10. The judgment of the appellate court is conclusive on the question of excessive damages.

Appeal from appellate court, Third district.

Action by John L. Davenport against the Illinois Central Railroad Company. From judgment for plaintiff, affirmed by the appellate court (75 Ill. App. 579), defendant appeals. Affirmed.

The following instructions were given for the plaintiff: "(1) A railroad company is under obligations to carry its passengers safely and properly, and to treat them respectfully; and, if the company intrusts this duty to servants, the law holds the company responsible for the manner in which such servants execute this trust. (2) A railroad company must not only protect its passengers lawfully upon its trains against violence and assaults of strangers, but also against the violence and assaults of its own servants or employes. If this protection is not given, and the passenger is assaulted and unlawfully expelled from the train by the employes of the company in charge of the train, the company will be liable for such unlawful acts of its employes and the injuries occasioned thereby. (3) If the jury believe from a preponderance of the evidence that upon

the occasion in question the plaintiff in this case went to the station agent at Maroa, at the station; that the train in question was then at the station, about to leave, going south to Emery; that the plaintiff then inquired of the agent if that was the train for him to take for Emery, and he informed him that it was; that he, relying on the information thus received, purchased a ticket, and thereupon got upon the said train, in a peaceable and orderly manner, and with due care and caution, and was quietly and orderly passing along the train to the caboose; that the train thereupon started from the station to Emery; that while the train was under headway, and moving towards Emery, two of the brakemen, employes of the defendant, on said train, in the general discharge of their duties, came to the plaintiff, and ordered him from the train, and after being informed that the plaintiff had a ticket, and was directed by the station agent to get upon that train, forcibly and violently ejected him from the train,—then, in such event of the proofs, the plaintiff would be entitled to recover. (4) In case No. 15,688, Davenport sues the defendant, and sets forth and claims in his declaration that on the 25th day of February, 1896, the defendant was running and operating a railroad between Maroa and Emery, in this county; that upon that day he had lawfully gotten upon one of the trains of the defendant, as a passenger to go from Maroa to Emery; that, while he was lawfully upon the said train as such passenger, by servants of the defendant in charge of the said train, and while said train was running, he was unlawfully, forcibly, cruelly, and wickedly ejected from said train, and was thereby greatly injured. Now, if the jury believes from a preponderance of the evidence that the material allegations in the plaintiff's declaration are true, then it will be your duty to find a verdict in his favor. (5) If the jury believe from a preponderance of the evidence, not only that the plaintiff was wrongfully ejected from the train as charged in the declaration, but that the ejection was wanton, willful, and malicious, and with a reckless and cruel disregard of his safety, then, under the law, in the assessment of damages you are not limited to the actual injury sustained by the plaintiff by being so expelled, but you have a right to assess damages in the way of punishment. (6) It is the law of this state that in actions of this kind, where a wanton, willful, or cruel assault is made, the jury have the right to go beyond the actual damages by way of punishment. The law has, for the repose and good of society, authorized the jury to give exemplary damages where a trespass is wanton, willful, or malicious, or where it is accompanied by such acts of indignity as to show a reckless disregard of the rights of others, as a punishment for the wrong, and to deter others from the perpetration of

such acts, not exceeding the amount claimed in the declaration."

I. A. Buckingham, for appellant. Mills Bros., for appellee.

BOGGS, J. The briefs of counsel make no reference to the rulings of the court as to the admissibility of evidence, and all assignments as for error of that nature are deemed waived.

It is not contended any ruling of the court in passing on the instructions, or otherwise, improperly defined the relation of passenger or carrier. The court was not called upon to instruct the jury the evidence was insufficient to support the verdict for appellee; hence that question does not arise upon this record. We cannot consider whether the facts disclosed by the evidence were or were not sufficient to establish that, as a matter of fact, the relation of passenger and carrier existed.

In order to determine alleged errors in the rulings of the court on the matter of instructions, we may make the following reference to the facts: The appellee purchased from the appellant's regular ticket and station agent at Maroa a ticket entitling him to ride on appellant's train from Maroa to Emery. The train in question, a freight train, with a caboose attached, was then at the depot at Maroa. The said ticket agent informed the appellee the ticket entitled him to ride on that train. Appellee went upon the train, believing, in good faith, he was lawfully entitled to take passage thereon. The regulations of the company did not permit persons to be carried on the train as passengers without a special permit from the superintendent. The appellee, having entered the train by direction of the station agent of the company, and without notice that passengers were not carried upon it, did not go upon the train as a trespasser. He was, at least, entitled to be regarded as lawfully upon the train until advised of the regulation, and given an opportunity to alight therefrom with safety. His contention that he was assaulted by appellant's brakeman, acting with the knowledge and under the direction of its conductor, and by such brakeman forcibly and maliciously knocked or thrown from the train, was accepted by the jury, the trial court, and the appellate court as having been established by the evidence. We must so accept it, unless it appears the jury were led to that conclusion by erroneous instructions of the court.

The case for appellee, upon the pleadings and proof, being that he was intentionally assaulted and knocked or thrown from the train by appellant's brakeman, acting under the direction of the conductor, it is unimportant to determine whether the jury were correctly instructed as to the degree of care and diligence which the law requires a carrier to observe in transporting a passenger. Nothing

in the pleadings or testimony had reference to an assault by other persons than appellant's brakeman, and for this reason the correctness of the rule declared by the instructions as to the duty of a carrier to protect passengers from the assaults of persons other than the employees of the company cannot be regarded as important for determination. The duty of persons desiring to be received as passengers upon a train to enter a car provided for passengers, and at the door provided for the use of passengers, was not involved; and the omission of reference in the instructions to such alleged duty could not be regarded as error of reversible character. It was not essential to the proper determination of the right of the appellee to recover that he should prove that, at the time he was removed from the train, the train was moving at the rate of speed alleged in either count of the declaration, or at any other rate of speed. The rate of speed of the train was important only so far as it operated to show the dangers which would attend a violent expulsion from the train, and thereby to characterize the act of ejection and the motives of the brakeman at the time. These observations dispose of the objections to the first, second, and third instructions given on behalf of the appellee.

The fourth instruction advised the jury the plaintiff's declaration contains certain specified allegations, being in fact the material allegations of that pleading, and in the concluding sentence directs the jury, if "they believe, from a preponderance of the evidence, the material allegations of the plaintiff's declaration are true, the verdict should be in favor of the plaintiff." The jury could but understand from this instruction that the material allegations of the declaration were those recited in the preceding portion of the instruction; and the instruction is not open to the criticism that it submitted to the jury a question of law as to which of the allegations in the declaration were material.

The complaint as to the fifth instruction given for the appellee is that it assumes the appellee was ejected from the train, as charged in the declaration. The instruction ought not be given that interpretation. The purpose of the instruction was to advise the jury that if they believed, from the preponderance of the evidence, the appellee was ejected from the train with wanton, willful, malicious, and reckless disregard as to the injuries likely to be inflicted upon him thereby, his right of recovery was not limited to any actual injury sustained by him, but the jury had the power to award him exemplary damages. We do not think the phraseology of the instruction, which, it must be confessed, was not well or accurately chosen, was such as to intimate to the jury they should accept the appellee's theory, that he had been ejected from the train, except they believed such theory to be true from a preponderance of the evidence.

The purpose of the sixth instruction was

the same as that of the fifth, and nothing in it ought have been understood by the jury as an assumption on the part of the court that a wanton, willful, cruel assault, or an assault of any character, had been made upon the appellee.

That the damages are not excessive is conclusively determined by the judgment of the appellate court. The judgment of the appellate court is affirmed. Judgment affirmed.

(177 Ill. 185)

EGGERS v. FOX.

(Supreme Court of Illinois. Dec. 21, 1898.)

WITNESS—INCRIMINATING TESTIMONY—WAIVER OF PRIVILEGE—ELECTION CONTEST—EVIDENCE—BALLOTS.

1. While a person who has voted illegally at an election cannot be compelled to testify in a contest, yet he may waive his privilege, and, if he neither claimed exemption, nor refused to testify, his evidence should be received.

2. Where a voter appeared as a witness in an election contest, and testified without objection to facts showing he had voted illegally, it was error for the court to refuse to permit him to testify for whom he voted, since, having already exposed his crime, the answer to the question would neither add to nor detract from the evidence already given.

3. A person who had voted illegally was produced as a witness in an election contest, and declined to testify, but, when asked, "For what reason?" said, "I have no particular reason." Held, that the witness thereby waived his privilege, and that the court's refusal to compel him to testify was error.

4. While a court may advise a witness that he is not required to give evidence in an election contest which would incriminate him of illegal voting, the witness should then be left free to waive his privilege. The court has no right to do anything further which might prevent the witness from testifying if he would.

5. Where one who had voted illegally at an election refused to testify in a contest, his affidavit, voluntarily made three days after the election, in which he said he had "unthoughtedly voted twice at said election," and each time voted the Republican ticket, is admissible to show that fact, because of which both ballots were invalidated.

6. Where election judges left the ballots, after they were counted, in the town hall until the second day after the election, to which others had access, instead of sealing them up and delivering them to the officer to whom the poll books are required to be delivered, as required by Election Law, c. 46, § 59 (Hurd's Rev. St. 1889, p. 613), the burden is on a candidate claiming to introduce them in evidence in an election contest to prove that they were not altered before they were in fact properly delivered, before they can be received.

Appeal from Fulton county court; S. H. Armstrong, Judge.

This was a petition brought by Elijah M. Eggers in the county court of Fulton county against I. C. Fox to contest his election to the office of town clerk of Young Hickory township at the annual town election held April 5, 1898. It is alleged in the petition that appellant was an elector in the town of Young Hickory on April 5, 1898; that an election was held on that day in said town for town clerk and other town officers; that the polls were opened according to law; that bal-

lots were received at said election for the office of town clerk and other town officers; that after the polls were closed a count was made by the judges of election of the votes cast for town clerk and other town officers, and a certificate made; that at said election appellant was the Democratic candidate and I. C. Fox, appellee, was the Republican candidate for the office of town clerk aforesaid; that Fox received 128 votes and Eggers 126 votes for such office of town clerk, as the result was declared by said judges; that Fox was declared elected, received a certificate of election, qualified, and entered into the possession of said office; that at said election one James Reid voted twice, and each time, by properly marking his ballot with a cross within the circle at the head of the Republican ticket, voted the straight Republican ticket; that the judges of said election counted both of the ballots so cast by said Reid for said Fox when neither of said ballots should have been counted for any one; that one ballot improperly marked, and that should not have been counted for any one, was by said judges counted for Fox; that votes were cast by illegal voters for Fox, and counted for him; that appellant received the majority of the legal votes cast at said election for the office of town clerk aforesaid. The petitioner prayed for a recount of said ballots, and that he may be declared and adjudged lawfully elected town clerk, and duly installed in said office, and said Fox be ousted therefrom. The defendant put in an answer, in which he alleged that he was duly elected town clerk, and denied the material allegations of the petition. To the answer petitioner filed a replication, and on a hearing before the court on the pleadings and evidence an order was entered dismissing the petition, and plaintiff appeals. Reversed.

Harry M. Waggoner and Marvin T. Robinson, for appellant. Chipfield, Grant & Chipfield, for appellee.

CRAIG, J. (after stating the facts). On the hearing in the county court, what purported to be the ballots cast at the election, the poll books, tally list, and the certificate of the judges of election were read in evidence. The certificate of the judges of election showed that E. M. Eggers received 126 votes and I. C. Fox 128 votes for town clerk, and that said Fox was declared elected. The tally list showed 126 votes cast for Eggers and 128 for Fox. The poll book showed J. M. C. Collard as voter No. 48 on the list of voters. Collard was called as a witness, and testified: "I voted at the election held in Young Hickory township, Fulton county, Illinois, on the 5th day of April, 1898. Had lived in Young Hickory township from February 18, prior to the 5th day of April, 1898. Prior to that time I lived in Knox county. I moved from Knox county to Fulton county, February 18, 1898." The witness was then asked, "What ticket did you

vote?" The question was objected to, and the objection sustained. Thereupon the following question was asked: "For whom did you vote for town clerk on the 5th day of April, 1898, at London Mills?" The question being objected to, the objection was sustained. Counsel for petitioner then asked the witness the following question: "Have you any objections to answering for whom you voted for town clerk on the 5th of April, 1898?" and he answered: "I don't know as I have." The general rules of evidence as to the competency of witnesses and the privileges of exemption from testifying prevail in election cases as in suits between private parties. 6 Am. & Eng. Enc. Law, p. 422. The law is also well settled that where the answer of a witness will expose him to a penal liability, or to any kind of punishment, or to a criminal charge, he is not bound to answer. 1 Greenl. Ev. § 451. In the authorities cited in the note in 6 Am. & Eng. Enc. Law, p. 422, it is laid down that a legal voter cannot be compelled to testify for whom he voted, but it is also laid down that the exemption is a personal privilege, and the testimony will be received if the voter sees fit to give it. Here the witness did not claim his privilege, and did not refuse to testify, and we are of the opinion that neither party to the action had the right to claim it for him. Moreover, Colard had not resided in Fulton county 90 days next before the election, and was not a legal voter. In addition to this, the witness had already testified that he had voted, and that he had only resided in Fulton county from the 18th day of February, 1898,—56 days before the election. He had, therefore, voluntarily exposed his unlawful act, and the answer to the question whom he voted for would neither detract from nor add to the force and effect of the evidence he had already given. We think the court erred in sustaining the objections to the questions.

James Reid was called as a witness, and testified that he resided in Young Hickory township. The following question was then asked: "Did you vote at the election held in and for the town of Young Hickory on the 5th of April, 1898?" The court stated that he need not answer, to which ruling plaintiff, by his counsel, then and there excepted. Witness then said, "I decline to testify." He was then asked, "For what reason?" and said, "I have no particular reason." If the witness had no reason for refusing to testify in answer to the question propounded, it was the duty of the court to compel him to answer. The witness did not claim a personal privilege, and neither the court nor the opposite party had the right to claim it for him. 29 Am. & Eng. Enc. Law, § 413. The poll books which were in evidence show Reid twice as a voter at the election in question. He was numbered in the list of voters first as No. 103 and second as No. 195, and it was claimed by the contestant that Reid had voted twice for the defendant, and that both ballots were counted for the defend-

ant. If the claim so made was true, and appellant was able to establish it, he had the right to do so by any and all legal evidence he saw proper to produce. When Reid was asked if he voted at the election, the court had the undoubted right to advise the witness that he was not required to give any evidence which would criminate him, but after that was done the witness should have been left free to waive his privilege and testify, if he saw proper. It was neither the duty nor the right of the court to say or do anything which might prevent the witness from testifying if he saw proper. *Fries v. Brugler*, 12 N. J. Law, 79. Three days after the election, Reid made the following affidavit: "State of Illinois, Fulton County—ss.: James Reid, being duly sworn, on oath says: I attended the election for the town officers of Young Hickory township held at London Mills, in said town, on April 5, A. D. 1898, and unthoughtedly voted twice at said election, and both times I voted the straight Republican ticket, and each time I marked a cross (X) within the circle at the head of the Republican ticket. James Reid." After the court ruled that Reid could not testify in the case, the appellant offered his affidavit in evidence, but it was excluded by the court. The affidavit was not offered for the purpose of showing that Reid was not a legal voter in the town on the day of election, but the sworn statement was offered for the purpose of showing that Reid had voted twice at the election, and, on account of having voted twice, both ballots should be rejected. When, and under what circumstances, the declaration of a voter may be received when offered for the purpose of impeaching his vote is a question upon which the authorities are not harmonious. In 6 Am. & Eng. Enc. Law, p. 429, the author says: "In England the weight of authority has been in favor of receiving the declarations of voters against their right to vote, although the earlier cases were in conflict. In this country the congressional cases are somewhat in conflict, although the weight of authorities seems to be in favor of admitting the declarations; and in the courts the authorities are also in conflict." The author also says: "The authorities are not uniform as to whether declarations made after the election by the voters as to how they had voted can be admitted, but where made at the time of the election they have been admitted as a part of the *res gestæ*." Here the declaration embodied in a sworn statement was made only three days after the election, and there is nothing to indicate that it was made for the purpose of aiding either of the contesting parties, nor does it appear that any undue means were resorted to to procure the statement. In *State v. Olin*, 23 Wis. 309, it was held that when a person who had voted refused to testify to his qualification, his declaration that he was not naturalized should be admitted. The same principle was announced in *People v. Pease*, 27 N. Y. 45. Under the rule indicated in the cases cited, we are inclined to hold that, after Reid

refused to testify to any act which tended to show his vote was illegal, his sworn declaration, made three days after he voted, was admissible.

It is also claimed in the argument that the court erred in refusing to consider the ballots and reject one counted for appellee, which was marked with a circle within the circle at the head of the Republican ticket. Section 59 of chapter 46 of the election law (Hurd's Rev. St. 1889, p. 613) provides: "All the ballots counted by the judges of election shall, after being read, be strung upon a strong thread or twine in the order in which they have been read, and shall then be carefully enveloped and sealed up by the judges, who shall direct the same to the officer to whom by law they are required to return the poll books, and shall be delivered, together with the poll books, to such officer, who shall carefully preserve said ballots for six months, and at the expiration of that time shall destroy them by burning without the package being previously opened." If the course indicated by the statute had been followed by the judges of election in disposing of the ballots, then appellant would have been entitled to have the ballot objected to examined on the hearing, and, if it was not marked with a cross in the circle, or a cross opposite the name of appellee, it would have been the duty of the court to have rejected the ballot. But such was not the case. On the night of the election, after the ballots were counted, and the result declared, they were not sealed up and delivered to the town clerk, but were strung on a wire, the wire was knotted, and they were then placed in the ballot-box, and a rope or cord tied around the box, and it was placed in one of the voting booths in the town hall where the election was held. The town clerk, Lance, locked the hall door, and kept the key until the second day after the election, when the judges and clerks went to the town hall, took the ballots from the ballot box, sealed them up, and delivered them to the town clerk. It also appears from the evidence that a justice of the peace and a police magistrate each had a key to the town hall. It thus appears that the ballots were left in the town hall, where they might be reached and tampered with by a person who might feel disposed to do so. If, after the polls are closed, the votes counted, and the result declared, the judges of election for any cause are unable to deliver the ballots and poll books to the proper custodian, it is their duty to keep such ballots and poll books in their possession, so that no one can have access to them, until such time as they can be delivered over to the proper custodian, otherwise the ballots will lose their value as evidence when relied upon to impeach or discredit the result as shown by the poll books. *Kingery v. Berry*, 94 Ill. 515. There is no evidence here, it is true, that the ballots were meddled with by unauthorized parties, but they were left in the town hall from Tuesday night until Thursday in an exposed condition, where they might

have been reached and tampered with. Under such circumstances we are of opinion that, before the ballots could be used to impeach the returns as shown by the poll books, it devolved upon the appellant to prove that the ballots were not changed or tampered with before they were delivered to the custodian on the second day after the election. We are therefore of opinion that the ruling of the court on the ballot mentioned was correct, but for the errors indicated the judgment will be reversed, and the cause remanded. Reversed and remanded.

(176 Ill. 557)

ROWELL v. COVENANT MUT. LIFE ASS'N.

(Supreme Court of Illinois. Dec. 21, 1898.)

SUPREME COURT—JURISDICTION—VALIDITY OF STATUTE.

1. Act July 1, 1893, § 20, providing that no order, judgment, or decree interfering with the business of any domestic insurance company, or appointing a receiver therefor, shall be granted otherwise than on the application of the attorney general, except in an action by a judgment creditor, has no application to a suit by a member of a beneficial association to restrain it from levying an assessment in violation of its contract; and hence an appeal of such suit to the supreme court on the ground that the validity of the statute was involved will be dismissed.

2. It is not sufficient, to appeal a case to the supreme court on the ground that a constitutional question is involved, for counsel to assert that in some view of the case the validity of the statute may be involved, where it is apparent that it can never come in question.

Appeal from circuit court, McLean county; C. D. Myers, Judge.

Bill by J. H. Rowell against the Covenant Mutual Life Association. From a decree in favor of defendant, plaintiff appeals. Dismissed.

Rowell, Neville & Lindley, for appellant. T. A. Moran, Geo. W. Wall, W. C. Calkins, and Fifer & Barry, for appellee.

CARTWRIGHT, J. This is an appeal prosecuted from a decree of the circuit court of McLean county dismissing appellant's bill filed in that court against appellee. The material facts alleged in the bill as a basis for the relief asked are as follows: The defendant association was incorporated January 9, 1877, under the provisions of the general act concerning corporations in force July 1, 1872, with the declared object "to afford financial aid and assistance to the widows, orphans, heirs, or devisees of deceased members." The by-laws provided for issuing certificates to members in various amounts, payable at the death of the members to the beneficiaries. On August 28, 1879, complainant was an active Odd Fellow, of the age of 47 years, eligible to membership, and applied therefor, paying for the medical examination and membership fee, and received a certificate of membership, set out in the bill. By this certifi-

cate defendant agreed that upon his compliance with its provisions an assessment should be levied, and the association would pay as a benefit to his children, at his death, \$5,000. The conditions to be complied with by him were the payment of the membership and examination fees, and assessments for death claims and expenses. The certificate stipulated that a mortuary assessment should never exceed \$1.20 on a certificate for \$5,000, and if the membership should exceed 5,000, or in case of the death of a member holding a certificate for a smaller amount, he should only be liable for such proportional part of an assessment as the amount of the certificate bore to the total membership of the association. The by-laws also provided for a membership fee limited to \$10 on a \$5,000 certificate, and a medical examination fee of \$2, and for assessments to pay death claims graded according to the amount of the certificate, the age of the member at joining, and the membership of the association. It was provided that such an assessment should never exceed \$1.20 for members from the ages of 39 to 47, inclusive, at the time of becoming members. The by-laws also provided for an assessment for expenses, which should not exceed 30 cents per month on a certificate for \$5,000. All certificates issued up to 1890 were of the same character as complainant's certificate. The defendant has attempted to make a large increase in assessments against complainant, contrary to the terms of his contract of insurance; claiming the right to assess him, not in accordance with his contract, but upon the estimated cost of life insurance at his present age, and to assess a larger sum for expenses than called for by his contract. A mortuary assessment (No. 149) was made February 28, 1898, for \$37.35; and complainant was notified that six calls of that amount would be made during the year, making in all \$224.10 for the year 1898. There are other matters averred in the bill, but we have stated the substance of the material averments, and the grounds upon which relief is asked. The bill charges that these assessments contrary to the terms of appellant's contract are in violation of it, and in excess of his legal liability. The prayer is that the mortuary call No. 149, made upon the new plan, be declared illegal and not binding upon complainant; that the court may decree that the only legal assessment which can be made is one in accordance with the terms of complainant's contract, and enjoin the defendant from taking any steps intended to work a forfeiture of the certificate because of a failure to pay said unlawful assessment or any other like assessment, and also to restrain the defendant from making any assessment upon complainant's certificate except in accordance with the terms thereof.

The bill was filed to prevent a forfeiture of

the certificate, and to enforce a specific performance of complainant's contract made with the defendant, according to its terms. The defendant demurred to the bill, and the demurrer was sustained, whereupon complainant elected to stand by his bill, and it was dismissed. The case is brought to this court under the claim that the validity of a statute is involved. The statute in question is section 20 of an act entitled "An act to incorporate companies to do the business of life or accident insurance on the assessment plan, and to control such companies of this state and of other states doing business in this state, and to repeal a certain act therein named, and providing and fixing the punishment for violation of the provisions thereof," in force July 1, 1893. The section is as follows: "No order, judgment or decree providing for an accounting, or enjoining, restraining or interfering with the prosecution of the business of any domestic insurance corporation subject to the provisions of this act, or appointing a temporary or permanent receiver thereof, shall be made or granted otherwise than upon the application of the attorney general on his own motion, or after his approval of a request in writing therefor by the auditor of public accounts, except in an action by a judgment creditor or in proceedings supplementary to execution." Appellant insists, in the first place, that the statute does not apply to a suit of this kind, but he says that, in the event the court should hold that it does prohibit his action, then a constitutional question would arise. A reading of the act shows that the section does not purport to have any reference to a suit like this. It refers only to a general accounting, or restraint of the prosecution of the business or system of doing business with the public in a general way by an insurance company, or the appointment of a receiver therefor. There is no averment in the bill that the defendant has been reincorporated under this act, but, whatever the fact may be, the act only purports to concern the public regulation, visitation, and control of such an association, and not the individual rights of contract. The purpose of this bill is neither an accounting, nor any of the other things provided for in the section. If complainant has a contract enforceable according to its terms, an accounting between him and defendant is neither necessary nor proper for the purpose of enforcing it. As the statute has no relation to a suit of this kind, and does not purport to have, there is no question of its validity involved in the litigation. It is not sufficient, to bring a case to this court on a constitutional question, for counsel to assert that in some possible view of the case the validity of a statute may be involved, where it is apparent that it can never come in question. The appeal will be dismissed. Appeal dismissed.

(177 Ill. 146)

COOK v. PEOPLE.

(Supreme Court of Illinois. Dec. 21, 1898.)

ABORTION—EVIDENCE—EXPERT TESTIMONY—INSTRUCTIONS.

1. Defendant seduced deceased, resulting in her pregnancy, and she, in endeavoring to produce an abortion, injured the neck of her womb. Failing in her efforts, defendant went to A., interviewed a doctor, and two days after accompanied deceased to A. She went to an hotel, and defendant that evening went with her to the doctor's office. An hour later defendant and the doctor held a whispered conversation, and shortly after another doctor was called, who found deceased in the operating chair. He examined her, found her condition as described, recommended certain treatment, and left. Deceased left the doctor's office soon after, and went to another hotel, where she registered under an assumed name. She was very sick next morning, and met defendant at the railroad station. Soon after, defendant was seen walking towards the station with the doctor from the direction of his house. Defendant and deceased went home on the same train, where she arrived in great pain. The next day she suffered an abortion, and three days after died. The post mortem showed the womb decayed and gangrenous, which result would have followed the use of a sound, though there was no evidence of injury from a sound or probe, which a physician would use to produce an abortion. *Held* sufficient to sustain a conviction of manslaughter in procuring an abortion.

2. Where evidence warranted a conclusion that an abortion had been performed with an instrument, it is not error to permit hypothetical questions, based on such conclusion, to be put to medical experts.

3. Where the fact that deceased had registered at an hotel under an assumed name was proved by other competent evidence, it is not reversible error to admit the register entry in evidence.

4. Where other instructions directed the jury that the people must prove the crime to have been committed in the county where the indictment was found, it was not error for the court to omit to add such direction to an instruction that the people were not bound to prove the exact time alleged in the indictment.

5. Where other instructions directed the jury that they had no right to presume that an operation had been performed to produce an abortion, but that such fact must be proved beyond all reasonable doubt, an instruction that defendant would be guilty if he advised, assisted, or encouraged it, though not present at the time, is not erroneous in that it assumed that an operation was performed.

6. In a prosecution for procuring an abortion, it was not error for the court to modify instructions given at defendant's request by including in the hypothesis on which he would not be guilty the fact that he did not aid or assist in the act.

Error to circuit court, Mason county; Thomas N. Mehan, Judge.

Eddie Cook was convicted of manslaughter in procuring an abortion, and he brings error. *Affirmed*.

A. J. Barr, H. R. Northrup, and Beach & Hodnett, for plaintiff in error. E. C. Akin, Atty. Gen., Andrew L. Anderson and Samuel Murdock, State Attys., Blinn & Harris, and John Fuller, for the People.

CARTWRIGHT, J. Plaintiff in error prosecutes the writ in this case to obtain a reversal of a judgment sentencing him to the

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penitentiary for a term of seven years upon a conviction for manslaughter in procuring an abortion upon the person of Minnie Bennett, whereof she died. The reversal is asked for mainly on the ground of a want of sufficient evidence to sustain the verdict, and nearly all the argument is directed to that question. This necessitates a full statement of the facts. The case was tried four times. Once the jury disagreed, and three juries have found defendant guilty. The first trial was in Logan county, and resulted in a verdict of guilty, after which the venue was changed to Mason county on motion of defendant, and the other trials took place there. The evidence preserved by bill of exceptions on the last trial established the following facts:

Defendant, who was 35 years old, became acquainted in March, 1894, at Waynesville, Dewitt county, Ill., with Minnie Bennett, who was 20 years old. Her mother was dead, and she was keeping house for her two brothers. Defendant visited her frequently up to the time of the abortion and her consequent death, which occurred February 17, 1895. In the meantime she moved with her brothers to Maroa, in Macon county, in September, 1894, and kept house for them there. She never kept company with any man other than defendant. He seduced and debauched her, resulting in her pregnancy, before the 1st of December, 1894. In the latter part of December she visited a doctor at Maroa, saying that she had falling of the womb, and upon examination it was found that she did not have that trouble, but that the cervix or neck of the womb was inflamed and sensitive, with an offensive discharge of pus. This had resulted from efforts of her own to produce an abortion, which had proved a failure. The doctor applied an antiseptic by means of a plug of cotton, and about January 1, 1895, she told him that she had come around, and was feeling better. It is clear that she was seeking to cover her shame by means of an abortion. Defendant was corresponding with her, and some earlier letters were kept by her, but all his letters after this time were burned by her as soon as read. On Friday afternoon, February 8, 1895, he came to Maroa, and had an interview with her, and on the following Sunday—February 10th—he went to Atlanta, and had an interview with Dr. Frank Gardner. On the following Tuesday—February 12th—she left Maroa by train on the Vandalla Line, having been, up to that time, to all outward appearance, in perfect health. When the train arrived at Waynesville, where defendant lived, he was at the station, and she came out on the platform, and beckoned to him with her hand, and went back into the car. He immediately joined her, and they rode together to Atlanta, where they arrived at 1:06 p. m. They left the train together, but the evidence does not show where they went. About 4 o'clock she went to an hotel,—the

Coleman House,—and stayed in the sitting room until supper. Defendant came there, and asked if there was a young lady stopping there, and, being told that there was, went away. He came back during supper, and sat in the office. After supper she inquired for him, and they went out together after he had paid for her supper. About 7 or 7:15 p. m. they went upstairs to the office of Dr. Gardner, and a few minutes afterwards defendant went down the street alone. About an hour afterwards, or about 8 o'clock, defendant and Dr. Gardner held a whispered conversation behind the prescription counter in a drug store below the doctor's office. Defendant then left Atlanta, and returned to Waynesville. Minnie Bennett had remained in the office of Dr. Gardner, and a little after 9 o'clock he called in Dr. Morse, who found her on the operating chair. Dr. Morse examined through a speculum at the request of Dr. Gardner, and found the neck of the womb inflamed and swollen. It was discolored and injured, indicating that the efforts towards an abortion had been continued by some person other than a doctor, but the injuries did not appear to have been inflicted at that time. Dr. Morse recommended palliative treatment for the injuries, and left. She soon left the doctor's office, but did not return to the Coleman House. She went to another hotel,—the Burford House,—and tried to get a room without registering, but, failing in that, she registered as "Leota Stelbacher, Bloomington, Illinois." She had \$20, which was an unusual amount for her, as she was entirely without means. The next morning she was very sick, and frequently vomited. She ate but very little, and took only a cup of tea at noon, after which she went to the railroad station, and met defendant, who had returned to Atlanta. Shortly after that time defendant was seen walking with Dr. Gardner from the direction of the doctor's house towards the station. When the train arrived, Minnie Bennett and defendant boarded it, and went home. He left the train at Waynesville, and she remained on the train to her home at Maroa, where she arrived in great pain, which she tried to relieve by bending forward. She then showed the characteristic symptoms of peritonitis. She could hardly walk, and took to her bed in great distress. The progress of the disease from that time was very rapid. The next day she suffered an abortion, and on the following Sunday—February 17th—she died of purulent peritonitis, caused by infection from the injuries about the neck of the womb. At the post mortem the abdominal cavity was found filled with pus, and the neck of the womb gangrenous and decayed. The usual method employed by physicians to produce an abortion is to insert a probe or sound in the womb, and move it around, for the purpose of rupturing a sac existing there. If this had been done at the doctor's office in Atlanta, the poison from the neck of the womb would

have been carried up on the instrument to the inside of the womb, and the result would be precisely what occurred as a matter of fact. An inflammation would be created, and the poison would be carried up through the fallopian tubes into the peritoneum, causing peritonitis, which would develop within 24 hours.

It is persistently argued that this evidence does not even tend to sustain the verdict, and that there is nothing but an indictment and verdict, without evidence to support the judgment. The ground of this argument is that the evidence of doctors shows that the poison might have been absorbed and carried up by the lymphatics, or through the body of the womb itself. There is testimony that such a thing might have happened, but, in view of all the evidence and the history of the case, there is scarcely a possibility that it did so happen. The neck of the womb is at the lowest point, and the injuries were at that place, where an ignorant person would reach it without effecting an entrance. At that point the drainage outward is perfect, and there is no tendency to absorb, but rather to drain away and expel, so that the foreign matter would probably drain off naturally. There are two closures of the womb, and in pregnancy the upper one is closed up tight, so that it is difficult to insert anything through it. If poison had been taken up either by the lymphatics or through the body of the womb, the inflammation would have spread through the whole body of the womb, which was not the case. The history of the case also demonstrates the improbability of the claim made. The neck of the womb was in worse condition in December than in February. At least six weeks before the trip to Atlanta the doctor at Maroa found pus there, and a very offensive condition. Yet whatever was there passed off naturally and no harm resulted, but she remained in good health. The fact, so much dwelt upon, that the post mortem disclosed no marks of violence on the inside of the womb, has no significance, for the evidence shows that there would be no such marks. The sound is a flexible instrument with a blunt end, that would not cause laceration; and if there was a failure to puncture the sac the result as to the poison would be the same. The facts and the subsequent course of events lead to the conclusion that the poison was carried up to the interior surface of the womb by an instrument within 24 hours before the development of peritonitis, which manifested itself the next day after the visit to Dr. Gardner's office at Atlanta.

There can be no doubt that Minnie Bennett was resolved upon an abortion, and counsel are agreed upon that question. There is as little question that she went to Atlanta for that purpose, and that the preliminary visit of defendant to Dr. Gardner was to make arrangements to that end. There was no occasion for going 27 miles to find a doctor to obtain palliative treatment for the injuries she had inflicted upon herself. Her conduct

at Atlanta shows that the purpose was not innocent. She secreted herself until after dark; and after the visit to the doctor's office, where it is claimed the palliative treatment was given, she changed her hotel, and attempted to conceal her identity by a different name. After she had been in Dr. Gardner's office an hour, defendant was in whispered conference with the doctor, and she was still there an hour later, when the other doctor was called in to determine what to do for the inflamed and injured parts. The calling in of the other doctor is insisted upon as evidence that the visit was innocent; but there is so much evidence to the contrary as to overcome any inference of that kind, and the fact that nothing criminal was done in his presence cannot be taken to establish the fact that it was not done during her long stay in the office. If there was nothing but palliative treatment of the external injuries to the neck of the womb, the results which speedily followed would not be probable. The only conclusion reasonably consistent with the evidence is that there was an operation to produce an abortion at Dr. Gardner's office that evening at Atlanta. It must have been understood at the preliminary visit on Sunday that the doctor would perform the operation, or the journey would not have been undertaken. There is nothing substantial to indicate that he afterwards declined, but everything to prove that he did not.

The fact of the operation being established, there can be no doubt of defendant's guilt. Minnie Bennett was resolved to procure an abortion, and the conduct of both parties shows that she appealed to him as the one responsible for her condition. He arranged in advance with the doctor; took her to Atlanta; called for her after dark, and, after paying her bill, took her to the doctor's office; held a private conference with the doctor before going home; came back the next day, and, finding her sick and distressed, went to Dr. Gardner's house, and was seen with him going towards the station, and within a short distance of it. Defendant proved that on the day he went to Atlanta with Minnie Bennett his mother was in a very critical condition, and her doctor told him to go to Atlanta, and get some gin for her, there being no gin in Waynesville. When he reached Atlanta he had 18 minutes to get the gin and return on the next train, which was time enough for the purpose. He remained in Atlanta for seven hours, and was giving his attention to Dr. Gardner and Minnie Bennett. The natural inference is that the business which detained him and brought him back the next day was of considerable importance. His mother was in a dangerous condition the next day, and he would not be likely to leave her except on urgent business. Dr. Gardner was dead before the first trial, and Dr. Morse, who was called in, died before the last trial. The facts stated above are wholly uncontradicted, and they seem to us to leave no reasonable doubt of defendant's guilt.

Some minor objections are made to rulings of the court on the trial, and among these are complaints that the court erred in restricting defendant in the examination of proposed jurors and in denying challenges. Fragmentary portions, only, of the examinations appear in the abstract, and, of course, we cannot tell how restricted they were, or what their scope was. From what does appear we cannot see any error in the rulings. But one of the jurors about whom complaint is made sat in the case, and he was clearly competent.

Another complaint is that the court permitted the people to put hypothetical questions to medical experts, based upon the hypothesis that an operation had been performed with an instrument to produce an abortion. These questions called for opinions as to what the effect would be as to carrying up into the womb purulent and poisonous matter on the instrument, and what results would be produced. The objection is that there was no foundation in the evidence for the supposed fact, and our opinion, already expressed, that the conclusion of fact embraced in these questions was warranted by the evidence, and a proper inference from it, answers the objection. The evidence showed that the visit to Atlanta and to the office was for the purpose of an abortion, that it was in pursuance of an arrangement with the doctor, that the method ordinarily used was by an instrument, and that an abortion followed.

It is objected that the court erred in admitting the entry on the hotel register. If there were any merit in the objection it would not be available, because the fact had been proved without objection. The hotel clerk had testified that she wrote on the register, "Leota Stelbacher, Bloomington, Illinois," and the proprietor had testified that she pointed out that name to him when she settled her bill. This was done without objection, and the fact was already proved.

It is also urged that the court erred in giving the fifth instruction asked by the people. It stated that the people were not bound to prove the exact time alleged in the indictment, and is admitted to be correct as a proposition of law. The supposed objection is that it did not also tell the jury that the people must prove that the crime was committed in Logan county, and they might infer that it could be committed elsewhere. The nineteenth, twenty-seventh, and thirty-ninth instructions given at the request of defendant informed the jury that, in order to convict him, the evidence must prove beyond a reasonable doubt that the crime was committed in Logan county. There could be no misunderstanding about that.

The ninth instruction given at the instance of the people is objected to as assuming that an operation was performed upon the person of Minnie Bennett. That instruction merely defined the relation of one who, not being present, advises, assists, or encourages the

perpetration of a crime. Standing alone, it might be subject to criticism; but there were a great many instructions requiring proof, beyond a reasonable doubt, of the fact that an abortion was produced, and particularly the thirty-third, thirty-sixth, and thirty-eighth, given at the request of defendant, told the jury that they had no right to presume that an operation was performed, but that such fact must be proved beyond all reasonable doubt. In the light of these instructions there could be no possible inference unfavorable to defendant arising from the language of the one objected to.

Other instructions are complained of on the ground that there was no evidence tending to prove that an operation was performed at Atlanta, and therefore no evidence on which to base them. We have disposed of the objection that there was no such evidence by holding that the evidence was sufficient to prove the fact.

Finally, complaint is made that the court modified three instructions given at the request of defendant, by including in the hypothesis upon which the jury were directed to find defendant not guilty the fact that he did not aid or assist in the abortion. We do not find any error in the modification, and on a review of all the instructions it is very clear that the party justly entitled to complain is not the defendant, but the people. The court gave 57 instructions prepared by counsel for defendant, most of which ought to have been refused. Under the form of instructing the jury as to the law, the case was very fully argued on behalf of the defendant, and he has no cause for complaint. The judgment is affirmed. Judgment affirmed.

(177 Ill. 272)

WESTVILLE COAL CO. v. SCHWARTZ.

(Supreme Court of Illinois. Dec. 21, 1898.)

SUPREME COURT—REVIEW—INJURY TO EMPLOYEE—CONTRIBUTORY NEGLIGENCE—FELLOW SERVANTS—INSTRUCTIONS.

1. Whether the verdict of a jury is against the clear preponderance of evidence is a question to be submitted upon a motion for a new trial, and the supreme court has no power to re-examine it.

2. Where, on a special occasion, a master agreed to look after the roof of the mine in which his servant was working, and the evidence shows that the servant was busy, with no time to look after the roof, and does not show that his attention was drawn to the fact that the duty of inspection was being neglected, he cannot be said to be guilty of contributory negligence when injured by falling rocks.

3. An objection of variance between pleadings and proof cannot be reviewed in the supreme court, where it was not presented in the trial of the cause.

4. Whether the foreman of a mine is a fellow servant of another mine worker in the performance of any particular duties is a question for the jury, in an action for personal injury to the latter caused through the negligence of the former.

5. In an action by a servant against his master for personal injury caused by the negligence

of the pit boss of the mine in inspecting the roof of the mine, the issue was whether, on the special occasion, the foreman assumed the duty of inspection and care of the roof. There was no question as to the authority of the pit boss to agree to assume such duty on behalf of defendant. The court instructed the jury that "a pit boss and an employé under him are not fellow servants." *Held*, that the instruction, though erroneous, could have had no effect on the verdict, since there was no question as to liability arising from that relation.

6. In an action by a servant against his master for personal injury, where the principal question is whether the master specially agreed to protect plaintiff against possible injuries, it is proper for the instructions as to liabilities of master to servant to be modified so as to include the feature of the agreement.

Appeal from appellate court, Third district.

Action by Daniel Schwartz against the Westville Coal Company. From a judgment for plaintiff, defendant appealed to the appellate court, where the judgment was affirmed. 75 Ill. App. 468. Defendant appeals. Affirmed.

W. J. Calhoun and H. M. Steely, for appellant. Will Beckwith and F. E. Shopp, for appellee.

CARTWRIGHT, J. On December 21, 1896, appellant, the Westville Coal Company, was operating a coal mine containing 200 rooms, in which it used 7 machines, run by electricity, to cut under the coal, which was afterwards thrown down by blasting, and then loaded and taken from the mine. Each machine was ordinarily run by what was called a "machine runner" and his helper, and it was moved from room to room as required. Each room was prepared for the machine by two men, who were called the "rock gang," who took down all loose rock from the roof, and cleared a floor space of 12 to 14 feet from the face of the wall. The machine was then brought into the room, and a cutting commenced from one side. The machine was fastened by what were called "jacks," one of which was set in a hole in the roof, to operate as a brace and hold the machine. The machine would cut under the coal about 3½ feet wide, and would run back about 7 feet. After a cut or run was completed the machine was moved over, and another cutting made, until it had gone across the room, along the face of the wall, in that way. It was then removed to another room, and the process repeated. On said night the appellee, Daniel Schwartz, was in the employ of appellant as a machine runner, and, by direction of the night boss, operated a machine with another machine runner, Thomas Fitzpatrick. They did the cutting in one room, after which the machine was moved to room No. 10. They made 18 cuts across the face of the wall, and turned the machine, and made 2 or 3 along the side, when a rock fell from the roof upon the appellee while he was bending over, oiling the machine. He brought this

suit against appellant, charging it with liability for his injury, and recovered a verdict for \$1,000, upon which judgment was entered, and the appellate court has affirmed the judgment.

At the close of the evidence offered by plaintiff, and again at the close of all the evidence, the defendant asked the court to give a peremptory instruction to the jury to return a verdict of not guilty. This the court refused to do, and the refusal is assigned as error. There were seven counts in the declaration, charging various acts and omissions as negligence; but the only evidence tending to support a cause of action was the testimony of the plaintiff himself, that on the night in question, by an express agreement, the defendant assumed the responsibility and duty of looking after the roof and keeping it in a safe condition. Plaintiff admitted, and the evidence was conclusive, that in the absence of such an agreement it was his duty to look after the roof, and to protect himself from that source of danger. It was the duty of the rock gang to see that the room was put in proper condition to take the machine into it, but these roofs were treacherous, and there was no certainty that they would remain safe for any length of time after being left by the rock gang. It was the uniform practice and the duty of the men who ran a machine, when it was taken into a room, to test the roof by a sounding with picks to see that it was safe, and to repeat such examination at proper intervals for slips and loosened rocks, which were liable to be found at any time. The safety of the men required such examination, and it was a sure method of protecting themselves from danger. The space cleared for the machine, which was 12 or 14 feet wide, could not be obstructed by props or timbers to support the roof, but must be left clear. The machine ran with much noise and a great deal of jar, and, being braced against the roof, was likely to loosen and throw down rocks. It seems that in a neighboring mine a record of 75 runs with one of these machines, in a shift of 10 hours, had been made, while the average in this mine was somewhere about 25 or 30 runs, and the highest that had been made was about 50 in the same time. An attempt was to be made on this night by plaintiff and Fitzpatrick, under some sort of understanding, to beat the record of the neighboring mine, with a larger number of runs. Plaintiff's testimony was that the boss or night foreman told them that on that night they need not look after the loading of the machine, the setting of the bits or the roof, and that he would look after the roof. There is no dispute, and could be none, under the evidence, of the proposition that, in the absence of the alleged agreement by the foreman, the duty which was neglected on this occasion was the duty of the plaintiff himself, and not of his employer, the defendant.

On the other hand, it was within the scope of the foreman's authority to assume, on behalf of defendant, for that occasion, the duty of looking after the roof while the men gave their undivided attention to making the highest possible speed with the machine. This assumption of duty plaintiff testified to, and his testimony was sufficient to support the verdict, so far as that question is concerned. The argument that the jury were not justified in crediting his statement, because he was not corroborated, but was contradicted by three witnesses, two of whom were examined on the subject in his own behalf, does not present the question of a want of evidence on the part of plaintiff, but, rather, that there was a clear preponderance on the other side. That question does not arise upon a motion for a peremptory instruction, but is a question submitted to the court upon the motion for a new trial, and to the appellate court. If a verdict is against a clear weight of the evidence, it is the duty of the trial court to grant a new trial, and the appellate court may for a like reason reverse the judgment and award a new trial; but the responsibility for the determination of such question ends with the appellate court, and we have no power to re-examine it.

It is further urged that if the duty of looking after the roof had been assumed and neglected, with injurious consequences to the plaintiff, yet the evidence clearly shows that plaintiff was guilty of negligence, because he knew that the duty was not being performed, and continued his work with such knowledge. He had been in this room, No. 10, about 2 hours; and there had been, so far as appears, no inspection of the roof. But he testified that he and Fitzpatrick had no time to look after the roof while endeavoring to make so many runs, and gave no attention to that subject. The machine ran with a great deal of dirt, noise, and jar, and the number of runs made shows that they were making a desperate effort to do a great amount of work. The average had been 25 or 30 runs in 10 hours, and on this occasion they had made 30 runs in about 3 hours. It is a fair inference that they were giving the machine their constant attention, and it does not necessarily follow, from anything appearing in the case, that they knew no one had observed the condition of the roof during that time. We do not think it can be said that the evidence was conclusive that plaintiff's attention was drawn to the fact that the duty of inspection was being neglected.

It is also insisted that there was a variance between the pleadings and the proofs as to each count of the declaration. But the record does not show that this question was raised in any manner upon the trial. In order to raise that question, it must be presented in some appropriate way to the trial court, so that it may be passed upon, and

there may be an opportunity of amendment. The point is mentioned in the motion for a new trial, and in the assignments of error in the appellate court and this court, but it comes too late after the trial. *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801.

Several objections were made to the action of the court in passing upon the instructions, but we do not find any prejudicial error therein. It may be said of the instructions, generally, that they were not carefully adapted to the question before the jury, and perhaps some confusion has arisen out of that fact. There was some question about the keeping of a record book, and other things which were not connected in any way with plaintiff's injury, and could have had no influence in the decision of the case. The neglect of the duty, by whomsoever was charged with it, and the consequent injury, were not in question; and the only questions before the jury were whether the duty of inspection and care of the roof was assumed by the defendant's foreman, and whether plaintiff was in the exercise of ordinary care for his own safety. The instructions—both those given and refused—related to numerous other questions. One of them—asked by the defendant—told the jury that the master was not liable for an injury caused by the negligence of a fellow servant; and the court added, "But a pit-boss and an employé under him are not fellow servants," and gave the instruction in that form. This modification was wrong, both for the reason that ordinarily the question whether the servants of a common master are fellow servants is one of fact, to be determined by the jury under instructions defining the relation (and under the evidence it would be such a question in this case), and also because a pit boss and employé under him might or might not be fellow servants as to particular acts or duties, according to the circumstances. The superior position of the pit boss, and the fact that he had the power to control and direct the plaintiff, would not determine the question. *Cooley, Torts*, 562. It appears from the evidence that on some occasions, at least, the pit boss performed the same duties as plaintiff, and during this evening he took plaintiff's place and ran the machine while plaintiff went to lunch. While he would not be a fellow servant with respect to the exercise of power over the plaintiff with which he was clothed, he might under other circumstances hold the relation of fellow servant. *Railroad Co. v. May*, 106 Ill. 288. But this instruction could have had no influence in the decision of the case, since there was no question of liability or exemption from liability arising out of that relation. If the duty of looking after the roof was assumed by the foreman, it was on behalf of the defendant as employer; and the failure to discharge it was not the negligence of a fellow servant, but the disregard of an obligation of the defendant to the plain-

tiff. The defendant offered five instructions, stating that certain conditions of fact would bar a recovery. They ignored the material and principal question in the case,—whether the defendant, through its foreman, promised the plaintiff to look after the roof, so as to exempt him from the discharge of that duty,—and the court added to each a modification embracing the omitted feature. The modification was correct, for the reason that the facts stated in the instructions would not bar a recovery, if the duty was assumed as claimed. There are some other minor criticisms, which it is not necessary to discuss at length. All that was good in refused instructions applicable to the case was contained in those which were given. The twenty-seventh instruction asked by the defendant, and given, was a fair and reasonable statement of the rule of law, and sufficient for the presentation to the jury of defendant's claim. The judgment is affirmed. Judgment affirmed.

(177 Ill. 161)

CITY OF BLOOMINGTON v. REEVES et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

SPECIAL ASSESSMENTS—APPEAL BY CITY—SUFFICIENCY OF PETITION—BOARD OF LOCAL IMPROVEMENTS.

1. Laws 1897, p. 102, § 47, provides that the court's determination as to the correctness of an assessment for a local improvement shall not be subject to review. Section 56 provides that judgments in such proceedings shall be subject to review on appeal only as in the act provided. Section 95 authorizes an appeal from such judgment by the owners of or persons interested in lands affected by such proceedings. *Held* not to deprive a city of the right to appeal from a judgment refusing to confirm a special assessment for a local improvement, given by *Hurd's Rev. St. 1897*, p. 527.

2. Under Laws 1897, p. 102, § 4, requiring local improvements in cities of less than 25,000 inhabitants to be made on petition of a majority of the property in contiguous blocks abutting on the proposed improvement, a petition for paving portions of two intersecting streets, the pavement to include the intersecting portions, so as to be one piece of pavement, must be signed by the owners of a majority of the property in each contiguous block on both streets abutting on the proposed improvement. A petition signed by a majority of the total abutting property on both streets is insufficient.

3. Laws 1897, p. 102, §§ 7, 8, require ordinances for local improvements to be paid for by special assessment, to originate with the boards of local improvements of the respective cities after hearing on petition for such improvement presented to such board. Section 9 requires said board to present a recommendation for such improvement with the ordinance providing therefor, which recommendation is made *prima facie* evidence that all preliminary requirements have been complied with. *Held*, that the recommendation of an improvement by such board is not conclusive that the petition therefor was sufficient.

4. Laws 1897, p. 102, providing for the construction of local improvements to be paid for by special assessment, requires a petition by abutters in cities of less than 25,000 inhabitants; and section 7 authorizes the board of local improvements of any city to originate an ordinance providing for such improvement with

or without a petition therefor by abutting property owners. *Held*, that only in cities of 25,000 inhabitants or more may the board of local improvements originate an ordinance for such improvement without a previous petition by abutters.

5. A street pavement of two intersecting streets provided for by one ordinance, which is to connect at the intersection and be one piece of pavement, is but one improvement; and where part of it is invalid, because not petitioned for by the owners of a majority of the abutting property on one of the streets, it will be adjudged invalid in toto.

Appeal from McLean county court; Roland A. Russell, Judge.

Application by the city of Bloomington against O. T. Reeves and others to confirm a special tax. From a judgment denying confirmation, petitioner appeals. Affirmed.

William R. Bach, Sigmund Livingston, and J. J. Thompson, for appellant. J. E. Pollock, Rowell, Neville & Lindley, O. Rayburn, and Owen T. Reeves, for appellees.

CRAIG, J. This is an appeal from a judgment of the county court of McLean county denying an application for the confirmation of a special tax levied to pay the cost of paving and grading certain streets in the city of Bloomington. The proceeding was instituted under the act of June 14, 1897 (Laws 1897, p. 102). The appellees have entered a motion to dismiss the appeal, on the ground the statute does not authorize the city of Bloomington to appeal. The only provisions found in the above act, in case of special assessment or special tax, relating to appeals, are found first in the last clause of section 47, which declares: "The determination of the court as to the correctness of the distribution of the cost of the improvement between the public and the property to be assessed shall be conclusive, and not subject to review on appeal or writ of error;" and in the first clause of section 56: "The judgments of the court shall be final as to all the issues involved, and the proceedings in said cause shall be subject to review by appeal or writ of error as hereinafter provided, and not otherwise;" and section 95: "Appeals from final judgments or orders of any court made in the proceedings provided for by this act may be taken to the supreme court of this state, in the manner provided by law, by any of the owners or parties interested in lands taken, damaged or assessed therein, and the court may allow such an appeal to be taken jointly, and upon a joint bond, or severally and upon several bonds, as may be specified in the order allowing the same." It is apparent that there is no provision of the act which authorized the city, when it happened to be defeated in the county court, to appeal; and, if the right of appeal depended solely on the act under which the proceeding was instituted, then the appeal could not be maintained. But we do not think that the right of the city of Bloomington to appeal depends on the act. Section 213 of the act relating to courts

(Hurd's Rev. St. 1897, p. 527) provides: "Appeals and writs of error may be taken and prosecuted from the final orders, judgments and decrees of the county court to the supreme court or appellate court in proceedings for the confirmation of special assessments, in proceedings for the sale of lands for taxes and special assessments, and in all common law and attachment cases, and cases of forcible detainer and forcible entry and detainer." See, also, page 1217, c. 110, § 89. These sections of the statute, which expressly allow either party an appeal in a case like the one under consideration, have never been repealed, and under them the city of Bloomington had the right of appeal. If the legislature had intended to cut off all right of appeal on behalf of a city where it was defeated in the county court, these two sections of the statute doubtless would have been modified or repealed. This not having been done, it will be presumed the legislature intended to preserve the right of appeal in the city as it existed heretofore. The motion to dismiss the appeal will be denied.

The first section of the ordinance under which the proceeding was instituted provided "that Chestnut street, in said city, from the west line of Center street to the west line of West street, and West street from the north line of Chestnut street to a line twelve feet north of and parallel with the south line of Seminary avenue, be prepared for a brick pavement of two courses of brick and a stone curbing, and be graded and paved as hereinafter provided." Upon petition filed by the city of Bloomington in the county court, a commissioner was duly appointed to make assessment of a special tax against the property abutting on the proposed improvement. The tax was assessed, and appellees filed objections to the confirmation of the special tax sale.

The points raised by the objectors, as we understand the record, were: First, that the estimate furnished by the city engineer to the board of local improvements was defective and insufficient; and, second, that the original petition of the property owners for the improvement did not contain the names of persons owning a majority of the frontage on that part of the proposed improvement on Chestnut street; and on account of this failure the city had no power to pass the ordinance. The court overruled the first objection, and sustained the second objection, holding, in substance, that it was necessary, in cities of less than 25,000 inhabitants, in order to give the court jurisdiction, that the petition to the board of local improvements for the proposed improvement must contain the names of persons owning a majority of the frontage of property abutting on the proposed improvement on Chestnut street, and also a majority of frontage on West street. The city of Bloomington contends that the ruling of the county court was erroneous. A correct solution of the questions presented by the rec-

ord depends upon the construction to be placed upon certain provisions of the act of June 14, 1897, entitled "An act concerning local improvements." It is conceded in the argument that the petition contained the names of persons owning a majority of the property abutting on those parts of both streets upon which the proposed improvement is to be constructed, but did not have the names of parties owning a majority of feet fronting on that part of the improvement on Chestnut street. The question then presented is whether it was intended by the act that the petition to be presented to the board of local improvements must contain a majority of frontage on every contiguous block on each street upon which the improvement is to be constructed, or whether the legislature intended that the petition should only contain a majority of frontage on the entire improvement. Section 4 of the act provides: "When any such city, village or town shall, by ordinance, provide for the making of any local improvement, it shall by the same ordinance prescribe whether the same shall be made by special assessment or by special taxation of contiguous property, or general taxation, or both. But in cities, towns or villages having a population of less than 25,000, ascertained as aforesaid, no ordinance for making any local improvement shall be adopted unless the owners of a majority of the property in any one or more contiguous blocks abutting on any street * * * shall petition for such local improvement." The city of Bloomington contained a population of less than 25,000 inhabitants, as shown by the last preceding census of the United States; and, unless section 4 of the statute is to be given a construction different from what the language used plainly imports, we think it is clear that the city council had no power to pass the ordinance, unless the owners of a majority of the property in any one or more contiguous blocks abutting on the street first petitioned for the improvement. No such petition was ever presented. If the legislature had intended that an ordinance should be enacted upon a petition of the owners of a majority of the property abutting upon the line of such local improvement, appropriate language would have been used to express that intention. Under the section of the statute, the blocks must not only abut on a street, but they must be contiguous blocks on that street. The word "contiguous," as used in the statute, as we have held, is to be understood in its popular sense, as meaning in actual or close contact, touching, etc. *Adams Co. v. City of Quincy*, 130 Ill. 566, 22 N. E. 624. The section was no doubt enacted for the purpose of affording protection to the property owners in a block on the line of a proposed improvement; and, where the consent of a majority of the property owners in a block on the line of the proposed improvement could not be obtained, the tax should not be imposed. The section was no doubt enacted to

correct abuses which existed under the old special assessment act, and it should receive a construction which carries out the intent with which it was enacted.

It is, however, suggested in the argument, that, under section 8 of the act, the sufficiency of the petition was a question to be passed upon by the board of local improvements, and the action of that board should be final. Section 7 provides: "All ordinances for local improvements, to be paid for wholly or in part by special assessment or special taxation, shall originate with the board of local improvements. Petitions for any such public improvement shall be addressed to said board." The section also provides for notice of a hearing. Section 8 provides for a hearing before the board, and after the hearing. "If the said proposed improvement be not abandoned, the said board shall cause an ordinance to be prepared therefor, to be submitted to the council or board of trustees, as the case may be." Section 9 provides that the board shall present with the ordinance a recommendation of the improvement, and that the recommendation "shall be prima facie evidence that all the preliminary requirements of the law have been complied with, and if a variance be shown on the proceedings in the court it shall not affect the validity of the proceedings unless the court shall deem the same willful or substantial." There is nothing to be found in section 8 which shows an intention of the legislature that the action of the board should be final or conclusive on the sufficiency of the petition. On the other hand, as has been seen, it is expressly provided by section 9 that the action of the board shall not be final, but only prima facie evidence that all the preliminary requirements of the law have been observed. Where, however, there has been a willful or substantial departure from the requirements of the law, such departure may be availed of by the property owner. Nor is there anything in section 7 of the act which supports the view of appellant. That section, among other things, provides that all ordinances for local improvements shall originate with the board of local improvements; that petitions for such improvements shall be addressed to said board; that the board shall have the power to originate a scheme for any local improvement, either with or without a petition, etc. We find no provision of the act which requires a petition signed by the owners of a majority of the property to be presented before the council can pass an ordinance for a local improvement in cities of a population of 25,000 or more. The requirement applies only to smaller cities. That clause of section 7, supra, which says the board may originate a scheme for any local improvement, either with or without a petition, evidently means that the board may originate a local improvement with a petition, where one is required by the act, and without a petition where none is required, as suggest-

ed in the brief of appellees. Here a petition, signed as provided by the statute, was required, and the city council had no authority to pass an ordinance providing for the improvement in the absence of a proper petition.

It is, however, suggested in the argument, that if the petition was insufficient as to Chestnut street, on account of not being signed by the owners of a majority of the property on any one or more contiguous blocks abutting on the street, as the same defect did not exist as to that part of the improvement on West street, appellant was entitled to a judgment confirming the special taxes on that part of the improvement on West street. We do not concur in that view. From an examination of the ordinance providing for the improvement, it is apparent that one improvement, and only one, was contemplated. True, the improvement embraces a part of two streets; but it is not a distinct and separate improvement on each. The framers of the ordinance had but one single object in view,—the construction of a pavement on portions of two streets. There is nothing to indicate a separation of the improvement into distinct parts.

We fully recognize the rule applicable to by-laws and ordinances,—that if a provision relating to one subject-matter be void, and as to another valid, and the two are not necessarily or inseparably connected, it may be enforced as to the valid portion as if the void part had been omitted, as held in *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871; but where the act or thing provided for is indivisible, as is the case here, if void in part it must fall as a whole. The judgment of the county court will be affirmed. Judgment affirmed.

(177 Ill. 208)

McFARLAND v. McFARLAND et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

WILLS—CONSTRUCTION—NATURE OF ESTATE CREATED—LEGACIES—LIENS—EVIDENCE—COMPETENCY.

1. A will devising testator's estate without words of limitation, and subject to a personal charge, to be held and enjoyed by the devisees indefinitely, unless they desire to terminate their interest, which they could do by a written instrument signed by at least two of them, passes an estate in fee, determinable only in the manner prescribed.

2. An estate was devised to be managed by devisees indefinitely, unless they desired to surrender it to the executor for sale, which they could do by written agreement signed by at least two of them. *Held*, that a disagreement among devisees as to such management, and their not conducting it as testator desired, did not operate to subject the property to sale, since that could only be done in the manner prescribed.

3. Where a testator omitted from his will provisions that he would have incorporated if he had not overlooked probable future occurrences, the court will not rectify such omissions.

4. Where legacies are made a charge on the estate devised, devisees cannot complain that

such charges are fixed as a lien, and given preference over other liens.

5. Where a will provides for the management of the estate by devisees, and directs the manner of such management, it is improper to ask a witness if the management was conducted as provided by the will, as it calls on him to construe the will, and to give his opinion as to whether it was being conducted as the will required.

Error to circuit court, Morgan county; C. Epler, Judge.

Bill by Anna H. McFarland and others against George O. McFarland and others to determine the right of complainants as devisees under the will of Andrew McFarland, deceased. From a decree, defendant McFarland brings error. Affirmed.

Andrew McFarland departed this life, testate, on the 22d day of November, 1891. His will is as follows: "First. It is my will that all my just debts and funeral expenses be fully paid. Second. It is my will, and I order and direct, that the persons hereinafter named who are to have the control and management of the institution known as 'Oak Lawn Retreat,' viz. George C. McFarland, M. E. McFarland, and Anna H. McFarland, shall, at the end of the first year of their management, pay to my daughter Mary E. Flack the sum of \$500, and, at the end of the second and third years of their management of the said institution, a like sum of \$500, and in no case is any payment to be made by said parties to my said daughter unless the said institution is under the exclusive control and management of the said parties. Third. To my son George C. McFarland I give my gold-headed cane. Fourth. To my son T. Fletcher McFarland I give my gold watch. Fifth. Subject to the payment of the debts, funeral expenses, contingent legacy and bequests above mentioned, and subject also to the charges and conditions hereinafter named, I give, devise, and bequeath to my son George C. McFarland, my daughter-in-law, M. E. McFarland, and my granddaughter Anna H. McFarland, all of my estate, both real and personal, wherever located or situated, to have and to hold the same so long as they shall carry on and conduct the business for which the real estate above mentioned is peculiarly and particularly adapted, viz. the care and treatment of the insane. Included in the devise of real estate above mentioned is the property known as 'Oak Lawn Retreat,' which I have improved and arranged as a hospital for the care and treatment of the insane; and it is my wish and will that my said son, George C. McFarland, be the business manager of said institution, and that my daughter-in-law, M. E. McFarland, be the matron of said institution, and that my said granddaughter, Anna H. McFarland (who, under my direction, has been specially educated in the medical profession, with the view of having her assume the position of physician to said institution), be the physician at said institution.

I will and direct that so long as the said institution, viz. Oak Lawn Retreat, shall be operated or managed by the said parties above mentioned, viz. George C. McFarland, M. E. McFarland, and Anna H. McFarland, they, the said last-named parties, shall give to my son T. Fletcher and to my daughter Harriet N. McFarland each the same care, maintenance, and support they now receive at said institution; and they, the said George C. McFarland, M. E. McFarland, and Anna H. McFarland, shall also pay to T. Fletcher McFarland and Harriet N. McFarland each the sum of \$100 per annum, payable in quarterly installments. The above-named parties who are to control and manage said institution, viz. George C. McFarland, M. E. McFarland, and Anna H. McFarland, shall share equally the profits in the business of conducting and managing the said institution. Sixth. If the said George C. McFarland, M. E. McFarland, and Anna H. McFarland refuse to enter upon the management of said institution, or, having entered upon the management of the same, shall at any time deem it unprofitable or inexpedient to continue the management of the same, then, in that event, and on their written request, such request being signed by at least two of them, I will and direct my executors, hereinafter named, to sell all of my said real estate at public or private sale, as they, after consulting with my legal heirs, shall deem best; and I hereby empower my said executors to make and execute all deeds of conveyance necessary to carry out the provisions of this will. On such sale being made by my said executors, I will and direct that my said executors shall, out of the proceeds of such sale, pay all liens and charges on said real estate, including the costs and expenses of such sale, and make distribution of the remainder of the proceeds of such sale as follows, to wit: First, divide such remainder into ten equal parts or shares; second, pay such shares or parts to the following named persons, in the following proportions, to wit: To George C. McFarland, two shares; to Mrs. M. E. McFarland, two shares; to Anna H. McFarland, two shares; to T. Fletcher McFarland, two shares; to Harriet N. McFarland, two shares. Seventh. In the event that my son T. Fletcher McFarland or my daughter Harriet N. McFarland should choose to live or reside elsewhere than at said institution while the said institution is under the management and control of the said parties, viz. George C. McFarland, M. E. McFarland, and Anna H. McFarland, then, if the place so chosen by them is within thirty miles of said institution, there shall be paid to each of them so residing away from said institution, in lieu of the care and maintenance mentioned above, an additional sum of \$100 per annum, payable in quarterly installments. Eighth. I hereby nominate, constitute, and appoint John A. Bellatti and Robert M. Hockinhull to be the executors of this, my will."

The said Andrew McFarland died leaving him surviving, the following, as his only children and heirs at law: George C. McFarland and T. Fletcher McFarland, his only sons, and Mary E. Flack and Harriet N. McFarland, his only daughters. The persons mentioned in the second and other clauses of the will as those to be vested with the control and management of Oak Lawn Retreat are the plaintiff in error, George C. McFarland, a son of the testator, M. E. McFarland (now deceased), who was the wife of the said plaintiff in error, and Anna H. McFarland, daughter of said plaintiff in error. They accepted the provisions of the will, and entered upon the management of the said institution. They paid to Mrs. Mary E. Flack the first and second of the three several sums of money directed to be paid her by the second clause of the will, and she accepted such payments from them. Only one of the persons (John A. Bellatti) nominated as executors of the will qualified, and he made due settlement of the estate in the county court of Morgan county, and was discharged from further duties as executor. On the 21st day of March, 1892, the plaintiff in error, by his deed of that date, conveyed and quitclaimed all his interest in the real estate described in the will to M. E. McFarland, his wife. On the 15th day of August, 1893, said M. E. McFarland died, leaving her husband, the plaintiff in error, and two daughters, said Anna H. McFarland and Marie B. Griffith (née McFarland). The daughters, on the 9th day of September following the death of their mother, conveyed and quitclaimed to the plaintiff in error an undivided one-third part of the said real estate in the will mentioned. The management was then assumed by the plaintiff in error and his said daughters. On the 23d day of November, 1894, the payment last falling due to Mrs. M. E. Flack under the second clause of the will was made by the plaintiff in error and his said two daughters, Anna H. McFarland and Marie B. Griffith; and at the same time Mrs. Flack executed a quitclaim deed, conveying to the said parties so making said payment "all interest of the grantor in the real estate mentioned in the will." In December, 1894, the plaintiff in error leased his interest in the Retreat to Frank Griffith, husband of his daughter Marie, until February 1, 1896. Said Frank Griffith and the defendant in error Anna McFarland, on the same day, entered into articles of co-partnership for the purpose of carrying on the business of treating the insane at Oak Lawn Retreat during the period of the running of the lease, and until January 31, 1896; and the institution was operated by them under the said articles of co-partnership, Mrs. Griffith acting as matron. The plaintiff in error during this time was engaged in other affairs not connected with the Retreat, and was not present at the institution. Shortly prior to the termination of the lease to Griffith and the articles of co-partnership, misunderstandings arose between the

plaintiff in error and his daughters, Anna H. McFarland and Marie B. Griffith, by reason of which they realized they could not carry on the business of the institution together. At the expiration of the lease to Griffith, the plaintiff in error returned to the institution, and his daughters withdrew therefrom. He has since been in possession and control of the Retreat.

On the 24th day of April, 1896, the said daughters of the plaintiff in error, Anna and Marie, filed this bill in chancery against the plaintiff in error, T. Fletcher, and Harriet McFarland, and the Security Savings, Building & Loan Association; the said association being made a party in order that a mortgage given by the testator, in his lifetime, on the real estate mentioned in the will, and which still remained, in the larger part, unsettled, might be adjusted. The allegations and theory of the bill are that the plaintiff in error and the complainants therein are seised of the title in fee to the real estate in question, subject to charges created thereon by the will for the benefit of the said T. Fletcher and Harriet N. McFarland, and also subject to the indebtedness due to the loan association, and also to a mortgage lien claimed to exist in favor of the complainant Anna H. McFarland, as administratrix of the estate of M. E. McFarland, and another lien claimed in favor of the complainants in the bill. Answers were filed to the bill, and replications to the answers. The plaintiff in error filed a cross bill, in which he claimed to be the owner of the mortgage lien set out in the bill as existing in favor of the estate of M. E. McFarland, and represented that it was not for the best interest of the institution that the said mortgage should be foreclosed, but asking the court to decree that the complainant in the cross bill was the equitable and true owner of said lien. Answers were filed to the cross bill, and replications to such answers, and the cause was submitted to the court. The decree declares the plaintiff in error and Anna H. Cromwell (née McFarland) and Marie B. Griffith (née McFarland) are the owners in fee of the premises described in the will as tenants in common, each owning undivided interests, upon the theory that the plaintiff in error, his deceased wife, and Anna H. were each seised, under the operation of the will, of an undivided one-third in the said land, subject to the liens hereinbefore mentioned, and subject to equitable charges established by the decree in favor of T. Fletcher and Harriet N. McFarland, to secure the provisions of the will in their behalf, respectively, and that the interest of the said M. E. McFarland descended, under the statute of descent, to her said daughters, Anna H. Cromwell and Marie B. Griffith, subject to the dower right of the plaintiff in error. The decree adjusted the amount due on the mortgage to the building association, and established it as a first lien against the property, and declared that the administratrix was the

legal owner of the other mortgage lien, and established the amount thereof as a second lien, and also declared a third lien in favor of Anna H. and Marie B., as claimed in the bill. The cross bill was dismissed, and the premises in question and the personal property belonging to the institution declared not susceptible of partition, and ordered to be sold by the master in chancery, and that the proceeds of such sale should be applied to the discharge of the liens, and the remainder distributed among the parties according to their rights, as declared by the decree. The decree also provided that the property should be sold subject to the equitable charge established therein in favor of T. Fletcher and Harriet N. McFarland, respectively. This is a writ of error brought to reverse the decree.

J. O. Priest, for plaintiff in error. Julian P. Lippincott, for defendant in error H. N. McFarland. John A. Bellatti and Edward P. Kirby, for defendants in error A. H. McFarland Cromwell and Marie B. Griffith.

BOGGS, J. (after stating the facts). The intention of the testator clearly appears. It was that the exclusive possession and control of, and entire estate in, the premises, and in the personal property used in connection therewith, which together constituted the "Oak Lawn Retreat," should vest in the plaintiff in error, his wife, M. E. McFarland, and his daughter Anna H. McFarland, to be held and enjoyed by them indefinitely, unless they, or some two of them, should desire to relinquish and terminate their right and estate therein, and should signify such desire by a written instrument signed by at least two of them. This devise was, we think, properly construed by the chancellor to pass an estate in fee, determinable only by the action of at least two of the devisees in the manner specified in the will. Words of limitation or inheritance are wanting, but our statute has made the addition of such words unnecessary "if an estate less than a fee" be not limited by express words, or does not appear to have been granted, conveyed, or devised by construction or operation of law. Rev. St. c. 30, § 13. The spirit of this statute and the policy of our law is to adopt that construction of a devise which will facilitate the alienation of property, if such meaning may fairly be gathered from the instrument. *Leiter v. Sheppard*, 85 Ill. 242; *Giles v. Anslow*, 128 Ill. 187, 21 N. E. 225. "If the terms of a devise clearly indicate an intention in the deviser to dispose of his entire estate in the property devised, it will be construed to convey a fee." 3 Washb. Real Prop. (5th Ed.) 563. In *Schouler on Wills* (page 592) it is said: "Whenever, expressly or by implication, the will shows the purpose to give one's property in fee simple, that purpose shall prevail."

The payment of the total sum of \$1,500 to Mrs. Flack is made a personal charge upon

the devisees in the event they accept the devise. At common law, though a devise contained no words of limitation or inheritance, it was implied to confer a fee if the payment of a debt or legacy was charged upon the devisee personally. *Funk v. Eggleston*, 92 Ill. 515; *McLellan v. Turner*, 15 Me. 436; *Varney v. Stevens*, 22 Me. 331; *Harvey v. Olmsted*, 1 N. Y. 483; *Snyder v. Nesbitt*, 77 Md. 576, 26 Atl. 1006. It is undeniable, the devisees, including the plaintiff in error, construed the devise to invest them with an estate in fee. The plaintiff in error conveyed all his right, title, and interest to his wife, and after her death accepted from her heirs a conveyance purporting to convey him an equal undivided one-third interest in the premises. This is consistent with the construction we are disposed to give to the devise, and entirely inconsistent with the insistence in the briefs of counsel for the plaintiff in error that the fee-simple title to the premises descended to all the heirs at law of the testator. It is clear the testator did not contemplate Oak Lawn Retreat should descend to his heirs at law in any contingency. He desired the plaintiff in error, his wife, and their daughter should own and operate it as an asylum for insane persons, as he had done, and should pay Mrs. Flack, his daughter, the sums provided in the will, and should care for T. Fletcher and Harriet N. McFarland while they should live, and should pay each of them \$100 per annum. In case the plaintiff in error, his wife and daughter, should decline to accept the devise, or, having accepted, should not desire to continue to operate the Retreat for the purpose he had prepared it, the testator intended the institution should be sold, and the proceeds distributed equally among certain persons whom he designated in his will to receive the same. Two of such designated distributees were not heirs of the testator, and Mrs. Flack, who was his daughter and legal heir, was not included among them.

It is argued the theory of the decree is that the Retreat is not being conducted as the testator designed, and that, if such is the case, it should be ordered sold, as contemplated by the will. The will, if we have correctly interpreted it, vested in the plaintiff in error, his wife, M. E. McFarland, and their daughter Anna H. McFarland (now Cromwell) an estate in fee, determinable, without the aid of a conveyance, by said devisees, or any two of them, signing a written instrument requesting the estate be sold, and the proceeds divided as the will, in such event, designated. One of the devisees is dead. The other two have not signed such a written instrument. The fact the surviving devisees have disagreed as to the management and control of the Retreat, and are not conducting it as the testator desired, cannot be substituted for that which the testator required should be done in order to terminate the estate created by the will. In making disposition of this

property, the testator anticipated the devisees might desire to determine their estate in the Retreat, and he provided a mode and manner in which they might accomplish such desire. When a devise is subject to be divested upon the happening of a certain specified contingency, courts will not accept another contingency as the equivalent of that named by the testator, but will only divest the estate when the contingency takes place literally. *Loan Co. v. Bonner*, 75 Ill. 315. It may be that the testator in the case at bar was not, when writing his will, mindful of the fact that one or more of the devisees might die, and that, had this occurred to him, he would have provided that a disagreement between the two remaining devisees, and their failure to continue the management and control of the Retreat, would determine their estate, and authorize the sale of the property by the executors. Courts cannot, however, determine, by mere conjecture, that the testator omitted from his will provisions that he would have incorporated if he had not overlooked probable future occurrences, and undertake to rectify such omission; for to do so would be to incorporate, by construction, a new clause in the will. This would not only be contrary to the will as made, but would be making a new will. *Loan Co. v. Bonner*, supra.

The provisions of the decree preserving a lien in favor of T. Fletcher and Harriet N. McFarland cannot be made the basis of well-grounded objection on the part of the plaintiff in error. As to him, the establishment of such a lien is eminently just and equitable. The effect is to postpone to these liens the liens in favor of the Security Savings, Building & Loan Association, the administratrix of the estate of M. E. McFarland, and of the defendants in error Anna H. Cromwell and Marie B. Griffith. But the parties whose liens are so postponed do not object, and the plaintiff in error cannot be allowed to object for them.

Counsel for plaintiff in error remarks, in his brief, that proper testimony tending to support the cross bill was rejected by the court, but does not indicate to what particular testimony the remark applies. Nor does the abstract disclose that objections were made and exceptions saved to any ruling of the court as to the admissibility of testimony, save one. A witness in behalf of the plaintiff in error, as complainant in the cross bill, was asked if the Oak Lawn Retreat was "being carried on as provided by the will of Andrew McFarland"; but the court ruled the question should not be answered. It was clearly improper. It called upon the witness to construe the will, and to give as a conclusion, merely, whether the manner in which the institution was being conducted was that which the will required.

The cross bill was not supported by the proofs as to the allegation that the complainant therein was the owner of the lien

decreed to his daughters, and the relief prayed by the cross bill was upon the theory that the title to the Retreat was in the heirs of the testator, which, as we have seen, is not the true view of the case. The cross bill was properly dismissed. The decree is affirmed. Decree affirmed.

(17 Ill. 82)

EGBERS et al. v. EGBERS et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

APPEAL—CONFLICTING EVIDENCE—DECLARATIONS AGAINST INTEREST—OBJECTIONS TO INSTRUCTIONS—WILLS—TESTAMENTARY CAPACITY—COSTS.

1. A verdict on conflicting evidence will not be disturbed, especially where two trials have produced the same result.

2. On an issue of a testatrix's testamentary capacity, the statement of a beneficiary, who is the only one interested in maintaining the will, that, when executing it, testatrix was just alive, and that was all, being against his interest, is admissible.

3. A litigant cannot complain of an instruction given on the court's own motion, where a similar instruction was given at his request.

4. Where the issue of the invalidity of a will because of a lack of testamentary capacity is submitted to a jury, it is not error to refer to the will in the charge as "the purported will," since the issue is whether it was a will or not.

5. Where, on an issue of the validity of a will, under proponent's evidence the will, if executed at all, was executed on a certain day while testatrix was sitting up in bed, either assisted or unassisted, an instruction that proponent claimed that, when executing the purported will, testatrix sat up in bed and signed her name to the instrument in question, and that the jury must find that it was signed at the time and in the manner claimed before they can find it to be her will, is not erroneous, as assuming not proven matters as having been proven.

6. On a decree adjudging a probated will invalid, costs are properly taxed against a legatee who was the only person seeking to maintain it.

Error to circuit court, Hancock county; G. W. Thompson, Judge.

Bill by Francis M. Egbers and others against John W. Egbers and others. There was a decree for complainants, and defendants bring error. Affirmed.

The court gave the following instructions for contestants, viz.: "(7) You are instructed that, although you may believe from the evidence that the signature of the instrument in question is the signature of Magdalena Egbers, yet, before you can find that the instrument is her last will and testament, you must believe from the evidence that she made such signature at the time and in the manner claimed. In determining this question, you should take into consideration her age, her physical condition, and all the circumstances in evidence; and if, after so doing, you believe from the evidence that it was impossible for her to have made the signature at the time claimed, then you should find for the contestants." "(10) The jury are instructed that it is claimed by the proponents in this cause that Magdalena Egbers on Friday morning, August 7, 1896, sat up in her bed, and, on a book in her

lap, signed her name to the paper in evidence, purporting to be her last will and testament. This is denied by the contestants, and in determining this question the jury should take into consideration all the testimony, facts, and circumstances surrounding the transaction as shown by the evidence, the age of the testatrix and her physical condition at the time, and all other circumstances in the case."

O'Harra & Scofield and William H. Hartzell, for plaintiffs in error. Sharp & Berry Bros., and Truman Plantz, for defendants in error.

CARTER, C. J. This was a bill filed by defendants in error to contest the validity of an instrument purporting to be the last will of Magdalena Egbers, and to set aside the probate thereof. The bill alleged that the alleged will, dated August 7, 1896, was probated in the county court of Hancock county; that it was never signed or published by Magdalena Egbers, and that she was at the time of its alleged execution so sick with fever that she was unable to execute an instrument of any kind; that she was unconscious and out of her mind; that she was very low with typhoid fever, unable to sit up in bed or to write, or understand anything about the disposition of her property; and that she had made a valid will three years before. The will sought to be set aside is as follows:

"State of Illinois, County of Hancock. August 7, 1896. I want all my legal heirs to have \$100 dollars, and the remainder to John W. Egbers; the land and household to use as he sees fit, as he is my executor.

"Magdalena Egbers.

"Viola Egbers.

Miss Mary Schaffner.

"Annie McArthur."

The land contained 80 acres, and was valued at about \$4,000. Issues were made, and tried before a jury, and a verdict was returned that the said instrument was not the last will and testament of Magdalena Egbers. This verdict was set aside, and another trial had, with the same result. A decree was then entered setting aside the alleged will and the probate thereof, and that John W. Egbers pay the costs. Proponents have sued out this writ of error to reverse the decree.

The testimony showed that Magdalena Egbers was an old lady, 82 years of age, living alone; that about 10 days before the alleged execution of the will she was found sick at her house, and that her son John, the principal devisee, then removed her to his own house for proper care and attention; that she had typhoid fever, and that her temperature ranged from 102 to 104½ degrees; that she had been ill about 10 days before her removal to her son's house; that the will was made Friday morning, August 7, 1896, about 8 o'clock; and that she died in the evening of the following day. The testimony was conflicting as to her mental and physical condition

on the day the will was executed. The subscribing witnesses were Mary Schaffner, a neighbor, and Annie McArthur, a domestic in the family. The former had called to see Magdalena Egbers, and found her asleep, and Robert Egbers, her son, fanning her. Miss Schaffner testified: That she took the fan, and said to Robert that he could go out a while, as he had been sitting up at night. That he went out, and Magdalena Egbers, being then awake, talked with her. That she was very sick and weak. That Mrs. John Egbers came in, and Robert came back, and sat upon a chair and went to sleep, and Mrs. John Egbers told him to go up stairs and lie down. That he did so, and, after he was gone, Magdalena Egbers told Mrs. John Egbers to get a piece of paper; that she wanted something written down. That when the paper was brought she said she wanted to make a little difference in her will; that she wanted John Egbers to have the place, and the house and lot, and the rest \$100 each. She further testified that Mrs. John Egbers sat by the bed and wrote what Magdalena Egbers told her to write, and called Annie McArthur, the other subscribing witness; that Magdalena Egbers sat up in bed, with some assistance from her, and wrote her name to the will; that she asked witness to sign as a witness, but witness told her she could not write; and that Mrs. John Egbers took hold of witness' hand, and helped her to write her name. Annie McArthur gave similar testimony, and testified that she signed as a witness at the time, and at the request of Magdalena Egbers. No one was present except those mentioned. Both of the subscribing witnesses testified, in substance, that Magdalena Egbers was entirely rational, clear, and sound of mind, and that she fully understood what she was doing when she signed the will. The genuineness of her signature was proved also by her banker, with whom she had often transacted business and deposited money. Her physician testified that he attended her from August 1st until Friday morning, about 6 o'clock, August 7th; that when he first saw her she was in a stupor, and her fever very high, and she was practically unconscious, but that at other times she was fully conscious, seemed bright and entirely rational, and frequently joked with him, and was so when he left her about 6 o'clock Friday morning (which was about two hours before the will was made); that she was very weak, but was sitting up in bed, eating a piece of cracker, and drinking some coffee; that she held the cup herself; that he thought her mind was sound at that time; that his visits were always in the morning, when she was at her best, and would have less fever and be brighter than later in the day. There was some other evidence tending circumstantially to show the competency of the testatrix to make a will; and, had the verdict of the jury and the decree of the court established the validity of the will, it is very clear such decree would not have been reversed on the evidence.

There was other evidence, however, tending to prove, not only that she was mentally incompetent at the time, but was also physically unable to sit up in bed, whether assisted or not, and write her name. She was in the last stage of a fatal case of typhoid fever, and was 82 years old, but previous to her last sickness she had enjoyed good physical and mental health. Witnesses who saw her Thursday night and on the Friday morning, a few hours before the will was executed, testified, in substance, that she was a part of the time in a stupor,—only semiconscious; talked as if to her children who had long been dead; that she was thought to be dying, was wholly unable to sit up, and was incompetent to transact business of any kind. The will was drawn by the wife of the principal beneficiary, and was signed in a plain, smooth hand, in German script. The contestants produced five physicians, who, in answer to hypothetical questions, gave expert testimony to the effect that the testatrix would not have been able, mentally or physically, to perform the acts testified to by the subscribing witnesses. There was other testimony tending to sustain this view, but we think it unnecessary to rehearse the evidence, any further than to show that there was a material conflict upon the facts, and evidence on either side sufficient to support a verdict. There were two trials, and the verdicts of both juries were the same; and, while it may appear from the record before us that the proponents made out the stronger case upon the facts, it must be considered that the jury and court below saw and heard the witnesses, and had better means of weighing their testimony than we have. We cannot, upon the record, say the verdict was manifestly wrong, or against the evidence; and while we might have been better satisfied, from the evidence in the record, with a different verdict, the rule of this court has long been not to interfere with the verdict in such cases. And especially should this rule be adhered to where a second trial has produced the same result. *Hill v. Bahrns*, 158 Ill. 314, 41 N. E. 912; *Sullivan v. Dollins*, 13 Ill. 85; *Bloom v. Crane*, 24 Ill. 49; *Bloomer v. Denman*, 12 Ill. 240; *Goodell v. Woodruff*, 20 Ill. 192; *Railroad Co. v. Hutchins*, 34 Ill. 108; *O'Brien v. Palmer*, 49 Ill. 72; *Howitt v. Estelle*, 92 Ill. 218; *Kightlinger v. Egan*, 75 Ill. 141; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941; *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145.

This is the principal question in the case, but counsel for plaintiffs in error contend that erroneous rulings of the court influenced the jury to bring in the verdict rendered. It is said that improper hypothetical questions were permitted to be answered by the expert witnesses, against the objections of counsel for the proponents. The objections are that they were not based on the evidence, and that they were not stated hypothetically, but positively. We have examined these questions, which are somewhat lengthy, and which are not altogether perfect in form, but we regard the ob-

jections urged as hypercritical. A jury of ordinary intelligence would understand these questions were hypothetical. Such is their purport from the outset, and there was sufficient evidence before the jury to sustain them. The jury could not have been misled by them, as contended, for they were fully instructed by the court as to their nature and purpose.

It is also contended that it was error to permit proof of the statement of John W. Egbers, the sole beneficiary seeking to sustain the will, made on the morning that the will was executed, to the effect that his mother was just alive, and that was all. There was no error in this. He was the only beneficiary, under the will, interested in maintaining it. The statements proved were against his interest, and affected him alone. *Blattner v. Wels*, 19 Ill. 246; *McMillan v. McDill*, 110 Ill. 47; *Campbell v. Campbell*, 138 Ill. 612, 28 N. E. 1080.

It is next urged that the court erred in giving to the jury the following instruction at the request of the contestants: "You are instructed that the burden of proof is upon the proponents to show that the will offered by them was signed by Magdalena Egbers on August 7, 1896, and, unless he has proven such execution by a preponderance of the evidence, you should find for the contestants. But if you believe from the evidence that Magdalena Egbers did execute the instrument offered as a will, and that the same was attested by two credible witnesses in her presence, and that the two subscribing witnesses have sworn that at the time she executed it she was of sound mind, then the burden shifts, and the contestants assume the burden of proving the testatrix was not of sound mind, as defined in these instructions." It is said that this instruction required the proponents, throughout the whole case, to sustain the burden of proving the signing of the will, whereas, it is contended, the burden of proving the execution of the instrument, as well as the alleged unsoundness of mind of the testatrix, after a *prima facie* case had been made by the proponents, shifted to the contestants, who were required to prove by a preponderance of all the evidence the allegations of their bill that she never signed or executed the same. As said by the learned author of the article entitled "Burden of Proof" in 5 Am. & Eng. Enc. Law (2d Ed.), the term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises. By the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a *prima facie* case. See notes and cases there cited. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to

establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and, unless he meets this obligation upon the whole case, he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end. This court has repeatedly said that the law presumes every man to be sane until the contrary is proved, and the burden of proof rests upon the party alleging insanity. *Argo v. Coffin*, 142 Ill. 368, 32 N. E. 679; *Guild v. Hull*, 127 Ill. 523, 20 N. E. 665; *Menkins v. Lightner*, 18 Ill. 282. But it is incumbent on the proponents of the will to make out a *prima facie* case in the first instance, by proper proof of the due execution of the will by the testator, and of his mental capacity, as required by the statute. The burden of proof is then upon the contestants to prove the allegations of their bill by a preponderance of all of the evidence,—that the testator was mentally incompetent. The law throws the weight of the legal presumption in favor of sanity into the scale in favor of the proponents, from which it necessarily results that upon the whole case the burden of proof rests upon the contestants to prove the insanity of the testator. *Craig v. Southard*, 162 Ill. 209, 44 N. E. 393; *Id.*, 148 Ill. 37, 35 N. E. 361; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. 1076; *Carpenter v. Calvert*, 83 Ill. 62. We are not called upon to consider in this case whether the rule relating to the burden of proof is the same in its application to both questions raised by the pleadings, viz.: First, that Magdalena Egbers did not sign the alleged will; and, second, that she was mentally incompetent to make a valid will. There is the natural presumption that she was sane, which, with all of proponents' evidence, must be overcome, and sufficient evidence adduced so that upon the whole evidence there is a preponderance in support of the allegation in the bill of her mental unsoundness, before the will can be set aside on that ground. See cases cited above. But there is no presumption that she signed the will, except that which the law raises from the *prima facie* case made by the proponents. But, whether any distinction can be drawn or not (*Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145), it is a sufficient answer to the point made on the instruction, that the court gave to the jury two instructions at the request of the proponents, which, in the respect mentioned, were in substance the same as the instruction complained of, and they cannot be heard to complain of an alleged error which they asked the court to commit.

Other instructions are criticised because in them the will was mentioned as "the purported will," and it is said the court thereby discredited the instrument as a will. We are not of that opinion. The question being tried was whether it was Mrs. Egbers' will or not.

It did purport to be a will, and the instructions simply so described it. That designation was more accurate than that of "the will." It is much less objectionable than "pretended will," which in *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740, this court condemned, but held insufficient ground upon which to base a judgment of reversal, in view of the full charge to the jury.

Nor do we find that instructions 7 and 10 given on behalf of the contestants are open to the objection made, that they assumed and stated matters to the jury as having been proved which were not proved in the manner stated. They stated the evidence with substantial correctness, as we read it, and we find no error in them. The will was executed on Friday morning, August 7, 1896, while Mrs. Egbers was in bed, and in the last stage of a fatal case of typhoid fever, or not at all. All of the proponents' evidence on the subject was to the effect that she sat up in bed while she signed the will,—some to the effect that she was assisted, and some otherwise. Its execution at any other time was inconsistent with all the evidence on the subject. Other criticisms are made of other instructions, but, in our opinion, they are unwarranted.

It is alleged as error that the decree adjudged that the proponent John W. Egbers should pay the costs. He was the only beneficiary seeking to maintain the will. All others were assailing it. We see no reason why the costs were not properly taxed against him. The decree must be affirmed. Decree affirmed.

(177 Ill. 169)

PHELPS et al. v. CITY OF MATTOON.

(Supreme Court of Illinois. Dec. 21, 1898.)

SPECIAL ASSESSMENTS—CONFIRMATION—REPORT OF COMMISSIONERS—RES JUDICATA.

1. On confirming a special assessment for a local improvement, the court cannot change the number of installments into which it has been distributed by the ordinance therefor.

2. A report of two only of three commissioners appointed to estimate the cost of a local improvement, without any showing that the other one took any part in the proceedings, is insufficient to support a judgment confirming a special assessment for such improvement.

3. Affirmance on error of a judgment confirming a special assessment is not a bar to review such judgment at the instance of one who was a party to the writ of error on which the affirmance was given, but whose interest in the property affected by the judgment did not appear in such proceedings, since such judgment is separate as to each tract of land, under Rev. St. c. 24, art. 9, § 34, providing that a reversal of such judgment shall only invalidate it as to the tract of land concerning which the appeal or writ of error was taken.

4. Affirmance on error of a judgment confirming a special assessment for a local improvement, on the ground that it does not appear as to which of the affected property the writ was being prosecuted, does not affect any particular property, and hence is not a bar to a review of such confirmation judgment as to particular parcels of land affected by it.

Error to Coles county court.

Petition by the city of Mattoon against Nathan Phelps and others to confirm a special assessment. There was a judgment of confirmation, and respondents bring error. Reversed.

D. T. McIntyre, for plaintiffs in error.
James W. Craig and John F. Voigt, Jr., for defendant in error.

CARTWRIGHT, J. The county court of Coles county entered judgment by default confirming a special assessment levied by the city of Mattoon for the paving and draining of C street. The ordinance divided the assessment into seven yearly installments, but the court, by its judgment, divided it into five installments, in the same manner as in the judgment reversed in the case of *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155. This judgment was therefore erroneous, for the reasons given in that case.

In addition to that error, the report of the committee appointed by the ordinance to estimate the cost of the improvement was signed by two members only, and it does not appear that the other member of the committee took any part in making the estimate. The committee consisted of C. G. Peck, C. C. Robinson, and M. B. Fitch; and the report, a copy of which was annexed to the petition, was signed by C. G. Peck and M. B. Fitch only. A valid report of the committee is a prerequisite to a valid judgment; and, as the third member took no part in the proceeding, the report was insufficient, and on that ground the judgment cannot be sustained. *Adcock v. City of Chicago*, 160 Ill. 611, 43 N. E. 589; *Moore v. City of Mattoon*, 163 Ill. 622, 45 N. E. 567; *Markley v. City of Chicago*, 170 Ill. 358, 48 N. E. 952.

Defendant in error relies upon a former adjudication between the same parties of the cause of action involved in this writ of error. It appears from the records of this court that nearly all of the plaintiffs in error who have sued out the writ in this case were also plaintiffs in error in the case of *Gibler v. City of Mattoon*, 167 Ill. 18, 47 N. E. 319, in which the judgment was affirmed. If it appears from the record that the parties are identical and the subject-matter of the litigation the same, then the former judgment of affirmance is conclusive, and plaintiffs in error are not entitled to reopen the controversy. And this is true, not only as to what was actually determined, but as to all questions that were properly involved, and which might have been raised and determined in that case. There is identity in parties as to the defendant in error and those plaintiffs in error who prosecuted the writ in the former case; but it is equally essential that the cause of action shall be identical. *Miller v. McManis*, 57 Ill. 126. The record does not show that such is the case. A judgment of this kind is several as to each tract or parcel of land in the assessment

roll; and in the former case there was nothing in the record to show that 10 of the plaintiffs in error had any interest in any tract against which judgment was rendered, or that they were parties to the proceeding, or injured by the judgment. As to the others, it did not appear as to what property the writ of error was taken, or as to what tract or tracts a reversal was asked. The record did not disclose the cause of action, and the judgment was affirmed for that reason. That judgment of affirmance, therefore, did not affect the particular tracts of land now involved in the record. It did not affirm the judgment as to the assessment roll generally, nor as to any tract, because no tract was identified by the record. The doctrine of *res judicata* does not apply, and, for the errors indicated, the judgment is reversed, and the cause remanded. Reversed and remanded.

(176 Ill. 561)

WILSON v. AUGUR.

(Supreme Court of Illinois. Dec. 21. 1898.)

EQUITY—PLEADING AND PROOF—FRAUD—EVIDENCE—LACHES.

1. Where a material averment in a bill is neither admitted nor denied by the answer, it must be supported by proof.

2. A bill for recovery of lands alleged forgery, fraud, and collusion in the procurement of defendant's title. Two witnesses testified to declarations of defendant tending to prove that possession of the bond for deed, through which defendant obtained title, was surreptitiously obtained from the owner, and that the assignment thereon was a forgery; and there was evidence that defendant, knowing the facts, aided the perpetrators of the wrong in obtaining a deed from the grantor in the bond for deed, and he subsequently obtained their title. The only evidence opposed to this was that of the assignee of the bond, who denied the fraud and forgery, and claimed that the bond was assigned to him in 1857 or 1858, and that he kept it about six months before obtaining the deed which the grantee of the bond was entitled to. It was admitted in the pleadings that the deed from the grantor in the bond was executed in 1862, and one witness testified to seeing the bond in the possession of the true owner in 1861 or 1862, and that it then was not assigned. *Held*, that the bill should not have been dismissed.

3. Defendant's testator went into the fraudulent possession of land in 1863. Complainant did not become of age until 1870. In 1882 complainant brought ejectment on other grounds than fraud in the procurement of testator's title, but failed to recover. Complainant did not know that testator had obtained his title through fraud and forgery until the time of bringing the present suit, at which time testator was dead. Testator's neighbors, who knew of the fraud and forgery, were afraid to disclose their information in testator's lifetime, because he was considered a dangerous and dishonest pettifogger, who always caused trouble to those who thwarted his plans. *Held*, that complainant was not guilty of laches in bringing his bill for the recovery of the land on the ground of fraud and forgery in the procurement of testator's title.

Appeal from circuit court, Christian county; William M. Farmer, Judge.

This was a bill in equity brought by Levi

52 N.E.—19

D. Wilson, son and heir at law of Daniel Wilson, against C. L. Augur, administrator with the will annexed of the estate of Ephraim M. Burns, deceased, in which he prayed that upon a final hearing of the cause he might be decreed to be, in equity, the owner of the E. 17½ acres off the S. W. ¼ of the S. E. ¼ of section 11, and of the N. W. ¼ of the S. W. ¼ of section 12, township 15 N., range 1 W. of the third P. M., in Christian county; that by virtue of the premises C. L. Augur, as administrator, etc., of the will of Ephraim M. Burns, deceased, holds the title to said lands in trust for complainant; that he be decreed to convey said premises to complainant, or, upon his refusal, that the master in chancery may be directed to make said conveyance to complainant,—and for such other relief as may be required in equity. The defendant put in an answer to the bill, in which he denied that the deed executed by Grigg and wife to Washington Wilson was not signed and acknowledged by them; denied that Washington Wilson, the grantor in the deed to these premises to Ephraim M. Burns, ever occupied said land as tenant of his father, Daniel Wilson, but asserted that Washington Wilson was the owner in fee of said lands, by virtue of a certain deed of conveyance by John Grigg and wife to Washington Wilson for said premises; denied that Daniel Wilson held either the legal or equitable title to said lands, or any part thereof, at the time of the conveyance of said lands by the said Washington Wilson to defendant; denied that E. M. Burns ever concealed his ownership, or any facts connected therewith, from the complainant or any one else, but alleged that he placed on record in the recorder's office in said county said deeds, and thereupon took full and complete possession and control of said lands, and has ever since that time, continuously, until the date of his death, been in possession of said premises, and that at the time of the death of said E. M. Burns he was the owner, in law and in equity, of said lands; admitted that, as administrator with the will annexed of the estate of E. M. Burns, he assumed control of said lands, and still continues to discharge his duties in that respect; denied that said deed executed by John W. Grigg and wife to Washington Wilson was executed and recorded in fraud or circumvention of the rights of Daniel Wilson or his representatives, and denied that Ephraim M. Burns ever held said lands, or any part thereof, in trust for the heirs of Daniel Wilson or the complainant, as alleged in complainant's bill, and denied that the complainant is entitled to a conveyance of the said lands or any part thereof; alleged that complainant is not entitled to the relief prayed, for reason of anything alleged in said bill, because of the lapse of time since the said matters and things set forth in complainant's bill are supposed to have occurred. Defendant pleaded the statute of limitations, and relied upon the laches of the complain-

ant as to matters herein contained, and asked to be dismissed, etc. After the answer had been put in, the complainant filed an amended bill, in which he, among other things, alleged that Washington Wilson connived and colluded with Ephraim M. Burns to defraud Daniel Wilson, and, after his death, his heirs at law, of their right, title, and interest in said lands, by procuring or attempting to procure a deed from John Grigg and wife conveying said lands to Washington Wilson as assignee of Daniel Wilson, without authority, knowledge, or consent of Daniel Wilson, who was the owner in equity of said lands, and entitled to a deed therefor from said Grigg and wife; that they secretly procured an assignment of said bond for deed to be falsely made and written thereon to Washington Wilson without the knowledge or consent of Daniel Wilson; that there was no consideration therefor, nor for the deed from Grigg and wife to Washington Wilson; and that the same are void as to complainant. It was also alleged that Ephraim M. Burns in his lifetime took the legal title to said land from Washington Wilson by deed dated September 1, 1863, as an implied or constructive trust, and that complainant is, in equity, the owner of said lands. After the amended bill was filed, the answer to the original bill was not refiled, but it was treated as an answer to the amended bill by the parties. The cause proceeded to a hearing on the pleadings and evidence, and upon the close of complainant's evidence the court, on motion of defendant, entered a decree dismissing the bill, to reverse which complainant appealed. Reversed.

L. G. Grundy, for appellant. J. E. Harrison and J. C. McBride, for appellee.

CRAIG, J. (after stating the facts as above). It appears from the evidence introduced on the hearing that Daniel Wilson, in his lifetime, owned 57½ acres of land, described as the N. W. ¼ of the S. W. ¼ of section 12, and 17½ acres off the east side of the S. W. ¼ of the S. E. ¼ of section 11, township 15 N., range 1 W., in Christian county. Daniel Wilson died on the 13th day of February, 1863. He had purchased the lands of John Grigg, and held a bond for a deed, the full amount of purchase money having been paid. It seems that a year or two before Wilson's death he was confined to his bed the most of the time, and was weak in both body and mind, and unable to attend to business. His wife was dead, and his two daughters, Ruth Wilson and Mary C. Jacobs, kept house for him and looked after his business. He resided on the 40-acre tract above mentioned, and Washington Wilson, a reputed son by a former wife, lived on the 17½-acre tract. He occupied under his father, and had what he could raise on the land. In addition to the children named, Daniel Wilson left surviving him two sons, John B. and Levi B. Wilson; the latter

at the death of his father being 14 years of age. After the death of Wilson, Washington Wilson claimed the entire 57½ acres of land; and it appears from the evidence that, about three months before the death of Wilson, Washington Wilson obtained possession of the bond for a deed, and, with an assignment of the bond to himself, he and Burns, who was a pettifogger residing in the neighborhood, went to Springfield, to J. C. Conkling, the agent of Grigg, to procure a deed for the land. They found a deed in the hands of the agent from Grigg to Daniel Wilson. This deed they induced the agent to return to Grigg, and they also induced the agent to procure another deed from Grigg to Washington Wilson. This deed was placed on record, and on or about the 1st day of September, 1863, Washington Wilson conveyed the lands to Burns. It also appears that in the spring of 1863, after the death of Wilson, the two daughters who resided with him on the 40-acre tract leased the land to Thomas Doolen for one year. He went into possession of the land, and raised a crop, but in August of that year he sold his crop to Burns, and turned over the possession of the land to him; and he occupied the land from that time until his death, in August, 1896. It also appears from the evidence that complainant, Levi D. Wilson, left Christian county and went West before he was of age, and returned in 1874 or 1875. After his return the other heirs of Daniel Wilson conveyed their interest in the premises to him. In 1882 he brought an action of ejectment against Burns to recover the possession of the premises, but he failed to recover. Nothing further was done by complainant to recover the lands until this bill was filed, in 1897.

The answer of the defendant neither admitted nor denied the charge of forgery of the assignment of the bond, and the collusion and fraud in procuring the deed from Grigg, as alleged in the amended bill of complaint, and it is contended that the failure to do so is equivalent to an admission of the truth of these allegations. We do not concur in that view. Where a material averment in a bill is neither admitted nor denied by the answer, it must be supported by proof. *De Wolf v. Long*, 2 Gilman, 679; *Stacey v. Randall*, 17 Ill. 467; *Wilson v. Kinney*, 14 Ill. 27; *Morgan v. Herrick*, 21 Ill. 481; *Trenchard v. Warner*, 18 Ill. 142.

It is next contended that, if it should be held that appellee has not admitted the forgery, fraud, and collusion charged in the bill, the court erred in dismissing the bill, because the evidence on the hearing was sufficient to sustain the allegations of the bill. There is evidence in the record tending to prove the allegations of the bill. Isaac F. McQuality testified on behalf of complainant as follows: "During the summer of 1874 or '75 I was helping Burns, with a number of other men, to put up hay on the forty where Daniel Wilson lived. John Morgan and Uncle

Johnnie Fletcher were great friends of Burns, and were there at the time. I was cleaning up around the stack between loads, and went back into the shade to get a drink of water,—also, some whisky, which it was the custom to furnish to the men who were helping put up hay. Burns, Morgan, and Fletcher had gone around in the shade, too, and were talking together, and having a little of the whisky Burns had there. They were speaking of the talk there had been in the neighborhood as to how Burns got this land through Wash. Wilson from Daniel Wilson. Fletcher told Burns he always had an idea that Mary Wilson, wife of Wash. Wilson, had sneaked the papers from Daniel Wilson, and wrote the assignment from Daniel Wilson to Wash. Wilson. Burns says: 'By God! that's so. Mary Wash. did sneak the papers away from old man Wilson, and made the assignment.'" The witness further testified that Burns was a farmer and pettifogger, and that his general reputation for honesty in the neighborhood was bad. Witness stated, under objection, that Burns was considered a dangerous man; that, "when any one got into trouble in the neighborhood, he always tried to get on one side or the other, and would get them into trouble, and let them get out the best they could; he was feared by his neighbors." Thomas Doolen testified that he knew Burns from 1859 until his death, and knew Daniel Wilson the last two or three years of his life. Witness stated: He rented the 40-acre tract in controversy from Mary C. Jacobs and Ruth Wilson after their father's death; rented it in spring of 1863. That Wash. Wilson told him he wanted him to pay rent to him, and proposed to sell the land to witness. Does not remember terms. Best recollection, he offered to deed the land for \$200. Witness and Burns talked about the land afterwards, and Burns asked witness if he was on a deal with Wash. Wilson for the land. Witness replied that Wash. Wilson had offered to sell the land to witness. Burns then said to witness: "You had better not buy that land. They can't make you any title to it. You had better let it alone." Witness states he asked Burns why he thought so, and Burns said in reply that the assignment of the bond, or something that seemed to be the title they had, was of their own work; that old Daniel Wilson did not know anything about it. These declarations of Burns,—uncontradicted, as they appear in the record,—it must be admitted, tend to prove that the bond for a deed was obtained from the possession of Daniel Wilson by foul means, and that the assignment of the bond from Daniel to Washington Wilson was a forgery. These facts were known to Burns when he obtained a deed from Washington Wilson for the land. Indeed, he seems to have been the principal actor in procuring a deed from Grigg to Washington Wilson on a fictitious assignment of the bond held by Daniel Wilson.

There is also evidence showing bad con-

duct on the part of Burns in regard to this property. As has been seen, at the death of Daniel Wilson his two daughters, who had been in charge of his business, were left in possession of the 40-acre tract. Under the advice of Burns, an action of forcible entry and detainer was brought by Washington Wilson before a justice of the peace against the two daughters, for the pretended purpose of recovering possession of the land; but on the day of trial,—when the two daughters were absent from home, attending to the suit,—under the advice of Burns, Washington Wilson went to the house, removed all goods and furniture into the highway, and tore down the house. This cowardly, unlawful conduct did not meet with approval in the neighborhood; and the neighbors, ascertaining what had been done, turned out in force and rebuilt the house, and the two daughters moved in with their goods. Failing to obtain possession of the land in this unlawful manner, Burns at a later date bought out the tenant of the two daughters, and thus went into the possession of the land. The term of the tenant expired in the spring of 1864, and upon the expiration of the term it was the duty of Burns to surrender possession of the land to the two daughters, who had leased to Thomas Doolen, as he went in under Doolen, and had no greater rights than he. But Burns did not restore the possession of the land to the landlord upon the expiration of the lease, as in good faith he was bound to do, but retained the possession of the land, claiming it as his own property. There was other disreputable conduct of Burns proven in regard to the transaction, but it will serve no useful purpose to refer to it here. If Mary Wilson "sneaked the bond from Daniel Wilson," and made the assignment upon it without the knowledge or consent of Daniel Wilson, and, under the assignment thus obtained, Washington Wilson and Burns procured a deed from Grigg, as shown by the evidence of McQuality, or if the assignment of the bond was the work of Washington Wilson and his wife, as Burns told the witness Doolen, we are aware of no principle upon which the title held by Burns can be upheld and sustained. The transaction can be viewed in no other light than an attempt by fraud and forgery to deprive Daniel Wilson and his heirs of the land. The transaction, too, was one known to Burns from its inception, and he participated in it.

In addition to the evidence of the two witnesses alluded to, the complainant read in evidence the deposition of Washington Wilson, which had been taken in the ejectment suit, and it is claimed that this evidence shows that the assignment of the bond was made by Wilson. Washington Wilson testified that he was present at the time the assignment was made; that Daniel Wilson attempted to sign it, but spoiled it, as he said, and then called in the wife of Wash-

ington Wilson to complete the assignment. It is apparent that this witness attempted to sustain or bolster up the transaction, and if the witness did not contradict himself, and if he was not contradicted by other evidence in the record, his evidence might have an important bearing; but upon referring to his evidence it will be found that he states that the bond was assigned to him in 1857 or 1858, and that he kept it about six months before going to Springfield to get a deed. It is admitted in the answer that the deed from Grigg was executed August 26, 1862. If this is true, the statement of the witness that the bond was assigned in 1857 or 1858, and that he held it seven months before receiving the deed, cannot be true. Moreover, James N. Cisna, a man whose integrity is not questioned, testified that in August, 1861 or 1862, he was called to the house of Daniel Wilson, and Wilson then showed him the bond from John Grigg for the land, and that it was not then assigned to any person. We do not think, therefore, that the unsupported statement of Washington Wilson in regard to the assignment of the bond can be held sufficient to overcome the other evidence tending to show that the assignment was not the act of Daniel Wilson.

It is, however, insisted in the argument that complainant has been guilty of laches, and upon this ground he cannot recover. As has been seen, Burns went into the possession of the land in the latter part of 1863. At that time complainant was a minor, and he did not become of age until 1870. Laches could not be imputed to complainant during his minority. In the spring of 1876 he procured deeds from the other heirs conveying their interest in the land to him, and in 1882 he brought an action of ejectment, but, on a trial, failed to recover. No further steps were taken to recover the land until February, 1897, when this bill was filed. The law is well settled in this and other states that a court of equity will refuse its aid to stale demands where the party has slept upon his rights or acquiesced for a great length of time, and shows no excuse for his delay in asserting his rights. *Castner v. Walrod*, 83 Ill. 171; *Dempster v. West*, 69 Ill. 613. Where, however, a party has been injured by fraud, and remains in ignorance of the fraud without any fault on his part, and a bill has been filed for relief on account of the fraud, laches will not, as a general rule, defeat a recovery. The obligation to institute proceedings can only arise upon a discovery of the fraud. 13 Am. & Eng. Enc. Law, 683; *Middaugh v. Fox*, 135 Ill. 344, 25 N. E. 584; *Greenman v. Greenman*, 107 Ill. 404; *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. 119. The complainant testified that he did not learn that the assignment of the bond under which Washington Wilson obtained a deed to the land was a forgery until 1897. It seems from the evidence that the people in the neighborhood were afraid of Burns,

and those who knew the facts in regard to the manner in which he and Washington Wilson had procured title to the property were afraid to disclose the information they had to complainant while Burns was living. The witness Doolen, on giving the reasons why he did not inform the Wilsons what he knew, said, "Burns was a man I did not want to come in contact with, and I let him alone whenever it was possible for me to do it." Under all the facts as disclosed by the record, we do not regard the laches of complainant a bar to a recovery. The judgment of the circuit court will be reversed, and the cause will be remanded for further proceedings consistent with this opinion. Reversed and remanded.

(176 Ill. 512)

PEOPLE ex rel. CANTRELL v. ST. LOUIS, A. & T. H. R. CO.

(Supreme Court of Illinois. Dec. 21, 1898.)

RAILROADS—DUTY TO OPERATE—CONSTRUCTION OF LEASE—MANDAMUS—PREFERRED STOCK.

1. The lessee of a railroad from a company bound to equip and operate its road is charged with the duty of furnishing and using cars and locomotives for the carriage of both passengers and freight.

2. Inasmuch as a railroad company is bound to carry both passengers and freight, and the duties and liabilities of a railroad company to passengers riding on freight and passenger trains are very different, a railroad company is obliged to furnish and operate passenger trains separate from its freight trains for the accommodation of passengers.

3. By the running of a mixed train, consisting of freight, coal, stock, and passenger cars, a railroad company does not discharge its duty to the public of furnishing transportation to passengers.

4. The duty of a railroad company to furnish a separate train for passengers is sufficiently clear and specific to be enforced by mandamus.

5. Where the system of railroads under one management is paying, and the company is solvent and prosperous, it cannot escape performance of its charter duty of furnishing transportation over one portion of its road by showing that that particular portion does not pay, when all parts of the system are so interwoven that an accurate ascertainment of the profits of any one portion of the road is impracticable.

6. In determining whether a railroad company is solvent, so as to determine its liability to perform its charter duty as to running trains, the claims of the holders of preferred stock are not to be charged as liabilities, they being merely claims to dividends.

Appeal from circuit court, Franklin county; A. K. Vickers, Judge.

Mandamus, on relation of William S. Cantrell, against the St. Louis, Alton & Terre Haute Railroad Company. From a judgment denying the writ, the relator appeals. Reversed.

This is a petition for a writ of mandamus in its amended form, presented in the name of the people of the state of Illinois, at the relation of William S. Cantrell, a citizen and property owner of Benton, Franklin county, Ill., as a patron of the defendant railroad com-

pany, the prayer of which petition is as follows: "That a writ of mandamus be issued, directed to the St. Louis, Alton & Terre Haute Railroad Company, commanding it to cause to be furnished, placed, run, and operated on said railroad, extending from Eldorado to Duquoin, a daily (Sundays excepted) passenger train, each way, suitable and sufficient to carry all passengers, with their necessary baggage, in comfortable and reasonable security, and at a reasonable speed, and to operate said line of railroad from East St. Louis to Eldorado as a continuous line, and that, upon final hearing hereof, such further order be made in the premises as to the court shall seem meet and proper." The petition was answered by the respondent railroad company. A replication was filed to the answer, except as to one paragraph thereof, which was demurred to, and the demurrer sustained. A jury was waived, and the cause was submitted by agreement for trial before the circuit judge without a jury. The trial judge rendered judgment refusing the prayer of the petition, and dismissing the same, from which judgment the present appeal is prosecuted.

A large amount of testimony, oral and documentary, was introduced upon the hearing, including reports of the respondent company to the railroad and warehouse commissioners, the charter of the Belleville & Eldorado Railroad Company, as found on pages 485, 486, and 487 of the Private Laws of 1861, and the lease executed by the Belleville & Eldorado Railroad Company to the respondent in 1880. The petition avers that the railroad of the Belleville & Eldorado Railroad Company is the only railroad in Franklin county, and also contains the following averments: "That on or about December 1, 1893, numerous citizens of said towns of Benton, Eldorado, Christopher, Mulkeytown, Thompsonville, and other towns along said line of railroad, presented petitions to the said railroad and warehouse commission of the state of Illinois, complaining of the train service on said railroad extending from Eldorado to Duquoin, and setting forth the alleged facts relating thereto, and asking the said commission to take cognizance of their complaint, and by appropriate order or orders, or by appropriate suit or suits, compel the said St. Louis, Alton & Terre Haute Railroad Company to run its trains through from St. Louis to Eldorado as one continuous line, and run a daily through passenger train, with appropriate connections with other trains at Duquoin and Eldorado, and give the public such further relief in the way of train service on said railroad as justice and right demand. That thereupon said commission gave notice to said railroad company of the presentation of said petition, and such action was thereupon afterwards taken and had by said commission that on January 9 and 10, 1894, a hearing was had at Benton on said petition, at which time and place said railroad company was present and represented by its president, Hon. George W. Parker, and its

counsel, F. M. Youngblood, and the said petitioners were represented by Hons. C. H. Layman and D. R. Webb; and thereupon, after hearing and considering the evidence introduced by the petitioners and the said company, the said commission made and promulgated the following order or recommendation in the premises, to wit: 'We therefore recommend to you, the St. Louis, Alton and Terre Haute Railroad Company, that you, without delay, cause to be placed and operated on the Belleville and Eldorado Division of your road, in addition to the mixed train now being operated by you on said line, a daily passenger train, suitable and sufficient to carry all passengers, with their necessary baggage, in comfort and security, and at a reasonable speed, and that you operate your said railroad from East St. Louis to Eldorado as a continuous line, so that persons desiring to leave Eldorado and intermediate points in the morning of each day (Sundays excepted) may be able to go on said railroad to East St. Louis and return the same day.' That said St. Louis, Alton & Terre Haute Railroad Company has wholly neglected to comply with the said order or follow said recommendation, but, on the contrary, refuses to comply therewith, and yet continues to run its said train as before, and still fails to accommodate the traveling public." Such other facts, set up in the pleadings and developed by the proofs, as are necessary to an understanding of the questions involved, are sufficiently stated in the opinion.

Maurice T. Moloney, Atty. Gen., H. J. Hamlin, A. W. O'Hara, T. J. Scofield, and M. L. Newell, for appellant. F. M. Youngblood and John H. Mulkey, for appellee.

MAGRUDER, J. (after stating the facts). The main question in this case is whether a railroad company can be compelled by mandamus to run a passenger train. The appellee operates about 50 miles of railroad running from Duquoin easterly to Eldorado, which it leased in 1880 for 985 years, from the Belleville & Eldorado Railroad Company; and it is conceded that it runs no passenger train—that is, no train for passenger service exclusively—over this distance of 50 miles between Duquoin and Eldorado. On Sunday and Monday evenings, a train, consisting of a baggage car and one passenger coach, runs from Duquoin easterly to Benton about 18 miles, returning from Benton to Duquoin the next morning about 4 o'clock; but, the only train which runs the whole length of the branch road between Duquoin and Eldorado is what is called a "mixed train," consisting of coal, stock, and freight cars, to which are attached a combination car and passenger coach. This mixed train leaves Duquoin daily at 11 o'clock a. m. for Eldorado, and, returning in the afternoon, arrives at Duquoin at 7:10 p. m. Appellee runs through trains from St. Louis, by way of

Belleville, to Duquoin; but the mixed train in question does not connect at Duquoin with any of the passenger trains run by appellee from Duquoin to St. Louis, nor at Eldorado with any of the trains upon the Cairo Division of the Cleveland, Cincinnati, Chicago & St. Louis Railroad, or the Shawneetown Branch of the Louisville & Nashville Railroad. Passengers for St. Louis or points west of Duquoin must remain over night at Duquoin, and take the train next morning, at 4:50 o'clock. This mixed train carries freight, express, baggage, stock, mail, and passengers. On account of the freight carried and handled, it is a slow train, being often behind its schedule time from 20 minutes to 3 hours. During the busy shipping season, it often has to be cut in two on the grades, one part going forward to a switch, and returning for the balance of the train, including the passenger coach. At Eldorado the entire train is often pushed in front of the engine down to the depot. When the mixed train goes east, the passenger coach, which is used by all classes of passengers, both ladies and gentlemen, is between the freight cars and the combination coach. The mixed train has two brakemen, is operated by hand brakes, and has no air brakes. The regular passenger trains on the other parts of the road are equipped with air brakes operated from the engine. The roadbed is a dirt ballast, and the passenger car on the mixed train is dirtier and dustier than the passenger cars on the west end of the road. There is often an odor from the stock cars ahead of the passenger coach. It is bad for ladies and children. The stock cars are frequently filthy and offensive from the manure in them. The train is often delayed at the stations to take on and deliver freight. It is subject to jars that stagger the passengers. Much switching is done, and, where switching is done at a station, the passenger coach is usually uncoupled; and passengers must wait while the cars are loaded with stock, cattle, and hogs, and are often inconvenienced by the gang planks thrown out. The country through which the mixed train passes is a farming country, and well settled. The products shipped are mostly grain, mill products, and live stock; and the freight distributed along the line is merchandise. St. Louis seems to be the commercial center for that part of the state. Of the counties through which the mixed train runs, Franklin county has a population of 17,138; Perry county, 17,259; Saline county, 19,342. And, of the towns along the line of the road, Duquoin has a population of about 5,000; Benton, 1,200; Eldorado, 2,000; Galatia, 800; Thompsonville, 500; Raleigh, 500; Christopher, 200; Mulkeytown, 200. Improved lands in that section are worth from \$20 to \$50 per acre. Such being the character of the mixed train, and such being the character and population of the territory through which the mixed train runs, ought appellee to be required to furnish the

people with a passenger train? The question is not whether appellee should run more than one train, but the question is whether it does all that it is required to do when it runs a passenger coach attached to a freight train, or whether it is its duty to run one or more passenger coaches, separate and disconnected from freight cars, for the accommodation of passengers only, and not of passengers in connection with shippers.

When it is sought by mandamus to compel a railroad company to do any act in relation to the equipment and operation of its road, the courts, as a general rule, will not interfere with its management of its railway in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted. *People v. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. 857. Whether or not the people are here entitled to relief by mandamus against the appellee company must be determined by the answer to the inquiry whether the act sought to be enforced is specific, and whether the right to a performance of that act is clear and undoubted. There can be no doubt about the clear legal duty of the appellee to operate the railroad from Duquoin to Eldorado, leased by it from the Belleville & Eldorado Railroad Company. The act of February 12, 1855, to enable railroad companies to enter into operative contracts, and to borrow money, authorizes railroad companies organized under the laws of Illinois to make contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof. 2 Starr & C. Ann. St. p. 1921. In case of a lease by one railroad company to another, the lessee assumes the rights, franchises, and obligations contained in the charter of the lessor, and must conform to the requirements of said charter. 1 Rorer, R. R. p. 610; 19 Am. & Eng. Enc. Law, p. 897. "And, when one company leases its road to another, the lessee must, in operating it, be governed by the charter of the lessor." *City of Chicago v. Evans*, 24 Ill. 52. When, therefore, the appellee leased the road in question from the Belleville & Eldorado Railroad Company, it assumed the charter obligations of the latter company, and agreed to conform to its charter requirements. Section 1 of the act to incorporate the Belleville & Eldorado Railroad Company, in force February 22, 1861, declares that the company "shall possess all the powers * * * necessary to carry into effect the objects and purposes of this act, which are to lay out, build, construct, equip, complete and continue in operation a railroad from Belleville in St. Clair county by way of Benton in Franklin county, and Galatia and Raleigh and to Eldorado in Saline county; * * * and they may make connections with any railroad on the line, or at either terminus, on such terms as may be mutually agreed upon between the parties." Priv. Laws Ill. 1861,

p. 485. Section 4 of the act provides that "said company shall have power, when, in their discretion, they have a sufficient amount of capital stock subscribed, to proceed to lay out, locate, construct, build, equip, complete and operate their road." *Id.* p. 486. It will be noticed that the charter of the Belleville & Eldorado Railroad Company provided for the construction, equipment, and operation of a railroad "from Belleville in St. Clair county by way of Benton in Franklin county, and Galatia and Raleigh and to Eldorado in Saline county." As matter of fact, however, the Belleville & Eldorado Railroad Company never constructed a railroad from Belleville to Eldorado. It constructed a road about 50 miles long from Eldorado to Duquoin, in Perry county, the latter place being distant more than 56 miles from Belleville; and as soon as the road between Duquoin and Eldorado was finished, and on July 1, 1880, it leased the latter road to appellee. At that time appellee owned and operated a railroad running from East St. Louis, opposite St. Louis, to Belleville, a distance of a little more than 14 miles, and, prior to that time, had leased for a long term of years the railroad of the Belleville & Southern Illinois Railroad Company, running from Belleville to Duquoin, and was then operating the entire line from East St. Louis to Duquoin as one road, commonly known as the "Cairo Short Line." The lease made on July 1, 1880, by the Belleville & Eldorado Railroad Company to appellee, recites the ownership by appellee of the road from East St. Louis to Belleville, and its lease of the road from Belleville to Duquoin, and its operation of the two as one line, and also recites the completion of the road from Duquoin to Eldorado, "and that it is deemed and considered for the mutual interest of the parties hereto [the Belleville & Eldorado Railroad Company and appellee] that said roads [the three roads] should be placed under the same management, and operated as one line; and, to that end, the party of the second part [appellee] has agreed to lease from the party of the first part [the Belleville & Eldorado Railroad Company] its railroad from Duquoin to Eldorado," etc. It thus appears from the recitals of the lease of July 1, 1880, that the object of that lease was to so connect the road from Duquoin to Eldorado with the roads from East St. Louis to Belleville, and from Belleville to Duquoin, as that the three roads could be operated as one line. And so, although the Belleville & Eldorado Railroad Company did not construct a road from Belleville to Eldorado, as its charter provided, yet, by the connection thus made with the road leased by appellee which ran from Belleville to Duquoin, it became part of a continuous road from Belleville to Eldorado, the terminal points named in its charter.

As the Belleville & Eldorado Railroad Company was bound to equip and operate its road, the appellee, the lessee company, was also bound to equip and operate the leased road.

"Equipment," as applied to railroads, has been defined to be "the necessary adjuncts of a railway, as cars, locomotives." *Rubey v. Mining Co.*, 21 Mo. App. 159; 6 Am. & Eng. Enc. Law, p. 865, note 6. Section 12 of article 11 of the constitution says: "Railroads heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." 1 Starr & C. Ann. St. p. 163. It follows that the obligation to equip and operate and continue in operation the leased road involves the obligation to furnish and use cars and locomotives for the transportation of persons and property; that is to say, for the carriage of both passengers and freight. Section 22 of the act of this state in relation to fencing and operating railroads provides (2 Starr & C. Ann. St. p. 1940) that "every railroad corporation in the state shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging way passengers and freights." It is claimed, however, in behalf of appellee, that, while it is obliged to furnish cars for the carriage of passengers, yet it is not necessarily obliged to carry passengers upon a separate passenger train, and that it has the right to exercise its own discretion as to the manner of their transportation. The discretionary power of railroad companies in this respect is subject always to the condition that there is no statutory provision limiting and restricting such power, and that its exercise is not opposed to the terms of the charter. *People v. Chicago & A. R. Co.*, supra; *Mobile & O. R. Co. v. People*, 132 Ill. 559, 24 N. E. 648; 2 Mor. Priv. Corp. (2d Ed.) § 1119. This discretion is also subject to the condition that it must be exercised in good faith and with a due regard to the necessities and convenience of the public. *People v. Chicago & A. R. Co.*, supra.

Counsel for appellant rely upon articles 1 and 6 of the lease of July 1, 1880. Article 1 is as follows: "The party of the second part shall have, possess, and operate the said railroad from Duquoin to Eldorado, for and during the time hereinbefore mentioned, upon the terms and conditions herein set forth, at all times during the continuance of this lease, furnish all necessary rolling stock and equipment for the complete and perfect operation of the said demised railroad." And in the sixth article the defendant company covenants as follows: "The said party of the second part shall and will, during the term hereby granted, operate, maintain, and keep in good repair the railroad and premises hereby demised, and shall, from time to time, make all necessary additions and improve-

ments, and shall and will indemnify and save harmless the said party of the first part, its successors and assigns, from and against all costs, charges, and expenses, damages, and liabilities whatsoever, growing out of the maintaining, repairing, operating, or using of said road." Thus, by the terms of the agreement made for the connection of the road of the Belleville & Eldorado Railroad Company with the roads of appellee, appellee was to operate the three roads from East St. Louis to Eldorado as one road, and to "furnish all necessary rolling stock and equipment for the complete and perfect operation" of the road from Duquoin to Eldorado. But, independently of the provisions of the lease, which was a contract between the lessor and the lessee companies, the right of the people to insist upon the running of a separate passenger train is implied from the charter obligation to equip and operate the road. Inasmuch as a railroad company is bound to carry both passengers and freight, the obligation of the appellee required it to furnish all necessary rolling stock and equipment for the suitable and proper operation of the railroad as a carrier of passengers, no less than as a carrier of freight. It cannot be said that the carriage of passengers in a car attached to a freight train is a suitable and proper operation of a railroad, so far as the carriage of passengers is concerned. The transportation of passengers on a freight train, or on a mixed train, is subordinate to the transportation of freight,—a mere incident to the business of carrying freight. To furnish such cars as are necessary for the suitable and proper carriage of passengers involves the necessity of adopting that mode of carrying passengers which is best adapted to secure their safety and convenience. This can be accomplished better by operating a separate passenger train than by operating a mixed train; that is to say, the duty of furnishing all necessary rolling stock and equipment for the suitable and proper operation of a railroad carrying passengers involves and implies the duty of furnishing a train which shall be run for the purpose of transporting passengers only, and not freight and passengers together.

Railroad corporations, engaged in the transportation of passengers for hire or reward, are bound to the exercise of the highest degree of care and diligence in the conduct of their business. "Their duties and liabilities in this respect extend as well to the appliances used as to the manner of using them." 2 Rorer, R. R. pp. 948, 949. But there are necessary differences between passenger and freight trains. 2 Wood, R. R. p. 1288. These differences need not be here noticed, but are well understood and easily recognized. Railroad companies are not required to adopt, on freight or mixed trains, all the appliances which they use on passenger trains, but they are merely required to use the highest degree of care consistent with the practical operation

of such trains. *Oviatt v. Railroad Co.*, 43 Minn. 300, 45 N. W. 436. When passengers are carried on freight or mixed trains, the care required of the company, so far as such appliances are concerned, is such as the nature of the train permits. 2 Wood, R. R. p. 1288. And, when a passenger rides on a freight or mixed train, he takes upon himself the increased risk and lessened comfort which is incident thereto; nor has he the legal right to demand any other care in the management of such a train than is requisite for that kind of a train, or any other security than such a mode of conveyance affords. 2 Rorer, R. R. p. 947; *Railroad Co. v. Fay*, 16 Ill. 558; *Railroad Co. v. Hazzard*, 26 Ill. 373.

It follows that, when the only train operated by a railroad company is a mixed train, passengers, being unable to ride upon any other kind of train, are forced to incur risks and submit to inconveniences which do not exist on a separate passenger train. Hence the operation of a railroad with a mixed train only is inconsistent with the duty of furnishing such cars and locomotives as are necessary to the suitable and proper operation of the railroad when engaged in the passenger traffic. We are not unmindful of the fact that, within certain limits, a discretion may be exercised as to what rolling stock and equipment are necessary for the suitable and proper operation of a railroad carrying passengers. When the mode of carrying passengers is separate from the mode of carrying freight, the legitimate exercise of discretion may begin. What we hold is that there cannot be suitable and proper operation of the railroad as a carrier of passengers when the car in which it carries its passengers is part of a freight train, because freight trains are inferior to passenger trains, and travel in them is attended with less comfort, convenience, and safety than travel in passenger trains. The inferiority of a freight train to a passenger train as a mode of carrying passengers is so obvious that no man of ordinary understanding would regard the use of a freight train for the purpose of hauling a passenger car as a suitable and proper operation of a railroad in the matter of transporting passengers. We are therefore of the opinion that the act here sought to be enforced—the running of a passenger car or cars separately from freight cars—is sufficiently specific to be enforced by mandamus, and the right to compel its performance is clear and undoubted, unless such right is changed or modified by the decision of the question whether the expense of running such a passenger car or train would be justified by the amount of business over the particular line of road running from Duquoin to Eldorado.

Counsel for appellee insists that a railroad company is not bound to provide a separate passenger train when its business is not sufficient to warrant it in doing so. In *Ohio & M. Ry. Co. v. People*, 120 Ill. 200, 11 N. E. 347,

where the lower court awarded a mandamus upon a petition to compel a railroad company to repair and improve generally a certain portion of its road, and to increase the passenger trains thereon, we reversed the judgment, and held that the writ was improperly issued, upon the grounds that the business of the road did not pay the current expenses, that the defendant was unable to perform the acts sought to be enforced, and that the requirement made upon the defendant was too general, and involved too much discretion as to details; but it was there said that a railroad company could be compelled by mandamus to perform any specific duty which it owed to the public as owner or operator of its road, such as operating its road as a continuous line, and running daily trains; and the following language was used (page 206, 120 Ill., and page 350, 11 N. E.): "It is believed, however, no case can be found which, in the absence of a statutory requirement, has gone to the length of holding that a railway company may be compelled by mandamus to increase the number of trains on its road, or to run daily a particular number of trains over its road; and we are satisfied there is no common-law authority for making such an order. Of course, where the charter of the company expressly requires that not less than a given number of trains shall be run daily, the company may be compelled by mandamus to perform this, like any other specific duty enjoined by its charter, or by other statutory provision. * * * A company that runs a daily passenger train each way over a road which cannot, with proper management, be made to keep up repairs and pay running expenses, certainly does as much as the law requires of it, so far as passenger trains are concerned." There are several marked differences between the Ohio & M. Ry. Co. Case and the case at bar. Here the appellee does not run a daily passenger train each way over the road from Duquoin to Eldorado. Here the charter enjoins a duty which cannot be regarded as otherwise than specific, in view of the considerations already presented. Here it cannot be said that the appellee is financially unable to discharge the duty imposed upon it by the law, and which it owes to the public. The learned circuit judge before whom this case was tried below says, in his decision of it, that "defendant railroad company is solvent and in a prosperous condition, its net earnings last year being over \$600,000, a net income of about \$3,000 per mile of road." After a careful examination, we are satisfied that the statement thus made is sustained by the evidence. When, however, it is said that "the defendant railroad company" has a net yearly income of some \$600,000, the reference is to the defendant railroad company as made up of its branches or leased roads, as well as of the main stem. So far as appears from this record, the main road, owned by appellee, and operated under its own charter, is the short line running from St. Louis to Belleville; but, besides the leased roads running from Belle-

ville to Duquoin and from Duquoin to Eldorado, appellee also operated three other roads leased by it for long terms of years, to wit: The Belleville & Carondelet Railroad, a short road, about 17 miles long, running west from Belleville, to East Carondelet, on the Mississippi river; the St. Louis Southern Railroad, 46 miles long, which taps said leased road that runs from Belleville to Duquoin, at Pinckneyville, about 10 miles east or northeast from Duquoin, and runs from Pinckneyville to Marion; and the Chicago, St. Louis & Paducah Railroad, about 52 miles long, running from Marion to Brooklyn, on the Ohio river. The Belleville & Carondelet road was not leased by appellee until June 1, 1893, and therefore but little consideration can be given to it in making up the estimate of earnings and expenses as found in the record. The large net income referred to is based mainly upon the earnings of the other five roads already mentioned.

It is said that the earnings of the Belleville & Eldorado Railroad, running from Duquoin to Eldorado, when that road is taken by itself and considered separately, are not sufficient to justify the expense of running a separate passenger train from Duquoin to Eldorado. But why should this branch be considered separately and by itself? Appellee operates its main road and its leased branches as one system, and, as thus operated, the main road and its connections or branches yield the net yearly income of about \$600,000 already referred to. All the divisions, which are entirely within the boundaries of the state of Illinois, are mere feeders of the main road running from East St. Louis to Belleville, which is also in Illinois; and all the leased roads above mentioned, except that running to East Carondelet, are feeders of the road running from Belleville to Duquoin. The latter road and the Belleville & Eldorado Railroad are required, by the charter of the Belleville & Eldorado Railroad Company, and by the terms of its lease to or agreement with appellee, to be operated as one line; and such operation as one continuous line is merely the carrying out of the original intention of said charter, which provided for the operation of one continuous line from Belleville to Eldorado. It is no more proper to select the 50 miles from Duquoin to Eldorado of this compact network of roads, all operated under one system, and all contributing to the support of each other, as being deficient in the profits necessary to justify a reasonably safe and convenient operation of passenger traffic, than it would be to select any other portion of the line running from East St. Louis to Duquoin, and charge that portion with being deficient in such profits.

If it be admitted that a railroad company is not bound to run a separate passenger train when its business is not sufficient to warrant it in doing so, we are confronted at this point with the question whether this doctrine refers to the business done by the main road and

other roads leased by it and connected with it, all of which are operated, or are required to be operated, as one line, or whether it can be made to refer to a small part of the continuous line or system which happens to run through a section of country, where the freight is not so much, and the passengers are not so many, as is the case on some other part of the line. We are of the opinion that the whole business of the various parts operated as one line should be taken into consideration where the circumstances are such as are revealed by this record.

The duty required of a railroad company in the matter of transporting passengers is the duty to meet and supply the public wants. These wants are measured by the business actually done, or what, it could be clearly shown, could be done if increased facilities were granted. That there is here a public demand for passenger service is shown by the fact that a passenger car is attached to a freight train, and that passengers are invited to ride, and do ride, upon this mixed train. It is not contended that appellee is not abundantly able, out of the earnings realized by it from the system controlled by it, to pay the expense of running a passenger car separately from freight cars over the Belleville & Eldorado Railroad, and thereby save the traveling public from the increased danger and inconvenience of taking passage on a freight train. Nor does it appear that such expense could not be easily met by the earnings of the line running from East St. Louis to Eldorado, by way of Duquoin. The following language used by the supreme court of the United States, in *St. John v. Railway Co.*, 22 Wall. 136, is applicable here: "The business of the road was a unit. If it had been disintegrated, as proposed by complainant, we apprehend it would have been found that the co-relations of the main stem and the branches were such, and that the expenses and charges incident to the entire business and to those of the several parts were so interwoven and blended, that an accurate ascertainment of the net profits of the main line, and any of the auxiliaries taken separately from the rest, would have been impracticable. An ancillary road may be short and yield but little income; yet by reason of its reaching to coal fields, or from other local causes, its contributions to other roads of the series may be very large and profitable. Whether, in this case, the partial computation insisted upon could or could not have been made, the process was one upon which the company was neither bound nor had the right to enter." The reports made by appellee to the railroad and warehouse commissioners for the years 1891, 1892, and 1893 show that it has never kept a separate account of the actual earnings or expenditures of the road from Duquoin to Eldorado, but has treated the line from East St. Louis to Eldorado as one continuous line, making no difference in its accounts between the division from Du-

quoin to Eldorado and any other portion of the road.

In estimating the liabilities of the Belleville & Eldorado Railroad Company, certain indebtedness, which is in the nature of preferred stock, is charged up as a liability, in the accounts produced, to show that the obligations of appellee are such as to relieve it from the duty of operating the passenger train asked for. This is manifestly improper, because guaranteed or preferred stock is but a dividend, and not a debt, and the holder of a certificate for such stock can have no action against the company as for a debt, but his right is to a dividend. *Taft v. Railroad Co.*, 8 R. I. 310; *St. John v. Railway Co.*, supra; 1 Rorer, R. R. p. 167.

The object of incorporating railroad companies is to secure to the public increased facilities of transit from point to point, and an improved mode of carrying persons and property. Their public character is apparent from the fact that they are clothed with the power of taking private property through the exercise of the right of eminent domain. Prior to the adoption of the present constitution, municipal corporations were authorized to aid in the construction of railroads by subscribing for their stock. As matter of fact, Franklin county, through which the Belleville & Eldorado Railroad passes, subscribed \$150,000 to its construction, of which indebtedness \$37,000 is still outstanding. Railroads are creatures of the law, and are intrusted with the exercise of these sovereign powers to promote the public interest, and are therefore bound to conduct their affairs in furtherance of the public objects of their creation. The interest of stockholders in their profits is secondary, and, in the main, subsidiary to the interest of the public. It is in view of their public character that the courts are authorized to determine and enforce the public duties enjoined upon them. The duties which they owe to the state and the general public cannot be shirked or evaded. 1 Wood, R. R. p. 12; *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269. We do not think that there is here such insufficiency of business or profits as to present a valid defense to the application of the people. The writ of mandamus should issue as prayed for. The judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to enter a judgment awarding the writ in accordance with the prayer of the petition. Reversed and remanded.

PER CURIAM. Since the rehearing was granted in this case, we have given further consideration to the questions involved, and entertain the same views as those expressed in the foregoing opinion, and adhere to the same conclusion there announced. Said opinion is accordingly readopted, and it is ordered that the same be refiled, and that the judgment heretofore entered, reversing the judgment of the circuit court, and remanding the

cause to that court with directions to enter a judgment awarding the writ in accordance with the prayer of the petition, be re-entered as the judgment of this court.

(177 Ill. 876)

LAKE ERIE & W. R. CO. v. MORRISSEY.

(Supreme Court of Illinois. Dec. 21, 1898.)

MASTER AND SERVANT—INJURIES TO SERVANT—SWITCHING TRACKS—OBVIOUS DEFECT—ASSUMED RISK—TRIAL—DIRECTING VERDICT.

1. Where there is evidence fairly tending to sustain the issues on behalf of plaintiff, it is not error to refuse to instruct for defendant.

2. For the safety of switchmen, it is the duty of a railroad company to so ballast its tracks at all switching points that the ballast between the rails is on a level with the top of the ties, leaving no opening under the rails.

3. Where defendant's servant, while coupling cars, was injured by catching his foot under the rail, defendant was not relieved of liability by the fact that its system of ballast, which left an open space under the rail, was a system in general use by other roads, unless the system rendered the track reasonably safe for employes.

4. Plaintiff, who, on his first trip over the road, was injured by a defect in the track, while coupling cars at night, did not assume the risk, though the defect was open and visible, if it was unknown to him.

Appeal from appellate court, Third district.

Action by Michael M. Morrissey against the Lake Erie & Western Railroad Company. From a judgment for plaintiff, affirmed by the appellate court (75 Ill. App. 466), defendant appeals. Affirmed.

This was an action brought by Michael M. Morrissey in the circuit court of McLean county, against the Lake Erie & Western Railroad Company, to recover damages for a personal injury suffered by him while in the service of the company as a conductor of a freight train, and while attempting to couple, in the nighttime, two Empire Line cars, at East Lynn, a small village on the line of the road. The declaration contains but one count, and the material part is as follows: "And the plaintiff avers that it was the duty of the defendant to keep and maintain that portion of its main tracks in the vicinity of said side tracks as aforesaid, which it was necessary for the plaintiff to pass over in order to do switching and coupling and uncoupling of cars, in a safe and proper condition, so as not to expose the plaintiff or the servants of said company to any unnecessary danger or liability of accident; and it was then and there the duty of the defendant to have filled in the space between the ties, and underneath the same, of its said railroad track, with cinders or other substance, to fill the same up level with the top of the ties to the bottom of the rail of the said defendant's track that was laid on said ties, so that the plaintiff and the servants of the said company whose duty it was to couple and uncouple the cars and do switching, in standing and walking on said track in order to couple its said cars, the

plaintiff would not be exposed to unnecessary danger or liability to catch his foot underneath the rails of said ties, or stumble or trip over the same. And plaintiff avers that the said defendant, not regarding its duty in that behalf, carelessly and negligently permitted that portion of its main track in the vicinity of the said switch and side track, at the village of East Lynn, and in the switch yard there, to remain in unsafe repair and condition, and then and there carelessly and negligently permitted the same to be and remain out of repair, and negligently and carelessly permitted certain ties to remain above the surface of the ground, and negligently and carelessly permitted the north rail of the track of the said defendant's railroad on the main track, as aforesaid, to remain above the ground, and failed to have the ground between the ties and the bottom of the rail filled up so that plaintiff would not be exposed to danger or accident in attending to his duties as such conductor while in and about coupling and uncoupling cars passing along and over the said track, which he was obliged to do while attending to his duties in coupling and switching the said cars. And plaintiff avers that while standing and walking upon the said portion of the said main track, which he was obliged to do in order to make a coupling between the cars on the head end and the cars in the rear end of defendant's train, in the line of his employment pursuant to his duty, not knowing the defective condition of the said track as aforesaid, in the nighttime, was then and there exposed to unnecessary danger and liability to accident; and then and there, while so engaged in making a coupling between the defendant's cars, as aforesaid, standing and walking upon the said portion of the main track, using due care and caution for his own personal safety in the line of his duty, his left foot became and was caught and fastened underneath the rail of the said defendant's track, and against one of the ties of the same, and he then and there was unable to extricate the same; and the plaintiff was then and there thrown with great force and violence, and, by the momentum of the cars he was so engaged in coupling, necessarily and unavoidably fell to and upon the north rail of said main track; and divers wheels of one of the defendant's cars, which plaintiff was then and there engaged in coupling, then and there ran and passed over his left leg, whereby his left leg was crushed so that it became and was necessary to amputate the same above the knee," etc. The defendant demurred to the declaration, which demurrer was overruled, and a plea of general issue was filed. A trial was had before a jury, resulting in a judgment in favor of the plaintiff. The defendant appealed from the judgment of the circuit court to the appellate court for the Third district, where the judgment of the circuit court was affirmed; and appellant has appealed to this court, and asks for the

reversal of the judgment of the appellate court.

Tipton & Tipton and John B. Cockrum, for appellant. J. E. Pollock and FitzHenry & Pollock, for appellee.

CRAIG, J. (after stating the facts). Appellee, at the time of the injury, was 30 years of age, and was married. He had been rail-roading about 12 years, as brakeman, baggageman, and conductor. He had worked on the Chicago & Alton road about 11 years. He commenced work for appellant on the 6th of April, 1897, as conductor of a gravel train, and he afterwards had a run between Rankin and Peoria. East Lynn is a regular station for receiving passengers and freight on the division east of Rankin. The night of August 14, 1897, when the accident occurred, appellee was sent east as conductor, in charge of the appellant's freight train, on the Third, or Eastern, Division, and he had never made any trip prior to this one over this Eastern Division. He started from Tipton, Ind., with a train of 43 or 44 cars; and when the train reached East Lynn, about 100 miles west from Tipton, it was about 1:30 o'clock at night. It was necessary to do some switching at this station, by putting off some cars. Two cars were shoved on the north, or "business," track, as it was called. Then they pushed two more on the main track, and shoved a couple more on the business track. Under the rules of the road, it was appellee's duty to couple and uncouple cars. Four cars were cut off and run down on the main track, and appellee set the brakes on them, when he noticed the other cars coming down the main track, pushed by the engine; and he went over and set the coupling pin on the two cars then standing on the main track. It appears that the two Empire Line cars he was attempting to couple have a deck on the end, and on this are iron buffers. The drawbar is below, and they are more difficult to couple than ordinary cars, and require the entire attention of the person making the coupling. When appellee undertook to make the coupling, he had hold of the handhold with his right hand, and reached down and placed the link in the drawbar. He then raised up and reached over to shove the pin down when the cars came together. The cars pushed the two cars that had been standing about half a car length, and appellee was compelled to walk along with them, and it was while going that distance that he was injured. He made two or three steps, and the cars parted, and, when they parted, he tried to step out from the track. He stepped out with his right foot, but his left foot caught, the toe of his shoe going under the north rail of appellant's track; and he was unable to extricate it, and was thrown down by the cars he was attempting to couple, and fell upon the north rail of the main track, and his left leg was run over, and was so injured that it was necessary to

amputate it. It appears that it was appellee's first trip through East Lynn in charge of a train, and he knew nothing about the condition of the track, except what he might have learned in the short time he stood there coupling the cars.

One of the grounds urged by appellant for reversal is that the court, at the close of the evidence and before the argument of counsel, refused to instruct the jury to find the issues for the defendant. Where there is evidence fairly tending to sustain the issues in behalf of the plaintiff, the weight to be given to the evidence must be submitted to the jury, and it is the duty of the court to refuse an instruction like the one asked. An examination of the evidence as to whether there was evidence tending to support the cause of action as set out in plaintiff's declaration satisfies us that the trial court did not err in refusing to take the case from the jury.

Did the court err in giving instructions on the part of appellee? Only 4 instructions were asked or given on the part of appellee, while 36 were given on the part of appellant. Appellant argues that it is not liable if its road was ballasted as roadbeds are usually ballasted which have adopted the system appellant adopted. The question made by the declaration was not whether the "crown" or "box" system of ballasting a railroad was the best, but whether, under the declaration, the appellant "carelessly and negligently permitted its main track in the vicinity of the switch and side track to remain out of repair and in unsafe condition, and carelessly permitted certain ties to remain above the surface of the ground, and carelessly and negligently permitted the north track to remain above ground, and failed to have the ground between the ties and the bottom of the rail filled up so that plaintiff would not be exposed to danger of accident in attending to his duties as such conductor while in and about coupling and uncoupling cars passing upon and over said track," etc. The third instruction for the plaintiff told the jury that it was the duty of the defendant to have its track ballasted at the village of East Lynn, within switching limits, with cinders, gravel, or other substance up level with the ties, and level with the bottom of the rail, if ballasting to that extent was necessary to make such railroad track reasonably safe to employes in coupling cars; and that if they believed, from the evidence, that the track was not so ballasted at the point of the alleged injury, but, on the contrary, was ballasted so that the gravel was lower than the rail at said point, and that, by reason of such gravel being lower than the rail, the plaintiff, while exercising ordinary care for his own safety, caught his foot underneath the rail, and was unable to extricate the same, and in consequence thereof was injured, then in such case they should find for the plaintiff, and assess his damages at what they believed, from the evidence, he had sustained.

In Railroad Co. v. Sanders, 166 Ill. 270,

46 N. E. 799, which was a case involving the same principle in effect, this court said (page 278, 166 Ill., and page 802, 46 N. E.): "The law does not require a railroad company to furnish machinery, tracks, and switches for their employes which are of the best character or that are absolutely safe; but the duty imposed is to use reasonable and ordinary care and diligence in providing safe machinery, tracks, and switches for the use of those engaged in its service. *Railroad Co. v. Lonergan*, 118 Ill. 41, 7 N. E. 55. But this rule, as the evidence tends to show, was not observed. The evidence seems to show that, as a general rule, railroad companies at stations within switching limits have their tracks filled up to the level of the ties, so that brakemen may walk over the ties in coupling cars without stumbling or falling. If this precaution had been observed, it is apparent appellee's foot, in attempting to couple the cars in question, would not have been caught under the ties, and he would not have stepped into the cattle guard, and received the injury." What was said in the *Sanders Case* is applicable here. The evidence in this case shows that many of the railroads,—the Chicago & Alton, the Chicago & Northwestern, the Chicago, Burlington & Quincy, and several other roads,—on the main track, in the switch yards, and at terminals, grade up their tracks even with the top of the ties to make them safe for brakemen coupling and uncoupling cars. The law requires a railroad company to exercise reasonable and ordinary care and diligence in furnishing safe tracks for its employes. If it is necessary for the safety of its employes in the larger towns and terminals, it is equally necessary in the smaller places where switching is necessary to be done. Moreover, the principle announced in appellee's third instruction is recognized in appellant's seventeenth instruction, which reads as follows: "The court instructs the jury that the law does not require railroad companies to ballast their roads, within switch yards or elsewhere, with cinders or other substance to and on a level with the bottom of the rail, unless the same is necessary to make the same reasonably safe. If the jury believe, from the evidence, that the roadbed and track at the point in question was reasonably safe for the employes in the management of defendant's trains, the jury will find the defendant not guilty." This instruction, while it asserts that the law does not require railroad companies to ballast their roads, within switch yards or elsewhere, with cinders or other substance, to and on a level with the bottom of the rail, admits it is required if necessary to make the same reasonably safe, which is in harmony with appellee's third instruction. The law required the railroad company to furnish a reasonably safe track inside the switching limits, where switching was required to be done; and the plaintiff,

in the absence of knowledge to the contrary, as we said in the *Sanders Case*, supra, had the right to presume that the railroad company had discharged its duty in this regard. The evidence shows that the plaintiff was not familiar with the road at the place where the injury occurred, having never been over this Eastern Division prior to this trip, and that he did not know anything about the condition of the track before that; that it was in the nighttime, and he was not standing there more than a minute before the cars were pushed up by the engine to be coupled. These instructions, both on the part of appellant and appellee, are in substance to the same effect, and agree as to the law, and are in accord with the views of this court as expressed in *Railroad Co. v. Sanders*, supra, and therefore could not have misled the jury to the prejudice of appellant. *Railroad Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021.

Appellant insists the court erred in modifying appellant's twenty-sixth instruction, by inserting the words "and known to plaintiff." The instruction is as follows: "The court instructs the jury that if they believe, from the evidence, that the plaintiff was an employe of the defendant, and, as such, was conductor of and in charge of the train in question, and if you further believe, from the evidence, the defendant's roadbed and track at the point in question, as constructed, was reasonably safe for its employes engaged in the movement of the defendant's trains and the operation of its road, and that the condition of the road at the place of injury was open and visible and known to plaintiff, then the law is that the plaintiff assumed the ordinary risks incident to such employment, and that the injury incident to the coupling of cars was one of the risks assumed by the plaintiff under that employment, and for which he cannot recover." The modification was proper, under the evidence in the case. Appellee testified this was his first trip over this division; that he knew nothing about the condition of the track where the injury occurred; that it was in the nighttime, and he had no opportunity to see it except the moment he was attempting to couple the cars; and there is nothing in the record contradicting appellee. In *Railroad Co. v. Hines*, supra, this court said (page 169, 132 Ill., and page 1022, 23 N. E.): "The burden of furnishing safe machinery, appliances, surroundings, etc., is upon the master; and, while the master is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect. *Shear. & R. Neg.* (2d Ed.) § 95; *Bish. Noncont. Law*, § 678; *Porter v. Railroad Co.*, 60 Mo.

160. And, necessarily, much more is the servant entitled to assume that his master has furnished him with suitable and safe materials, machinery, and surroundings, and relieved him of investigation and inquiry in that regard, where, as in the present instance, the performance of his duties requires constancy of attention to other matters. A man whose attention is constantly directed to moving cars, and their coupling and uncoupling, cannot possibly give much attention to the ties, switch bars, etc., over which he may, from time to time, have to pass."

Appellant objects to the modification of its thirtieth and thirty-first instructions. They are as follows: (30) "The court instructs the jury that if they believe, from the evidence, that it is customary for well-managed railroad companies to ballast their tracks with gravel, making a crown in the center, sloping off each way toward the rails, leaving an inch or an inch and a half of space under the rails for water to escape, and that such method of ballasting is reasonably safe for employes, and if the jury believe, from the evidence, that the defendant's road at the point in question was so ballasted, then the jury will find the defendant not guilty." (31) "The court instructs the jury that if they believe, from the evidence, that defendant's road was ballasted with gravel at the point in question, crowned in the middle, sloping to the tracks, leaving an inch or an inch and a half of space under the rails for the water to escape, and that this mode of ballasting is in common use by well-managed railroads in this country, and that such ballasting is reasonably safe for employes, then the defendant is not liable." Under the allegation in the declaration, as before shown, the modification, "and that such method of ballasting is reasonably safe for employes," was proper, and not error. The modification of appellant's sixth, sixteenth, twentieth, twenty-first, twenty-third, and twenty-fourth instructions was proper for the same reason, and it is unnecessary to refer to each one separately. The instructions, taken together as a series, fully presented the law as applicable to the case under the pleadings; and, perceiving no serious error, the judgment of the appellate court will be affirmed. Judgment affirmed.

(177 Ill. 93)

SEWELL et al. v. CHICAGO TERMINAL TRANSFER R. CO.

(Supreme Court of Illinois. Dec. 21, 1898.)

EMINENT DOMAIN—DAMAGES—ADMISSIBILITY OF EVIDENCE.

If a witness resides near land sought to be condemned for a railroad, and owns land adjoining it, his opinion as to whether the railroad will benefit or injure the land is admissible on the question of the owner's damage.

Appeal from superior court, Cook county; John Barton Payne, Judge.

Petition by the Chicago Terminal Transfer Railroad Company to condemn certain land of Homer Sewell, Enos H. Nebeker, Mary E. Nebeker, and Michael Mayer. From a judgment fixing the damages, defendants appeal. Reversed.

F. M. Lowes, for appellants. Kemper K. Knapp, for appellee.

CARTER, C. J. This appeal was taken from a judgment condemning as a right of way, on appellee's petition, a strip of land 68 feet wide, running diagonally across a tract of land of appellants containing 119 acres, situated about one mile northwest of the limits of the city of Chicago. Appellants claim damages also to the land not taken. The jury found the value of the land taken was \$425 per acre, and also awarded appellants \$850 as damages to the land not taken. Numerous errors have been assigned, but they all relate to the alleged inadequacy of the amount allowed as damages to the land not taken. The whole tract was nearly square in form, and appellee's road would so divide it as to leave on one side, in the southeast corner, upwards of 19 acres, and on the other the rest of the tract not taken for the right of way. The value testified to by the witnesses ranged from \$300 to \$500 per acre, and according to the finding of the jury the whole tract was worth upwards of \$50,000. There was testimony tending to prove that the land was valuable for purposes of subdivision, and witnesses for appellants, held by the court qualified to testify, fixed the damages to the land not taken at \$8,000 and upwards. Appellee produced evidence tending to prove that the construction and operation of its road,—which was to be a belt line around Chicago, connecting with all roads entering that city, and to be used for transporting freight only,—would cause manufactories to be built along its line and upon or near appellants' land, and that the tract would be benefited more than it would be damaged. We shall not enter upon a discussion here of appellee's evidence on this branch of the case, except to say that it assumed a wide latitude, and approached near to a character that was purely speculative. But we are of the opinion that the court applied a rule too restrictive to appellants in the examination of their witnesses, and the judgment must be reversed for that reason.

After appellee had produced its evidence to prove that the land not taken would not be damaged, but would be benefited, by the road, appellee called, among others, George Good-year, who testified that he resided at Dunning, which, as we understand, is in the neighborhood of the property in question; that he was acquainted with the property, owned land adjoining it, and was acquainted with its value, and the values of land in that vicinity; that its value was \$500 per acre, and that he was "acquainted with the effects of

railroads on property." Appellants then asked the witness this question: "Can you state whether, in your opinion, the operation of this railroad through that land would be a benefit to it?" The court refused to permit the witness to answer, and appellants offered to prove by the witness that the railroad would greatly damage the land,—would depreciate its value to the extent of \$5,000. The court erred in refusing to allow the witness to answer the question and to be examined on the subject inquired about. The full extent of his information and the value and weight of his testimony could have been elicited on cross-examination. If none but experts could testify upon such subjects, the owners of land condemned for railroad purposes would have very inadequate protection of their property rights. Substantially the same question has been decided by the court in *Railway Co. v. Nix*, 137 Ill. 141, 27 N. E. 81, and other cases. In the *Nix* Case we said: "The question called for the opinion of the witnesses as to the value of the land not taken, as affected by the construction and operation of the railway. It is not the rule that on the question of the value of property no witnesses can be examined but those engaged in buying and selling the species of property under investigation, but, on the contrary, any person knowing the property and its value may testify, the weight to be given to their testimony being left to the jury. *White v. Hermann*, 51 Ill. 248; *Johnson v. Railway Co.*, 111 Ill. 418. The precise question arising here was decided in *Railroad Co. v. Henry*, 79 Ill. 290, where it was held that, on an assessment of damages under a proceeding by a railroad company to condemn a right of way through a farm, it is competent for witnesses who are acquainted with the farm, and familiar with the use and productions of such property, and its value, to give their opinions as to the extent of damage which the construction of the road over the same will occasion, leaving it to the jury to give their evidence such weight as, in their opinion, it may deserve." *Railroad Co. v. Dickinson*, 161 Ill. 22, 43 N. E. 706.

These views apply also to the witness Hatch, offered by appellants, and whose testimony was refused by the court. A witness for appellee (its general agent, who did not appear to know the value of the land in controversy, nor the uses to which it was adapted, or for which it was most valuable) had testified, against appellants' objection, from his knowledge of the effect of the road on lands at Harvey (a place 26 miles away) and from his experience in railroad business, and in view of his "experience in the location of industries and the serving of industries by the road," that the road would be a great benefit to that part of this tract not taken, and that he had found that there had been an increase in value of property wherever this road had run.

It is apparent from the record that appel-

lants were placed at a disadvantage by the rulings of the court, and from the amount of damages allowed for cutting into irregular fragments this valuable tract of land it cannot be said that appellants were not prejudiced. For the error mentioned the judgment is reversed, and the cause remanded. Reversed and remanded.

(177 Ill. 250)

DORSEY v. BRIGHAM et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

ELECTIONS—QUALIFICATIONS OF VOTERS—CITIZENSHIP—ALIEN WOMEN MARRIED TO CITIZENS—NATURALIZATION—EFFECT ON CHILDREN—RESIDENCE.

1. Rev. St. U. S. tit. 25, § 1994, providing that any woman married to a citizen, and who might herself be naturalized, shall be deemed a citizen, is a uniform rule, within Const. U. S. art. 1, § 8, conferring upon congress the power to establish a uniform rule of naturalization, even though congress has provided for the naturalization of aliens, both male and female, by a judicial proceeding.

2. Suffrage is not a right of citizenship, and citizenship is not essential to the right of suffrage.

3. Under Rev. St. U. S. tit. 25, § 1994, conferring citizenship upon alien women married to citizens, and *Starr & C. Ann. St. 1896*, p. 1741, c. 46, par. 342, and *Const. 1870*, art. 7, § 1, whereby women who are citizens are entitled to vote at school elections, a woman foreign born, married to a citizen and qualified by age and residence, is entitled to vote at school elections.

4. It will not be presumed that women illegally voted at a school election merely because it appears that they and their husbands were foreign born, and that the women were not naturalized, and it does not affirmatively appear that their husbands were ever naturalized.

5. It will not be presumed that election officers acted illegally, in the absence of proof at least sufficient to render the existence of the negative probable.

6. The admission of parol evidence to prove naturalization is harmless, where the presumption of qualification to vote is not overcome.

7. The naturalization of a father confers citizenship upon his minor son.

8. As Rev. St. c. 46, § 66, provides that a permanent abode is necessary to constitute a residence, within the meaning of the election law, a woman whose husband has moved from one county to another does not acquire a residence in the latter until she is physically present therein.

9. A woman whose husband is a resident of one school district cannot be considered as a resident of another merely because of her former residence there and her temporary presence in her father's family in the latter district.

10. A vote cast by an alien woman before her marriage to a citizen is illegal.

11. An alien who files his declaration of intention to become a citizen, but who has not received his certificate and is not entitled to receive the same, is not a citizen.

12. The naturalization of an alien father does not confer citizenship upon a child who has attained his majority.

Appeal from Livingston county court; C. M. Brickman, Judge.

Petition by John Dorsey to contest the election of O. H. Brigham and another as members of a board of education in Livingston county. From an order dismissing the petition, said Dorsey appeals. Reversed.

N. J. Pillsbury and Ray Blasdel, for appellant. C. C. & L. F. Strawn, for appellees.

BOGGS, J. The appellant and one S. S. Hitch were candidates upon one ticket for members of the board of education at an election held on the 17th day of April, 1897, in school district No. 1, township 26, range 8 E., in Livingston county, and the appellees were candidates for the same offices upon another ticket. Two members of the board were to be elected. The judges of the election declared said S. S. Hitch duly elected to one of the said offices, and that the other candidates had each received an equal number of votes. In some manner, not clearly disclosed and not necessary to be known, the judges cast off the tie, and declared appellee Brigham elected by lot. This is a petition filed by the appellant, Dorsey, to contest the election of said Brigham and to establish that appellant was duly elected.

By agreement of the parties, the ballots were counted in the presence and under the supervision of the court, and the result was that 260 ballots were found for the appellant and 258 each for Brigham and Stanford. On application of the appellees, verification of the count was allowed, the result being 260 votes for appellant, 259 for Stanford, and 257 for Brigham. The court overruled the motion of appellant for final judgment declaring him to be the duly-elected member of the board of education, and, on motion of the appellees, ordered the recount and verification to be stricken from the record, and appellant saved exceptions. The petition and the answer thereto challenged the legal right of a number of voters to cast ballots at said election. A hearing before the court resulted in an order that the petition of appellant be dismissed. This is an appeal to obtain a reversal of such order.

A number of ballots were cast at the election by women who were foreign born and had not been naturalized by judicial decree or the judgment of any court. Certain of these female voters were the wives, others the widows, of husbands who were also foreign born, but who were shown, by certificates of naturalization introduced in evidence, to have been admitted to citizenship by the order or judgment of competent courts. Others of such female voters were the wives, others the widows, of foreign-born husbands, who, it was insisted, had been naturalized by judicial proceeding, but in whose cases neither certificates of such naturalization nor other record proof thereof was produced; and still others of such female voters were the wives or widows of native-born husbands; and still others of such female voters claimed citizenship through the naturalization of their fathers or the fathers of their husbands. In some cases the female voters were married to their husbands in foreign countries, and in the cases of others the ceremony of marriage was celebrated in the United States.

But in all of the cases the relation of husband and wife existed and was maintained in the United States. Whether these women were lawfully entitled to vote at said election arises first for decision.

Paragraph 342, c. 46, p. 1741, Starr & C. Ann. St. 1896, is as follows: "Any woman of the age of twenty-one years and upwards belonging to either of the classes mentioned in article 7 of the constitution of the state of Illinois, who shall have resided in this state one year, in the county ninety days and in the election district thirty days preceding any election held for the purpose of choosing any officer of schools under the general or special school laws of this state, shall be entitled to vote at such election in the school district of which she shall at the time have been for thirty days a resident: provided, any woman so desirous of voting at any such election shall have been registered in the same manner as is provided for the registration of male voters."

One of the classes of persons, the members whereof section 1 of said article 7 of the constitution of 1870 clothed with the right to exercise the elective franchise, comprised "every male citizen of the United States above the age of twenty-one years." In *People v. English*, 139 Ill. 622, 29 N. E. 678, and again in *Plummer v. Yost*, 144 Ill. 68, 33 N. E. 191, we held that the true construction to be put upon the statute above set out, authorizing women to vote at any elections where "any officer of schools" is to be chosen, is that the qualification of sex prescribed in said section 1 of article 7 of the constitution was not intended to be adopted, and in the latter of these cases we held a woman could not be denied the right to vote at such school elections on the ground that the constitutional qualification of sex was lacking. The qualification of citizenship is, however, necessary under the said section and article of the constitution. If these women possessed the qualifications of age and residence required by the said paragraph 342 of chapter 46, authorizing women to vote at school elections, and were citizens of the United States, they were lawful voters at the school election in question.

Section 1904, tit. 25, entitled "Citizenship," of the Revised Statutes of the United States, is as follows: "Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." Under the naturalization act in force when the foregoing section was enacted, any "free white person" not an alien enemy might lawfully be naturalized. The term, "who might herself be lawfully naturalized," incorporated in said section 1904 above recited, therefore only limited the application of the law to free white women not alien enemies. *Kelly v. Owen*, 7 Wall. 496. An alien enemy is one who owes allegiance to an adverse belligerent nation. None of these women were of

such nationality, but all were friendly aliens. In *Minor v. Happerset*, 21 Wall. 162, it was declared that "from the commencement of the legislation upon this subject [naturalization] alien free white women and alien minors could be made citizens by naturalization."

The proper construction of said section 1994 of the Revised Statutes of the United States is that every woman, who might be lawfully naturalized by a judicial tribunal, who lives in a state of marriage with a husband who is a citizen, becomes herself a citizen by force of the existence of the marriage relation. In *Kelly v. Owen*, supra, it was said: "Whenever a woman who under previous acts might be naturalized is in a state of marriage to a citizen, whether his citizenship existed prior to the act or subsequently, or before or after the marriage, she becomes by that fact a citizen also." It therefore would seem clear that each woman voter in question who sustained the relation of wife to a citizen of the United States became also a citizen of the United States.

Counsel for appellees, however, urge that the act of congress conferring citizenship upon a foreign-born woman because of the existence of the marriage relation with a citizen is in contravention of section 8 of article 1 of the constitution of the United States. This section confers upon congress the power to enact legislation whereby aliens may become citizens, and is as follows: Congress shall have power "to establish a uniform rule of naturalization and uniform laws upon the subject of bankruptcies throughout the United States." The argument of counsel is that the lawmaking power of the United States, having adopted a rule or statute providing for the naturalization of aliens, both male and female, by proceedings in a judicial tribunal, could not, without violating the rule of uniformity prescribed by the constitution, enact another statute by the terms whereof certain alien women might become clothed with the rights of citizenship without complying with the provisions prescribed by the statute authorizing naturalization through the medium of the courts. The purpose of granting to the congress of the United States the power of enacting a law or rule for the naturalization of aliens was to deprive the several states of that power, and the reason was that, if the power remained with the different states, the terms and conditions of citizenship would depend upon the will and pleasure of each of the states, and might be widely and materially different. The requirement of the constitution that congress should enact a uniform rule of naturalization is properly construed to mean that the mode or manner of naturalization prescribed by congress should have uniform operation in all the states. Aside from this, the enactment in question has uniform operation as to all alien women who sustain the relation of wife to a citizen, and its benefits and privileges extend equally and uniformly to all such

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alien women within the relation and circumstances for which it provides. It operates upon a general class of persons, and extends to all of that class who are in the same situation or circumstances. It is therefore a uniform rule or enactment, even if a proper construction of the said fourth paragraph of section 8 of article 1 of the constitution of the United States requires that character of uniformity contended for by appellees. *Lippman v. People*, 175 Ill. 101, 51 N. E. 872.

Counsel urge the object of the act conferring citizenship upon a married woman, the wife of a citizen, is to confer civil rights only, not political rights. This position is correct. Naturalization by judicial proceeding, or otherwise, under the provisions of any of the acts of congress, whether the person naturalized be male or female, confers only civil rights, i. e. liberty of person and conscience, right to acquire and hold and transfer property, to sue and defend, security in person, estate, and reputation, and other civil rights. Naturalization creates the person naturalized a citizen, whether male or female. But suffrage is not a right belonging to citizenship. *Van Valkenberg v. Brown*, 43 Cal. 50. Citizens and legal voters are not synonymous. Minors and females may be citizens, and yet not legal voters. *People v. Supervisors of Oldtown*, 88 Ill. 202. "A citizen," in the popular and appropriate sense of the term, is one who by birth, naturalization, or otherwise is a member of an independent political society called a 'state,' 'kingdom,' or 'empire,' and as such is subject to its laws, and entitled to its protection in all his rights incident to that relation; and the right to vote, as we have just seen, is not necessarily incident to or co-extensive with the right of citizenship." *Blanck v. Pausch*, 113 Ill. 60.

As we have seen, a woman may become naturalized by order or judgment of a court under the federal statute providing for naturalization in that manner, and thereby become a citizen, and yet such woman would not have had the right to vote at any election in this state prior to the enactment of the statute under consideration relating to the election of school officers. On the other hand, persons not citizens of the United States may lawfully vote in this state. Section 1 of article 7 of the constitution of 1870 endows every person with the right to vote who had resided in the state one year, in the county ninety days, and in the election district thirty days next preceding the election, and who was an elector in the state on the 1st day of April, 1848. The constitution of 1848 vested every white male citizen above the age of twenty-one years who had resided in the state one year, and every white male inhabitant of the age aforesaid who was a resident of the state at the time of the adoption of the constitution, with the right of suffrage. In *Spragins v. Houghton*, 2 Scam. 377, an "inhabitant" was defined to be one

who lives in a place, and has there a fixed and legal settlement; and that to determine whether one who was an inhabitant of Illinois was entitled to vote under the constitution of 1818, which conferred the elective franchise on all white male inhabitants above the age of twenty-one years who had resided in the state for six months, it was wholly unnecessary to inquire whether he was a "citizen" of the United States, but only necessary to know he was an "inhabitant" of the state, within the meaning of the word as given by the court. Therefore, under our present constitution, any white male inhabitant of the state who was an inhabitant of the state in 1848, and twenty-one years of age at that time, may lawfully vote in this state, though he be foreign born and never naturalized. A foreign-born woman admitted to citizenship by a judicial proceeding under the naturalization statutes of the United States, or under the statutes of the United States giving citizenship to the wife of a citizen of the United States, becomes thereby endowed with the civil rights of a citizen of the United States; but such naturalization or condition of citizenship would have no effect, within itself, to constitute such woman a voter in the state, in the absence of a statute of this state conferring such political right.

We need not enter upon the discussion of the power of the federal government to declare the qualifications of voters. It has never attempted to exercise such power, and, aside from the limitation created by the fifteenth amendment to the federal constitution, that a citizen of the United States shall not be denied the right of suffrage on account of race, color, or previous condition of servitude, the right to vote depends wholly upon the enactments of the lawmaking bodies of the respective states. In our state the statute under consideration, and the section of the constitution of 1870 to which it refers, operating together, have conferred upon all women who are citizens of the United States, and have the specified qualifications as to age and residence, the right to exercise the elective franchise at elections for school officers. Said women become, by force of the statute, the constitution, and their condition of citizenship, voters at elections for school officers in this state whether the condition of citizenship resulted from an order or judgment of a court in a naturalization proceeding, or from the statute of the United States creating the condition of citizenship from the existence of the marriage relation between the woman and one who was a citizen by birth, or, being foreign born, became a citizen by judicial order or by operation of law. Citizenship may also be conferred upon foreign-born persons, male or female, through the naturalization of the father during the minority of such persons. Rev. St. U. S. tit. 30, § 2172. In this case, some of the female voters whose ballots were challenged were

of this class, and others sustained the relation of wife to husbands who were of this same class. These women thus became citizens of the United States, and, if they had the requisite qualifications of age and residence, became lawfully entitled to vote by the force and effect of the said enactment of this state conferring upon women the right to exercise the elective franchise for school officers. In the cases of the greater number of the women voters who claimed to be citizens by virtue of the citizenship of their husbands, the husbands were aliens, and the naturalization of such husbands was established by record evidence.

Mrs. M. Blackburn, Mrs. Fredricka Comberink, Mrs. Mary O'Hara, Mrs. Ellen Moran, and Mrs. Margaret Beckman voted for appellant. They were all foreign born, and claimed citizenship by virtue of the alleged citizenship of their respective husbands. Their husbands, respectively, were aliens, and no record proof of the naturalization of any of them was produced. The appellees challenged the legality of the ballots cast by these women. It was, however, stipulated by the parties that the husband of Mrs. Blackburn was a citizen of the United States. In view of what has been said, she must be regarded as a legal voter. The appellees produced oral evidence tending to show, and it may be conceded did establish, that Mrs. Comberink, Mrs. O'Hara, Mrs. Moran, and Mrs. Beckman were all born in foreign countries, and that they had not been naturalized by the judgment of any court awarding them certificates of naturalization. It then appeared that each of these women, and the husband of each of them, was of foreign birth, and there was no record evidence or certificates of naturalization produced showing either of them, or the husband of either, had been naturalized. Appellees contend that, in this state of the proof, each of these women must be regarded as incompetent to vote. We do not assent to this. The allegation that these women cast illegal votes was made by the appellees. It involved a charge of crime, one voting without qualification being liable to punishment criminally. The presumption would be they had voted legally, and had not committed a crime.

The appellees' challenges also questioned the correctness of the official acts of the election officers, which are *prima facie* correct. It was incumbent upon the appellees to overcome this presumption of innocence and of proper official action by proof. Full and conclusive proof is not, however, required where a party has the burden of proving a negative, but it is necessary that the proof should be at least sufficient to render the existence of the negative probable in order to overcome the presumption. *City of Beardstown v. City of Virginia*, 76 Ill. 34; *Behrensmeyer v. Kreltz*, 135 Ill. 591, 26 N. E. 704. The presumption is these voters had become in some legal way naturalized citizens. This naturalization

may have come through the naturalization of their husbands. Proof that they were aliens, and had not themselves become naturalized, would not overcome the presumption. The mere absence of proof as to whether or not their husbands had been naturalized was equally ineffectual to overcome the presumption. Some proof tending to show their husbands had not been naturalized, or at least sufficient to create a probability that the husbands had not been naturalized, was essential to overcome the presumption of innocence and of the regularity of the acts of the judges of the election, and warrant the court in declaring the votes had been cast in violation of law. Behrensmeyer v. Kreitz, *supra*.

Parol evidence was heard tending to show that the respective husbands of these voters had been naturalized. Appellees strenuously insist that this parol evidence was inadmissible. We need not determine that contention, for, if such evidence was disregarded as inadmissible, the record would but remain barren of proof tending to show, or make it most probable, that such husbands had not been naturalized; and, such being the condition of the record, we must hold appellees' assertion that these voters were not legal voters has not been maintained.

Annie Broadhead, alien born, voted for appellant. Her husband, John, was also an alien. He came to the United States when four years old, with his mother, who came to join his father, George Broadhead, who had preceded them. A certificate was introduced showing the naturalization of the father, George Broadhead, on the 17th day of September, 1868, at which time the son, John, was a minor of the age of 17 years. The naturalization of the father conferred the rights of citizenship upon the son, John, and Annie, the voter, became a citizen by virtue of her marriage with John.

Nicholas Pool and his wife, Crescinda, voted for the appellant. Both were foreign born. Nicholas Pool was brought to the United States by his father, Joseph Pool, when about three years old. He testified his father voted while he was a minor, and he voted because he understood and believed his father became a legal voter during his minority. There was no record proof that the father had ever been naturalized, nor any proof tending to render it most probable that the father had not been naturalized. In this state of the evidence, the presumption that Nicholas Pool was a legal voter must prevail. The relation of husband and wife existing between Nicholas and Crescinda conferred upon Crescinda the right of citizenship, and by force of the statute she became a legal voter.

Mrs. Annie Miller, who voted for both the appellees, had not resided in the county 90 days preceding the election. She was not a legal voter, and appellees so conceded the truth to be.

Mrs. Lizzie Rosendahl voted for both the

appellees. She was but 19 years old. Her vote is illegal, and so conceded by the appellees.

Mrs. A. Greenstone voted for both the appellees. The election occurred on the 17th day of April, 1897. The statute authorizing women to vote at the election grants the right to any woman who shall have resided in the county 90 days next preceding the election. To answer the qualification of residence, the voter at this election must have been a resident of Livingston county on the 18th day of January, 1897. Mr. Greenstone, husband of the voter, together with the voter, his wife, resided in Chicago, Cook county, until about the 11th day of January, 1897. He then went to Livingston county, and commenced work there as a tailor. His wife did not accompany him, but remained at the Chicago home, with their family, until the 12th day of February, 1897, when she came to Chatsworth and joined her husband. She had never been in Livingston county before the said 12th day of February, which was but 65 days prior to the day of election, the day of the election included. By operation of law, the domicile of the husband is, for many purposes, the domicile of the wife. The marriage relation implies a common home for the husband and wife. In view of the fact that married persons may not be able to agree as to a place of residence, authority must reside in one of them to determine where the home shall be. The law casts upon the husband the burden of supporting the family, and for that reason empowers him to determine where the family shall abide. The domicile of the husband therefore fixes the domicile of the wife for purposes connected with the marriage relation and the duties of both husband and wife. The domicile of Mrs. Greenstone for such purposes and duties was in Livingston county at once after her husband determined to make the home of himself and family in that county. The statutory qualification is that the voter shall have resided in the county 90 days next preceding the election. The meaning to be given the word "reside" is declared by the statute (Rev. St. c. 46, § 66) as follows: "A permanent abode is necessary to constitute a residence, within the meaning of the preceding section." An abode is the place where a person dwells. And. Law Dict. tit. "Abode." Residence and domicile may, in some cases, have the same meaning, but frequently they have other and inconsistent meanings, and import entirely different ideas. And. Law Dict. p. 376; 21 Am. & Eng. Enc. Law, pp. 124, 125. "A resident of a place is one whose place of abode is there, and who has no present intention of removing therefrom." Id. p. 122. A married woman, by operation of law, may have a domicile in a place where she has never been, but it could not, with any correctness of speech, be said she was a resident of that place. On the day of the beginning of the period of 90 days preceding the elec-

tion in question, Mrs. Greenstone was not in the county of Livingston, and had never been in that county on any day prior thereto, nor was she ever in the county until some 20 days after the beginning of the period of 90 days next preceding the election. She had her domicile in the county with her husband when he fixed that as the home of himself and family, but she did not become a resident until she was actually physically within the limits of the county. Her vote must be excluded from the count.

Mrs. Emma J. Bennett cast a ballot for the appellees. Prior to her marriage she resided in the school district as a member of her father's family. Mr. Bennett, who became her husband, also resided in the school district at that time; but before the marriage he moved to Pontiac, in the same county, but not in the school district; and still later changed his place of residence from Pontiac to Chicago, where he resided at the time of the marriage. The marriage occurred at the home of the bride's father, in the school district, and Mrs. Bennett accompanied her husband to his home in Chicago. She visited her father's family, sometimes accompanied by her husband, but her husband did not again become a resident of the school district. Prior to the beginning of the year in which the election was held the husband located in Forrest, in Livingston county, but not in the school district, and engaged in business there as a photographer. Mrs. Bennett assisted her husband in the photograph gallery, and was with him in Forrest a portion of the time and at times with her father's family. Mrs. Bennett's residence was at one time in the school district, but she lost her residence there and gained a residence at another place. Her presence in her father's family after this was not with the intention to remain and make her permanent abode there, and she was not a resident, within the meaning of our election laws.

Mrs. Martha Crone, née Wendtlandt, voted for the appellees. She was born in Germany, and her father still resides in that empire. She had not been naturalized by judicial judgment or decree. She had not married when she cast her ballot at the election in question. On the 16th day of September following the election she intermarried with Christian Crone. If her husband was a citizen the marriage relation constituted her a citizen from thenceforth, but would have no retrospective effect. She was not a citizen when she voted, and for that reason was not a legal voter.

Mrs. Tenie Satoff voted for the appellees. She was a native of Germany, was married there, and her husband died there. She came to this country an adult, has not remarried, and was not naturalized by proceedings in the courts. She was an alien, and hence not a legal voter.

Mrs. Mary Rosenbaum voted for appellees. She was a native of Germany, as was also her husband. They were married there, and removed to the United States. She had not been

naturalized by order of any court, nor had her husband. He filed his declaration of intention to become a citizen prior to the school election, but had not received his certificate of naturalization, nor had he become entitled to receive such certificate, for the reason he had not been in the United States five years at the time of the election. He was not a citizen. McCrary, Elect. § 71. The existence of the marriage relation did not constitute the voter a citizen, her husband not being a citizen. Her ballot must be rejected.

The conclusion hereinbefore announced, that the wife of a citizen, in virtue of the marriage relation, becomes also a citizen, and under the statute with relation to the election to school officers in question became a legal voter, disposes of all ballots challenged by the appellees except Lottie Hitch and Tillie Bock, whose ballots were for the appellant. Lottie Hitch was born in England, is unmarried, and was never naturalized by any proceedings in court. Her father was naturalized by judicial proceedings, but not until after Lottie had reached her majority. Her vote must be rejected. Tillie Bock had not reached the age of 21 years when her vote was cast. She was challenged upon other grounds, but we need not consider or decide the question of pleadings argued by the parties in this respect, as the rejection of her vote will not change the result which we think should have been declared by the trial court.

It follows from what has been said that the ballots cast for appellees by Mrs. Annie Miller, Mrs. Lizzie Rosendahl, Mrs. A. Greenstone, Mrs. Emma J. Bennett, Mrs. Martha Crone, née Wendtlandt, Mrs. Tenie Satoff, and Mrs. Mary Rosenbaum, seven in number, must be rejected from the count, and that the ballots cast by Lottie Hitch and Tillie Bock for the appellant must also be rejected.

We need not determine whether the count as made by the judges of the election or that had under the direction and supervision of the court should be accepted, for the reason that, upon the basis of the count least favorable to him, a majority of at least five ballots were cast for the appellant over either of the appellees.

The order and judgment appealed from is reversed, and the cause is remanded, with directions to the county court to enter an order and judgment declaring the appellant to have been elected to the office of member of the board of education within and for the said district. Reversed and remanded.

(177 Ill. 64)

**JOHNSON et al. v. PEOPLE ex rel.
KOCHERSPERGER.**

(Supreme Court of Illinois. Dec. 21, 1898.)

APPEAL—OBJECTIONS NOT RAISED BELOW—SPECIAL
ASSESSMENT—OBJECTIONS WAIVED—RECAST-
ING ASSESSMENT—JUDGMENT BY DEFAULT.

1. An objection not within those urged below as they appear in the abstract cannot be considered on appeal.

2. Where property not assessed was benefited

by a municipal improvement, an owner of assessed property who suffered judgment to be entered against him for such assessment by default cannot object that the court, finding that other property was in fact benefited, failed to recast the assessment, and include such property, in a proceeding to subject his property to the payment of the judgment.

3. Where property not assessed was benefited by a municipal improvement, the court, on sustaining objections by assessed owners on that ground, has power to recast the assessment so as to include the omitted property.

4. Where, after judgment has been entered by default against the owner of property for a municipal assessment, a valid ground for setting it aside arises, application therefor should be made in a direct proceeding; it cannot be urged in a collateral proceeding to subject the property to the payment of the judgment.

Appeal from Cook county court; O. N. Carter, Judge.

Action by the people, on the relation of D. H. Kochersperger, against W. H. Johnson and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Taylor & Martin, for appellants. Charles S. Thornton, Corp. Counsel, and John A. May, Asst. Corp. Counsel, for appellee.

CARTWRIGHT, J. Upon application of the county collector for judgment against property delinquent for a special assessment levied by the city of Chicago, appellants appeared and filed objections, which, upon a hearing, were overruled, and judgment was entered. Counsel for appellants, in their argument, say that the objection urged at the hearing was that upon the original application for confirmation of the special assessment the county court dismissed the petition as to certain property included in the assessment roll, assessed to the amount of one-fourth of the entire assessment and benefited to that amount, and that such dismissal was upon the ground that other property benefited was not included in the assessment. The abstract does not show any objection of that character, but recites the objections as follows: "(1) Ordinance invalid and void, and no jurisdiction of property owners. (2) Proceedings contrary to statute, and void. (3-5) Municipality without power or jurisdiction to make improvement; ordinance, assessment roll, and all proceedings are void. (6, 7) Assessment without authority of law," etc.

The objection now argued does not go to the power of the city to make the improvement, the validity of the ordinance, or the jurisdiction of the county court in the original proceeding. It is admitted that the ordinance and assessment were by authority of law, and that the county court had jurisdiction to enter the judgment of confirmation, and all that is claimed is that there was an erroneous exercise of such jurisdiction, resulting in injury to appellants. In this proceeding appellants offered to show that other property not included in the assessment roll was benefited, and the judgment of the county court, in sustaining an objection of that char-

acter, is not claimed to have been even erroneous; but the argument is that, upon sustaining such objection, the court should have recast the roll, and included the omitted property benefited by the assessment, and that a failure to do so resulted in injury to them by making the burden of the assessment unfair and unequal. As this argument is not within the terms of the objections filed as they appear in the abstract, we are not required to consider the question. Such an objection, however, could not be entertained in this proceeding in any event. As already stated, no question is raised as to the jurisdiction of the county court, and its power to enter a binding judgment for the confirmation of the assessment. The record shows that, on the return of the assessment, objections were filed by some of the owners of property assessed, but appellants did not join in such objections. They were satisfied with the equation of burdens and benefits resulting from the improvement as made and returned by the commissioners, and they were defaulted, and judgment entered against their property. That judgment so entered was valid and binding until set aside or reversed in some direct proceeding. Appellants in this case offered to prove that John M. Oliver and Murry Nelson had filed an objection that other property benefited by the assessment was not included in the roll, and that this objection was sustained, and the petition dismissed as to said objectors. The court refused to admit such proof, and in this there was no error. The judgment against appellants did not become void by reason of such a dismissal as to two other property owners, and appellants could have no relief against it in the collateral proceeding for judgment against their property. The same objection which had been filed by Oliver and Nelson was open to appellants, but they did not choose to make it, and suffered a judgment against their property to be entered upon the assessment roll as it was returned. The court had power, upon sustaining the objection of Oliver and Nelson, by virtue of its supervisory jurisdiction over the action of the commissioners, to have recast the assessment so as to include the omitted property which was benefited, and enforce the rule of equality between all parties assessed. Hurd's Rev. St. c. 24, art. 9, § 33; Jones v. Town of Lake View, 151 Ill. 663, 38 N. E. 688. Appellants offered to prove that the property of Oliver and Nelson was benefited; but if the court erred in releasing their property because other benefited property was not included, instead of releasing all, and by such action an injury was wrought to the remaining property, against which judgment had been entered by default, the proper place to raise the question and obtain relief was in the county court. If a valid reason arose, after the default and judgment were entered, for setting them aside on account of a change in the conditions upon which they were entered, application should have been made to the

county court, which had full jurisdiction in the premises. Where a similar question arose in *Walker v. People*, 170 Ill. 410, 48 N. E. 1010, it was held that the remedy was by application to the county court, or by appeal from or writ of error to that court in the original proceeding. The court had no power, in this collateral proceeding, to review or annul the judgment of confirmation for a mere error, if it were such, in failing to set aside or recast the assessment roll. The judgment will be affirmed. Judgment affirmed.

(177 Ill. 219)

CANALE v. PEOPLE.

(Supreme Court of Illinois. Dec. 21, 1898.)

FOREIGN MARRIAGE—PRESUMPTIONS—VALIDITY—FOREIGN STATUTES—CONSTRUCTION—VOIDABLE MARRIAGE—DISAFFIRMANCE.

1. Where there is evidence on trial for bigamy that a marriage was performed in a foreign country, the presumption that the necessary preliminary steps were taken will not prevail if there is proof as to what those steps are, and that compliance with them is essential, and there is no evidence of such compliance.

2. A marriage celebrated in a foreign country between citizens of that country is invalid everywhere if invalid where performed.

3. The evidence of a witness learned in the law of a foreign country will be received as to the construction of foreign statutes.

4. A voidable marriage between persons under age may be disaffirmed after arriving at the age of consent by ceasing to cohabit and marrying again.

Error to criminal court, Cook county; William G. Ewing, Judge.

Carmelo Canale was convicted of bigamy, and brings error. Reversed.

Carmelo Canale, the plaintiff in error, was convicted in the criminal court of Cook county on an indictment charging him with bigamy. Three witnesses testified that in 1891, in Altavilla, Italy, they were present at the marriage of plaintiff in error and Rosalie LoCasco; that the marriage took place in a church, and was solemnized by a minister of religion according to the rites of the church, and in the presence of a large number of friends and acquaintances. The sister of Rosalie testified that after the ceremony plaintiff in error and Rosalie went to the home of his parents, and they there lived together for three months, and that he then abandoned his wife, and that she never saw him again until she came to Chicago, where she found him living with another woman as his wife. She further testified that plaintiff in error was 15 and her sister 18 years old when they were married, and that no child had been born of the marriage. It was also shown by the people that in September, 1897, plaintiff in error was married to Gluseppa Rimagro by a justice of the peace in Chicago. Plaintiff in error testified in his own behalf, and denied ever participating in any marriage ceremony with the said Rosalie at any place or before any person authorized by law to perform a marriage ceremony, and denied that he had ever lived or

cohabited with her as his wife. Count A. L. Rozwadowski, the Italian consul at Chicago, testified that he was a graduate of the university at Naples, and was a member of the bar of the city of Turin, Italy, and had practiced before the courts in said city two years; that he was president of the Italian consular court at Alexandria, Egypt, for four years; that he was familiar with the Civil Code of Italy, and that the following citations given in evidence are correct translations from the Code, a copy of which he then had before him: Page 17, § 55: "No male person can enter into marriage until eighteen years of age nor any female person until fifteen." Page 18, § 63: "No son under twenty-five nor daughter under twenty-one can marry without consent of father and mother." Page 18, § 71: "Notice of proposed marriage must be posted by the official of public acts twice in succession on door of town hall in town where either party resides." Page 18, § 74: "No publication of marriage can be posted unless consent of father and mother is had." Page 20, § 84: "Where difference of opinion between father and mother, father's opinion shall prevail." Page 25, § 93: "The marriage must be celebrated in the town hall in public manner, before the official of the civil acts of the town in which one of the contracting parties have their domicile or residence." He testified further that these sections had been in force without amendment since 1865, and were still in force; that by the laws of Italy a marriage ceremony, to be valid, must be celebrated in accordance with the above provisions, and a compliance therewith is absolutely essential to constitute marriage; that there is no other legal mode in which a marriage can be celebrated, and an intended marriage contracted otherwise than as prescribed cannot be validated or recognized as lawful by subsequent ratification or declarations or the cohabitation of parties, and any marriage ceremony intended or pretended, and not celebrated in strict compliance with the foregoing provisions, is deemed in law wholly null and void, and not merely voidable; that where an intended marriage is contracted or celebrated otherwise than in accordance with the foregoing provisions, no act or acts of parties participating can make the same valid and of force in Italy. The father of Gluseppa Rimagro testified that he knew the plaintiff in error and said Rosalie in Italy; that he knew no such marriage ceremony as described by the witnesses ever took place; and that children born as the issue of people who have participated in such ceremony were not legitimate and had no right to inherit. What, if any, knowledge this witness had of the laws of Italy does not appear from the record. Plaintiff in error, at the close of the evidence for the people, moved the court for an instruction to find him not guilty, which was refused, and he renewed his motion at the close of all the evidence, and it was again refused. A motion for a new trial was also overruled, and judgment entered on the verdict.

David Jetzinger, for plaintiff in error. Edward C. Akin, Atty. Gen. (Charles S. Deneen, State's Atty., and Willard M. McEwen, Asst. State's Atty., of counsel), for the People.

CARTER, C. J. (after stating the facts). The vital question presented for our determination in this case is, was the alleged first marriage of plaintiff in error in Italy absolutely void? Counsel for the people contend that "the proof of a marriage in fact in another state, followed by cohabitation, is sufficient proof of the validity of the marriage, without evidence as to the law of the place where the marriage was celebrated"; citing numerous authorities. It may be conceded that it is the general rule that, if the celebration of the marriage is proved by witnesses who were present, it is not necessary that any preliminary steps required by law should also be shown, as it will be presumed that the officiating person performed his duty, and proceeded only when his authority was complete. 1 Bish. Mar. & Div. § 450. Still, when there is direct and positive proof as to the invalidity of the marriage, this presumption cannot prevail. The only proof offered by the people in respect to the alleged first marriage was that it was solemnized in a church by the officiating clergyman according to the rites of such church, and it was shown that no other ceremony was performed. In the absence of proof as to the law of the kingdom of Italy relating to marriage, such proof would be sufficient to establish the marriage. But in this case we are confronted with a number of provisions of the Civil Code of Italy requiring that the contracting parties be of a certain age, or else the consent of the parents; notice to be posted by a certain official, which could not be done without the consent of the parents duly obtained; and then a celebration in the town hall in a public manner before a certain civil official,—none of which provisions are shown to have been complied with. To this must be added the testimony of the Italian consul, who qualified as one learned in the Italian law, and testified, without objection, to the effect that a compliance with all these provisions was absolutely essential to a valid marriage in Italy, and that there was no other legal mode in which a marriage could be celebrated or contracted to make it valid in that kingdom, and that by no subsequent acts could it be ratified or validated, it being wholly null and void. It is urged by counsel for the people that, notwithstanding the failure to observe such provisions, the marriage is still valid unless the law of the state where it was celebrated expressly makes it invalid for lack of such formalities; and it is claimed that the sections of the Italian code quoted do not show that such requirements are exclusive or essential. While this is, in general, true as to our marriage laws, still courts uniformly take notice of the construction given to foreign statutes by the foreign tribunals, and, to be informed of such construction, will receive the testimony

of witnesses learned in the foreign law. *Hoes v. Van Alstyne*, 20 Ill. 201. The evidence of the Italian consul is uncontradicted as to the construction and effect given to these statutes in Italy. It is a general rule that a marriage invalid where it is celebrated is everywhere invalid. 1 Bish. Mar. & Div. § 390. The only exceptions to this rule relate to parties sojourning in a foreign country, who may, in certain cases, contract a valid marriage without celebrating it according to the local requirements. But the plaintiff in error and said Rosalie were both Italians, and, of course, do not come within such exceptions. In *McDeed v. McDeed*, 67 Ill. 545, it was said that the law of the state where the marriage takes place must control as to the validity of the marriage; and in *Weinberg v. State*, 25 Wis. 370, on an indictment for polygamy, where the first alleged marriage was in Prussia, and it appeared that by Prussian law a marriage, to be valid, must be entered into as a civil contract before a civil magistrate, it was held that proof of a religious ceremony will raise no presumption that a civil ceremony has been performed. If this first marriage were treated as only voidable, and not void, both parties being at the time under the age prescribed by the laws of Italy, still, when they arrived at the age of consent, either of them would, at the common law, have had the lawful right to disaffirm it. Plaintiff in error did disaffirm it by ceasing to cohabit with the said Rosalie three months after the alleged marriage, and by abandoning her, and by afterwards marrying another woman, with whom, after he became of marriageable age, he has lived and cohabited as his wife. But the proof is uncontradicted that such marriages are absolutely void in Italy, and, whatever may be the rule of law as to such marriages celebrated in this state, still, the foreign law and its construction being shown, we should follow that law, and especially so in favor of the innocence of the accused. As the record shows there was no previous valid marriage, the conviction cannot be sustained. The judgment is reversed, and the cause remanded, with directions to discharge the accused. Reversed and remanded.

(177 Ill. 368)

EMERICK v. HILEMAN.

(Supreme Court of Illinois. Dec. 21, 1898.)

EXECUTORS AND ADMINISTRATORS — BILLS AND NOTES—EVIDENCE—WITNESSES—TRANSACTIONS WITH PERSONS SINCE DECEASED.

1. Where an administrator during the lifetime of the intestate made payments on his note, held by the intestate, which were not indorsed on the note, the county court is not obliged to appoint an administrator pro tem., as provided by Rev. St. c. 3, § 72, in order to arrive at a settlement with the administrator; the payments made being in no sense a claim against the estate.

2. On an issue as to the amount due on a lost note, two witnesses testified that there were only three indorsements thereon. One witness testified that he computed the amount

due on it, and his computation agreed with two others, one of whom testified that a large portion of the back of the note was covered with indorsements, and the other that there were six indorsements. Another witness testified that there were more than three, and that several indorsements of interest were written "between the money indorsements." Another witness testified that the back of the note was covered with indorsements. *Held*, that the evidence preponderated in favor of the conclusion that the first two witnesses only took notice of the payments of principal, and not of the indorsements of interest.

3. A party cannot object that evidence brought out by himself on cross-examination is inadmissible because evidence of transactions with a person since deceased, against whose estate the witness is an adverse party.

Appeal from appellate court, Second district.

Naomi Emerick filed objections to the report of Ade O. Hileman, administrator of the estate of Ann B. Hileman. A judgment of the circuit court sustaining the overruling of the objections by the county court was affirmed in the appellate court (71 Ill. App. 512), and the objector appeals. *Affirmed*.

On the 25th day of March, 1893, Ann B. Hileman died in Carroll county, Ill., leaving an estate amounting to about \$14,000, and also left Ade O. Hileman, Lucy Cowen, and Naomi Emerick as her children and sole heirs at law. Ade O. Hileman was appointed administrator, and at the July term, 1893, he filed in the Carroll county court his inventory in said estate. Among the items of assets of the estate, he inventoried a note due from himself, dated April 30, 1881, for the sum of \$3,900, interest at 6 per cent., "less payments." He also inventoried a note from Namen Woodin at \$700, dated October 1, 1892, at 6 per cent. Both these notes were reported good. The inventory was approved. At the July term, 1894, he filed his first report, in which he charged himself with having received \$9,075.78, among which items are: "October 31, 1893. Payment on note from Namen Woodin, \$300." "January 27, 1894. Balance principal and interest, Namen Woodin, \$451.88." "August 1, 1893. Balance due on Ade O. Hileman note and mortgage inventoried, less all payments and indorsements, \$1,281.90." He shows in the said report amounts paid out aggregating \$89.89. In the same report is the following: "I, Ade O. Hileman, hereby ask this honorable court, as administrator, to appoint some discreet person as administrator pro tem., for the sole and only purpose of releasing of record in the Carroll county recorder's office a certain mortgage which secured the note of said Ade O. Hileman inventoried herein, which note has been fully paid by him, and he has charged himself, as such administrator, for the balance due on said note, as appears in this report; said mortgage being recorded in said recorder's office, in Book 25 of Mortgages, page 593." The said report was filed July 7, 1894, and on July 10, 1894, there was a hearing as to said report and

petition; and the court entered an order showing the presenting of the report for approval, and that the cause came on for hearing upon the report, the exhibits, and proofs, and that the court found from the evidence that said report was a just and true statement of the condition of said estate, and the report was approved. The court in the order further found, from the evidence, that Ade O. Hileman was indebted to the said Ann B. Hileman in her lifetime; that said debt remained unpaid at her death; that he had executed a mortgage to secure said indebtedness; that he had paid said debt, and charged himself, as administrator, therewith. The order then appointed an administrator pro tem. for the sole and only purpose of discharging said mortgage of record. At the January term, 1895, the administrator filed another report, which was also approved, and an order entered for distribution of the principal part of the estate, which distribution was made and reported to the court, and an order and decree made approving the same. At the July term, 1895, the administrator asked to be discharged on distributing \$54.06, and notice was given to the heirs. Objections were filed by Naomi Emerick to the administrator's report and discharge. After a hearing the county court overruled the objections to the final report, approved the same, and discharged the administrator. An appeal was taken by Naomi Emerick to the circuit court, where the case was tried by the court without a jury, and written propositions of law were submitted. The circuit court also overruled the objections and exceptions to the final report of the administrator, and objector appealed to the appellate court for the Second district, where the judgment was affirmed, and from the judgment of the appellate court the case was appealed to this court.

Henry Mackey, for appellant. Geo. L. Hoffman, for appellee.

CRAIG, J. (after stating the facts). The principal controversy in this case arises over the note inventoried at \$3,900, "less payments," due from the administrator to the deceased, on which certain payments had been indorsed, and also payments made to his mother in her lifetime amounting to \$972.60, which had not been indorsed, but which the administrator claims should have been indorsed, thereon. Appellant contends that as the payments, amounting to \$972.60, were not indorsed upon the back of the note, the administrator should have filed his claim against the estate, and had an administrator pro tem. appointed to defend, as provided in section 72 of chapter 3 of the Revised Statutes. This was not necessary. The estate owed the administrator nothing, but he owed the estate a balance of \$1,281.90, as found by the probate court. The demand of the administrator was not a claim, within the

meaning of section 60 of chapter 3 of the Revised Statutes, but consisted of payments made to the deceased in her lifetime, and not credited. As the appellate court very properly said: "Section 60 of the administration act requires a claimant to swear that his claim is just and unpaid, after allowing all just credits. This administrator cannot so swear, if, as he claims, these payments by him were payments upon the note. The balance was against him, and the estate owed him nothing. The question how much was due from him to the estate on his note could not be settled by his filing a claim against the estate for all or any part of what he had paid on the note, whether indorsed or unindorsed. Payments to the deceased on a debt could not constitute claims to be put in judgment against her estate. Payment extinguishes the obligation of the debtor, but raises no obligation on the part of the creditor to refund the money so paid. *Litch v. Clinch*, 136 Ill. 410, 26 N. E. 579. The amount due from the administrator could have been determined by having the court appoint a special administrator to bring suit at law against Ade O. Hileman in some court of record upon his note, or to file a bill against him to foreclose the mortgage; but this would have entailed unnecessary expense, and would have removed the question from the determination of the county court on its probate side, and, indeed, would have taken the whole matter away from the county court, as there was more than \$1,000 still due. The administrator was apparently ready and willing to pay all he owed. We cannot hold the county court had no power to determine the amount due from its administrator. It had jurisdiction of this administrator, and of his inventories and reports, and power to require him to charge himself with whatever sums were legally chargeable against him. If any heir or interested creditor had shown to the county court, by petition or other proper mode, that the note against the administrator was in fact for the principal sum of \$5,000, we cannot doubt the jurisdiction of the county court to hear proofs, and compel the administrator to amend his inventory. If the administrator, by petition or otherwise, had shown to the county court that by mistake the principal of the note stated in the inventory at \$3,900 was in fact only \$3,000, the county court would have full authority to admit an amendment of the inventory. If on July 7, 1894, the administrator had presented to the court an amendment to the inventory as to this note, stating in detail each payment he claimed he had made thereon, in our opinion the county court would have been acting within its ordinary probate jurisdiction in investigating said alleged payments, hearing the proofs, deciding the truth of the matter, and permitting a true amendment to be filed. It may be, the county court could have appointed an administra-

tor pro tem. in such a case to protect the interests of the estate, but no statute requires it. Every time an administrator presents a report, it is possible some one might advantageously resist its approval, in the interests of the heirs and creditors. In every such case the administrator may have failed to charge himself with all for which he is legally liable, or may have given himself improper credits, yet the law has not provided for the appointment of an administrator pro tem. for such purposes. The county judge is expected to scrutinize such matters, ascertain the facts, and protect the interests of all. A rule which should require the appointment of an administrator pro tem. every time the regular administrator takes a step where he could unduly charge the estate or unduly credit himself would be a great burden upon estates." We concur in the foregoing reasons, and the conclusion reached by the appellate court, that the county court had jurisdiction to hear and determine the matters presented by the administrator's first report without the appointment of an administrator to contest the account.

Appellant also contends there was no competent evidence offered on the trial in the county court from which the court could find that Ade O. Hileman could legally deduct the sum of \$972.60 from the note due the estate. It appears from the evidence that on the day after the funeral of their mother, Ann B. Hileman, the objector, Mrs. Emerick, and her husband, together with W. Scott Cowen, the husband of Lucy Cowen, and Ade O. Hileman, looked over the papers and effects of deceased. Among the papers were the \$3,900 note and mortgage given by Ade O. Hileman to his mother April 30, 1881. On the trial in the circuit court a dispute arose as to the amount and number of the indorsements on the note at the date of the mother's death, in March, 1893. Mrs. Emerick and her husband both testified that there were only three indorsements on the note when they saw it after her death. The note, it appears, was inventoried, and was taken to the office of the attorney of the administrator, and was there when the first report to the county court was prepared, and was seen by three different persons, who made computations of the amount due thereon, with the indorsements, and the \$972.60 of unindorsed payments claimed by the administrator; and the amount so found due was put in the report to the county court. The note was taken to the county judge, and was used on the hearing of the report. At the trial in the circuit court the note could not be found. The administrator testified that he had never seen the note since it was used in the county court; that he did not know where it was then, and that he had never seen it since that time. The note being in the custody of the county court when last seen, and there being nothing to show that the administrator was responsible for its loss,

the administrator should not be prejudiced by the loss. As the note was lost, and could not be produced, it became material for the administrator, so far as he was able, to establish the indorsements on the note on the hearing in the circuit court. Appellee introduced as witnesses on his part the three persons who saw the note and made the computation of the amount put in the first report. E. T. E. Becker, an attorney,—one of those who made the computation,—testified: "I figured the interest and indorsements, and produced the amount due. * * * I think there were indorsements on the note,—partial payments. Couldn't remember how many there were on. * * * The computations made by all three of us substantially agreed." Miss Tomlinson testified: "Mr. Hoffman read six indorsements from the note to me when I made the computation, * * * and I think we virtually agreed." George L. Hoffman, the attorney for appellee, testified: "Capt. Becker, Miss Tomlinson, and myself figured upon the note. * * * Becker and myself agreed substantially. Miss Tomlinson differed widely from our figures, and I restated the data on the note, and she figured it again. Then we all agreed. * * * The back of the note was—at least a large portion of it was—covered with indorsements. I further state that the amount put in the report, \$1,281.90, was written there by myself, and that was the amount we all agreed upon in this computation." Scott Cowen, who saw the note when the appellant, Mrs. Emerick, saw it, testified that there were more than three indorsements; that there were indorsements of "interest paid to date," and several indorsements of interest were written "between the money indorsements." Hileman, the administrator, also testified that the back of the note "was practically covered with indorsements." This evidence clearly preponderates in favor of appellee, that there were more than three indorsements on the back of the note, and leads to the conclusion that appellant only noticed the payments of principal, and did not note the indorsements of interest. Under the evidence, we think the amount, \$1,281.90, incorporated in the report of 1894, was correct. Allowing the indorsements on the back of the note, and the \$972.60 which was not indorsed, but which the administrator claimed he had paid his mother in her lifetime, it seems plain that the amount incorporated in the administrator's report was the true amount due on the note and mortgage. As to the sufficiency of the proof of the \$972.60, Namen Woodin, who owed the estate a note for \$700, accounted for \$200 paid by Ade O. Hileman to his mother during her lifetime, and the administrator, on his cross-examination, established the payment of the balance, making the \$972.60.

The objection made by appellant that Ade O. Hileman was permitted by the circuit court to testify to payments made to his

mother is not tenable, under the circumstances shown by the record. Hileman was a witness in his own behalf as to matters occurring after the death of his mother, Ann B. Hileman, and as to the indorsements on the note when the first report was prepared to the county court. This was competent evidence. Appellant's attorney did not, however, confine himself to cross-examining appellee upon the facts to which he testified in chief, but went further, and proved by the administrator the making of payments which were unindorsed on the note, to his mother in her lifetime, and the several amounts which went to make the \$972.60. Appellant violated the well-recognized rule that, "when a witness is called by one party, the other has only the right to cross-examine upon the facts to which he testified in chief." Appellant, having called out this evidence herself, cannot complain that it was incompetent. *Stafford v. Fargo*, 85 Ill. 481.

After a careful examination of the evidence, we are satisfied that appellant failed to sustain her objections, but, on the other hand, that the evidence preponderates in favor of appellee. The judgment of the appellate court is affirmed. Judgment affirmed.

(177 Ill. 194)

ADAMS v. BRENNAN et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

CONTRACT FOR PUBLIC WORK—EMPLOYMENT OF UNION LABOR—SUIT BY TAXPAYER—BOARD OF EDUCATION—POWERS—INJUNCTION—PRACTICE.

1. A board of education has no right to stipulate in a contract for improvements that none but union labor shall be employed by the contractor, particularly where it appears that the result thereof is to increase the cost of the work.

2. A board of education can exercise no greater power than the legislature can confer upon it.

3. Injunction will lie at the instance of a taxpayer to prevent the execution of a contract for public improvements stipulating that the contractor shall employ none but union labor.

4. It is error to dismiss a bill to enjoin the execution of a contract for public improvements containing an illegal stipulation, even though the contractor has begun the work, where it appears that he agreed to do the work for a less sum, in the absence of such stipulation, as relief should be granted in such case, at least to the extent of the difference in cost.

Appeal from superior court, Cook county; Farlin Q. Ball, Judge.

Bill by John L. Adams against Thomas Brennan and others and the board of education of the city of Chicago. The bill was dismissed, and complainant appeals. Reversed.

Paddock, Wright & Billings, for appellant. Tenny, McConnell, Coffeen & Harding, for appellees.

CARTWRIGHT, J. Appellant, a taxpayer of the city of Chicago, suing on behalf of himself and the other taxpayers, filed his bill in this cause March 14, 1898, in the superior

court of Cook county, against the board of education of said city of Chicago, John A. Knisely, a contractor, and said city of Chicago, asking to have a contract between the board of education and Knisely declared illegal, and to restrain the defendants from carrying out the same or expending money thereunder. The facts stated in the bill are substantially as follows: In September, 1897, the board of education entered into an agreement with an organization in said city known as the "Building Trades Council," representing labor or trades unions in said city, by which the board of education on its part agreed to insert in all contracts for work upon school buildings a provision that none but union labor should be employed in such work, and that none but union workmen should be employed and placed upon the pay rolls of said board. The Bryant School, one of the school houses under the care of the board, being in need of repair, the board advertised February 5, 1898, for bids for the construction of a roof on an addition thereto, which advertisement contained the following: "Notice: None but union labor shall be employed on any part of the work where said work is classified under any existing union. By order of board of education." On February 11, 1898, the defendant John A. Knisely, among other contractors, submitted his bid for the roof, in which he agreed to furnish material and do the work in strict accordance with the plans and specifications prepared and on file in the office of said board for the sum of \$2,000, and to be bound by said condition, and further stated: "I, the undersigned, will do the above work for the sum of \$1,900, provided all conditions as to the employment of none but union labor are stricken from the specifications and contract made accordingly. This last bid is made, not necessarily because the undersigned expects to employ nonunion labor for this work, but because it is worth to him the difference to have the liberty to do so should circumstances make it necessary or advisable." On February 23, 1898, the board accepted Knisely's higher bid of \$2,000 with the restriction, and awarded to him the contract. About March 1, 1898, the board and Knisely entered into a contract in accordance with the bid so accepted, containing a provision that none but union labor should be employed by him. The work required by the contract was classified under the existing trades unions in the city of Chicago, and the term "union labor" included only the labor of such mechanics and workmen as were members of voluntary associations in the city of Chicago commonly known as labor or trades unions, which did not embrace all the citizens, taxpayers, mechanics, or workmen in said city, a large proportion of whom do not belong to any trade or labor union. Upon the filing of the bill, application was made for a preliminary injunction, which was heard upon the bill, and affidavits and

the record of proceedings of the board of education, which sustained the charges of the bill. The application was denied, and the court dismissed the bill for want of equity appearing upon its face.

The board of education of the city of Chicago is a public corporation, created by legislative authority as an agent of the state for the purpose of maintaining public schools and school buildings within that subdivision of the state. For the purposes of that function, it receives from the taxpayers, and holds as a trustee, the school fund, and is bound to administer it for the benefit of the beneficiaries of the trust. The taxpayers are, in equity, the owners of the fund, and the board can only hold and apply it to legitimate purposes of the trust. The law is established, beyond doubt or controversy, that a bill to enjoin public officers so situated from misappropriating the fund in their charge is a proper remedy for a taxpayer. Courts of chancery will interfere to restrain such authorities from a misuse of the fund intrusted to them, or its appropriation to a purpose not warranted by law. *Colton v. Hanchett*, 13 Ill. 615; *Perry v. Kinnear*, 42 Ill. 160; *Beauchamp v. Supervisors*, 45 Ill. 274; *Jackson v. Norris*, 72 Ill. 364; *Board v. Welder*, 64 Ill. 427; *Chestnutwood v. Hood*, 68 Ill. 132; *Wright v. Bishop*, 88 Ill. 302; *Board v. Arnold*, 112 Ill. 11; *Stevens v. Training School*, 144 Ill. 336, 32 N. E. 962.

The bill charges that this board has negotiated a sort of treaty with the Building Trades Council, a private organization, representing particular laborers or associations of workmen, and constituted for the furtherance of the interests of such laborers and workmen, the effect of which is to give those persons a monopoly of the work to be done for the public under the charge of the board. The record of the board shows an application by a committee of this Building Trades Council for the adoption of the provision in question. The provision was adopted by resolution of the board, with an agreement on the part of the Building Trades Council to call off a strike; and a reason given in the application to the board for the adoption of the clause was that it would do away with strikes upon school buildings, and thereby save the board much annoyance and delay. Ordinarily, the restraining power of a court of equity should be directed against the enforcement, rather than the passage, of unauthorized orders and resolutions; and, if this resolution was unlawful, it is a proper time to enjoin its enforcement when a contract like the one in question is made under it. *Stevens v. Training School*, supra. In the execution of this agreement and resolution, the board of education assumed to let the contract to the defendant Knisely, with the stipulation that none but members of the associations in question should be employed, and at an expense of \$190 more than would be required to fulfill the same contract without the restriction. The two bids were

made by the same contractor, with the same responsibility in either instance, and who was prepared to perform the contract as fully and well under one stipulation as the other. The award to him was therefore not made in view of any question of responsibility as a bidder, but solely to carry out the agreement.

It is plain that the rule adopted by the board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition and to increase the cost of work. It is unquestionable that if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should, by a statute, undertake to require this board, as the agency of the state in the management of school affairs in the city of Chicago, to adopt such a rule or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void, as in conflict with the constitution of the state. If such a restriction were sought to be enforced by any law of the state, it would constitute an infringement upon the constitutional rights of citizens, so that the state, in its sovereign capacity, through its legislature, could not enact such a provision. *Millett v. People*, 117 Ill. 294, 7 N. E. 631; *Froerer v. People*, 141 Ill. 171, 31 N. E. 395; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62; *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364; *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454; *People v. Chicago Live-Stock Exchange*, 170 Ill. 556, 48 N. E. 1062. There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members of some particular party or church. In any such case it might be said that the board entertained a bona fide opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be attained; or that the members of a church, on account of their higher standard of morality, would more faithfully and conscientiously carry out the contract. The fact that the board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders, and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work.

There seems, however, to be a claim that the board of education, although it could not be lawfully required or authorized to make such a contract, may have some sort of discretion to do so; and the only question in the case on the subject of the validity of such contract is whether the board possesses power beyond that of the legislature, in which is vested the entire legislative authority of the state. Upon what theory it could be claimed that this board of education, which exercises merely the function of the state in maintaining public schools within a limited portion of

the state, can possess either power or discretion which the state in its sovereign capacity could not confer upon it, we are unable to imagine. No argument is made which would justify such a conclusion. There can be no greater power of the board to act of its own motion than by virtue of positive law. The results in either case are equally in conflict with the organic law, and such legislation, contract, or action, whatever form it may take, is void. Nor can the fact, if it be a fact, that an individual might make such a bargain, authorize these public officers exercising a public trust to do so. The individual may, if he chooses, give away his money; but the public officer, acting as a trustee, has no such liberty, and no right to surrender to a committee or any one else the rights of those for whom he acts.

The complainant, as a taxpayer, is a proper party to question the action of the board. The contract containing the illegal provision was entered into voluntarily by the contractor, in pursuance of his alternative propositions submitted to the board. There is injury to the taxpayer on account of the unlawful agreement, and he is not deprived of a remedy for his wrong because neither the contractor nor any excluded laborer has questioned the contract.

There is another ground upon which complainant has an undoubted right to maintain the bill, and that is that the contract tends to create a monopoly, and to restrict competition in bidding for work. The board of education may stipulate for the quality of material to be furnished and the degree of skill required in workmanship; but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to limit competition by preventing contractors from employing any except certain persons, and by excluding therefrom all others engaged in the same work, and such a provision is illegal and void. A taxpayer may resist an attempted appropriation of his money in execution of such a contract. *Fishburn v. City of Chicago*, 171 Ill. 338, 49 N. E. 532.

It is suggested that there can be no relief, because the bill fails to show that the contractor, Knisely, did not enter upon the work under his contract before the bill was filed. The illegality of the contract results from public law, which he was bound to know, and the provision was wholly outside of the powers of the board of education. Under no circumstances could he be entitled to the \$190 which was the direct result of such illegality. The bid furnishes, in this case, the exact measure of the injury to the taxpayers resulting from the unlawful restriction; and the question whether he had entered upon the performance of the contract could not, in any event, go further than to the question of the extent of relief to be granted.

No question concerning the merits of labor

or trades unions is in any way involved in this case. The right of organization for mutual benefit in all lawful ways is not denied. The question is whether the board of education has a right to enter into a combination with such an organization for the expenditure of the taxpayers' money for the benefit of members of the organization, and to exclude any portion of the citizens following lawful trades and occupations from the right to labor. It has no such right. The decree of the court dismissing the bill is wrong, and it is reversed and the cause remanded for proceedings in conformity with what is here said. Reversed and remanded.

(177 Ill. 203)

WATSON v. LE GRAND ROLLER SKATING RINK CO. et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

JUDGMENT—SETTING ASIDE—CORPORATIONS—DISSOLUTION—APPEAL AND ERROR.

1. Though a decree be final in its terms, yet where, before the end of the term, a petition for a rehearing is filed upon which a continuance is granted, the operation of the decree is suspended, and the court retains jurisdiction to amend or vacate at a subsequent term.

2. Where it is shown that a bill by a stockholder to dissolve a corporation is filed in pursuance of an agreement with the president of other corporations against which the corporation sought to be dissolved has an important suit pending, and the object sought is to dissipate rather than preserve the assets, the bill will be dismissed.

3. Errors not objected to at the trial, nor assigned as errors in the supreme court, will not be considered.

Appeal from superior court, Cook county; Theodore Brentano, Judge.

Bill for dissolution of a corporation by William H. Watson and another against the Le Grand Roller Skating Rink Company and others. From a decree dismissing the bill, the complainant Watson appeals. Affirmed.

This is a proceeding begun on October 17, 1890, by William H. Watson and Amos H. Perkins, stockholders, to wind up and dissolve the Le Grand Roller Skating Rink Company, a corporation, and to collect and distribute its assets, under the provisions of section 25 of the statute in relation to corporations. The causes for dissolution charged in the bill are that in June, 1886, the corporation ceased doing business, leaving debts unpaid; that the objects for which the company was organized had ceased to exist, and that the business could not be carried on profitably; that there was no intention to resume business; and that, while engaged in business, the company exercised powers not conferred upon it by law, and had in other respects violated its duty. The corporation answered, joining issue; and on August 12, 1892, upon the hearing, the court entered a decree finding the facts substantially as charged in the bill, ordering that the corporation be dissolved, its debts paid, and its affairs adjusted, and appointing a receiver to carry

the order into effect. Upon the filing of this decree, complainants filed amendments to their bill. On August 26th following, leave was granted the defendant to file a petition for rehearing, and that matter was continued to the September term. At the latter term (on November 5th) an order was entered denying the rehearing, and directing "that the interlocutory decree entered herein on the 12th day of August, 1892, be, and the same is hereby, modified so as to permit all parties to amend their answers, and make such further answers to the bill herein filed as may be desired by them, and proper to be made for a just and appropriate final hearing of this cause by the court." On June 12, 1896, complainants filed a second amendment to the bill, making certain stockholders parties defendant; and, on July 24th following, all the defendants were defaulted, and the bill taken against them pro confesso. This default, however, was afterwards set aside. On July 24, 1896, the Le Grand Roller Skating Rink Company and others filed pleas to the amended bill, averring that the complainants, Watson and Perkins, before the commencement of this proceeding, had entered into a fraudulent and champertous agreement with one Charles T. Yerkes, authorizing him to take the necessary steps to dissolve this corporation at his own expense, and giving him all the profits to be derived therefrom, and further averring that, at the time the agreement was entered into, there was pending in the circuit court of Cook county a suit of the Le Grand Company against the North Chicago City Railway Company, the North Chicago Street-Railroad Company, and Adam L. Amberg, for the recovery of the possession of certain real estate which had been unlawfully seized by the last-named parties; that Charles T. Yerkes was then, and ever since has been, the president and managing official in each of the corporations named; and that he caused this suit to be brought in the name of Watson and Perkins for the purpose of preventing the Le Grand Roller Skating Rink Company from successfully prosecuting its suit. This was the condition of the record when Watson, the sole complainant surviving (Perkins having died, and the suit having abated as to him), moved for a sale of the assets of the Le Grand Company, and to strike defendants' pleas from the files, and when defendants moved to set aside the order of default entered on July 24, 1896, and to dismiss complainant's bill for fraud. On August 16, 1896, a hearing was had, and an order entered finding that this proceeding was not instituted and prosecuted in good faith by the ostensible complainants, but, in fact, was instituted and prosecuted by Charles T. Yerkes, as president of the railroad companies referred to, and in their behalf, for the purpose of enabling the street-railroad companies to avoid payment of the amount found due from the latter to the Le Grand Company in the pending suit in the

circuit court; that the pretended purpose of this suit to collect and distribute the assets was false; and that the real purpose was to wreck the Le Grand Company, and thus relieve the street-railroad companies from their liability; and the decree of August 12, 1892, was vacated, the receiver discharged, and the bill dismissed. From this last decree of the superior court, this appeal is prosecuted.

Pence & Carpenter, for appellant. John Woodbridge and Sidney C. Eastman, for appellees.

WILKIN, J. (after stating the facts). It is urged on behalf of appellant—First, that the decree entered August 12, 1892, dissolving the corporation and appointing a receiver, was final, and that the court had no power to vacate it on August 16, 1898; and, second, that the pleas filed by the corporation and stockholders July 24, 1896, present no defense to the merits of the bill.

The first contention is not well supported. While, in form, the decree of August 12, 1892, may have been final, the filing by the defendant of its petition for a rehearing at the same term at which the decree was rendered, and the cause being continued to a subsequent term upon that petition, had the effect of suspending the operation of the decree, and of retaining jurisdiction over the subject-matter at the subsequent term, and the court had the power, at the later term, to amend, alter, modify, or vacate the decree. *Hibbard v. Mueller*, 86 Ill. 256; *Hearson v. Graudine*, 87 Ill. 115; *People v. Springer*, 106 Ill. 542.

The second and chief question for our decision is presented by the pleas filed by the corporation and stockholders on July 24, 1896, setting up a champertous agreement between the complainant herein and Charles T. Yerkes, giving the latter authority to prosecute this proceeding, and thereby enable him to defeat a claim of the Le Grand Roller Skating Rink Company against the street-railroad corporations of which he is president. Appellant does not attempt to deny the champertous nature of the agreement entered into, but contends that champerty is no defense except in a suit upon the champertous agreement by one of the parties thereto against the other, and that third parties cannot take advantage thereof; and numerous authorities are cited in support of this position. A careful examination of the record in this case forces the conviction upon us that the agreement referred to is more than a mere champertous one,—that it is, in fact, a collusion between the parties thereto to enable Yerkes, as president of the street-railroad corporations mentioned, to accomplish a purpose indirectly which he could not accomplish directly; i. e. to wreck the Le Grand Company, and thus relieve his corporations from liability to it,—in other words, that the real purpose was not to preserve the assets of the Le Grand Company, but to destroy them. The rule is well settled that courts of equity will

not lend their aid to the dissolution of a corporation, or to enjoin or bring to an accounting the corporate directors, where the suit is instituted, not to protect, benefit, and preserve the interests of the stockholders in the corporation, but to benefit some other corporation. The difficulty usually is to prove that the suit is instituted on behalf of some other person or corporation; but in this case we have the champertous agreement averred in the defendants' plea, and the uncontradicted affidavits of Sidney C. Eastman, one of the solicitors for the Le Grand Company, that this suit was instituted and has been prosecuted by Yerkes, and that complainant Watson had stated to him that the suit was being conducted under contract with Yerkes. To determine whether a proceeding is properly invoked, a court of equity may go behind the parties on the face of the record to see who are the real parties to the proceeding, and, if it be discovered that the prosecution is carried on for the exclusive benefit of an individual or corporation, the court will dismiss the bill; and this, not upon the ground that the proceeding may have been instituted in pursuance to a champertous agreement between the ostensible complainant and some third party, but because of the fraud that is attempted to be perpetrated upon the court. *Cook, Stock, Stockh. & Corp. Law* (3d Ed.) § 736; *Thomp. Corp.* §§ 4567, 4568; *Mor. Priv. Corp.* § 260; *People v. General Electric Ry. Co.*, 172 Ill. 129, 50 N. E. 158.

Counsel for appellant, in their reply brief, insist that, upon the hearing, certain affidavits were improperly admitted in evidence, and considered by the court, these affidavits containing facts material to the finding of the court upon the merits. It is stated by counsel for appellees that the affidavits were introduced by agreement, and that formal pleadings were waived in the cause. The record discloses no objection made at the time to the introduction of the affidavits in evidence, nor does the assignment of error filed here raise the question. This question, not having been raised upon the hearing, nor assigned as error here, will not be considered by this court. Upon a careful consideration of the entire record and the questions raised therein, we are satisfied there was no error committed in dismissing the bill. Judgment affirmed.

(176 Ill. 606)

PORTER v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 21, 1898.)

OBJECTIONS TO JURISDICTION—WAIVER—SPECIAL ASSESSMENTS—CONFIRMATION.

1. An objection to the jurisdiction is waived by raising general objections.

2. In an action to confirm a special assessment for the improvement of a street, the petition, with a properly certified copy of the ordinance attached, the assessment roll, affidavit of mailing and posting notices, and proof of publication are sufficient evidence to authorize a confirmation of the assessment under Laws 1897, p. 119, § 49, providing that those proofs "shall be prima facie evidence of the correct-

ness of the amount assessed against each objecting owner."

Appeal from Cook county court; A. W. S. Wheatley, Judge.

Action by the city of Chicago against Ida V. Porter. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas W. Prindeville and William J. Donlin, for appellant. Charles S. Thornton, Corp. Counsel, and John A. May, Asst. Corp. Counsel, for appellee.

WILKIN, J. This is an appeal from a judgment of confirmation in the county court of Cook county of a special assessment against certain property of appellant for improving North Clark street, in the city of Chicago. At the time fixed for the hearing, appellant, by her counsel, entered a special appearance for the purpose of questioning the jurisdiction of the court. Upon such appearance it was objected—First, that the proof of publication of notice by the commissioners was insufficient; and, second, that, as shown by such proof of publication, the notice was not published the requisite time. These objections were overruled, and thereupon the same counsel, on her behalf, adopted certain general objections filed on behalf of other property holders, questioning the sufficiency of the ordinance, the petition, and assessment roll, and that the assessment on the property of objectors exceeds the benefits which will accrue to the property by the improvement. On these objections a trial was had by jury, and judgment of confirmation duly entered. The attempt is now made to assign as error the ruling of the county court on the special objections to its jurisdiction. The publication was proved, not by the certificate of the publisher, but by an affidavit, and it is insisted that this was not proper proof of the publication. The affidavit shows that the notice was published in a daily newspaper, and that the date of the first paper containing the same was May 28, 1898, and that of the last paper containing the same, June 2, 1898. The 29th day of May was Sunday, and Monday, the 30th, Decoration Day. The contention is that both Sunday and Monday, the latter being a legal holiday, were dies non juridici, and therefore to be excluded in the computation of time, which would leave less than five days of consecutive publication. We are not prepared to hold that the proof of publication was not sufficient, nor that Decoration Day is such a legal holiday as to render it non juridicus, the statute providing simply that it shall be treated as a holiday in regard to the presentation, etc., of negotiable instruments for payment. It is not, however, important in this case to definitely determine either of the foregoing questions, because it is well settled that upon the overruling of the objections to the jurisdiction the defendant waived them by filing and urging her gen-

eral objections. *People v. Sherman*, 83 Ill. 165; *Nicholes v. People*, 165 Ill. 502, 46 N. E. 237; *Mix v. People*, 106 Ill. 425.

Upon the hearing the petitioner offered in evidence its petition, with a properly certified copy of the ordinance attached, with the assessment roll, and affidavit of mailing and posting notices, and the proof of publication, and this was all the evidence introduced by it. Appellant insists that, notwithstanding section 49 of the city and village act, concerning local improvements (Laws 1897, p. 119), which provides that these proofs "shall be prima facie evidence of the correctness of the amount assessed against each objecting owner, but shall not be counted as the testimony of any witness or witnesses in the cause," where objections are urged, and a trial had, such evidence is not sufficient to authorize a confirmation of the assessment. We are unable to comprehend force in this position. When a party upon a trial has made a prima facie case, he is certainly entitled to a judgment unless testimony of some kind is introduced to overcome that case, and no such proof appears to have been offered here.

It is finally insisted that the record fails to show a compliance with the requirements of section 38 of the above statute concerning local improvements, and that it fails to show that any order of court was made directing the superintendent of special assessments in the city to make a true assessment, etc. This objection, as shown by the amended record, cannot be made, the amended record showing that such order was properly entered. We find no reason for disturbing the judgment below, and it will accordingly be affirmed. Judgment affirmed.

(177 Ill. 346)

SCHUBERTH v. SCHILLO.

(Supreme Court of Illinois. Dec. 21, 1898.)

FRAUDULENT CONVEYANCES—INSOLVENTS—PREFERENCE OF CREDITORS—EVIDENCE—VALID SUBSISTING DEBT.

1. A failing debtor may prefer a creditor if he does so in good faith, though the creditor is a member of his family.

2. A debtor owed his wife and son for borrowed money, but no note was ever given therefor. No interest was paid, nor time for repayment mentioned, though the debtor kept some account of the sums received. The money lent by the wife was obtained by keeping boarders. Her husband was the head of the household, and paid her at least eight dollars per week. Their children, as soon as they were old enough to obtain employment, began paying board to their mother, and she had other boarders besides. After part of the claims were outlawed, the debtor, without either his son's or his wife's request, conveyed his real estate to his son, who conveyed an undivided half thereof to his mother, and shortly thereafter judgment was taken against the grantor, and execution thereon returned nulla bona. *Held*, that the conveyances were unsupported by valid subsisting debts, and fraudulent.

Appeal from appellate court, First district.

Bill by Adam Schillo against Frank Schubert and others to set aside conveyances. From the affirmance of a decree for plaintiff by the appellate court (76 Ill. App. 356), defendant Frank Schubert appeals. Affirmed.

A. S. Robertson, for appellant. Arnold Tripp, for appellee.

CARTWRIGHT, J. On August 7, 1895, Frank Schubert made a conveyance to his son, George F. Schubert, of certain premises in Chicago, and on the same day said George F. Schubert conveyed an undivided half thereof to Mary Schubert, his mother, wife of said Frank Schubert. On October 21, 1895, Adam Schillo, the appellee, recovered a judgment against Frank Schubert for \$1,457.23 and costs, upon a note given to him by said Frank Schubert for a debt of three years' standing. An execution on the judgment was returned nulla bona, and appellee filed his bill in this cause in the superior court of Cook county, against said other parties, to set aside said conveyances as in fraud of his rights, alleging that they were without consideration, and made to hinder and delay him as creditor, and that Frank Schubert remained in possession of the premises, and had no other property out of which the debt could be made. The defendants answered the bill, admitting the recovery of the judgment, the issue and return of execution, and the conveyances of the premises, but denying that Frank Schubert remained in possession except by the consent of George F. Schubert and Mary Schubert, or that the conveyances were without consideration, or made to hinder, delay, or defraud complainant, and alleging that they were each made for a good, valuable, and sufficient consideration. Replication being filed, the cause was referred to a master in chancery to take the proofs, and report the same with his conclusions. It was afterwards ordered that this reference should stand to the same person as special commissioner. The evidence was taken, and at the hearing it was claimed that George F. Schubert, the son, had loaned to his father various sums of money at different times from January 22, 1886, to June 20, 1895, aggregating \$2,850; that Mary Schubert, the wife, had also loaned to her husband, Frank Schubert, at different times from July 15, 1874, to August 6, 1893, various sums, amounting in all to \$2,060; and that the conveyance to George F. Schubert, and the conveyance by him of an undivided half to Mary Schubert, were made in payment of the debts to them for said moneys. The special commissioner reported that the money was either loaned or paid to said Frank Schubert, but that no note or obligation was ever given for any of the items of alleged indebtedness; that no interest was paid, nor any time mentioned or agreed upon when the money should be repaid; that nothing was ever done by the said George F. Schubert or Mary Schubert, during all the years after the money was paid over, to obtain or to secure payment; and that

the record failed to show that the conveyances were made at the request of either of the parties claiming to have loaned money, or that they had ever, at that time or before, pressed Frank Schubert for payment. Upon these facts the commissioner concluded that the conveyances were not made in good faith, but for the purpose of placing the property beyond the reach of the creditors of Frank Schubert, and he recommended a decree for the complainant in accordance with the prayer of the bill. Exceptions to this report were overruled, and a decree entered accordingly, and the appellate court affirmed the decree.

A debtor in falling circumstances may prefer one creditor to another if he does so in good faith, and the fact that a wife is the creditor will make no difference, if there is a bona fide debt, and the conveyance is in good faith. *Tomlinson v. Matthews*, 98 Ill. 178. The same rule would apply to a son or other member of the family. But in such a case there must be clear and satisfactory proof of a valid subsisting debt, which is to be enforced, and payment exacted, regardless of the fortune or misfortune of the husband or father. *Frank v. King*, 121 Ill. 250, 12 N. E. 720. These facts upon which the rights of the parties depend must be determined in this case from the conduct of the parties and all the circumstances in evidence. The source of the moneys which the wife, Mary Schubert, let her husband have, was keeping boarders. He was a carpenter and contractor, and the head of the household. He supplied the house at least to the amount of eight dollars per week, which she says he paid her. The children, of whom there were several, as soon as they were old enough to obtain employment, commenced paying board, and the money was given to their mother, and she had some other boarders. As to both of the accounts, it seems that the father and husband, Frank Schubert, kept some account or memorandum of the sums received, but no time of payment was ever fixed or even mentioned, no note or other writing was ever given, and no interest on the debt was ever paid or asked for. The matter stood in that way for many years, without anything being done by either of the parties to collect or secure the claims, or fix any time when they should be paid. While a third party cannot raise the defense of the statute of limitations, and a debtor may pay a debt barred by the statute if he chooses, yet, where there is a valid existing debt which is to be enforced, the creditor does not ordinarily allow it to become outlawed. In this case many of the items were in that condition, and that fact is proper to be considered on this question. Under all the circumstances, we think the commissioner and superior and appellate courts were correct in their conclusion that the purpose of the conveyances was to place the property beyond the reach of creditors, and that they were not supported by valid subsisting debts. The judgment of the appellate court is affirmed. Judgment affirmed.

(177 Ill. 225)

DORN v. ROSS.

(Supreme Court of Illinois. Dec. 21, 1898.)

**REVIEW—OBJECTIONS FIRST RAISED ON APPEAL—
TRUST DEED—COMPUTATION OF AMOUNT
—ATTORNEYS' FEES.**

1. Where the abstract shows suggestion of complainant's death before answer filed, and that one appointed as executor was substituted, it cannot be objected for the first time on appeal that there was no sufficient proof of those facts.

2. The introduction in evidence of a trust deed fixing the amount of an attorney's fee is prima facie proof of the reasonableness thereof.

3. The master may compute the amount due on a note secured by trust deed without the intervention of a witness to testify to it.

4. The objection that the evidence was not signed before the master, or signature waived, cannot be raised for the first time on appeal.

5. Errors assigned upon the record, but not insisted upon, are waived.

Appeal from appellate court, First district.

Bill by Isom Ross against Gay Dorn and others to foreclose a deed of trust. On the death of plaintiff, John B. Ross, his executor, was substituted. From a judgment of the appellate court (77 Ill. App. 223), affirming the decree below, Gay Dorn appeals. Affirmed.

Charles Pickler, for appellant. Mann, Hayes & Miller, for appellee.

WILKIN, J. The following statement of this case is made by the appellate court: "Isom Ross, the owner of a principal promissory note of \$4,000 made by C. E. Dorn and G. Dorn, payable to their own order, and by them indorsed, dated October 5, 1892, due in three years after date, bearing interest at six per cent. per annum, payable semiannually, and evidenced by six coupon notes for \$120 each, and bearing interest at seven per cent. per annum after maturity, all secured by a trust deed made by said Dorns and Thomas Scanlan, as trustee, on lots 19 and 24, in block 1, in Columbia Addition to South Shore, in Cook county, Ill., together with said Scanlan, filed a bill July 1, 1896, in the superior court of Cook county, to foreclose said trust deed against the said Dorns and others. December 18, 1896, the death of said Ross was suggested, and his executor, John B. Ross, was substituted for deceased as a party complainant; and thereafter the cause proceeded in the name of the said executor, as a co-complainant with said Scanlan. The defendants not defaulted answered the bill, and, after replication was filed, the cause was referred to a master to take proof, and report the same with his conclusions thereto. The master, after taking evidence, reported it with his conclusions, showing that there was due to said executor on said notes, principal and interest, for taxes paid on said premises, and for solicitor the amount of \$200, in all the sum of \$4,683.58; that the same was secured to be paid by said trust deed; and that complainants were entitled to a decree of foreclosure. Exceptions to the master's report were overruled, and a decree of foreclosure in accordance with the

master's report entered, from which Gay Dorn has appealed. He has made eight assignments of error, but by his brief he claims—First, that there is no evidence that John B. Ross is the executor of Isom Ross; second, that there is no evidence justifying the allowance of \$200 solicitor's fees; third, that there is no evidence showing any amount due on the principal note and coupons; and, fourth, that the witnesses did not sign their depositions before the master, nor were the signatures waived, and their testimony was therefore inadmissible." The appellate court overruled the errors assigned, and affirmed the decree of the superior court, from which judgment this appeal is prosecuted.

We concur in the views expressed in the opinion of Windes, J., holding that the pretended abstract is wholly insufficient, under the rules of that court as well as of this court, and are further of opinion that in no proper view of the record can the errors insisted upon be sustained.

It appears from the abstract that after the bill was filed, and before answers, Isom Ross, the complainant, died; and, on suggestion of his death "and appointment of John B. Ross as his executor, the latter was made complainant." Thereafter answers were filed, making no denial of the fact of death or the appointment of an executor. Nor does the record show any objection thereafter to the proceeding in his name. Appellant cannot now be heard to say that there was no proof made of the death of the original complainant and the appointment of the substituted executor. *Stebbins v. Duncan*, 108 U. S. 32, 2 Sup. Ct. 313.

It is not denied that the trust deed provided for the allowance of a solicitor's fee of \$200 in case of foreclosure. The master, in his report, found that that amount was due as solicitor's fee, and recommended its allowance. In the objections filed before the master, and refiled before the court as exceptions to his report, no objection whatever is made to the reasonableness of such fee, nor does it appear that the defendants in any way offered to question the fairness of that amount by proof. It was not necessary, under these circumstances, for the complainant to prove, in the first instance, that it was a proper compensation for the services of his attorney in foreclosing the mortgage. *Haldeman v. Insurance Co.*, 120 Ill. 390, 11 N. E. 526; *Sweeney v. Kaufmann*, 168 Ill. 233, 48 N. E. 144. Where the parties expressly contract for a fixed amount as attorney's or solicitor's fee, and that contract appears in evidence, it cannot be said that there is no proof of the reasonableness of such amount.

When the notes and trust deed were offered in evidence before the master, the amount due thereon rested in computation, and amounted to sufficient prima facie proof of that amount. It was not necessary that a witness should compute the amount due, and testify to it, in order to authorize the master to find and report it.

The objection that the witnesses testifying before the master did not sign, nor were their signatures waived, is not true, as a matter of fact, as shown by the master's report. His certificate is that their testimony was reduced to writing, and by such witnesses "read at the time and sworn to before me, except where the signature to the deposition was waived by stipulation of counsel." But, if it were otherwise, the question that the evidence was not signed or waived cannot be raised for the first time in the appellate court or this court. *Jones v. King*, 86 Ill. 225.

As stated above, these are the only errors insisted upon in the appellate court or urged here, and neither of them is well assigned. Other errors assigned upon the record, but not presented or insisted upon, are waived. *Strodtmann v. Menard Co.*, 158 Ill. 155, 41 N. E. 778.

Counsel for appellee insist that it sufficiently appears that this appeal is prosecuted simply for delay, and that, therefore, damages should be awarded to the appellee, as provided in section 23 of chapter 33 of the Revised Statutes. While the grounds relied upon for a reversal of the decree and judgment below are wholly untenable, we are not prepared to say that it sufficiently appears that the appeal was for delay only, to authorize the infliction of the penalty provided by the statute.

Upon the merits, we entertain no doubt that the judgment of the appellate court affirming the decree of the superior court is right, and should be affirmed. Judgment affirmed.

(177 Ill. 33)

CROSS v. WILL COUNTY NAT. BANK.
(Supreme Court of Illinois. Dec. 21, 1898.)

RECEIVERS—RENTS—DISTRIBUTION.

Rents collected by a receiver appointed to protect the interests of those concerned in the property, in an action by a judgment creditor against a mortgagee of the property to set aside the mortgage, should be first applied in payment of the mortgage, where it is sustained as a prior lien to that of the creditor, though the appointment was made on his motion.

Appeal from appellate court, Second district.

Bill by Peleg Cross against the Will County National Bank and others to set aside certain mortgages as clouds on the title of property levied on by plaintiff under execution. From an order that rents collected by a receiver of the property should be applied on a mortgage of said bank, plaintiff appealed to the appellate court, and from a judgment of affirmance therein (71 Ill. App. 404) he again appeals. Affirmed.

This case has been before us before, and is reported as *Cross v. Commission Co.*, 153 Ill. 499, 38 N. E. 1038. The original bill was filed by Peleg Cross on September 10, 1890, setting up that on September 2, 1890, he had recovered a judgment against William M. and Albert A. Druley, as co-partners under the firm name of Druley Bros., for \$7,653.33; that execution was issued upon said judgment

and levied upon certain leasehold properties, owned by the defendants, and known as the "Plainfield Elevator" and the "Caton Elevator," and also upon certain personal property; and that the Weare Commission Company and the Will County National Bank claimed interests in said elevators by virtue of mortgages held by them. The object of appellant's original bill was to set aside the said mortgages as clouds upon the title to the property levied upon in aid of the execution under which the levy was made. In *Cross v. Commission Co.*, supra, it was decided that the mortgage of the Weare Commission Company, and the mortgage of the present appellee, dated July 14, 1890, and recorded in Cook and Will counties in July, 1890, were sufficient for the purpose of conveying the property described therein as realty, and that they were entitled to priority over appellant's judgment and execution. The mortgage of the Weare Commission Company was upon the Plainfield Elevator, and the mortgage of the bank, the present appellee, was upon the Caton Elevator. On September 16, 1890, upon the motion of the appellant, complainant in said bill, one William Grinton was appointed receiver, with directions that he should "take possession of the said two elevators, and care for the same, and keep them insured, and rent the same, and out of the rents pay the expenses." The receiver was authorized to rent, and did rent, on September 22, 1890, the Plainfield Elevator at \$78 per month and the Caton Elevator at \$154 per month. In its answer filed in said cause the appellee, which had procured judgment upon the judgment note secured by its mortgage, set up that at the time of obtaining its judgment the Caton Elevator was already in the possession of the sheriff under appellant's execution, and that afterwards a receiver was appointed upon the motion of appellant, who immediately took possession of said Caton Elevator, so that it was impossible for the appellee to take possession of the same. The appellee and the Weare Commission Company filed cross bills in the suit to foreclose their mortgages, and, on January 11, 1892, a final decree was entered finding the amounts due to the Weare Commission Company and to the appellant, and also finding that there was due to the bank, upon its mortgage, the sum of \$4,141.28, and decreeing a foreclosure and sale of the Caton Elevator to pay appellee's mortgage. The former appeal, which brought the case to this court, was from this decree of January 11, 1892. While the appeal was pending, and in the fall of 1892, the Caton Elevator was burned down. In September, 1893, a petition was filed by the Weare Commission Company, reciting that William Grinton, the receiver, had become insolvent, and asked for his removal. Thereupon Grinton was removed, and one George W. Young was appointed receiver in his stead. A report, filed by Grinton as receiver, showed that he collected, from the time of his appointment

up to June 1, 1894, of rents on account of the Caton Elevator, \$3,187.88, and that he collected on account of insurance upon that elevator \$5,109.37, and on account of debris sold \$250, and that he had paid out \$792.46, leaving a balance of \$7,754.80; that he had in his hands, of rent collected from the Plainfield Elevator, after making certain payments, a balance of \$886.69; and that he also had of moneys received from other assets, after making certain payments from the same, a balance of \$614.81. Under the foreclosure decree the two elevator properties were sold by the master on December 8, 1894. A deficiency decree was entered in favor of the appellee bank for \$4,743.42. And also a deficiency decree was entered in favor of the Weare Commission Company. On account of Grinton's failure a settlement was made with his bondsmen, by which they paid over to Young, his successor, the sum of \$2,500. After paying out of this fund \$75 for receiver's charges, there was left the sum of \$2,350 to be distributed among the parties entitled thereto. On June 23, 1896, the appellee filed a petition for the distribution of this fund by the receiver. On January 11, 1897, the court entered a decree, finding that the Weare Commission Company had a first and prior lien upon the rents in the hands of the receiver derived from the Plainfield Elevator, and that the appellee had a first and prior lien upon the rents and profits derived from the Caton Elevator; and by its decree the court divided the said sum of \$2,350 into three funds, numbered 1, 2, and 3, respectively, the first representing the amount collected as rent from the Plainfield Elevator, the second representing the amount collected as rent and insurance from the Caton Elevator, and the third representing the amount collected from other assets of said partnership. Fund No. 1 was \$225.10; fund No. 2, \$1,968.80; and fund No. 3, \$156.10. The court, by its decree, directed that the costs should be paid out of fund No. 3; that the receiver should pay fund No. 1, namely, \$225.10, to the Weare Commission Company; and that he should pay fund No. 2, namely, \$1,968.80, to the appellee. An appeal was taken to the appellate court by the appellant from so much of the decree of distribution entered by the court below as directed the sum of \$1,968.80 to be paid to the Will County National Bank. One of the judges of the appellate court had presided at the trial of the cause in the circuit court, and therefore took no part in its consideration in the appellate court. The two other judges of the appellate court were divided in opinion as to whether the judgment of the circuit court should be affirmed or reversed, and, being so divided in opinion, affirmed the judgment of the circuit court. The present appeal is prosecuted from such judgment of affirmance.

George S. House, for appellant. Egbert Phelps, for appellee.

MAGRUDER, J. (after stating the facts). The fund which the receiver was directed by the decree of the circuit court to pay to the appellee consisted not only of insurance money collected by the receiver, but also consisted of rents collected by him under a lease made by him of the Caton Elevator before it was burned down. The contention made by the appellant is that such rents were improperly directed to be paid to the appellee, and that they should have been paid to him. Appellant concedes that appellee's mortgage is entitled to priority over the lien of his judgment and execution; but he contends that, inasmuch as the receiver appointed by the court below was appointed upon his motion, the rents collected by such receiver should have been applied upon his judgment. Appellant obtained the judgment and levied the execution thereunder upon the elevators, and then filed a bill in aid of his execution to remove appellee's mortgage, and another mortgage, as clouds upon his title. He contends that his possession as judgment creditor is the same as that of a junior mortgagee holding a mortgage subject to the mortgages of the appellee and the Weare Commission Company. William M. and Albert A. Druley, the mortgagors and judgment debtors, were in the possession of the elevators up to the time of the levy of appellant's execution upon the same, and the taking possession thereof by the sheriff, which possession was transferred to the receiver appointed in the suit begun by appellant. They consented to the possession of the receiver appointed at the instance of appellant.

The rule at common law, and laid down by this court, is that a mortgagor is not required to account to the mortgagee for rents and profits while he remains in possession. *Moore v. Titman*, 44 Ill. 367; *Mississippi V. & W. R. Co. v. United States Exp. Co.*, 81 Ill. 534. A mortgagee cannot interfere with the right of a mortgagor to collect the rents until he enters upon the property, or gives notice to tenants in possession thereof, or files a bill for the foreclosure of his mortgage, and obtains, in aid of it, the appointment of a receiver. *Scott v. Ware*, 65 Ala. 174. A mortgagee, filing a bill to foreclose a mortgage, will not be entitled to have a receiver appointed, unless it appears to the court that the mortgagor is insolvent, and that the security is inadequate. It here appears that the mortgagors were insolvent, and that the mortgaged property was an insufficient security for the incumbrances upon it. *Haas v. Society*, 89 Ill. 498. It is contended by appellant that, inasmuch as Druley Bros., as mortgagors, had a right to the rents of the mortgaged property so long as they were in possession, the right to such rents passed to appellant through the receiver, who was appointed upon his application. It is said in the text-books and in many of the decisions of the courts that a junior mortgagee, who

obtains a receiver of the rents and profits in aid of a bill to foreclose his mortgage, is entitled to the rents and profits up to the time of appointing a receiver at the instance of a prior mortgagee. Undoubtedly, where the first mortgagee is not made a party defendant to a bill to foreclose filed by a second mortgagee, such second mortgagee, procuring the appointment of a receiver to collect the rents and profits, is entitled to have such rents and profits applied upon his mortgage to the exclusion of the prior mortgagee; and in such case the prior mortgagee will not be entitled to payment out of the rents until he files a bill to foreclose his mortgage, and procures the receivership to be extended to his security. *Sanders v. Lord Lisle*, 4 Ir. Eq. 43; *Bank v. Barry*, 3 Ir. Eq. 443; *Lanauze v. Railway Co.*, Id. 454; *Post v. Dorr*, 4 Edw. Ch. 412. The rule that a second mortgagee is entitled to the rents and profits of the mortgaged estate under a receivership secured by him on a bill filed to foreclose his mortgage applies generally in cases where the first mortgagee is not made a party to the suit. As was said by the supreme court of the United States in *Miltenberger v. Railway Co.*, 106 U. S. 307, 1 Sup. Ct. 158: "The authorities limit the exclusive right of the second mortgagee to the income of a receivership, created under a bill filed by him, to a case where the first mortgagee is not a party to the suit." *Howell v. Ripley*, 10 Paige, 43; *High*, Rec. § 638. It must appear that the first mortgagee is not a party to the foreclosure suit begun by the second mortgagee, or that the receiver was appointed for the benefit of the second mortgagee alone, and not for the benefit of all the parties to the suit, in order to secure to the second mortgagee the exclusive right to the rents of the mortgaged property.

In *Williamson v. Gerlach*, 41 Ohio St. 632, where a junior mortgagee commenced an action to foreclose, making all lienholders parties, and upon his motion a receiver was appointed, but the receivership was not limited to any party or lien, it was held that the fund collected by the receiver was applicable to the liens on the property in the order of their priority; and there the court say: "Where an incumbrancer has a receiver appointed for his benefit, and other parties to the action, who may be entitled to have the receivership extended to their liens, take no steps to have the receivership thus extended, the party procuring the appointment will be entitled to the fund produced thereby because of his superior diligence. The cases in which a junior mortgagee has had rents and profits collected by a receiver, and applied to his lien, are those in which either the senior mortgagee was not a party to the action, or the receiver was appointed for the benefit of the junior mortgagee, and the receivership was not extended to the other liens."

The case of *Bank v. Tilden* (Sup.) 22 N. Y. Supp. 11, is an instructive one upon this sub-

ject. In the latter case a foreclosure of a second mortgage on a farm was commenced, the holder of the first mortgage being made a party. A receiver was appointed, the order appointing him being general in its terms, and not for the benefit of any particular party. The action was delayed by appeals, and a foreclosure of the first mortgage was begun, judgment was entered, the farm was sold, and a deficiency left; and a motion was made for an order directing the receiver to pay the amount in his hands, received from the rental of the farm, to apply on the deficiency. It was held that the action of the lower court in denying this motion was erroneous. It appeared in the *Tilden Case*, supra, that the receiver was appointed, not specially for the benefit of the holder of the second mortgage, but that his appointment was general for the benefit of any party who should appear to be entitled to the fund; and the court there say: "The authorities referred to by the trial justice * * * are cases where either an order appointing the receiver directed that the money should be applied in a specified manner, or were orders made in cases where the party claiming the fund was not a party to the action in which the receiver was appointed. * * * We think that, under the circumstances of this case, the receiver having been appointed for the benefit of all parties, the fund should be distributed according to priority of liens." *Keogh v. McManus*, 34 Hun, 521; *Beach*, Rec. §§ 554, 555. The same doctrine is announced by Jones in his work on Mortgages. 2 Jones, Mortg. (5th Ed.) §§ 1524, 1688. In the case of *Scott v. Ware*, 65 Ala. 174, which is relied upon by counsel for appellant, the rule is recognized that, where a junior mortgagee proceeds to foreclose his mortgage, and obtains a receiver of the rents and profits pending the suit, he obtains a specific lien upon them if the senior incumbrancers are not made parties.

In *Insurance Co. v. Fleischauer*, 10 Hun, 117, a junior mortgagee had the rents of the property applied to his mortgage to the exclusion of prior mortgagees, but there the appointment of the receiver was made for the benefit of the junior mortgagee only, and no other lienholder asked to have the receivership extended to any other lien. Applying the doctrine thus announced to the facts of the present case, we are of the opinion that the court below committed no error in decreeing that the rents should be paid to the appellee, whose mortgage was a prior security to the judgment of the appellant.

The original bill filed by appellant did not ask for the appointment of a receiver for the sole benefit of the appellant as judgment creditor, but the prayer of the bill was that "a receiver be appointed herein for the said two leasehold interests hereinbefore named, with the improvements thereon, with the usual powers of receivers in like cases." In this respect the bill was like the bill filed in

Miltenberger v. Railway Co., supra, of which it was there said: "The original bill evinced no intention to create a receivership for the sole benefit of the second mortgage bondholders." In addition to this, the appellee, the Will County National Bank, was a party defendant to the original bill filed by the appellant in aid of the execution issued upon his judgment. Not only so, but the order appointing the receiver, and entered on September 16, 1890, shows that the receiver was not appointed for the benefit only of the appellant as a junior lienholder, but was appointed for the benefit of all the parties to the suit. By the terms of that order the receiver is directed "to take all needful and proper care of all said property, and keep the said elevators, feed mills, with the machinery and other structures on said leased ground, well and properly insured in safe and responsible insurance companies, for the protection of the interests of such as may be found to be interested in the property." The receiver was therein directed to care for the elevators, and keep them insured, and rent them, and out of the rents pay the expenses, but in no sense was he directed to apply the rents for the benefit exclusively of the appellant. This being so, it was proper to apply the rents to the liens on the property in the order of their priority, and, as the lien of appellee's mortgage was prior to that of appellant's judgment, appellee was properly entitled to have the rents applied upon its mortgage. The decree of the circuit court and the judgment of the appellate court affirming that decree are affirmed. Decree affirmed.

(177 Ill. 134)

RIBORDY v. MURRAY et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

Drains—Acquiescence—Evidence—Sufficiency
—Right to Close—Water Courses—
Definition—Obstruction.

1. Adjoining owners constructing independent ditches, and then connecting them together, so as to form a continuous system of drainage, will be presumed to have acquiesced in the formation of such system, within 3 Starr & C. Ann. St. p. 475, § 3, providing that none of the parties shall fill up a drain, where their consent to the construction thereof might be inferred from their acquiescence.

2. One seeking a confirmation of his act in filling up a ditch, through which water of an adjoining owner had been drained for several years, has the burden of showing that the ditch is not a natural water course.

3. A fixed course over which surface water from adjoining land is uniformly discharged at a definite point is a "water course," within the rule prohibiting one from filling up a water course so as to impede the flow from the adjoining land, though the course has no well-defined banks and beds.

4. The fact that water passed through a natural water course for several years, with such force and volume as to produce a ditch 18 feet wide and 3 feet deep, will not authorize the owner of the land through which the water course passes to fill it up to the level of the ground on each side, on the assumption that

the water would thereafter flow as it did in a state of nature.

5. A landowner has a right to have water accumulating on his land flow therefrom, through a water course running on the land of an adjoining owner, as unobstructed as it would do in a state of nature.

6. A landowner may make such ditches for agricultural purposes as may be required by good husbandry, though he thereby increases the flow of water in a natural water course running through another's land.

Appeal from appellate court, Second district.

Bill by Ferdinand Ribordy against Bronson Murray and others for a confirmation of the right to fill up a certain ditch. Defendants filed a cross bill to compel complainant to remove an obstruction in the ditch. Decree for defendants, and plaintiff appealed to the appellate court, which affirmed the decree (70 Ill. App. 527), and plaintiff again appeals. Affirmed.

This was a bill in equity filed by appellant, June 30, 1890, against appellee Murray, as the owner of the N. $\frac{1}{2}$ of section 22, in township 30 N., range 6 E., in said Livingston county, and also against the commissioners of highways of said township, as having official control and jurisdiction of the highways in said township. The proceeding was instituted under an act of the legislature approved June 4, 1889, in force July 1, 1889, entitled "An act declaring legal, drains heretofore or hereafter constructed by mutual license, consent or agreement by adjacent or adjoining owners of land, and to limit the time within which such license or agreement heretofore granted may be withdrawn." 3 Starr & C. Ann. St. p. 475. The bill alleges that appellant was the owner of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, of section 15, in said township 30, and that immediately south of his land there is a public highway, upon the south side of which, and within 20 years prior to the filing of the bill, said commissioners of highways had constructed a ditch to a bridge under the highway, connecting this ditch with an open ditch on appellant's land north of the highway; that appellee Murray owned the land south of this highway, and directly opposite that of appellant, the land of Murray being in section 22 of the same town; that said Murray had constructed a ditch on his land to the point directly opposite the bridge under the highway, and connecting with the ditch constructed by the commissioners along the highway; that by means of these ditches the water falling on said highway and the lands adjoining, and upon the Murray land, or a part thereof, was carried through these several ditches, and discharged into the ditch on the land of appellant with which the highway ditch had been connected; that neither of the appellees had any written authority to discharge the waters from said ditches into the ditch on the land of complainant; that the same had not been constructed for a

period of 20 years, so as to give a prescriptive right, and that the ditch on the land of complainant was not a natural water course; that complainant, exercising his right under the law, had closed the ditch on his land opposite the said bridge under the highway, and declared thereby a revocation of any right to the same by appellees. The prayer of this bill is for confirmation of the right of complainant to fill up the said ditch on his land. The answer of the defendants (appellees) to the bill admitted the construction of the highway ditch and that on the land of Murray, and their connection with the ditch on the land of appellant, and averred the right to so construct and connect the same, and denied all the other material allegations of the bill. Appellee Murray filed a cross bill, the material part of which charged that by the closing of the ditch by Ribordy the natural flow of the water from his land across Ribordy's was obstructed, and praying that Ribordy be compelled to remove the obstruction, and permit the waters to flow through said ditch. A supplemental bill was filed by appellee Murray, alleging that since the filing of the original bill appellant had filled up 20 rods or more of the ditch on his land north of the first obstruction, and praying that he be required to remove that, as well as the dam he had first placed in said ditch. A very large amount of testimony was taken in the case, and upon a final hearing upon the issues formed upon the original bill and the cross bill and supplemental cross bill of appellee Murray, which were all heard together as one case, the circuit court entered a decree dismissing the original bill for want of equity, at the costs of appellant, and decreeing to appellee Murray the relief prayed by him in his cross bill and supplemental cross bill, and perpetually enjoining appellant from obstructing the ditch in question on his own land, and ordering him, within 60 days from the date of the decree, to remove the obstructions he had placed in said ditch, or be considered in contempt of court. The decree also ordered all costs on the cross bills to be taxed against appellant. Upon appeal to the appellate court the decree was affirmed, and the present appeal is from such judgment of affirmance.

Torrance & Torrance, R. S. McIlhuff, and N. J. Pillsbury, for appellant. C. C. & L. F. Strawn, for appellees.

PER CURIAM. In their opinion affirming the decree of the circuit court, the appellate court, speaking through Mr. Justice Crabtree, expressed the following views:

"Objection is raised by appellees that the bill does not show a cause of action under the statute in pursuance of which the suit is brought, because it does not allege that the ditches in question were made and connected with the ditch on appellant's land by the mutual license, consent, or agreement

of the owner or owners of the adjacent lands, so as to make a continuous line upon, over, or across the lands of several owners, as provided by the statute. But the third section of the statute provides as follows: 'Sec. 3. Whenever drains have been or shall be constructed in accordance with this act, none of the parties interested therein shall, without the consent of all the parties, fill the same up or in any manner interfere with the same so as to obstruct the flow of water therein; and the license, consent or agreement of the parties herein mentioned need not be in writing, but shall be as valid and binding if in parol as if in writing, and may be inferred from the acquiescence of the parties in the construction of such drain.' We think the evidence shows that for several years prior to the damming up of the ditch on appellant's land the ditches of appellees had been connected therewith, forming a continuous line of drainage over the lands of Murray, across the highway, and over the lands of appellant, and we think the acquiescence of appellant may be inferred from all the circumstances appearing in the evidence, thus bringing the case within the spirit of the statute, upon which we are not disposed to place the narrow construction contended for by appellees. Leaving out of view, for the moment, the question as to whether the continuous line of ditch in controversy was constructed in a natural water course or where the water would flow in a state of nature, and assuming that the ditches were constructed to carry water where it would not otherwise flow, we are inclined to hold that the construction of independent ditches by adjoining owners of lands, and then connecting them together so as to form a continuous system of drainage across the lands of the several owners, by mere acquiescence and without any special agreement or license, would bring the case within the statute. Our holding is that the allegations of the bill, if proven, made a cause of action for appellant under the statute.

"The bill, however, alleges that the ditch on the land of appellant was not a natural water course, and we think it was incumbent upon him to prove this allegation to the reasonable satisfaction of the court before he would be entitled to an order approving or confirming his action in obstructing and damming up the ditch which for several years had been carrying off water from the highway and from the lands of the adjoining owner, Murray. He was seeking to interfere with and break up the order of things which had existed for a number of years prior thereto, and, before he was entitled to an order or decree of court confirming or approving of such action, he was bound to show a clear legal right. It seems to us the case stands upon the same footing as it would if, instead of bringing this suit after damming up the ditch, he had filed a bill

for an injunction against appellees to restrain them from turning the water from their ditches into the one upon his land, and if, upon the allegations and proofs upon such a bill, there be a reasonable doubt of the right, the injunction would be denied. *Wilson v. Dondurant*, 142 Ill. 645, 32 N. E. 498. In the case just cited, it was held that the act of 1889, under which this suit was brought, does not restrict or abridge the rights of drainage as they existed at common law, but that its sole purpose and effect is to enlarge those rights.

"The real question in controversy in this case, and the one upon which the great mass of testimony was taken, is as to whether the ditch upon appellant's land was in the natural course or channel through which water coming through the Murray ditch and the highway ditch would find its natural outlet, and through which, in a state of nature, it would and ought to flow. Upon this question the court below found that the land of appellant was the servient heritage, and the land of Murray the dominant heritage, and that, prior to the filling up of the ditch by appellant, water passed in a course of nature from said dominant to the servient heritage. The court further finds that so far as the ditch in question formed a continuous line upon, over, and across the lands of Murray, the highway, and the lands of appellant, it was but a natural water course. Notwithstanding the labor involved in reading the great mass of testimony taken in the cause, we have carefully done so, and are unable to say that, upon the material questions involved, the court below came to a wrong conclusion. We do not deem it necessary to discuss or detail the evidence at length, as it would probably serve no useful purpose, but we think a clear preponderance of it shows that in a state of nature there was a gradual flow of water from the lands of Murray onto those of appellant, which in times of high water found its outlet in a northeasterly direction across the lands of appellant, through a swale or series of depressions in the ground, until it finally emptied into Mazon creek, some distance northeast of appellant's lands. It is true, there was no well-defined 'water course,' in the sense in which that term is often used, having well-defined banks and beds. But that was not necessary. If the conformation of the land was such as to give the surface water flowing from one tract to another a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its flow is a water course, within the meaning of the rule applicable to this class of cases. *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. 53. We think a preponderance of the evidence given by witnesses who knew the land in a state of nature, before it was broken up for cultivation, shows that such a water course

existed across the lands of appellant. Some of the witnesses call it a slough, others a sag, others a gash, still others a swale, and some say there was a depression a rod or a rod and a half wide, through which the water flowed on to its outlet. We think the evidence shows that the ditch on appellant's land, and which he has dammed up, runs along in this natural depression and in the line of the ancient water course. There seems to be some doubt as to how this ditch was first started. Appellant testifies there was no ditch there in 1878, when he went to the old country, and that on his return he found some one had plowed a couple of furrows some 36 or 37 rods long, connecting with the highway ditch, and he never could find out who did it; that nothing has ever been done to it since, except that by the action of the water and the cattle it has been deepened and widened, until it is now a ditch 18 feet wide and 3 feet deep. The fact that the ditch has been so deepened and widened without human agency would seem difficult of explanation except upon the theory that it is a natural water course, carrying large quantities of water. The men plowing a couple of furrows upon land where water does not naturally flow in considerable volume and amount could hardly be expected to produce such a result.

"But appellant insists that even if it be true that the ditch was located in a natural water course, yet he has the right to fill it up to the natural surface of the ground, and this he claims is all he has done. There is a conflict in the evidence as to the height of the dam. The testimony of the witness D. J. Stanford, county surveyor, is that, from different levels taken by him, it is shown that the dam is from three to five inches higher than the ground on each side. Other witnesses testify that the dam is a little higher than the surrounding ground. However the fact may be, we are unwilling to assent to the proposition that, if the ditch is in a natural channel or water course, the party upon whose land it is so situated has the right to fill it up to the level of the ground on each side. Such a proceeding would undoubtedly have the effect to impede and interrupt the natural flow of the water and prevent its free and natural passage, so that it would be thrown back upon the dominant heritage. After the water has passed through a channel for a number of years, with such force and volume as to produce a ditch 18 feet wide and 3 feet deep, it might be extremely difficult, if not impossible, to ascertain what the natural surface originally was, and hence it would be very dangerous to allow the ditch to be dammed up, on the assumption that the water would thereafter flow as it did in a state of nature. There is evidence to show that, notwithstanding the dam, the water still forces its way around it, and reaches the old ditch in the field beyond. If this be true, it is a physical fact tending very strongly to

show that the dam is placed in a natural water course, and also that it obstructs the natural flow of the water. This appellant had no right to do. The proposition that the owner of the dominant heritage has the right to have the water accumulating on his land flow therefrom to the servient heritage as freely and unobstructedly as it would do in a state of nature is so well recognized and understood that it needs no citation of authority in its support. It may be true, in this case, that the construction of the highway ditch, and the ditches connecting therewith from the Murray land, have increased the volume and flow of water into the ditch on appellant's land, and that it now empties into the same with greater force than it would in a state of nature. But this cannot be avoided. It is one of the inevitable results experienced in the drainage and improvement of land, which the development of the country cannot always permit to remain in a state of nature. It has therefore frequently been held in this state that the owner of the dominant heritage may make such drains or ditches for agricultural purposes on his own land as may be required by good husbandry, although by so doing the flow of water may be increased in the natural channel which carries the water from the upper to the lower field. *Peck v. Herrington*, 109 Ill. 611; *Davis v. Commissioners*, 143 Ill. 9, 33 N. E. 58; *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. 53. This proposition does not seem to be denied by counsel for appellant, but they insist that the evidence shows the ditch in question was not in a natural water course, and that, even if it were, appellant had the right to fill it up to the natural surface of the ground. We have already said all we care to say upon the subject of filling up the ditch, and we think the evidence was sufficient to warrant the court in finding against appellant upon the question as to whether or not the ditch was in a natural water course. It is true that the bridge or culvert in the highway is not at the same place at which it was originally constructed when the highway was first graded. The witness Charles Eastman testified that in 1875 he helped to move the culvert a few rods further west than it was originally built; that appellant assisted in this work, and said that the object of moving the culvert was to make a straight course for the water. If this statement is anywhere denied by appellant, such denial has escaped our observation, and, if witness speaks truthfully and recollects correctly, this would be a strong circumstance tending to show that appellant then recognized the right of the water to flow under the highway and upon his land immediately north of it.

"On a careful examination of the whole case we are not prepared to say the decree is erroneous. The appellant failed to establish his right to maintain the dam in question, and therefore his bill was properly dis-

missed. Upon the cross bill, we think appellee Murray was entitled to the relief prayed, and the court properly granted it. We find no error in the decree upon the question of costs. The decree will be affirmed."

Concurring in the foregoing views and in the conclusion above announced, we adopt so much of the opinion of the appellate court as is above quoted as the opinion of this court. Accordingly, the judgment of the appellate court is affirmed. Judgment affirmed.

(176 Ill. 545)

KINGMAN & CO. v. HANNA WAGON CO.

(Supreme Court of Illinois. Dec. 21, 1898.)

SALES—ACTION FOR NONACCEPTANCE—EVIDENCE—
MEASURE OF DAMAGES—PERFORMANCE
—APPEAL—REVIEW.

1. Evidence that wagons were defective is inadmissible in an action for nonacceptance of them, under a contract to take a stated number, as an excuse for nonacceptance of part of them only.

2. Rulings on the admissibility of depositions cannot be reviewed if the depositions are not set out in the record.

3. The measure of damages for nonacceptance of wagons bargained and sold by the manufacturer under a contract for an exclusive right of sale to the trade is the difference between the cost of manufacture and the contract price.

4. The manufacturer of wagons under an agreement to furnish a certain number at a stated price "as ordered" need not make and tender them if they are not ordered, as a prerequisite to bringing action for nonacceptance.

5. The supreme court cannot consider an assignment of error that a verdict was excessive because involving questions of fact.

Appeal from appellate court, Second district. Action by the Hanna Wagon Company against Kingman & Co. A judgment for plaintiff was affirmed by the appellate court (74 Ill. App. 22), and defendant appealed. Affirmed.

This was an action of assumpsit commenced to the February term, 1897, of the circuit court of Peoria county, by the Hanna Wagon Company, a corporation engaged in the manufacture of farm wagons at Peoria, Ill., to recover from Kingman & Co., also a corporation, for the alleged breach of a certain written contract dated December 22, 1892, and modified by a written contract dated March 22, 1894. Kingman & Co. was engaged, as a dealer, in selling all kinds of farm implements, with its principal place of business and office at Peoria, and with branch houses at Kansas City, Omaha, Des Moines, and St. Louis. The material parts of the contracts, so far as it is necessary to state them, are substantially as follows: They provide that Kingman & Co. should have the exclusive sale of wagons manufactured by Hanna & Co., in the states of Illinois, Missouri, Kansas, Arkansas, Indian Territory, Oklahoma Territory, the western half of Kentucky, and Tennessee, Iowa, and Nebraska, the south half of Minnesota, and the south half of South Dakota. Under this contract of December 22, 1892,

appellant ordered 3,000 wagons for the year 1893, viz. from February 1, 1893, to February 1, 1894, and 3,000 for the year 1894, viz. from February 1, 1894, to February 1, 1895, the yearly quantity to be distributed as follows: For the months of February, March, and April, 600; for May, June, and July, 600; for August, September, and October, 900; for November, December, and January, 900. These, under the contract, were to be taken in equal monthly deliveries, as near as possible, and it was provided therein, in detail, for the making and delivery of the wagons, and parts thereof, on board the cars at Peoria; for the packing and marking of the same; for the furnishing by appellee of a good supply of printed matter, and also electrotypes for advertising the wagons in the territory assigned; the prices and terms of settlement, the settlements to be the 10th of each month for wagons shipped the previous month. The parties entered upon the execution of the contract, but appellant took only about one-half of the number of wagons agreed upon for the year 1893 under the written agreement, and appellee was claiming damages by reason thereof, and was continually urging appellant to give appellee orders, as provided in the agreement. Finally the parties entered into a written contract March 22, 1894, modifying the contract of December 22, 1892, and providing that both parties cancel all claims against each other by reason of any alleged default or defaults up to that time in the performance of the contract of 1892, except as to repairs on wagons then out that were defective. It was also agreed that the wagons and parts to be furnished by appellee should be well constructed, of good material, and with all improvements as proposed, and to be well made throughout, and to be first-class wagons. By this last contract and modification, the wagons and parts were to be furnished by appellee free on board the cars at its factory as ordered, and that within the ten months from April 1, 1894, to February 1, 1895, Kingman & Co. was to take 1,500 wagons in equal monthly installments, with a slight variation, not to exceed 20 per cent., and 500 extra cottonwood boxes, at the prices mentioned in the original contract; also, 100 poplar boxes, at a price of \$8.50 each, and, for all additional poplar boxes, \$9 each. By the terms of the contract, appellant should have ordered and received from appellee, on an average, 150 wagons per month, and not less than 130 nor more than 180 in any one month during the period from April 1, 1894, to February 1, 1895; but appellant failed to comply with the contract in this regard. Appellee, it appears by the evidence, was importuning appellant for more orders, and urging it to give specifications for more wagons and more boxes. Much correspondence on this matter is found in the record showing appellee's readiness to furnish the wagons and boxes provided by the contract. Of the entire 1,500 wagons appellant was to take by the terms of

the contract, it appears appellant ordered and accepted only 808, being 692 short of the number it should have taken within the period required by the agreement; and, of the wagon boxes mentioned, it ordered and received but 207, being 393 less than the number contracted for. The agreement also provided that the original contract should remain in full force and effect, except as modified by this last agreement. It also appears that, after the expiration of the contract, appellant ordered and received from the Hanna Wagon Company 79 wagons; and there was a dispute as to whether these last-mentioned wagons were delivered as a part of the 1,500 contracted for under the agreement of March 22, 1894. The defense claimed that the wagons were so defective as to affect appellant's trade, and claimed this as an excuse for not fulfilling the contract on its part. The case was tried by a jury, and a verdict was rendered in favor of appellee for \$4,545. A motion for a new trial was made and overruled, and judgment was entered upon the verdict. The case was appealed to the appellate court for the Second district, which affirmed the judgment of the circuit court; and appellant prayed an appeal to this court, asking for the reversal of the judgment of the appellate court.

Stevens, Horton & Abbott, for appellant.
Winslow Evans, for appellee.

PER CURIAM. Among the errors assigned by appellant, the two principal ones relied upon for a reversal are the following: First, the refusal of the court to admit evidence as to the defects in certain wagons received and paid for by appellant; and, second, the alleged erroneous measure of damages adopted by the trial court.

In determining whether the court erred in refusing to admit evidence as to defects in certain wagons received and paid for by appellant, it becomes necessary to know the purpose for which the testimony was offered. It does not appear that it was offered for the purpose of recoupment, as we do not find, on examination of the evidence in the record, that any offer or attempt to offer was made by appellant to show the amount of damages it had sustained by reason of defective wagons, and there was no evidence before the jury by which damages for defects in wagons could be ascertained or recouped, but the only purpose in offering it appears to have been as an excuse on the part of appellant for not ordering the number of wagons and boxes required by the contract. We fail to find any evidence which shows that appellant repudiated the contract because of the defective condition of the wagons; but, on the other hand, the wagons seemed to be satisfactory, as appears from a letter of appellant to the Hanna Wagon Company, dated May 7, 1894, in which appellant says "that they were keeping the wagons to the front, and that they gave very good

satisfaction, and that they would compare favorably with other wagons." It also appears that appellant continued to order and receive wagons every month from April, 1894, to and including January, 1895, but not the full number to be ordered by the appellant under the contract. The reason appears to have been not so much the defective condition of the wagons as the depressed condition of the market. In a letter from appellant dated August 8, 1894, to appellee, with reference to the trade in Iowa, appellant says: "In fact, we positively know that people are not making shipments into Iowa quite largely, as there is absolutely no trade. We have five men on the road in this state that are working as hard for business as any one can, and we know also that we are in a position to make just as good prices as any one can make, quality of work considered; and yet we are unable to sell goods, for the simple reason that all dealers have some wagons in stock, and are selling nothing, hence will not place orders for future use." Counsel for appellant admit in their argument that the purpose in offering this testimony was not to prove damages, as appears from the following language used: "It was not a question of the amount of damages caused appellant, but claimed as an excuse for a refusal to take any more of the wagons." Undoubtedly, appellant could have refused to receive any wagons if they were defective, but it could not continue to order each month, and receive, only a portion of the wagons required to be ordered and received by them, and claim the contract rescinded as to the rest. In *Roebling's Sons Co. v. Lock-Stitch Fence Co.*, 180 Ill. 660, 22 N. E. 518, this court said (page 666, 130 Ill., and page 518, 22 N. E.): "One party to a contract cannot, by simply refusing to carry out his part of it, compel the other party to rescind it. The latter has a right to keep it alive notwithstanding such refusal. This doctrine was clearly announced in *Kadish v. Young*, 108 Ill. 170." Appellant, by its own conduct, kept the contract alive; and it could not, under the terms of the contract, refuse to take only what the demands of the trade required, when it had contracted to take a certain number during a specified time, and to give orders therefor. The court properly rejected the evidence for the purposes for which it was offered.

Objection is made that the court erred in excluding certain portions of the depositions of H. L. Carey, Joshua A. Davidson, C. H. Behrens, and Albert F. Aufderheide. The portions of the depositions objected to are very imperfectly set out in the abstract, and we have been compelled to resort to the record to ascertain what was admitted and what was excluded. Much of the evidence objected to was read to the jury, and portions were properly excluded, for the reason hereinbefore given, and also because the inquiries were not confined to the wagons in controversy. In examining the record, we find in the cross-ex-

amination of Carey cross-interrogatories from 49 to 59, inclusive, omitted. In the deposition of Behrens the record says, "Direct interrogatories 81 to 85, inclusive, omitted;" and on page 187 of the record it reads, "The balance of the deposition omitted." No reason is given why portions of the depositions are omitted in the record. Non constat but that the portions omitted may have cured some of the excluded portions of the depositions. But whether that is the case or not, if appellant desired to save the question sought to be raised, the entire depositions should have been set out in the record.

Were the measure of damages adopted by the court, and the instructions given with reference thereto, erroneous? The basis of the measure of damages adopted by the trial court is contained in plaintiff's seventeenth instruction, which is as follows: "If you find, from the evidence, that the defendant has failed and refused to take a portion of the wagons and extra boxes mentioned in the contract, and pay for the same, and has thereby broken the contract in evidence, as charged in the declaration, then the plaintiff is entitled to recover damages in this case from the defendant for breach of such contract, and for failure to take and pay for the wagons and extra boxes in question. The measure of the plaintiff's damages in such case is the difference between what it would cost the plaintiff to make and deliver such wagons and extra boxes, and the price which the defendant agreed, in and by its contract, to pay the plaintiff therefor; and, whatever the evidence shows the amount of these damages to be, it is your duty to assess the same in favor of the plaintiff." Appellant contends that the proper measure of damages was the difference between the contract price and the market price at the time and place of delivery. This, undoubtedly, is the general rule under a contract to deliver goods at a certain price, and when the purchaser refuses to accept and pay for them, because the seller may take his goods into the market, and obtain the current price for them; yet where, from the nature of the articles, there is no market on which the articles can be sold, this rule is not applicable. *Leake*, Cont. p. 1060. The rule contended for by appellant is not applicable to the facts in this case. The contract provided that appellant should take 1,500 Hanna wagons between March 22, 1894, and February 1, 1895, in equal monthly deliveries from April 1st to that time. Appellant, under the contract, had the exclusive right to sell Hanna wagons of the Hanna Wagon Company's manufacture in the states of Illinois, Missouri, Tennessee, Iowa, Nebraska, Kansas, Arkansas, Indian Territory, Oklahoma Territory, and other states. Thus, appellee had no market where it could sell the wagons. If appellee had not contracted its entire product to appellant, but had been manufacturing and selling to others at the same time it was deliv-

ering to appellant, then there would have been a market to which it might have resorted, and a different question would have been presented. In *Leake*, Cont. pp. 1059, 1060, it is said the doctrine of measuring damages by the market price applies only where there is a market for goods of the description, to which the buyer or seller may resort to buy or sell, and prevent further damages accruing, and that, if there be no such market, the further consequences have to be considered in measuring damages. Appellee could not go into the market at Peoria, where the wagons were to be delivered under the contract, without abandoning as well as violating its contract with appellant, for appellant had the exclusive sale of these wagons in Illinois. Appellant was in default. It was the duty of appellant to give orders, with specifications for the wagons and boxes, as it required them, under the terms of the contract; and it should have ordered the entire 1,500 in equal monthly deliveries before February 1, 1895. This it did not do, though frequently requested by appellee to give it orders and specifications for wagons and boxes. By reason of appellant's conduct, appellee being ready, willing, and able to comply with the terms of the contract, appellee was excused from actually making the wagons and boxes, and tendering them to appellant, before bringing its action for damages.

In *Hinckley v. Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, the defendant, *Hinckley*, agreed, in writing, to purchase 6,000 gross tons of steel rails of the *Pittsburg Bessemer Steel Company*. Said rails were "to be made of the best quality of Bessemer steel, and to be subject to inspection as made and shipped, and to be well straightened and free from flaws, and to be drilled as may be directed." The price to be paid by defendant, *Hinckley*, was \$58 net per ton. The defendant refused to give directions for drilling, and by repeated statements of defendant that he was not ready to give drilling directions, and not ready to use them, the plaintiff postponed and delayed rolling any of the rails until after the time prescribed for their delivery under the contract, and, when formally requested to furnish drilling directions, he informed the plaintiff that he should decline to take any rails under the contract. The court held—First, the defendant was liable in damages for a breach of the contract; second, that the plaintiff was excused from actually manufacturing the rails and tendering them to the defendant; third, that the measure of damages was the difference between the cost per ton of making and delivering the rails, and the \$58, the contract price. The court cited approvingly the cases of *Masterson v. Mayor*, etc., 7 Ill. 61; *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81; *U. S. v. Speed*, 8 Wall. 77.

In *Masterson v. Mayor*, etc., 7 Ill. 61, the plaintiff, on the 26th day of January, 1836,

had contracted with the defendant to furnish and deliver, at the site of the city hall, in the city of Brooklyn, all the marble that might be required for building the city hall, according to certain plans and specifications, and in conformity with such drawings, molds, and patterns as should be from time to time furnished by the architect. Plaintiff furnished a portion of the marble, and received pay for it; but defendant suspended operations upon the building in 1837, for want of funds, and refused to receive any more materials of the plaintiff, though the latter was ready and willing to perform. An action was brought in 1840 against the defendant, founded upon the breach of contract, which occurred in 1837. The court said: "The contract here is for the delivery of marble wrought in a particular manner, so as to be fitted for use in the erection of a certain building. The plaintiff's claim is substantially one for not accepting goods bargained and sold,—as much so as if the subject-matter of the contract had been bricks, rough stone, or any other article of commerce used in the process of building. The only difficulty or embarrassment in applying the general rule grows out of the fact that the article in question does not appear to have any well-ascertained market value. But this cannot change the principle which must govern, but only the mode of ascertaining the actual value, or, rather, the cost to the party producing it. Where the article has no market value, an investigation into the constituent elements of the cost to the party who has contracted to furnish it becomes necessary, and that, compared with the contract price, will afford the measure of damages. The jury will be able to settle this upon evidence of the outlays, trouble, risk, etc., which enter into and make up the cost of the article in the condition required by the contract, at the place of delivery. If the cost equals or exceeds the contract price, the recovery will, of course, be nominal; but, if the contract price exceeds the cost, the difference will constitute the measure of damages."

Under the authorities herein cited, and the facts in this case, the rule adopted by the circuit court for ascertaining the measure of damages was the correct one.

We have not considered each specific objection made to the ruling of the court on instructions, but what has been said covers the substantial objections made to the ruling of the court on instructions.

The contention that the verdict was excessive and erroneous cannot be properly addressed to this court, as it necessarily involves questions of fact which the statute has withdrawn from our appellate jurisdiction. *Railroad Co. v. Eldridge*, 151 Ill. 542, 38 N. E. 246. Finding no material error in the record, the judgment of the appellate court will be affirmed. Judgment affirmed.

176 Ill. 533)

SLOCUM v. HAGAMAN et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

APPEAL — CROSS ERRORS — WILLS — CONSTRUCTION.

1. By failing to assign cross error, a defendant in error estops himself from objecting to the decree.

2. A will gave certain specific bequests, and gave testator's widow, in lieu of dower or other statutory provision, certain property in fee, and a stated annuity. It created another annuity to commence on his widow's death, and directed the sale of non income bringing property, and prohibited, during the widow's life, the sale of property bringing income. The possession and profits of certain income-bringing property disposed of by the will were withheld from the devisees until after the widow's death. The widow renounced the will, and elected to take under the statute as a surviving widow. *Held*, that the residuary legatees were entitled to a distribution immediately on the widow's election, since it accelerated the residuum.

Error to superior court, Cook county; **H. M. Shepard, Judge.**

Bill by **Almira A. Hagaman** and others against **James E. Slocum** and others. Decree for complainants, and **Slocum** brings error. Affirmed.

Wilson, Moore & McIlvaine, for plaintiff in error. **William D. Washburn**, for defendant in error **Charles FitzSimons**, executor and trustee. **P. W. Sullivan**, for defendant in error **Catherine H. Ashley**. **T. A. Moran**, for certain defendants in error.

MAGRUDER, J. This is a bill, filed in the superior court of Cook county on June 23, 1897, by the defendant in error **Almira Ann Hagaman**, widow of **Benjamin Hagaman**, deceased, who died at Chicago on December 9, 1894, testate, leaving no children or descendants of a child, but leaving, him surviving, his said widow, and two sisters, and certain nephews and nieces, children of his deceased brothers. The defendants to the bill were said nephews and nieces and sisters, and certain devisees and legatees under the will, and certain persons holding incumbrances upon portions of the property. The bill was filed for partition and for a construction of the will. The decree, entered in the court below appears to have been entered by consent, and in pursuance of a stipulation entered into by all the parties, except the plaintiff in error herein, **James E. Slocum**, executor and trustee under the will. The present writ of error has been sued out by **Slocum** alone, as such executor and trustee, for the purpose of reviewing the decree entered below. The will was dated October 6, 1888, and a codicil thereto was dated April 19, 1892. The will and codicil were admitted to probate in the probate court of Cook county on December 27, 1894. **Robert C. Givens**, and the plaintiff in error, **James E. Slocum**, were appointed executors by the will, but **Givens** failed to qualify, and letters testamentary were issued to **Slocum** alone. By the terms of the will the testator, **Benjamin Hagaman**, gives and devises to his wife, **Almira Ann Hagaman**,

in fee, certain stores and lots of land known as "104 and 106 South Water Street, in Chicago," and also \$4,000 per annum, payable quarterly from and after the date of the testator's decease, so long as she may live. The testator also wills and bequeaths to his wife all of the household goods and furniture, and everything in the house in which they lived; and he recites that his bequests and devises to his wife "are in lieu of any and all dower, widow's award, and of all other claim or claims." The will provides for the payment of \$500 per annum to each of the two sisters of the deceased, as long as they respectively live; and also the sum of \$800 per annum after the death of his wife to a certain adopted daughter, named **Katie D. Hagaman**, afterwards married to **Herbert M. Ashley**, and called in the record **Catherine H. Ashley**. On January 5, 1895, the widow filed in the probate court her written renunciation of any devise or provision made for her by the will, thereby renouncing all claim to the benefit of any jointure given or assured to her in lieu of dower, or of any devise or other provision made to her by said will; and elected to take, in lieu thereof, her dower and legal share in the estate of her husband. On June 10, 1896, she filed in the probate court her written election, as surviving wife of **Benjamin Hagaman**, to have (in lieu of dower in said estate, and of any share of personal estate therein, which she might be entitled to take with dower, and in lieu of all the provisions made for her in the will), absolutely and in her own right, one-half of all the real and personal estate belonging to the estate, which should remain after the payment of all just debts and claims against the estate. The widow averred in her bill that by virtue of said election and renunciation she was entitled to one-half of all the real and personal estate belonging to her husband's estate, and, in addition thereto, to her widow's award. The bill also avers that the title to the other undivided one-half of the real estate was devised by implication to the executors therein, and was held by the said **James E. Slocum**, executor and trustee, who was made party defendant to the bill. Besides the lands left by the testator in the state of Illinois, he owned lands in several other states of the Union. The will provided that, after the demise of the testator's wife, and as soon as it could be done at fair prices, his property should be sold, and the proceeds thereof divided pro rata among his nephews and nieces and his said adopted daughter, share and share alike; and that, should any of his nephews and nieces die before such division, leaving children, such child or children should be entitled to the share of the parent. The bill alleged that the renunciation by the widow of the provisions of the will accelerated the residuary estate. The decree entered by the court below directed a partition and distribution of the estate, notwithstanding the fact that the widow was

still living, upon the ground that the estate of the nephews and nieces had been accelerated by the renunciation by the widow of the provisions made for her in the will. The decree also ordered that the widow should receive one-half of the proceeds of sale of the real estate owned by the testator outside of the state of Illinois.

After the present writ of error was sued out from this court, and on December 14, 1897, the death of the widow, Almira Ann Hagaman, was suggested, she having died on November 17, 1897, at Chicago. Upon motion of the solicitor of record, who had appeared for her in this court, Charles FitzSimons, executor and trustee under her last will and testament, was substituted as defendant in error for the said Almira Ann Hagaman, and entered his appearance herein. Charles FitzSimons, the executor and trustee under the will of Mrs. Hagaman, deceased, has entered a motion to dismiss the present writ of error, alleging, in support of said motion, that the death of Mrs. Hagaman, prior to the death of any of the nephews and nieces who are beneficiaries under the will of Benjamin Hagaman, has removed the question of acceleration from the consideration of this court, and that there is now no question before this court for adjudication.

The motion to dismiss the writ of error is not opposed by the plaintiff in error, Slocum, the executor under the will of Benjamin Hagaman, deceased. The only opposition to the dismissal of the writ of error seems to be made by counsel representing some of the nephews and nieces who were defendants below. These nephews and nieces consented to the entry of the decree entered by the trial court. They have assigned no cross errors in this court. They are, therefore, estopped from alleging any objections to the decree. A dismissal of the writ of error would leave the decree standing in the court below as it was there entered, so that such dismissal would operate to secure the same result as would follow from an affirmance of the decree. A decision by this court that acceleration was produced by the renunciation of the widow necessarily leads to an affirmance of the decree below, without considering any of the other findings of the decree.

Upon the face of the will, the distribution of the estate was to be made at the death of the widow, but the court below held that the division and distribution of the estate could take place at once, as though the widow had died, upon the ground that the right and power of the trustee to sell and convey the estate, and to divide and distribute the proceeds thereof, had been accelerated. Inasmuch as it appears that the widow has died, the period for the distribution of the estate under the terms of the will has arrived, whether there was any such acceleration as is claimed, or not.

The only party prosecuting the present writ of error is the plaintiff in error, Slocum,

the trustee and executor under the will of Benjamin Hagaman, deceased. Counsel for plaintiff in error say: "If the decree of the court was correct in finding that the estate of the remainder-men was accelerated by the renunciation of the widow, no other parties have any beneficial interest in the estate, and the trustee would not represent any interest not present in court, and satisfied with the decree, and would have no duty to perform, except to carry into effect the decree as rendered. * * * The question as to the interest of the widow in the proceeds of the lands outside of the state of Illinois arises only in the event that this court shall hold that no acceleration was produced by the renunciation of the widow." In other words, the parties below, interested in the estate, and all of whom are of age, made a stipulation, which was introduced in evidence before the master, and therein consented to the entry of a decree, by the terms of which the proceeds of the sale of the lands outside of Illinois were to be divided equally between the widow on the one side, and the nephews and nieces and adopted daughter on the other side. The sisters and adopted daughter agreed to take certain specified sums in lieu of the annuities granted to them by the will, and the widow agreed to pay these sums out of her share of the estate. A settlement was also made satisfactory to all parties with certain devisees, named in the will, who are the children of one Gage, living in the state of Iowa. It thus appears that there is nothing in the decree entered below of which either the plaintiff in error or any of the defendants in error can complain, if the decree of the court below was correct in finding that the renunciation of the widow worked an acceleration of the remainders.

It seems to be settled by the weight of authority that, "where the widow, who has been given a life interest under the will, renounces and elects to take her dower or the statutory allowance instead, her renunciation works an extinguishment of her life estate, and accelerates the rights of the second taker." *Fox v. Rumery*, 68 Me. 121; *Dean v. Hart*, 62 Ala. 310; 20 Am. & Eng. Enc. Law, pp. 895, 897, and cases cited in note 3. The doctrine of acceleration proceeds upon the supposition that, though the ulterior devise is in terms not to take effect in possession until the decease of the prior devisee, if tenant for life, yet that, in point of fact, it is to be read as a limitation of a remainder to take effect in every event which removes the prior estate out of the way. 1 Jarm. Wills, 539; *Blatchford v. Newberry*, 99 Ill. 11. Whether the life estate is determined by a revocation, or by death, or by the renunciation of the widow, or by any other circumstance, which puts the life estate out of the way, the remainder takes effect, having only been postponed in order that the life estate might be given to the life ten-

ant. *Blatchford v. Newberry, supra.* In the case of *Blatchford v. Newberry, supra*, we held that the doctrine was founded upon the presumed intention of the testator that the remainder-man should take on the failure of the previous estate, notwithstanding the prior donee may be still alive; and that the doctrine was to be applied in promotion of the presumed intention of the testator, and not for the purpose of defeating his intention. Where the intention of the testator is that the remainder should not take effect till the expiration of the life of the prior donee, the remainder will not be accelerated. *Id.*

The question, then, arises in this case, whether the testator, Benjamin Hagaman, postponed the interests of his nephews and nieces and adopted daughter because of the income which his wife was to have for her life, and in order that she might have such income for life. Upon examination of the whole will, we are of the opinion that the postponement of the division of the estate until the death of the widow was for the purpose of securing her income during her life, and that, when she renounced the provisions of the will, and took absolutely, as her own property, one-half of the testator's realty and one-half of his personalty, the reason for the postponement of the period of distribution no longer existed; and it was proper to make such distribution as though the widow had died. In the seventh clause of the will the testator directs that none of the property "bringing income," belonging to his estate, should be sold during the life of his wife, except the Dakota farm and lands. By his codicil he increased the annuity to be paid to his wife from \$4,000 per year to \$5,000 per year. The same restriction as to the sale of lands not bringing income does not exist in the will. The annuity of \$800 per year to be paid to his adopted daughter is not to be paid until after the death of his wife. By the fourth clause of the will certain children of one Gage are to have a certain block of buildings in Fargo, D. T., but they are not to come into possession or enjoyment thereof, or of the rents, issues, and income thereof, until after the death of his wife; and the possession, care, management, and control of said property are given to his executors, or the survivor of them, until the decease of his wife. These and other provisions of the will indicate that the chief care of the testator was to keep his estate in such condition that an income should be derived therefrom for the benefit of his wife during her life. Therefore, when, by the renunciation of the widow, the income, provided for by the will, could no longer be paid, it was not necessary to postpone the vesting of the remainders until the expiration of her life. We are, therefore, of the opinion that the court below decided correctly in holding that the doctrine of acceleration was applicable under the terms of the present will, and un-

der the circumstances already detailed. Accordingly, the decree of the superior court of Cook county is affirmed. Decree affirmed.

(176 Ill. 576)

PEOPLE ex rel. GREEN v. BOARD OF COM'RS OF COOK COUNTY et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

MANDAMUS—TAXATION—REVIEW OF ASSESSMENTS—CONSTRUCTION OF STATUTE.

1. To entitle the petitioner to mandamus, he must show not only a clear right to the act sought to be enforced, but the defendant must have the power to do the act.

2. If the act sought to be enforced by mandamus is judicial and discretionary in its character, the court will only compel the defendants to act, but never compel them to decide in a particular manner.

3. Where a public officer or tribunal is guilty of so gross an abuse of discretion or evasion of duty as to amount to a virtual refusal to perform the act enjoined, or to act at all in contemplation of law, mandamus will afford a remedy.

4. By a demurrer to a petition for mandamus, defendants admit that all allegations therein which are well pleaded are true.

5. Where petitioner's lands are assessed 300 per cent. higher than lands in the same neighborhood, and the board of commissioners on appeal overrule his objection without consideration, and without giving counsel an opportunity to be heard, there is such an abuse of discretion that mandamus will be awarded to compel a proper review if the board have authority to review assessments.

6. The revenue law of 1872 (Rev. St. c. 120, § 97) provides that the county board, at a meeting held the second Monday in July, shall review assessments. The law of July 1, 1898 (section 41), provides that county boards who have heretofore acted as boards of review shall not hereafter have such power, and that the boards of review therein provided for shall meet as soon thereafter as practicable, not later than the second Monday in July, and enter upon the discharge of their duties. Section 32 provides that in counties containing 125,000 or more inhabitants a board of review shall be elected at the regular election in 1898, their term of office to commence January 1, 1899. *Held*, that the act of 1898 abolished the county board of review in such counties for the period of six months, and the act could not be construed to mean that the retiring board should hold over from July 1, 1898, to January 1, 1899, under section 55, providing that the old law should be in force except as by the new law is otherwise provided.

7. Rev. St. c. 131, § 1, par. 17, provides that the word "hereafter" shall mean any time after the day on which a statute takes effect. The revenue law of 1898 (section 41) provides that county boards shall not hereafter have certain powers of review. Const. art. 4, § 13, provides that no act of the general assembly shall take effect until the 1st day of July next after its passage, etc. *Held*, that after July 1, 1898, the authority of the county boards of review ceased.

8. The revenue law of 1898 is constitutional, though it takes away from property owners in counties of over 125,000 inhabitants the right to an appeal to the county board of review in cases of unjust assessment for the year 1898, as a party has not a vested right in an appeal unless guaranteed by the constitution.

9. Whether the revenue law of 1898 is constitutional in its provision in section 51, giving the state board of equalization power to raise the assessments of counties, cannot affect the constitutionality of the law in relation to boards

of review for counties, as the provisions are entirely separable.

10. The provision of the revenue law of 1898 for a board of review in counties of 125,000 or more population different from those in other parts of the state does not violate the rule of uniformity in taxation.

11. The provision of the revenue law of 1898 for a board of review in counties of 125,000 or more inhabitants different from the rest of the state does not violate the provision of Const. art. 4, § 22, forbidding the passage of special laws regulating township and county affairs.

12. The provision of the revenue law of 1898 for a board of review in counties of 125,000 or more inhabitants different from the rest of the state does not violate the provision of Const. art. 10, § 7, that the affairs of Cook county shall be managed by a board of commissioners consisting of 15 persons.

13. The provision of the revenue law of 1898, changing the duty of the township assessor, does not invade the constitutional rights of township organizations, since the whole *modus operandi* of township organizations is given to the legislature.

Original petition for mandamus on relation of Hetty H. R. Green against the board of commissioners of Cook county and others. Writ denied.

This is an original proceeding in this court by the people, on the relation of Hetty H. R. Green, to obtain a writ of mandamus to compel the board of commissioners of Cook county to act as a county board of review to review the assessments for 1898 on certain property of the petitioner situated in the town of Lake, in said county, and particularly described in the petition. The petition states that Cook county is organized under the township organization laws of the state, and that the town of Lake is one of the towns of said county. It then sets out the substance of sections 86 and 97 of the revenue act of 1872 (Rev. St. 1874, c. 120), relating to the review of the assessments of the town assessor by the town board of review, and, on appeal from the finding of such board, by the county board of review; among other things, that the county board shall revise and correct the assessment on such property concerning which the owner or his agent has made application to the town board to have the same revised, and has given notice in writing to the town board that he will appeal from its decision to the county board if it shall appear that the same has been assessed higher in proportion than other lands in the same neighborhood, and make such reduction in said assessment as shall be just and right. The petitioner further alleges that the assessor of the town of Lake, in making the valuations or assessments upon her property for 1898, fraudulently and unlawfully discriminated against and overvalued her said property, and valued the same, and each tract thereof, greatly higher than other lands in the same neighborhood, to wit, an average of at least 300 per cent. higher than other lands of equal value adjoining and contiguous to and in the same neighborhood as her said property. She further alleges that she duly complained, in writing, to the town board of review of the town of Lake, and duly urged such complaint

at the meeting of such town board held according to law on the fourth Monday of June, 1898, and that said town board overruled her application and objections, whereupon she gave notice in writing, according to law, to said town board, that she would appeal from its decision to the county board of Cook county; that afterwards she filed her objections in writing before said county board on the second Monday of July, 1898, and that such objections were referred to the finance committee of the board, which committee reported that, according to an opinion rendered by the county attorney, the powers of the county board as a board of review had been taken away by the provisions of the new revenue law in force July 1, 1898, and that no action could be taken by the board in the matters complained of, and recommended that the petition be placed on file, which report was adopted by the county board at a meeting held July 25, 1898, but the board declined to entertain her complaint, and refused to revise and correct said assessments; that it was the duty of said county board to do the acts which it so refused to do, and that the performance of such duty was an absolute vested right in said petitioner under the revenue act; that on the presentation of the report of the finance committee counsel for petitioner appeared before the county board, and objected to the adoption of the report, and stated that he stood ready to urge her objections, which right was denied him. Petitioner further alleges that she is advised that the new revenue law, approved February 25, 1898, in force July 1, 1898, does not, in fact, deprive the county board of the right and duty to act upon said appeals from the town board, as directed by the revenue act of 1872; that she served notice in writing on the board of commissioners of Cook county on September 23, 1898, that she would apply to this court, on the first day of the October term, 1898, for a writ of mandamus to compel such board to review said assessments; that, after the service of such notice, at a meeting of the board held September 26, 1898, the county attorney rendered a certain opinion to said board, stating that, in case the mandamus suit should be successful, the board would be required to consider the complaints heretofore filed, but, if the new law should be interpreted by the court according to its expressed terms, the board would not be required to take any action, and that, if the board acted on such complaints, their action would then be null, and any changes made would be set aside by a court of chancery, but, if it should be held that the new law does not, for the present, repeal the old law, then such action of the board would be legal and valid; that the county board thereupon adopted certain resolutions, which are as follows: "Whereas, the assessments of taxable property in each and all of the several towns of Cook county, as made by the assessors in said towns, have been returned to this board for its action thereon; and whereas, it appears to this board that the said assessments

are just and equitable, and that the assessment in each town bears a just relation to all the towns in the county: therefore, be it resolved, that the several complaints and objections to the assessment of property heretofore filed with this board be, and the same are hereby, overruled and denied, and that the said assessments as returned by the assessors in each and all of the towns of Cook county be approved, and the same are hereby declared to be the assessments for the year A. D. 1898." The petitioner further alleges that said resolutions and action of the county board were and are merely colorable, without consideration of the merits of petitioner's complaints and objections to the assessments upon her property, and without notice to her or her counsel, and without consideration of any of the matters touched upon in such resolutions, and not a compliance with the requirements of said section 97; that the board, in and by said action, did not in fact revise and correct the assessments upon her said property, and that said action was and is nugatory, and of no effect, and was had and taken for the purpose of evading the plain duty of said board in that behalf; and that, unless said board be compelled to review and correct said assessments, the property of petitioner will not be assessed in proportion to its value, as guaranteed by the constitution, and the same will be assessed higher in proportion than other lands in the same neighborhood,—all of which will work great and irreparable hardship to the petitioner. The petition prays for a writ of mandamus to be directed to said board of commissioners of Cook county, commanding it to review the assessment upon the premises aforesaid, and correct the same as shall appear to be just, in conformity with said section 97, and to ascertain and equalize the valuation among all the towns of Cook county, and to do all other acts and things devolving upon them under said section 97. To this petition the defendants interposed a general demurrer, and the issue presented is one of law.

Stillman & Martyn, for petitioner. Robert S. Iles, Co. Atty., and Frank L. Shepard, Asst. Co. Atty., for defendants.

CARTER, C. J. (after stating the facts). It is well settled that to entitle the petitioner to the writ of mandamus the petitioner must show not only a clear right to the acts sought to be enforced, but the defendants must have the right by law to do such acts, and, if the action required is judicial and discretionary in its nature, the court will only compel them to act, but never compel them to decide in a particular manner. In *Illinois State Board of Dental Examiners v. People*, 123 Ill. 227, 13 N. E. 201, this court said (page 241, 123 Ill., and page 202, 13 N. E.): "If a discretionary power is exercised with manifest injustice, the courts are not precluded from commanding its due exercise. They will interfere where it is clearly shown that the discretion is abused. Such

abuse of discretion will be controlled by mandamus. A public officer or inferior tribunal may be guilty of so gross an abuse of discretion or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law. In such a case mandamus will afford a remedy. *Tapp. Mand.* 19, 66; *Wood, Mand.* 64; *Commissioners v. Lynah*, 2 McCord, 170; *People v. Perry*, 13 Barb. 206; *Arberry v. Beavers*, 6 Tex. 457."

Defendants, having demurred generally, have thereby admitted that all the material allegations in the petition which are well pleaded are true. It is admitted, then, that petitioner's property was valued by the assessor of the town of Lake greatly higher than other lands in the same neighborhood of equal value adjoining and contiguous to the same, and that on appeal from the town board of review to the county board of review the county board first refused to act on the complaint of petitioner on the ground of lack of power, and afterwards, on being advised by its attorney as to the effect of its action in case its view of the law should not be sustained, adopted certain resolutions finding the assessments just and equitable and overruling and denying petitioner's complaints and objections; that such action was without consideration of the merits of petitioner's complaints and objections to the assessments upon her property, and without consideration of any of the matters touched upon in the resolutions, and that the board did not, in fact, thereby revise and correct the said assessments. It is also alleged in the petition that such action was merely colorable, and was taken for the purpose of evading the plain duty of the board in the premises. While these are, of course, mere conclusions of the pleader, still we are of the opinion that the admitted facts lead to no other conclusion, and that, under the rule laid down above, the action of the board, if it had power to review the assessment, was so gross an abuse of discretion, and such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law, and that mandamus will afford a remedy if the board had the legal power to do the act sought to be compelled by the petitioner. Counsel for defendants have pointed out several alleged defects in the petition for mandamus, but we are of the opinion that the allegations are sufficient upon general demurrer.

It is contended by defendants that the act entitled "An act for the assessment of property and providing the means therefor, and to repeal a certain act therein named," approved February 25, 1898, in force July 1, 1898, and generally known as the "New Revenue Law," took away their right to act as a county board of review, existing under the act entitled "An act for the assessment of property and for the levy and collection of taxes," approved March 30, 1872, in force July 1, 1872, and known as the "Old Revenue Law." If this contention

is correct, the writ cannot be awarded. The old revenue law provides in section 86, as amended in 1891, that all "property whereof the owner or his agent has made application to the town board to have the assessment on the same revised, as provided by this section, and has given notice in writing to said board that he will appeal from its decision to the county board, shall be subject to complaint to the county board, and the county board shall revise and correct the assessment upon the same upon application of the owner or his agent, as provided by section 97 of this act; and if it shall appear that the same has been assessed higher in proportion than other lands in the same neighborhood, the county board shall revise and correct the same and make such reduction in said assessment as shall be just and right." Section 97 provides, among other things, that "the county board, at a meeting to be held for the purpose contemplated in this section, on the second Monday in July, annually, after the return of the assessment books, shall— * * * Second, on the application of any person considering himself aggrieved, * * * review the assessment and correct the same as shall appear to be just." The new revenue law provides, in section 41, that "the township supervisors, township assessors and township clerks who have heretofore acted as the town boards of review in their respective townships, and the county boards, shall not hereafter have the power, as such board of review, to assess, equalize, review or revise the assessment of property. The boards of review herein provided for shall meet as soon after the taking effect of this act as shall be practicable, not later than the second Monday of July, and shall thereupon at once enter upon the discharge of their duties." Other sections of the new revenue law provide for a board of review, and section 32 provides that in counties containing 125,000 or more inhabitants the board of review, consisting of three persons, shall be elected at the regular county election in the year 1898, their term of office to commence January 1, 1899. It will thus be seen that section 41 enacts that "the county boards shall not hereafter have the power, as such board of review, to assess, equalize, review or revise the assessment of property," and that the boards of review provided for shall meet as soon after the taking effect of the act as practicable; and section 32 enacts that the term of the board of review of Cook county shall commence January 1, 1899. The new revenue law was in force July 1, 1898, and there is, therefore, a period of six months unprovided for, if it was the intention of the legislature that the power of the old board of review should absolutely cease on July 1, 1898. No such difficulty can occur in other counties, for in those under township organization and having less than 125,000 inhabitants the clerk of the county court, the chairman of the county board, and some citizen resident of the county, appointed by the county judge on or

before June 1st of each year, are made the board of review, and in counties not under township organization the board of county commissioners is constituted such board of review. In the latter class of counties the board was in existence July 1, 1898, and in the second class the clerk of the county court and the chairman of the county board were in office, and the county judge could have appointed the third member as soon as the law took effect. Not so, however, with the newly-created board of review for Cook county.

It is contended by counsel for the petitioner that the proper construction of the act is that the old board of review for Cook county has the power to act as a board of review until the new board shall come into being, because section 55 of the new revenue law provides that "all the provisions of the general revenue law in force prior to the taking effect of this act shall remain in force and be applicable to the assessment of property and collection of taxes, except in so far as by this act is otherwise expressly provided." Our attention is also called to the seventeenth paragraph of section 1 of chapter 131 of the Revised Statutes, which provides that "the word 'heretofore' shall mean any time previous to the day on which the statute takes effect, and the word 'hereafter' at any time after such day." Section 41 provides that the county boards shall not hereafter have certain powers of review. Construing this by the provisions just quoted, it means that they shall not have such powers at any time after the day on which the statute takes effect. Section 13 of article 4 of the constitution provides that "no act of the general assembly shall take effect until the first day of July next after its passage," except, of course, in case of emergency, etc. Section 41 provides that the county boards shall not hereafter have power as boards of review. Still, it is provided in section 31 that the board of county commissioners in counties not under township organization shall constitute the board of review. In the old revenue law all these various governing boards of the counties, by whatever name called, are styled "county boards," and these boards of county commissioners are therefore included in the term "county boards," employed in section 41, which takes away the powers of review which they had under the old law; but as section 31 of the new law expressly constitutes them boards of review, they still are boards of review, but act under the new law instead of the old. The second Monday of July was the time fixed for the meeting of the boards of review under the old revenue law, and the new law provides that they shall meet as soon after the taking effect of the act as shall be practicable, not later than the second Monday of July. The new act plainly provides boards of review for every county in the state, but, after taking away the power of the Cook

county board to act after July 1, 1898, has made no provision for any board to act in its place until the new board assumes office January 1, 1899. Section 38 of the new act provides that the board of review shall complete its work on or before September 7th annually, and shall attach to each of the assessment books an affidavit, signed by at least two members of the board, stating, in substance, that the assessed values are, in their opinion, a just and equal assessment of such property for purposes of taxation, and contains this proviso: "That in counties containing 125,000 or more inhabitants the board of review shall also meet from time to time, and whenever necessary, to consider and act upon complaints and to further revise the assessment of real property as may be just and necessary."

It is clear that the Cook county board had no power to hear the complaints of the petitioner, and review the assessment, as requested by her, for all such power ceased on the 1st day of July, when the new act took effect, unless, as contended by the petitioner, the new act is unconstitutional; and this brings us to a consideration of that question raised by the petitioner. It is contended that the new law is unconstitutional, because it deprives the taxpayer of the means of securing a proportionate assessment for the year 1898 by taking away from the county board the jurisdiction to review and equalize the assessments for that year, and providing no other body with power to do so; because it confers improper powers on the state board of equalization; because the methods of taxation established by it are not uniform throughout the state; because it takes some of the management of county affairs out of the hands of the board of county commissioners, to whom the same is committed by section 7 of article 10 of the constitution; because it is special legislation regulating county and township affairs; and because it destroys, in effect, township organizations relating to the assessment of property without a vote of the people, as required by section 5 of article 10 of the constitution. These are, substantially, the grounds on which counsel base their contention that the statute is unconstitutional. Section 1 of article 9 of the constitution, so far as applicable to the act under consideration, provides: "The general assembly shall provide such revenue as may be needful, by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise." This section commits the whole matter of determining how property shall be assessed for taxes to the discretion of the general assembly, only prescribing that the valuation must

be made by persons elected or appointed as the legislature shall direct, and the taxes shall be proportionate to the value of the property. There is no provision for any board of review in this section of the constitution, and they are pure creatures of the statute. The old revenue law, in counties under township organization, provided for two boards of review,—the town board and the county board; but in counties not under township organization it provided for but one,—the county board,—and for railroad corporations it provided for no board of review or appeal at all, the whole matter having been committed by the statute to the state board of equalization. That such assessment by the state board of equalization is constitutional was held in *Porter v. Railroad Co.*, 76 Ill. 561, and no appeal lies from it. *East St. Louis C. Ry. Co. v. People*, 119 Ill. 182, 10 N. E. 397. Although the power of the county board of Cook county to review and correct the assessment of 1898 has been taken away, still the powers of the town board for 1898 remained unaffected, as its meeting was held before July 1, 1898, and the petitioner did, as a matter of fact, make application to the town board for a review and correction of her assessment, which was denied, and of which no complaint is made. Nor can the contention be sustained that the petitioner had a vested right in the appeal to the county board which could not be taken away. It is well settled that no one has a vested right in a mode of procedure, nor in a right of appeal, unless secured by the constitution. *Holcombe v. People*, 79 Ill. 409. Whether the provision of section 51 of the new revenue act giving the state board of equalization power to raise the assessment in any county, not to exceed 10 per cent. of the total assessed value of all property in the state, is constitutional or not, is foreign to the questions involved, and need not be determined here. Even if such clause were unconstitutional, it could not affect the other provisions of the act, as it is entirely separable from them.

There is no merit in the contention that the new act violates the requirement of uniformity in taxation. The uniformity required is secured when the method is uniform as to the class upon which it operates. *Porter v. Railroad Co.*, supra; *Coal Co. v. Finlen*, 124 Ill. 686, 17 N. E. 11. The new law divides the counties into classes for the purposes of assessment for taxation, and is uniform in its methods of procedure as to each class. The old law did the same, making a difference, in some respects, between counties under township organization and those not under township organization. Both laws prescribe a uniform rule for valuation throughout the state, only varying the personnel of the officers to suit the exigencies and conditions of the different classes of counties. It is contended that this act vio-

lates section 22 of article 4 of the constitution, forbidding the passage of any special laws regulating county and township affairs. The title of the act is, "An act for the assessment of property and providing the means therefor," etc. It does not purport or attempt to regulate county and township affairs, but the sole object of the act is to provide means for the assessment of property, and it cannot be said that by doing so the legislature has attempted to regulate the county and township affairs of any county or township by a special law, as the act is applicable to the whole state, and for the purpose of facilitating and regulating assessments so that they shall be uniform and more satisfactory than heretofore has classified the counties of the state. See, also, *People v. Onahan*, 170 Ill. 449, 48 N. E. 1003.

Another objection is that the provisions establishing the new board of review for Cook county are in conflict with the provisions of section 7 of article 10 of the constitution, providing that the county affairs of Cook county shall be managed by a board of commissioners of 15 persons. The power to direct in what manner the assessments for taxes shall be made, and to designate the officers who shall make such assessments, is conferred on the legislature by the constitution, and the exercise of this power is not restricted in any way. We are of the opinion that the legislature has full power to designate what officer or officers shall make the assessments, and that it is not restricted, in the exercise of such power, by section 7 of article 10, to any particular body, officer, or officers. There are matters in connection with the raising of the revenue that have never been committed to the county board; for instance, the assessment of railroads for the purposes of taxation, the fixing of the rate of taxation for state purposes, and others. In fact, most of the machinery by which the revenue is raised is not under the control of the county boards. There is here no invasion by the legislature of the power of the county board of Cook county to manage the county affairs of such county.

The objection that the new revenue law is in conflict with the provisions as to township organization is untenable. The whole modus operandi of township organization is committed to the legislature, the constitution prescribing no particular form or officers, and the legislature has the power to fix and limit the powers of the township officers, and to modify them at will. To say that, because the duties of the township assessor are changed by the new revenue law, therefore township organization has been destroyed without a vote of the people on the subject, is entirely without foundation. The whole scheme of township organization still remains. But neither the town board nor the county board could act as a board of review after the new revenue law took effect.

The demurrer to the petition must be sustained, and the writ of mandamus denied. Writ denied.

(177 Ill. 68)

BARTLETT v. CICERO LIGHT, HEAT & POWER CO.

(Supreme Court of Illinois. Dec. 21, 1898.)

CORPORATIONS—RECEIVERS—TORTS—LIABILITY OF COMPANY.

Where the net income derived from the business of a corporation during the receivership is diverted from the payment of the operating expenses, and applied to the permanent improvement of the corporate property, and the receiver is discharged and the property turned over to the corporation, it is liable for torts occurring during the receivership, to the extent of the net income so applied.

Appeal from appellate court, First district. Action by Edward Bartlett, administrator of the estate of Edward Bartlett, Jr., deceased, against the Cicero Light, Heat & Power Company. A judgment for defendant was affirmed by the appellate court (69 Ill. App. 576), and plaintiff appeals. Reversed.

This is an action begun in the circuit court of Cook county on December 10, 1895, by plaintiff in error against the defendant in error to recover damages for the death of plaintiff's intestate, alleged to have occurred through the negligence of the defendant in error, as set up in the declaration. The declaration consists of three counts, in each of which it is alleged that plaintiff's intestate came to his death while in the employment of a receiver who was in control of the plant of the defendant in error. A demurrer was filed to the original declaration, and sustained. To the amended declaration a demurrer was also filed and sustained. Plaintiff elected to stand by the amended declaration, and thereupon judgment was entered in favor of defendant in error for costs. An appeal was taken from this judgment to the appellate court, where the judgment of the circuit court was affirmed. The present appeal is prosecuted from such judgment of affirmance. The declaration alleges that on and before December 27, 1893, the defendant below, the Cicero Light, Heat & Power Company, the defendant in error here, was a corporation organized under the laws of Illinois, and engaged in the business of supplying electric light, and constructing and selling electrical machines, and conducting an electrical plant near Austin, in Cook county, in which were run engines of great power, and dynamos for the generation of electricity, from which were conducted wires charged with powerful currents; that on September 30, 1893, in the case of the American Trust & Savings Bank against the Cicero Light, Heat & Power Company, the superior court of Cook county appointed C. S. Burton receiver of said company; that said receivership continued until May 25, 1894, when the receiver was discharged by a stipulation between the parties

to the suit, and was directed to turn over all the property and assets of the company to the company itself; that the cause in which the receiver was appointed was then dismissed without costs; that on December 27, 1893, the plaintiff in error's intestate, Edward J. Bartlett, Jr., a lad of 17 years of age, was employed by the receiver and his agents to do work in the electrical plant; that the said Edward J. Bartlett, Jr., was inexperienced in the work of an electrician, and in the labor and services required in the plant; that the plant was a dangerous place for one so inexperienced in such labor and services; that the defendant in error, before the appointment of the receiver, had placed in its plant defective and improperly constructed machinery, in the selection, procurement, and setting up or which proper care had not been exercised; that said defective machinery was being run and propelled in said plant by the receiver and his employés at the time of the killing of plaintiff's intestate; that through the negligence of defendant in error, and its improper conduct, carelessness, and recklessness, the said Edward J. Bartlett, Jr., came into contact with a wire charged with a powerful current of electricity, and received therefrom such an electrical shock that he was then and there killed. The allegations above set forth are those of the first count in the amended declaration. The second count further avers that it was the duty of the employers of the deceased to see to it that he was not exposed to danger arising from the structure of the building or machinery, or the nature of the business conducted therein, which an older and more experienced operative of ordinary intelligence and experience would perceive, and to give him sufficient instruction to enable him to avoid danger and perils, the nature of which he did not know or could not properly appreciate, if he did nominally know, and to which a prudent and right-minded master would not have allowed him to be exposed; that his employers neglected their duty, and did not properly look out for him and give him the instructions above referred to, but allowed him to remain alone in a room where there were engines, dynamos, unprotected fly wheels and wires, charged with powerful currents of electricity; that his death was not caused by his own fault or negligence, or that of any of his fellow servants, but solely by the carelessness and negligence of the said receiver and his agents. The third count, in addition to the averments in the other counts, further avers that the receiver and his agents, for whose acts and conduct in the control of the business of the company the company was responsible, so negligently managed said plant and the machinery therein that thereby the deceased came in contact with one of the five wires therein, and received the shock which caused his death. All the counts of the amended declaration contain the allegation quoted in the opinion.

James A. Fullenwider and Cyrus J. Wood, for appellant. Cutting, Castle & Williams, for appellee.

MAGRUDER, J. (after stating the facts). The main question presented by the demurrer to the amended declaration in the present case is this: Where a corporation has been placed in the hands of a receiver, and an injury or death has been caused by the negligence of the receiver while he is operating the property of the corporation, and where by stipulation between the parties the receiver is discharged, and the property is restored to the possession of the corporation, can the corporation itself be held liable for damages for the injury so received during the receivership? As a general rule, a corporation, while its property is in the hands of a receiver, has no control over either the receiver or his servants, and, therefore, in the absence of any liability imposed by statute, is not responsible for the negligence or torts of the employés of the receiver, and no suit for damages occasioned thereby can be maintained against the corporation itself. But there is an exception to this rule which will be hereafter stated. The amended declaration in this case contains the following averment: "And the plaintiff avers further that during the receivership the said receiver had the entire management and control of the business of the defendant company, collected large sums due it, sold its bonds and other property, and applied the receipts to the running of the business of the company and to the improvement and betterment of the company's property, and that the said property at the close of the receivership was, without reservation, turned back into the possession of the company." We do not deem it necessary to discuss any other of the points made or questions raised by counsel, except that suggested by the averment of the declaration above quoted. In view of this averment, we are of the opinion that the court below erred in sustaining the demurrer to the declaration. The receiver holds the property in his possession as an officer of the court. But the appointment of the receiver does not dissolve the corporation. The corporation still remains in existence, and is still clothed with its franchises. The appointment of the receiver merely gives him the temporary management of the corporation under the direction of the court, instead of leaving it under the direction of the manager appointed by the directors of the corporation. *Railroad Co. v. Van Slike*, 107 Ind. 480, 8 N. E. 269; *Railway Co. v. Russell*, 115 Ill. 52, 3 N. E. 561; *Heffron v. Gage*, 149 Ill. 182, 36 N. E. 569; *Safford v. People*, 85 Ill. 558; *Railway Co. v. Beggs*, Id. 80. By the appointment of the receiver the corporation's capacity of being sued is not affected. The receiver is legally the agent of the company, although under the direction of the court, and the title to the property is not divested

by his appointment. Damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employes, are classed as a part of the operating expenses of the corporation. 20 Am. & Eng. Enc. Law, p. 385, and cases cited in note 1; *Green v. Railroad Co.*, 97 Ga. 15, 24 S. E. 814; *Sloan v. Railway Co.*, 62 Iowa, 728, 16 N. W. 331; *Railway Co. v. McFadden*, 80 Tex. 138, 33 S. W. 853; *Peoples v. Yoakum*, 7 Tex. Civ. App. 85, 25 S. W. 1001. Such damages, being part of the operating expenses, are accorded the same priority of payment as belongs to other necessary expenses of the receivership, and "will be paid out of the net income, if that is sufficient, but in the event of a deficiency they will be paid out of the corpus." 20 Am. & Eng. Enc. Law, p. 385, and cases in note. Where the net income derived from the business during the receivership is diverted from the payment of such operating expenses, and applied to the permanent improvement of the property of the corporation, and the receiver is afterwards discharged, and the property is again turned over to the corporation, in such case the corporation is liable for torts during the receivership, to the extent of the net income so applied. 20 Am. & Eng. Enc. Law, p. 389. In *Railway Co. v. Johnson*, 76 Tex. 421, 13 S. W. 463, it was held that a claim for damages caused by injuries inflicted through the negligence of a receiver while he was operating a railway was entitled to payment out of the current receipts; that, if the current earnings be invested by the receiver in the betterment of the road, which without sale was returned to the company with its other property at the close of its receivership, then the company must be held to have received the property, charged with the satisfaction of any claim which the receiver ought to have paid out of the earnings. *Railroad Co. v. Bailey*, 83 Tex. 19, 18 S. W. 481. The receivers in such cases are not personally liable upon their discharge for claims of this character, but the claims follow the property or fund which alone can be used to satisfy them. *Gluck & B. Rec.* (2d Ed.) pp. 494, 495, § 93. Not merely claims arising out of contracts, but claims for torts, arising through the negligence of the receivers or their subordinates, thus follow the property or fund. *Id.* Where the earnings of the road have thus been invested in betterments upon it, and the receiver has been discharged, and the property has been returned to the owner with such improvements, it necessarily follows that the company must be liable, because the receiver, by virtue of his discharge, ceases to be liable. *Railway Co. v. Comstock*, 83 Tex. 537, 18 S. W. 946; *Boggs v. Brown*, 82 Tex. 41, 17 S. W. 830; *Railway Co. v. Johnson*, 76 Tex. 421, 13 S. W. 463; *Brown v. Gay*, 76 Tex. 444, 13 S. W. 472. "Where the receiver is discharged, and the property restored with improvements, the company is liable for accidents during

the receivership." 2 Cook, Stock, Stockh. & Corp. Law (3d Ed.) pp. 1447, 1448, § 875, note 2, and cases there cited. If such were not the law, great and irreparable injustice would be done in many cases. As a receiver is not personally liable for the torts of his servants, but only liable in his official capacity, and as the damages for such torts cannot be recovered in suits against him personally, or collected on execution against his individual property, a judgment rendered while the receiver is in possession should provide for its payment out of the trust fund, or the property in the hands of the receiver or under his control. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. 452. In the case at bar, suit has not been brought against the receiver, but has been brought against the company, to which the trust fund or property was restored after the discharge of the receiver. In the absence of all personal liability on the part of the receiver, there is no reason why the trust fund or property should not be liable as well after the discharge of the receiver as while he is in office. Where the receiver has returned the property to the company, the fund or property remains the same; and the only difference in the circumstances is that it is in the possession of the company, instead of being in the possession of the receiver. In the case at bar, if the plaintiff has no remedy for the death of his intestate against the company, then he has no remedy at all, inasmuch as the receiver, during whose administration the death occurred, has been discharged from his office, and cannot be held personally liable.

The doctrine above announced has been well stated, and has been placed upon correct grounds, by Thompson in his Commentaries on the Laws of Corporations (volume 5, § 7151), where the author says: "The receiver becomes the new custodian of a property which was before, in a sense, a trust property in the hands of the corporation. In the management of this trust property, negligences are committed by his servants, for which, under the settled principles of law, the receiver is liable,—not personally, except where he has been guilty of personal fault, but out of the trust funds in his hands. The liability is then essentially a liability of the fund, and not of the custodian. When, therefore, the fund is transferred to a new trustee, whether it be to a new and reorganized corporation created by the purchasers at a mortgage sale for the purpose of receiving and operating the property, or whether it be the original corporation, its former owner, to whom it is redelivered under a new arrangement, it is the case of a trust property, to which a liability has attached, passing into the hands of a new trustee. The trust property continues liable; but, from the very nature of the case, any action brought to charge it must, if the receiver has been discharged prior to the bringing of the action, be brought against the corporation which is

its custodian,—that is to say, against the new trustee."

It is contended by counsel for defendant in error that a contrary doctrine to that here announced has been laid down by this court in the case of *McNulta v. Lockridge*, supra. But that case is not capable of the construction sought to be given to it. It is true that general expressions are there used to the effect that the corporation is not responsible for the negligence or torts of the employes of the receiver, but such expressions are to be understood as applying to the facts of the case. It was there held that an action can be maintained against one receiver for the torts of the servants of a preceding receiver; that the liability is enforceable against the fund, which is the subject of the trust, and follows such fund; that the judgment in such a case is in the nature of a judgment in rem, the res being the matter of the receivership; and that the plaintiff should not be deprived of his action, and of the right of trial by jury, because one receiver has succeeded another. The reasoning of the court in the *McNulta* Case lends support to the doctrine that a company which receives its property back from the receiver improved and bettered, and after such property has been managed and operated for some time at an expense paid by the receiver out of the property, cannot escape liability for the torts of the receiver's agents or employes. If the corporation desires to set up that it is only liable for claims of this character to the amount of the net income during the receivership which has been applied to the improvement and betterment of the property, the fact of the payment of such claims to an amount equal to the value of the improvements, if such fact exists, presents a question which the corporation must raise by the pleadings. 20 Am. & Eng. Enc. Law, p. 390, and cases cited in note 1. The judgments of the appellate court and of the circuit court of Cook county are reversed, and the cause is remanded to the latter court, with directions to proceed in accordance with the views herein expressed. Reversed and remanded.

(177 Ill. 9)

**INTERSTATE BUILDING & LOAN ASS'N
OF BLOOMINGTON v. AYERS et al.**

(Supreme Court of Illinois. Dec. 21, 1898.)

**MORTGAGES—NOTICE—BUILDING ASSOCIATIONS—
PLEADING—FILING CROSS BILL—MECHANIC'S
LIEN—LAND OWNED BY WIFE.**

1. Notice to a mortgagee of a prior unrecorded mortgage affects him in the same way that a record of the mortgage would affect him.

2. The by-laws of a building and loan association provided that its board of directors might appoint advisory boards, whose duty should be to furnish the directors information concerning association matters in their localities. Each advisory board should elect a secretary and treasurer to receive applications for shares, the treasurer to collect dues, and applications for loans should be made through the advisory board. *Held*, that notice to one who

was secretary and treasurer of an advisory board of an unrecorded mortgage is notice to the association.

3. One who pleads priority of a lien need not allege notice to other lienors.

4. A defendant who has answered may file a cross bill without leave, even after a reference has been made.

5. In an action to foreclose a mortgage, another mortgagee, who has answered, asserting a prior lien, need not file a cross bill in order to obtain relief.

6. The title of one to whom the owner has agreed to sell a lot, and who moves onto the lot, and lives there while a building is being erected, is sufficient to support a mechanic's lien for material furnished for the building as against a mortgagee who took a mortgage from the one in possession after conveyance, and after the lienor began furnishing the material.

7. One who furnishes material to the husband of one who owns a lot for a building on the lot, where the husband makes all contracts relating thereto, and the owner lives on the lot while the building is being erected, and subsequently ratifies the contract for material, is entitled to a mechanic's lien, although the husband's agency and the name of his principal were not disclosed when the contract was made.

8. A claim for a mechanic's lien is not invalidated because the claimant charges the material to the owner and her husband, and also names in his claim for a lien the owner's grantor as one of the persons liable.

9. A bill for a mechanic's lien was filed, and a mortgagee put in a cross bill, to which another lien claimant filed an answer, alleging "that his claim herein is for materials furnished as set forth in his answer herein to the original bill of complaint herein, and that he is entitled to a lien upon the premises therein mentioned, and that his lien is superior to that of said loan company, and to any claim or demand whatsoever said company may have, if any, upon the premises." *Held*, that this is sufficient to permit a reference to the answer to the original bill, and supports his lien, even though the original bill was dismissed.

Appeal from appellate court, Second district.

Action by the Interstate Building & Loan Association of Bloomington against Emma I. Ayers and others. From a decree giving plaintiff a third lien on certain property covered by its mortgage, it appealed to the appellate court (71 Ill. App. 529), where the decree was affirmed, and plaintiff appeals. *Affirmed*.

Alschuler & Murphy (J. J. Morrissey, of counsel), for appellant. *A. M. Beaupre* and *M. O. Southworth*, for appellee *Henry F. Hafenrichter*. *Aldrich, Winslow & Worcester*, for appellee *Laurens Hull*.

PER CURIAM. The opinion of the appellate court in this case was delivered by Mr. Justice *DIBELL*, and is, in part, as follows:

"This cause originated in a bill for a mechanic's lien upon lot 3 of *Burdsall & Bruce's* addition to *Aurora*, filed by *C. Solisburg*, against *Emma I. Ayers*, the owner thereof, and others, for materials used in erecting a building for 'flats' on said lot. Many mechanics and material men filed answers claiming liens. Plaintiff in error answered, claiming a mortgage lien for the principal sum of \$6,000, with interest and

other charges superior to all other liens, and filed a cross bill for the foreclosure of said mortgage. Henry Hafenrichter answered, claiming a mortgage lien for the principal sum of \$1,850, with interest, prior to all other liens, and filed a cross bill for the foreclosure of said mortgage. Issues were joined, and there was reference to the master to take proofs and state an account between the parties. The master heard proofs, and prepared a report, to which numerous objections were filed, and by the master overruled. Exceptions were filed to the master's rulings, and there was a hearing thereon in the circuit court, where two exceptions were sustained, and all others were overruled, and there was a decree accordingly. By said decree, Hafenrichter was given a first lien under his mortgage; Laurens Hull, trading as the Aurora Lumber Company, was given a second lien for materials furnished; plaintiff in error was given a third lien under its mortgage; numerous other mechanics and material men were given a fourth lien pro rata; and certain others, who had asserted liens, including C. Solfsburg, were denied a lien. The association brings the cause here by writ of error, and has assigned errors upon the record. No cross errors have been assigned. The rights of those who received a lien fourth in order, and of those who were denied a lien, are not involved. Mrs Ayers does not question the order of the liens established by the decree. There is also no controversy between Hafenrichter and Hull. The questions are whether Hafenrichter was entitled to priority over plaintiff in error, and whether Hull was entitled to any lien, and, if so, whether he was entitled to priority over plaintiff in error.

"Mrs. Ayers is the daughter of Hafenrichter, and the wife of Francis E. Ayers. J. H. Jenks, at the time of the events here litigated, was the secretary of the advisory board of plaintiff in error at Aurora. Hafenrichter received a deed of the property September 2, 1892, and afterwards made some arrangement for selling it to his daughter; and she went into possession, and her husband made contracts with mechanics and material men for the erection of this building. After the work on the building had progressed some considerable time, Hafenrichter, on May 20, 1893, conveyed the lot to Mrs. Ayers for the consideration of \$2,200; and she paid him \$350 in cash, and executed, with her husband, a note of that date, for \$1,850, due in six months after date, with interest at 6 per cent. per annum for the balance of the purchase money, and also a mortgage upon the lot securing said note. Hafenrichter handed the mortgage to Ayers that day, with directions to get it recorded, and supposed, till long after that, it had been so recorded. As the result of a conference between Ayers and Jenks, Ayers kept the Hafenrichter mortgage off the record till Mrs Ayers' application for a loan from plaintiff in error had been granted, the money paid, and the mortgage to the association re-

corded. Jenks placed the association's mortgage on record July 8, 1893, and Ayers placed the Hafenrichter mortgage on record July 11, 1893. Thus, the mortgage first executed was last recorded. * * * When Hafenrichter's mortgage was placed in the hands of Ayers to file it for record, he immediately consulted Jenks; and, by the suggestion and procurement of the latter, Ayers withheld it from record till after plaintiff in error's mortgage was, at a later date, executed, sent to Bloomington, accepted, returned from Bloomington with the money, and recorded. Plaintiff in error, in its opening brief, admits the acts of Jenks in this matter in the following language: 'There can be no question that Francis E. Ayers and J. H. Jenks colluded together to withhold Hafenrichter's mortgage from record until after the loan was made and the mortgage to the building and loan association was filed for record.' This admission was repeated in said brief, and makes a consideration of the details of the evidence on that subject unnecessary. 'Subsequent purchasers, who have notice of a prior unrecorded mortgage, are affected by their knowledge of it in the same way that the prior record of mortgage would affect them.' 'Priority among mortgagees and grantees depends, not only upon the date of their deeds and the date of their record, but also upon the knowledge they have of the true state of facts as to the title, and of the rights and equities of those who have not fixed their priority by duly recording their deeds.' 1 Jones, Mortg. § 572; Marshall v. Fisk, 6 Mass. 24; Dole v. Thurlow, 12 Metc. 157; Rev. St. 1874, c. 30, § 30. It is proved in this case that after Mrs. Ayers had made this application to plaintiff in error for a loan, and about a month and a half before the mortgage to plaintiff in error was executed and delivered, Ayers told Jenks that Mrs. Ayers owed Hafenrichter \$1,850 for purchase money of this property, and that Hafenrichter held a mortgage on the property to secure said debt. If notice to Jenks was notice to plaintiff in error, then the rule above stated applies to this case, and Hafenrichter was entitled to the prior lien he received. If notice to Jenks was not notice to plaintiff in error, then the decree was erroneous in giving Hafenrichter priority.

"Plaintiff in error was organized in 1889, under our statute relative to building associations. Section 9 of article 8 of its by-laws provides that its board of directors may appoint advisory boards to such an extent and at such times as it may deem best. 'They shall advise with the board of directors on important topics whenever called upon to do so, and shall furnish said directors with such information relating to the matters of the association in their particular localities as they may, from time to time, require.' Article 12 of said by-laws provides that each advisory board shall consist of not less than five members, who shall elect a president, vice president, secre-

tary, and treasurer, and may elect them from members of the association who are not members of the advisory board. Bond is required from the secretary and treasurer. Section 4 of said article requires that all monthly dues to the association shall be paid to the treasurer of the advisory board, and by him remitted to the secretary of the association at Bloomington. Section 5 of said article provides that applications for shares shall be made by or through the secretary of the advisory board, and forwarded by him to the secretary of the association; and section 6 requires members wishing loans to fill blanks required by the association, and present them to the advisory board for action, and the advisory board will forward them to the association. Plaintiff in error organized an advisory board at Aurora. J. H. Jenks was secretary and apparently treasurer thereof during the time covered by the events here in controversy. Mrs. Ayers and her husband applied to the association, through Jenks, for stock and for the loan. He secured the issue of stock to Ayers, and its transfer to Mrs. Ayers when he discovered an error had been made as to the person in whose name the land was held. Jenks transmitted the application to the home office. Mrs. Ayers and her husband executed the bond and mortgage in his presence. The association sent the draft for nearly \$6,000 to Jenks. He caused Mrs. Ayers to indorse it on the back, and return it to him, and he deposited it in the bank, and collected it, and held the money, took out of it dues, etc., owing to the association, and paid the rest of the money out on orders of Ayers and wife, as the building progressed. Although plaintiff in error put in evidence the by-laws, it also proved orally by Jenks, its witness, that his duties as secretary of the local board were to solicit stock, make loans, collect dues and interest, do the general work of the secretary and treasurer of the local board at Aurora, keep the accounts of the association at Aurora, and to collect dues, premiums, and fees of the stockholders of the association at Aurora. Jenks paid off the prior Butler mortgage previously resting on the property, recorded its release, and recorded plaintiff in error's mortgage. It was only by Jenks the association could prove what had actually been paid by Mrs. Ayers upon the dues, interest, and premium. No one else connected with the association knew, except by his books and reports. Counsel for the association, in interrogating Jenks as its witness, assumed he had been 'acting as agent for the Interstate Building & Loan Association in Aurora,' and he so assumed in his answers. Jenks was the officer of the association who retained possession of the stock upon which the loan was made, as the bond and mortgage recited. Jenks testified 'we' had been to the records to ascertain the state of the title, implying he performed that office for plaintiff in error. Plaintiff in error proved what statements Ayers made to Jenks as to the condition of the title, evidently on the theory that a

statement by Ayers to Jenks that the property was clear was a statement to the association. Marian Hatch, called as a witness by the association, testified she succeeded Jenks as agent of the association, and had in her possession the ledger kept by Jenks containing the accounts of the payments made by him out of the proceeds of this loan to material men and laborers on the building on the orders of Mr. and Mrs. Ayers. It is evident this was a book belonging to the association, in which Jenks kept its accounts at Aurora. The abstract of title was examined and passed upon by the lawyer of the association at Bloomington, and perhaps the mortgage was drawn there; but, so far as appears from the evidence, every other act on behalf of the association in regard to this loan was performed by Jenks for it. Ayers and wife did not see or deal with any other officer of the association.

"The argument of plaintiff in error on the subject of notice, carried to its legitimate conclusion, produces the result that the association would not be bound by the notice of a prior unrecorded mortgage where said notice was given to any of its officers except the lawyer whom it hired to examine abstracts of title. We do not think it could relieve itself of the effect of notice to its officers by hiring a lawyer to advise it whether the proposed borrower had a good title. It is argued Jenks was the agent of Ayers and wife, because they paid him \$25 to go to Bloomington and try to hurry up the loan, which was being delayed. Whether this \$25 more than paid his traveling expenses is not disclosed, but he evidently went because he was the agent of the association. It is claimed Jenks was agent of Mrs. Ayers because she paid him \$45 for issuing stock; but the testimony of Jenks shows the rules allowed the secretary of the advisory board a fee of \$1 for each share of stock issued, and the 60 shares issued to Mrs. Ayers entitled Jenks to a fee of \$60, but he agreed to take \$45 therefor. This, therefore, was a fee paid to him as an officer of plaintiff in error.

"It is insisted Jenks acted as the agent of Mrs. Ayers in paying out the proceeds of the loan to her material men and laborers, on the order of her husband or herself, as the building progressed. This position is untenable. A building association furnishing money to put up a building on the premises mortgaged to it, which building is usually an important part of the security for the payment of the loan, does not place the avails of the loan in the hands of the mortgagor, and leave it to his discretion whether he will put the money into the building, or use it elsewhere for his other purposes. Such a course would be suicidal to the association. It requires the borrower to permit it to retain the money, and it pays out the money on the order of the borrower, and thus sees that the proceeds of the loan are applied to the building on the real estate given it as security. Jenks performed that responsible office for plaintiff in error. We hold he was an agent of the association for the pur-

poses of this loan, and that notice to him of the prior unrecorded Hafenrichter purchase-money mortgage for \$1,850 was notice to the association. To hold otherwise would, it seems to us, practically relieve plaintiff in error from the effect of the doctrine of notice as to loans made by it through its advisory boards at places other than Bloomington, where its chief officers reside. Jenks no doubt intended by his action in the matter to give his association priority over the Hafenrichter mortgage, and was endeavoring to act for the benefit of his principal, the association. It follows we are of opinion that plaintiff in error, through its agent, Jenks, had full notice of the unrecorded mortgage.

"But it is argued Hafenrichter did not, in his pleadings, charge notice to plaintiff in error of the unrecorded mortgage. He did, however, in his answer to the original bill and to the cross bill of plaintiff in error, and in his own cross bill, charge he had a lien prior to every one else; and this notice to plaintiff in error, through its agent, Jenks, is one item of the proof by which he seeks to establish that priority; and the rule is familiar that a party need not plead his evidence."

"It is said Hafenrichter filed his cross bill the day after the reference to the master, without leave of court, and that it should not have been treated as included in the reference. A defendant who has answered requires no leave to file a cross bill, and it is not too late to file a cross bill after a reference has been made. But this cross bill was wholly unnecessary, and the decree does not depend upon it. In each of his answers, Hafenrichter set up his mortgage, and averred it was a prior lien to all others. The cross bill of plaintiff in error asked a sale of the property to pay its mortgage. It was indispensable to that relief that the court should establish the order of liens from the evidence, and direct their payment in the order of their priority out of the proceeds of the sale. *Dillman v. Bank*, 139 Ill. 269, 28 N. E. 946. As the proofs stand, Hafenrichter must have been paid first out of the proceeds of a sale under the association's cross bill, even if he had filed no cross bill.

"It is asserted Hull was not entitled to the lien given him because Mrs. Ayers had no title when he made the contract to furnish materials for said building, and therefore his contract was not with the owner. Ayers testified the subject of the conveyance of this property from Hafenrichter to Mrs. Ayers of May 20, 1893, had been considered by Hafenrichter and himself before that date; that along about the first of March or last of February, 1893, a deal was made by which it was understood Mrs. Ayers was to be the owner of the premises, and that the transactions between them on May 20th, the deed to Mrs. Ayers, and the note and mortgage back to Hafenrichter, were the consummation of that previous contract. The questions put to Ayers on this subject were leading,

but they were not objected to, and the facts so established were not contradicted. We think this sufficient prima facie proof that there was a contract between the parties about the last of February or first of March, 1893, by which Hafenrichter was to convey these premises to Mrs. Ayers at the time, in the manner and for the consideration indicated by the conveyance afterwards made to her. A cottage standing on the premises was moved off, and Mrs. Ayers built a temporary structure, or shanty, on the back of the lot; and she, with her husband, moved into it and took possession, and lived there until the new building was so far completed that they could move into a part of it. The evidence does not show just when she built and moved into the shanty, but it is a fair inference from the proofs that she occupied it during the entire time the flats were being erected. Hull testifies the arrangement for lumber was made in the fore part of April, 1893, and that he began delivering lumber April 13, 1893. We think the proof shows that, at the time the arrangement was made with Hull for the lumber, Mrs. Ayers had a contract with Hafenrichter, the owner, for a warranty deed of the property, and that it is probable from the evidence that she was then living upon the premises. *Paulsen v. Manske*, 126 Ill. 72, 18 N. E. 275, is conclusive that such an interest as Mrs. Ayers had would support a mechanic's lien; and inasmuch as the vendor's title might, under certain circumstances, be also subjected to a lien for labor and materials placed upon the land by the vendee (*Henderson v. Connelly*, 123 Ill. 98, 14 N. E. 1), we see no reason why, upon the vendee acquiring the legal title during the progress of the building, the lien should not attach to the entire title so vested in her (*Springer v. Kroeschell*, 161 Ill. 358, 43 N. E. 1084; *Insurance Co. v. Batchen*, 6 Ill. App. 621).

"It is said Hull made his contract with Ayers, and not with Mrs. Ayers, and therefore did not make it with the owner, and hence has no lien. The evidence on this subject is too voluminous to be repeated. By the testimony of some 17 witnesses it was clearly proved that Ayers was, in fact, his wife's general agent in the construction of these flats; that he made most of the contracts with mechanics and material men, disclosing his agency to some, and not to others; that his wife told various parties in interest that her husband was her agent in the construction of the building, and that she left everything to him in regard to the building and the payments; that she lived on the rear of the premises all the time the work was going on; that those delivering the material and doing the work saw her there daily, and frequently conversed with her about the work; and that she frequently gave orders to them in relation to the work,—in regard to the fixtures, trimmings, and moldings. She examined the work, and caused some changes

to be made. Her directions, when given, were obeyed. She was present when her husband made some of the contracts. One contractor delivered most of his goods directly to her. It is clear to us that the contracts of Ayers for this building were binding upon his wife. *Bruck v. Bowermaster*, 36 Ill. App. 510. Hull did not inquire, and did not know, who owned the land until he had delivered about half of the lumber. He then learned of Mrs. Ayers' title, and had a talk with her, and asked her if the lumber was all right, and she said it was. We think this contract of the agent bound the principal, though the fact of his agency and the name of his principal were not disclosed till later. It is the general rule that an undisclosed principal is liable when discovered.

"Hull charged this account on his books to both Ayers and Mrs. Ayers, and, in filing his claim for lien, named *Hafenrichter* with them as the persons from whom his demand was due. We think this does not militate against the lien. His pleadings claimed he made the contract with Mrs. Ayers, through her agent, Ayers; and the proof sustained the allegation. It may be he could also hold Ayers liable for failure to disclose his principal. It may be there were some equitable considerations which would have subjected the land to the lien in the hands of *Hafenrichter* if he had not conveyed it; but the material question now under consideration is whether Hull has a lien upon the lot as against Mrs. Ayers, and we think he has. Errors in respect to matters not required to be included in the statement of lien do not invalidate the statement nor defeat the lien. *Culver v. Schroth*, 153 Ill. 437, 39 N. E. 115; *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422.

"It is suggested that as Hull did not file a cross bill, and as the bill of *Solfsburg* for a mechanic's lien was dismissed by the final decree, therefore Hull's answer to *Solfsburg's* bill, in which answer Hull claimed a lien, also fell, and that Hull has no pleading to support a lien in his favor. We do not think this position well taken. But Hull had other pleadings. In his answer to the cross bill of plaintiff in error, Hull alleges 'that his claim herein is for materials furnished, as set forth in his answer herein to the original bill of complaint herein, and that he is entitled to a lien upon the premises therein mentioned, and that his lien is superior to that of said loan company, and to any claim or demand whatsoever said company may have, if any, upon the premises.' We think this reference to his answer to the original bill permits a reference thereto for the purpose of supporting his lien. In his answer to the *Hafenrichter* cross bill, he again set out his claim of lien in detail.

"Plaintiff in error, by its exceptions, claims its mortgage should have been held prior to all other liens to an amount equal to the value of the said premises on July 1, 1893; also to an amount equal to the payments

made from the proceeds of said loan, or otherwise, for the erection of the improvements on said premises; also to the extent to which the proceeds of its mortgage were applied in the improvement of said premises; also to the extent of the money paid by Mrs. Ayers and husband in the improvement of said premises, from whatever sources derived. Hull made the arrangement with Ayers early in April, 1893. By it Hull was required to furnish all the lumber required for the building, and at the same figures he would have given if the whole bill had been furnished for him to figure on in advance. He began furnishing lumber on the contract April 13th. His lien attached to the land at the making of the contract, and to the building as it progressed. The mortgage to the association was dated July 1, acknowledged July 4, and recorded July 8, 1893, and, as against Hull, did not become a lien until the latter date. Under section 17 of the mechanic's lien act, in force in 1893, this mortgage could not operate upon the building erected or materials furnished until the lien in favor of the person doing the work or furnishing the materials was satisfied. The association introduced proof of the value of the premises on July 11, 1893, but that was being daily increased by the addition of labor and material, and its value on July 8, 1893, was not shown. No proof was offered by plaintiff in error as to the value of the land separate from the building, nor as to the extent to which its loan, as applied, increased the value of the property, nor as to the extent to which labor and material furnished by others than Hull increased the value of the property, nor any proof which would enable the court, under the statute then in force, to give plaintiff in error any lien upon any part of the premises until Hull was paid. We * * * are of opinion that the decree of the court below has not * * * been successfully assailed. It will therefore be affirmed."

We concur in the foregoing views, and in the conclusion reached by the appellate court, whose opinion, so far as it is above quoted, is hereby adopted as the opinion of this court. Accordingly, the judgment of the appellate court is affirmed. Judgment affirmed.

(176 Ill. 489)

BELL v. FARWELL.

(Supreme Court of Illinois. Dec. 21, 1898.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS OF FOREIGN CORPORATIONS—ENFORCEMENT IN ACTION AT LAW—EFFECT OF STATUTES OF FOREIGN STATE—CONSTRUCTION—CONSTITUTION—SELF-EXECUTING PROVISIONS.

1. The provision in Const. Kan. art. 12, § 2, that "dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law," is not self-executing without the aid of legislation.

2. Where a statute of one state, which is neither penal nor criminal, has received a construc-

tion by the highest court of such state, such construction is binding on the courts of other states.

3. The liability of a stockholder of a corporation to its creditors for an additional amount equal to his stock, imposed by Const. Kan. art. 12, § 2, and Gen. St. Kan. 1889, pars. 1200-1205, is not penal, but contractual, and therefore can be enforced in other states.

4. Where the constitution and statutes of another state, as interpreted by the highest court of such state, provide that an action at law may be maintained by a creditor of an insolvent corporation against a single stockholder to enforce an additional liability equal to the amount of his stock, such an action may be maintained in Illinois against a stockholder of a corporation organized under such law without first proceeding in equity in the former state, although a liability of a stockholder of a corporation organized under the laws of Illinois can be enforced only in equity.

Appeal from appellate court, First district.

Action by James Bell against Charles B. Farwell. Judgment for defendant was affirmed by the appellate court, and plaintiff brings error. Reversed.

This was an action of assumpsit brought by James Bell against Charles B. Farwell, a stockholder in the Abilene Central Land Company, a Kansas corporation, to recover the amount of defendant's alleged liability as such stockholder, to be applied in satisfaction of a balance remaining due on a judgment recovered by plaintiff against the corporation in one of the courts of Kansas. The declaration contained two counts. In the first count it was averred that on the 26th day of February, 1890, and prior thereto, at the county of Dickinson, in the state of Kansas, the Abilene Central Land Company was a corporation duly organized and doing business under and by virtue of a statute of the state of Kansas; that the said company was not a railroad nor a religious nor a charitable corporation, nor a corporation organized for such purposes; that at the time of the organization of the corporation, and at the time the liability was incurred, there was in full force and effect in the state of Kansas a provision in the state constitution as follows: "Dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liability shall not apply to railway corporations nor corporations for religious or charitable purposes;" that there was also in force a certain statute, as follows: "If any execution shall have been issued against the property or effects of the corporation except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of the court in which the action, suit or proceedings shall have been

brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." It is also alleged that the defendant was a stockholder in said land company, and was the owner of 10 shares of the capital stock, of the par value of \$500 each; that he had paid therefor the sum of \$5,000; that on the 26th day of February, 1890, at a term of the district court of Dickinson county, Kan., a judgment was rendered in favor of plaintiff against the Abilene Central Land Company for \$39,755; that execution was issued on said judgment, and returned, "No property found;" that there now remains due on the said judgment \$27,856.77, by means whereof defendant became liable to pay plaintiff the sum of \$5,000, etc. The second count contains substantially the same allegations as the first, except no reference is made to the section of the statute set out in the first; and, after setting out the section of the constitution of Kansas found in the first count, the declaration proceeds as follows: "That during all of said time there was in full force and effect in said state of Kansas a certain statute, in words and figures as follows: 'A corporation is dissolved, first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any corporation shall be deemed to be dissolved for the purpose of enabling any creditor of such corporation to prosecute suit against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation not so suspended from business shall, for three months after the passage of this act, fail to resume its usual and ordinary business.' Gen. St. 1889, par. 1200. And further: 'If any corporation created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved leaving debts unpaid, suits may be brought against any person or persons who are stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of the dissolution for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder, respectively; and if any number of stockholders [defendants in the case] shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders and collection made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the

time the corporation dissolved.' Id. par. 1204. And further: 'If any stockholder pay more than his due proportion of any debt of the corporation he may compel contributions from the other stockholders by action.' Id. par. 1205. And further: 'No stockholder shall be liable to pay debts of the corporation beyond the amount due on his stock, and an additional amount equal to the stock owned by him.' Id. par. 1206. That the supreme court of said state of Kansas, being the court of last resort of said state, have passed upon and construed the foregoing provisions of said statute, holding that thereunder each stockholder in corporations organized under said statute is severally and individually liable to each creditor of such corporation in an additional amount equal to the amount of his or her stock, to be recovered in an action brought by such creditor directly against such stockholder, without joining said corporation or other stockholders therein as defendants to such action." That said defendant was a stockholder in the company from its organization until its dissolution. That judgment was rendered, and execution returned unsatisfied, and the debt unpaid, as alleged in the first count. That prior to the 1st day of July, 1891, said Abilene Central Land Company suspended business, and thence hitherto has not engaged in or done any business, by means whereof it was dissolved before the commencement of this suit. To the declaration the defendant interposed a general demurrer, which the court sustained; and, plaintiff electing to stand by his declaration, judgment was entered against him for costs.

Cratty Bros., Gray, MacLaren, Jarvis & Cleveland, for plaintiff in error. Tenney, McConnell & Coffeen (William E. Church, of counsel), for defendant in error.

CRAIG, J. (after stating the facts). It is first insisted in the argument that the provision of the constitution of Kansas set out in the declaration is self-executing, and intended to take effect without any legislation. We do not concur in that view. It is apparent from the reading of the provision itself that legislation was contemplated in order that it might be properly enforced; otherwise the last clause, "and such other means as shall be provided by law" (article 12, § 2) would never have been incorporated in it. Moreover, this provision of the constitution of Kansas was involved in *Tuttle v. Bank*, 161 Ill. 497, 44 N. E. 984, and upon careful consideration it was expressly held that it was not self-executing. The same doctrine was announced in *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419, and *Bank v. Lawrence* (Mich.) 76 N. W. 105, where the same provision of the constitution of Kansas was involved.

The right, however, of the appellant to maintain this action, does not depend upon the disposition of this question. As has been

seen, in the second count of the declaration it is averred that the corporation in which the defendant was a stockholder had suspended business for more than one year. It is then averred that there was in full force in the state of Kansas a statute which provides that "any corporation shall be deemed to be dissolved for the purpose of enabling any creditor of such corporation to prosecute suit against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year." It is also averred that the statute further provides: "If any corporation created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved leaving debts unpaid, suits may be brought against any person or persons who are stockholders at the time of such dissolution, without joining the corporation in such suit." It was further averred in the declaration "that the supreme court of said state of Kansas, being the court of last resort of said state, have passed upon and construed the foregoing provisions of said statute, holding that thereunder each stockholder in corporations organized under said statute is severally and individually liable to each creditor of such corporation in an additional amount equal to the amount of his or her stock, to be recovered in an action brought by such creditor directly against such stockholder, without joining said corporation or other stockholders therein as defendants to such action." The facts set up in the declaration are admitted by the demurrer, and the question presented is, admitting the facts as pleaded to be true, is the appellant entitled to maintain his action against the defendant to enforce his liability as a stockholder in the corporation? Where a statute of another state has received a construction by the highest court of such state, such construction will ordinarily, in the courts of this state, be adopted as binding and conclusive; and this although the examining court finds that, upon similar language in a statute within its own sovereignty, it would place a different, or even reverse, construction. *Van Matre v. Sankey*, 148 Ill. 536, 36 N. E. 628.

It is, however, said that the legislation in Kansas relates only to the remedy, and, as the remedy is special to the state of Kansas, it will not be enforced here. It may be regarded as a well-settled rule that the courts of one country will not enforce either the criminal or penal laws of another; nor will they carry out, or be guided by, the laws of another regulating the forms of actions, or the remedies provided for civil injuries. But it is also well settled that in the construction of contracts, and in ascertaining whether they are valid, the law of the country where the contract was made or to be performed shall, in general, govern. *Sherman v. Gasset*, 4 Gilman, 521. The statute in question is neither a criminal nor a penal law. There

is no ground for holding that the liability imposed by the constitution and statute of Kansas is penal in its nature or purpose.

In *Diversey v. Smith*, 103 Ill. 378, we had occasion to consider when a statute might be regarded as penal, and when the liability might be regarded as primary and based on contract. In that case the statute declared that the corporation should not transact business until certain specified things had been done, and, if it did transact business in violation of the statute, the trustees and corporators should be liable to the creditors in a specified amount. The court, in the decision of the case, among other things, said (page 390): "But the statute under consideration * * * prohibits the making of all contracts. It imposes the liability upon the trustees and corporators, not because the company was authorized to contract in their names or on their behalf, or so as to otherwise bind them, but because it prohibited the commencing of business and issuing of policies, and the trustees and corporators, in violation of their duty, caused or permitted business to be commenced and policies to be issued. Sedgwick says: 'Penal statutes are acts by which a forfeiture is imposed for transgressing the provisions of the act.' He moreover adds: 'A penal law may also be remedial, and a statute may be remedial in one part and penal in another.' Sedg. St. & Const. Law, 41. In *Potter, Dwar. St. 74*, it is said: 'A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions or for doing a thing prohibited.' It is the effect, not the form, of the statute that is to be considered; and, when its object is clearly to inflict a punishment on a party for violating it (i. e. doing what is prohibited or failing to do what is commanded to be done), it is penal in its character." In the decision the distinction between a penal and a contractual liability is made. In the one case the liability arises by a violation of the law. But where the statute declares that the corporation may transact business, and the stockholder shall be liable for debts contracted, then the liability is primary, and based upon contract. It will be observed that *Fuller v. Ledden*, 87 Ill. 310, *Culver v. Bank*, 64 Ill. 529, and *Corwith v. Culver*, 69 Ill. 502, are referred to by the court in the above case; and it is said that the liability of the stockholder in those cases was contractual, and not penal. Upon examination it will be found that the language of the statute under which the corporations were organized in those cases was substantially the same as in the case under consideration. Nor does the act in question undertake to provide any form of action whatever. It merely provides that suits may be brought against any persons who are stockholders, without undertaking to determine the character or kind of action that shall be brought. It is true, the liability of the stockholder to the creditors is one im-

posed by statute; but at the same time the liability is one arising out of contract. Where the charter of the corporation provides that the stockholder shall be liable to creditors individually, as was the case here, all persons who became stockholders agreed to become liable to all who might give credit to the corporation. The stockholders offer to the public to be liable as a corporation to the extent of the capital invested in the corporation, and they agree to become liable individually to an amount specified in the act of incorporation. Persons who give credit to the corporation do so upon the faith of the personal liability of the stockholders, and upon what principle can it be said that the liability is not contractual? In the discussion of this question, Morawetz on Private Corporations (section 870) says: "If the company's charter provides that the shareholders shall be subject to a special individual liability to creditors, persons becoming shareholders agree to become liable, both in their corporate capacity and individually, to all persons who shall give credit to the corporation. They offer to all the world to become liable, in their corporate capacity, to the extent of the capital which they have agreed to contribute for the purpose of carrying on the company's business, and they offer to become liable individually to the amount expressly provided by their charter or incorporation law. Parties who contract with the corporation contract upon the faith of this liability held out as their security, and the offer of the shareholders, being thereby accepted, ripens into a binding contract." See, also, *Thomp. Priv. Corp. § 3056*; *Cook, Stock & Stockh. § 223*. In *Bank v. Lawrence*, 76 N. W. 105, the supreme court of Michigan held that under the Kansas constitution and statute the stockholder was individually liable to a creditor; that the action was transitory, and might be enforced in any state where personal service could be had on the stockholder. In *Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349, the supreme court of Massachusetts held that an action might be maintained in that state by a creditor against a stockholder, under the constitution and statute of Kansas, to enforce the personal liability of the stockholder. In the decision of the case the court said: "This case comes up on demurrer to the plaintiff's declaration. It is averred, in substance, that under the statute of Kansas, as interpreted by the decisions of the supreme court of that state, the liability of the defendant as a stockholder is a contractual liability, and arises upon the contract of subscription to the capital stock made by the defendant in becoming a stockholder, and that in subscribing to said stock and becoming a stockholder he thereby guaranteed payment to the creditors of an amount equal to the par value of the stock held and owned by him, which should be payable to the judgment creditors of said corporation who first pursued this

remedy under the statute, and that an action to enforce said liability is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder. The liability of the stockholders must be determined according to the law of Kansas. *New Haven Horse-Nail Co. v. London Springs Co.*, 142 Mass. 349, 7 N. E. 773; *Halsey v. McLean*, 12 Allen, 438; *Flash v. Conn.*, 109 U. S. 371, 3 Sup. Ct. 263. We now have a case where the declaration, as we interpret it, sets forth that according to the law of Kansas the defendant is liable to a judgment creditor of the corporation as upon a contract, which is stable anywhere. The facts alleged in this respect are different from those in any case heretofore presented to this court (see *Bank v. Rindge*, 154 Mass. 203, 27 N. E. 1015), and the alleged liability of stockholders is of a different character from that which exists in this commonwealth. We are, however, to adopt the construction which is given in Kansas to the liability and undertaking of stockholders in Kansas corporations, and to give force and effect to the same as there established."

It is said, however, assuming a liability which the courts might undertake to enforce, they will refuse to do so, except by a proceeding in consonance with the judicial policy of our state. *Thompson on Liability of Stockholders* (sections 82, 83), says: "If the liability sought to be enforced is in the nature of contract, and is not opposed to the legislation or public policy of the state in which it is sought to be enforced, the courts of such state will give effect to it. If the statute creating such liability is penal in its nature, it will not be enforced outside of the sovereignty enacting it." Under this rule we see no reason why the action brought in the case under consideration might not properly be maintained. The statute creating the liability, as we have seen, is not penal; and, while the liability is one imposed by statute, it arises out of a contract of subscription entered into by the stockholder when he became a stockholder in the corporation. *Morawetz on Corporations* (section 875) says: "The right to maintain a suit of this character outside of the jurisdiction of the state by which the corporation was chartered does not depend upon the comity of the state where the suit is brought, or its willingness to recognize and give effect to the laws of a foreign state. It depends upon the willingness of the courts to enforce a contract validly entered into between the parties in another jurisdiction." The policy of a state is to be determined, in a great measure, from its legislation and from the decisions of its courts; and under our decisions a liability of a stockholder has been frequently enforced in an action at law, where the liability of the stockholder did not arise under

the general incorporation act of the state. *Wincock v. Turpin*, 96 Ill. 135; *Schalucky v. Field*, 124 Ill. 617, 16 N. E. 904; *Corwith v. Culver*, 69 Ill. 502; *Fuller v. Ledden*, 87 Ill. 310; *Culver v. Bank*, 64 Ill. 529; *McCarthy v. Lavasche*, 89 Ill. 270. Where a liability arises under the general incorporation act of the state (Rev. St. c. 32), the remedy of the creditor is in equity, as provided by section 25 of that statute, as held in *Low v. Buchanan*, 94 Ill. 76. But in *Wincock v. Turpin*, supra, it was held that the remedy in equity was confined to corporations organized under that act; hence the fact that a remedy in equity was established in a particular class of cases could have no special bearing on the question involved.

The appellee, however, relies upon *Tuttle v. Bank*, supra, as an authority that the action cannot be maintained. There is a marked distinction between this case and the *Tuttle Case*. In the second count of the declaration will be found three provisions of the Kansas statute set out and relied upon which were not before the court in the *Tuttle Case*. In addition, the construction placed upon the constitution and statutes of Kansas by the supreme court of that state is pleaded in this case, which was not before the court in that case. It is averred in the declaration, and the averment is admitted to be true by the demurrer, "that the supreme court of Kansas, being the court of last resort of said state, has passed upon and construed said statute, and holds that any stockholder in a corporation organized thereunder is severally and individually liable to each creditor of such corporation in an amount equal to the amount of his stock, to be recovered in an action brought by the creditor directly against the stockholder, without joining said corporation or other stockholders therein as defendants." Had the statutes set up in this case, and their construction by the court of last resort, been before us in the *Tuttle Case*, a different result might have been reached on the question of remedy. The liability imposed is not to the corporation, nor to all the creditors of the corporation; but, on the other hand, the liability is to each individual creditor. Nor is the liability of the stockholders a joint one, but each stockholder is severally liable. Under such circumstances a resort to a court of equity in the state of Kansas does not seem to be required before bringing an action here to enforce the individual liability of the stockholder. The rule established in *Young v. Farwell*, 139 Ill. 326, 23 N. E. 845, and *Patterson v. Lynde*, 112 Ill. 196, does not apply to the case made by the declaration here. The judgments of the appellate and superior courts will be reversed, and the cause will be remanded, with directions to the superior court to overrule the demurrer to the declaration. Reversed and remanded.

(177 Ill. 351)

DONAHOE et al. v. CHICAGO CRICKET CLUB et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

DREDS—CANCELLATION—DURESS—FRAUD—ATTORNEY AND CLIENT—RESULTING TRUSTS—EVIDENCE—SUFFICIENCY—HOMESTEAD—CONVEYANCE.

1. A husband executed a deed in trust for himself and wife, and about a year and a half afterwards disappeared, and nothing was ever heard of him. He was ignorant and excessively intemperate, and his wife had threatened to leave him if he did not deed the property to her, and he had been afraid to do so lest she would then turn him out of doors. *Held* insufficient to show that the deed was executed through undue influence or duress.

2. A deed to the grantor's attorney, in trust for the benefit of the grantor and wife, is not constructively fraudulent by reason of the confidential relation, where the attorney acquires no advantage from the transaction.

3. A deed was given to an attorney in trust for the benefit of the grantor and his wife or the survivor of them. After the date of the deed, and before it was acknowledged or recorded, the grantor, by said attorney, began suits against strangers to the deed to recover possession. *Held*, that no resulting trust was created in favor of the grantor, enabling his heirs to recover the property after his wife had survived him.

4. A deed of a homestead executed by a householder alone, for the use of his wife, does not convey the estate of the homestead to the extent in value of \$1,000, in view of Homestead Act, § 4, providing that no conveyance of an estate so exempted shall be valid, unless it is executed by the householder and his wife.

Appeal from circuit court, Cook county; E. Hanecy, Judge.

Bill by Patrick S. Donahoe and others against the Chicago Cricket Club and others. Decree for defendants, and complainants appeal. Reversed.

John E. Groves and Nicholas R. Finn (Thornton & Chancellor, of counsel), for appellants. Swift, Campbell & Jones and B. F. Chase, for appellees.

CRAIG, J. This is a proceeding in chancery, the object of which is to impeach a previous decree in chancery, and have an interest in certain real estate in Cook county decreed to be in the complainants. Upon the hearing below, a decree was rendered in favor of the defendants, from which complainants appeal. It appears that one Sylvester Donahoe was on the 15th day of October, 1883, the owner of certain property in Cook county. He executed a warranty deed to George H. Leonard on October 15, 1883, conveying this property, acknowledging it September 8, 1884. It was recorded on this latter date. It is conceded by all parties to the suit, and by Leonard, that this deed was made to the latter in trust for certain purposes. At the time of its execution, Sylvester Donahoe, and his wife, Sarah, lived on the premises, and continued to reside there until March 28, 1885, when he disappeared, and never returned nor was heard of after his disappearance. He left no child or chil-

dren. Several mortgages were placed upon the property by Leonard thereafter, Sarah Donahoe joining in their execution for the purpose of relinquishing her dower rights, the principal part of the money realized on these mortgages being expended in the erection of improvements on the property. On January 2, 1886, Sarah Donahoe executed a warranty deed to Leonard, releasing her right of dower and homestead. Leonard soon after, in the same month, subdivided the premises into lots, except two parcels of it. On June 9th following, Sarah Donahoe commenced suit in chancery in the circuit court of Cook county, showing the above facts, and claiming that the deed by Sylvester Donahoe to Leonard was in trust, for her sole benefit; that, before her marriage to Sylvester Donahoe, she had been a servant in the family of Leonard; that Leonard was an attorney, and Sylvester Donahoe his client; that, at the time the deed to Leonard was executed, Sylvester's health had become impaired, and was becoming more so on account of his intemperate habits; that the only heirs Sylvester had at that time, besides his wife, Sarah, were brothers, and desiring to secure the property for her benefit, and to have some one of experience to manage it, he made the deed in trust; and that Leonard gave her a writing showing the conditions of the trust. She also alleged that Leonard had left the country, and asked for the appointment of a new trustee. None of the relatives of Sylvester were parties to this proceeding. David Quigg was appointed trustee, and he, as such trustee, filed a petition in the cause, showing a necessity for a sale of his interest, as trustee, in the lots. By the order of court, in compliance with this petition, all the lots except one were sold. The one lot, and the balance of the money in the hands of the trustee, were turned over to Sarah Donahoe, and the trustee discharged. The present action is on behalf of the children of a brother of Sylvester Donahoe, and the executor and sole devisee of another brother. Their contention is that they are entitled to their interest in this property as heirs of Sylvester Donahoe, and also, as such heirs, they are entitled to share therein at least to the extent of a homestead interest at the time Sylvester Donahoe disappeared. It seems to be conceded on both sides that seven years having elapsed after his disappearance, on March 28, 1885, Sylvester Donahoe became legally dead; that is, after March 28, 1892. It is also conceded by defendants below that if the complainants, who were not parties to the former suit, have any rights in the property, they are in no way bound by the decree therein entered.

Appellants claim the deed from Sylvester Donahoe was procured by fraud and undue influence. There was testimony to the effect that Sylvester was excessively intemperate, and that he was ignorant in many respects, but there was nothing in the evidence

to warrant the court in setting the deed aside on the ground of fraud or duress. There was nothing whatever to show that the grantor, at the making of the deed, was intoxicated, or that he did not understand the effect of his act. One of complainants' own witnesses, Jane Hogue, was asked, "Do you know whether or not Sarah Donahoe threatened to leave her husband if he did not deed the property to her after the marriage?" and she answered, "Yes, I do." This was as far as the witness testified, and it certainly falls far short of proving duress. There was also testimony tending to show that Sylvester was afraid to deed the property to his wife, because "she would have the power, and exercise it, to turn him out of doors." The master's report, which was approved by the court, upon the subject of duress, found that there was no evidence of such "influence, deceit, duress, or threats used against said Sylvester Donahoe, either at the date of that deed, or at the date of its acknowledgment, or connected at any time with that deed"; and we think the evidence fully warranted such a finding.

It was insisted that because Leonard was the attorney of Sylvester, and because of his acts as such, constructive fraud arose out of that confidential relation. Leonard does not appear to have had any interest in the trust property, nor does it appear that any advantage whatever was taken by him after the transaction.

Appellants further contend that the deed to Leonard was intended to, and did, create a resulting trust in the grantor or his heirs. They rely, in part, to support this claim, upon the fact that after the date of the deed to Leonard, but before the acknowledgment or recording thereof, Sylvester Donahoe, by Leonard, as his attorney, began two suits,—one in chancery, and another in ejectment,—against Michael Saunders, to recover possession of one of the lots; the contention being that by these suits Sylvester Donahoe was still claiming to be the owner of the property. The fact that he may have claimed the property after the execution of the deed to Leonard, or that Leonard, the trustee, may have recognized him as interested in the property, cannot be held sufficient to overcome the evidence, which clearly establishes the conveyance of the property from Donahoe to Leonard, and the agreement under which Leonard held the title. Leonard, who had no interest whatever in the litigation, and who, under the ruling in *Bradshaw v. Combs*, 102 Ill. 428, may be regarded as a competent witness for his co-defendants, testified: "The deed was given by Sylvester Donahoe to me, to hold in trust for the benefit and use of Sylvester Donahoe and Sarah Donahoe, or the survivor of them." He also testified that in no event was he (Leonard) to have any equitable interest in the property. This evidence, in connection with the other evidence in the record, satisfactorily shows that the trust

was meant for the sole benefit of the survivor.

It is, however, contended that, upon the death of Sylvester Donahoe, he never having conveyed his homestead in the premises in the mode prescribed by law, the estate of homestead of the value of \$1,000 descended to his heirs at law,—one half to his widow, Sarah Donahoe, and the other half to his two brothers. At the time of the conveyance from Sylvester Donahoe to Leonard, October 15, 1883, the value of the property was largely in excess of \$1,000; and, so far as the excess in value above \$1,000 is concerned, that passed to the grantee in the deed, although the deed was not executed and acknowledged by the wife, as provided by the homestead act. *Despain v. Wagner*, 163 Ill. 598, 45 N. E. 129. But the estate of homestead to the extent in value of \$1,000 stands upon a different footing. Section 4 of the homestead act provides: "No release, waiver or conveyance of the estate so exempted shall be valid unless the same is in writing, subscribed by said householder and his wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or possession is abandoned or given pursuant to the conveyance." Here, Sarah Donahoe, the wife of Sylvester Donahoe, did not join with her husband in the execution of the deed to Leonard, nor was the possession of the premises abandoned or given pursuant to the deed. It therefore follows that the estate of homestead to the extent in value of \$1,000 did not pass by the conveyance, but remained in Sylvester Donahoe. After the execution of the deed, Donahoe and his wife continued to reside on the premises until March 28, 1885, when he disappeared, and has not been heard of since. It nowhere appears from the record that he acquired a home or domicile at any other place, and the premises upon which he resided when he disappeared continued to be his home and residence until it is proved that he acquired a home and settlement elsewhere. *Behrensmeyer v. Kretz*, 135 Ill. 591, 26 N. E. 704; *Moore v. Dunning*, 29 Ill. 130.

As the estate of homestead vested in Sylvester Donahoe did not pass by the deed to Leonard, and as possession was not abandoned or given in pursuance of the conveyance, it is apparent that, at the time of his death, Sylvester Donahoe was possessed of an estate of homestead in the premises to the extent in value of \$1,000. That estate descended to his heirs at law. *Klitterlin v. Insurance Co.*, 134 Ill. 647, 25 N. E. 772; *Anderson v. Smith*, 159 Ill. 93, 42 N. E. 306; *Wilson v. Bank*, 166 Ill. 9, 46 N. E. 740. Donahoe died intestate and without issue, and, under the statute, one half of his estate of homestead descended to his wife, and the other half to appellants, sole heirs and devisees of two brothers, subject to the right of occupancy by the widow during her natural life. It appears, however, that the widow

has abandoned the premises, and ceased to occupy them as a homestead. The appellants were therefore entitled to an estate of homestead in the premises of the value of \$500 at the time of filing the bill. The decree of the circuit court will be reversed, and the cause remanded for further proceedings in conformity to this opinion. Reversed and remanded.

(176 Ill. 620)

BRENAN et al. v. PEOPLE ex rel. CIVIL SERVICE COM'RS.

(Supreme Court of Illinois. Dec. 21, 1898.)

MANDAMUS—MUNICIPAL CORPORATIONS—GENERAL SCHOOL LAWS—EFFECT ON CHICAGO CITY CHARTER—CIVIL SERVICE LAWS—CONSTRUCTION—BOARD OF EDUCATION—OFFICERS.

1. Laws 1895, p. 85, regulating civil service of cities, and providing (section 3) that the commissioners shall classify all the offices and places of employment in such cities, does not include offices in no way connected with the municipal government.

2. The city of Chicago, by incorporating under the general law for the incorporation of cities (Laws 1871-72, p. 218, art. 1), did not abrogate any of the provisions of its special charter relative to schools, since such general law contains no provision as to schools, and provides (section 6) that all laws and parts of laws not inconsistent therewith, and applicable to such cities, shall continue in force.

3. The general school laws of 1872 (Laws 1871-72, p. 700) and 1889 (Laws 1889, p. 239) did not repeal the provisions of the Chicago city charter relative to schools, since the repealing sections thereof do not indicate any intention to repeal any special acts, except such as are inconsistent therewith.

4. The board of education of the city of Chicago, authorized by the general school laws of 1872 (Laws 1871-72, p. 700) and 1889 (Laws 1889, p. 239), providing that in all cities of over 100,000 inhabitants the public schools shall be controlled by the board of education, is still connected with and a part of the municipal government, and, as such, all its offices and places of employment are within the civil service act (Laws 1895, p. 85), except the members of the board, the superintendent, and teachers, who by section 11 are exempted from such classified service.

5. The teachers' and employes' pension act (Act June 21, 1895) and the civil service act (Act March 20, 1895) conflict as to the powers of removal of employes of the board of education of Chicago, but, as the former is the latest expression of the legislative will (the latter not taking effect until adopted by the electors of Chicago, June 1, 1895), such board can remove or discharge its employes as therein empowered.

Appeal from circuit court, Cook county; M. F. Tuley, Judge.

Petition by the people, on the relation of the civil service commissioners of Chicago, against the board of education of such city and Thomas Brenan and others, for mandamus to compel the latter to make requisition upon the former for certificates of eligible candidates for positions of employment classified under the civil service act (Laws 1895, p. 85). From an order awarding the writ, defendants appeal. Affirmed.

Daniel J. McMahon, for appellants Thomas Brenan and others. Collins & Fletcher, for

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appellant Alfred S. Trude. S. P. Shope, for appellant John T. Keating. William G. Beale and Donald L. Morrill, of counsel, for appellants. T. A. Moran, John W. Ela, Levy Mayer, and C. R. Holden, for appellees.

CARTER, C. J. The civil service commissioners of Chicago filed their petition in the circuit court of Cook county for a writ of mandamus to compel the board of education of the city to make requisition upon the civil service commission for certificates of eligible candidates for positions and places of employment classified under the civil service act (Laws 1895, p. 85), which said board was about to fill by appointment thereto, and to make such appointments from persons whose names should be certified by said commission. The board and its several members demurred to the petition, and contended that the civil service act does not apply to the board of education of the city of Chicago, and some of the defendants contended below, and contend here, that said act is unconstitutional. The trial court overruled the demurrer, and awarded the writ.

It is wholly unnecessary, on this appeal, to consider further the constitutional question raised, inasmuch as this court has, since the judgment below was rendered, fully considered and decided that question in *People v. Kipley*, 171 Ill. 44, 49 N. E. 229, and in *Same v. Loeffler*, 51 N. E. 785, and has held that the statute is not in conflict with the constitution. True, some additional reasons are advanced in this case, but we regard them as untenable. The only question, then, important to be considered or decided, is, does the civil service act apply to the employes of the board of education, or, rather, control such board in their employment or removal? Section 3 of the act provides that "said commissioners shall classify all the offices and places of employment in such city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in section 11 of this act. The offices and places so classified by the commission shall constitute the classified civil service of such city, and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned." Section 4 provides that the commission shall make rules for examinations, appointments, and removals in accordance with the act. Section 6 provides for free competitive examinations, of a practical character, of all applicants for offices or places in the classified service, except those exempted by section 11. Section 10 provides for notice to the commission by the head of the department in which a position in the classified service is to be filled, and for the certification by the commission to the appointing officer of the name and address of the candidate having the highest standing in the particular class or grade, and for the appointment of the person so certified on probation, but who may be

discharged by such head of department during such probation upon reasons assigned in writing to the commissioners, and with their consent. Provision is also made for temporary appointments to meet exigencies in the public service. Section 11 is as follows: "Officers who are elected by the people, or who are elected by the city council pursuant to the city charter, or whose appointment is subject to confirmation by the city council, judges and clerks of election, members of any board of education, the superintendent and teachers of schools, heads of any principal department of the city, members of the law department, and one private secretary of the mayor, shall not be included in such classified service." Section 12 provides that no officer or employé in the classified service, appointed under the rules after examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense; that such charges shall be investigated by or before the commission, or some officer or board appointed by it, and that the finding, when approved by the commission and certified to the appointing officer, shall forthwith be enforced by such officer, but that nothing in the act shall be construed to limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days. There are other provisions not necessary to be referred to here.

A question is raised and discussed by counsel as to the meaning, in reference to the classified service, of the phrase in section 3, "all offices and places of employment in such city." It would do violence to the plain intent of the act to hold that offices or places of employment in the city in no wise connected with the offices or purposes of the municipal corporation are included in the act. It is plain from the scope and purpose of the statute, and the language employed in its different provisions, that offices and places of employment not so connected do not come within its provisions. Taking this view, the appellants contend that the board of education of Chicago is a public corporation under the general school laws of the state, separate and distinct from the city government; that it is in no sense a department of the city government, but, even if not a public corporation, it is a state agency, charged by public law with the duty of administering, within the limits of the city of Chicago, the school laws, and with the maintenance and management of the public schools in the city, and, as such public corporation or state agency, is not subject to the civil service department of the city government. It is conceded, and is clearly true, that when the city was under its special charter, enacted, approved, and in force February 13, 1863 (Priv. Laws 1863, p. 40), the board of education was one of the departments of the city government; but the position of appellants is that substantially all of the provisions relating to schools in the act of 1863, and subsequent amendments, were repealed

by the general school laws of 1872 (Laws 1871-72, p. 700) and 1889 (Laws 1889, p. 239). In 1875 the city of Chicago became incorporated under the general law for the incorporation of cities and villages, and its special charter is no longer in force, except so much of it as is not inconsistent with the general law. It is provided in section 6 of article 1 of said general law (Laws 1871-72, p. 218; 1 Starr & C. Ann. St. p. 454) that "all laws or parts of laws not inconsistent with the provisions of this act shall continue in force and applicable to any such city or village, the same as if such change of organization had not taken place." Now, the general law for the incorporation of cities and villages contains no provision whatever relating to schools. It is plain, therefore, that its adoption by the city of Chicago did not abrogate any of the provisions of its special charter relative to schools, unless, indeed, they, or some of them, are in other respects inconsistent with the general act of incorporation (*Smith v. People*, 154 Ill. 58, 39 N. E. 319); and no such inconsistency has been pointed out. Nor is it contended that the reincorporation of the city abrogated the provisions of the special charter relating to schools, but that they were repealed, as before stated, by the general school laws above mentioned. It is not contended that they were expressly repealed, but by implication only, as being inconsistent with such general laws. We are of the opinion that the repealing sections of the acts of 1872 and 1889, and the language used in other sections of the acts, indicate an intention not to repeal any parts of the special acts except such as were inconsistent with such general acts. The language of said sections, after naming the statutes repealed, is: "And all other acts and parts of acts inconsistent with this act, and all general school laws of this state, are hereby repealed."

When the general school law of 1872 was in force, this court decided the case of *Fuller v. Heath*, 89 Ill. 296, and held that the city of Chicago had power, under former laws, to levy and collect taxes for school purposes. The "former laws" referred to were the provisions contained in the special charter and subsequent amendments. It was there said "that neither the adoption as its charter by the city of Chicago of the general law relating to cities and villages, nor the passage of the general school law, has modified or impaired the former laws authorizing the city of Chicago (as a public agency) to levy and collect taxes for school purposes." It is not necessary to determine in precise terms, in this case, how far these "former laws" have been modified in other respects by the act of 1872, or how far they have been modified by the act of 1889 operating as an amendment, but it is sufficient, for the purposes of this case, if it appears that such former acts relating to schools have not been so far abrogated as to sever the connection which they created between the board of education and the city government, and to make the board an independent public corpora-

tion having full corporate powers distinct from those of the city, or a mere agency of the state for the administration of the school laws, disconnected from the municipal government. The mere fact that the statutes of 1872 and of 1889, and the amendment of 1891, apply to the school system of Chicago and the board of education, and had or have the effect of modifying and amending the former school laws of that city, does not authorize the conclusion that the board is no longer a municipal agency. The legislature knew, when it passed these acts, that there was but one city in the state having more than 100,000 inhabitants, and that that city had, as one of its departments, a board of education, and it is fair to assume that if it was the intention to convert this body into an independent corporation, or a mere state agency, separate from the municipal government of Chicago, of which it formed a part, such intention would either have been expressed or clearly implied from the language used. But it appears that the statutes which are supposed to have wrought such a change in the board of education of Chicago contain no provision declaring such boards to be bodies politic and corporate, as they do in reference to school directors and other school authorities. Many and greater powers are by statute conferred on the city council, but it cannot be said for that reason that it alone is a corporate body.

The question, however, is not whether the board possesses corporate powers, and, if so, what are their precise limitations; for, as said in *Board of Water Com'rs of City of Springfield v. People*, 137 Ill. 660, 27 N. E. 698, "the mere fact that the legislature saw fit, for purposes of convenience and of administration, to give it [the board of water commissioners] a corporate existence, and invest it with certain corporate powers, did not prevent it from being simply a branch or an agency, created for a special purpose, of municipal government. Without the active co-operation of the city council it would have been wholly unable to effect the objects of its creation." See, also, *McGurn v. Board*, 133 Ill. 122, 24 N. E. 529, where this same board was spoken of as "an organization which, in some points of view, is to be regarded as a subordinate department of the city government, and in others as an independent municipal corporation." There is, of course, a broad distinction between this and the two cases cited, but they are pertinent, as showing that merely because a board is invested with certain corporate powers it is not necessarily separated from the municipal government; and, even if the board has been invested with corporate powers, the question remains whether or not the former admitted status of the board of education as a department of the municipal government of Chicago has been so changed by subsequent legislation as to exclude it from the operation of a statute enacted to regulate the civil service of cities, and requiring

the classification of all offices and places of employment in such cities, with certain enumerated exceptions, and thus forming what is designated as the classified service from which appointments must be made. And we are of the opinion that, even if the effect of the school legislation is to confer corporate powers on the board of education, or to make it a state agency for certain purposes, still the change has not been such as to disconnect it from the city government, and to authorize the courts to declare that the offices and places of employment under the board are no longer offices or places of employment in or of such city. Nor in so holding is it necessary, or thought to be within the proper scope of this case, to point out definitely each and all of the provisions of the special charter relating to schools which remain in force. Indeed, counsel on both sides have failed, in their able and elaborate arguments, to point out for our consideration the specific parts of the act of 1863, and its amendments of 1865 and 1869, which it is contended, upon the one hand, have been repealed, or, upon the other, continue in force; and counsel for appellants say: "When we state that the school provisions of the charter of 1863 have been repealed by the subsequent general school legislation of the state of Illinois, we mean simply to state that all of the essential provisions relating to schools have been so repealed, without enumerating in detail unimportant matters like some of those which have been discussed in the opinion of the circuit court;" and, further: "That the board of education of the city of Chicago does not engage in this controversy for the purpose of protecting the right to appoint a few petty officers, such as clerks and janitors, insignificant in number when compared with the whole body of approximately 6,000 school employes, but they have presented these questions to the court primarily, in order that the legal relations between the board of education of the city of Chicago and the municipal government of the city of Chicago may be fully and completely defined and determined." It does not appear to us to be necessary in this case for us to assume the labor suggested by counsel, but, in addition to what has already been said, it seems to us sufficient to say that the title to school lands remains in the city as provided by the act of 1863; that the school law of 1872 did not create the board of education of Chicago, but recognized its then present existence, and changed and enlarged, in many respects, its powers and duties, but continued, as did the subsequent school act of 1889, its dependence, in many important matters, upon the city council. Thus, it was provided in the same language in both acts that "the board of education * * * shall have power, with the concurrence of the city council: First. To erect or purchase buildings suitable for school houses and keep the same in repair. Second. To buy or lease

sites for school houses, with the necessary grounds. Third. To issue bonds for the purpose of building, furnishing and repairing school houses, for purchasing sites for the same, and to provide for the payment of said bonds; to borrow money on the credit of the city." By another section all conveyances of real estate must be made to the city for the use of schools, and no sale of such real estate shall be made except by the city council upon the written request of the board. The board cannot levy or collect any tax; this is done by the city. The board is required to communicate to the city council, from time to time, such information in its possession as may be required, and to report to the council any suggestions deemed expedient or requisite in relation to the schools and the school fund, or the management thereof, and to recommend the establishment of new schools and districts. The school funds of all kinds are held by the city treasurer, subject, it is true, to the order of the board, but only upon its warrants countersigned by the mayor and city clerk. In *People v. Roche*, 124 Ill. 9, 14 N. E. 701, it was held that a mortgage for purchase money of school land should be made to the city, and not to the board.

After a careful examination and consideration of the various statutes and decisions bearing upon the question, and the arguments of counsel, it seems clear to us that the board of education of the city of Chicago is still connected with, dependent upon, and to some extent a part of, the municipal government of that city, and, as such, that its offices and places of employment fall within the operation of the civil service act. This view is strengthened, not only by the general language employed in the last-named act, but also by the wording of section 11, which mentions, among the officers excepted from the classified service, "members of any board of education, the superintendent and teachers of schools." The exclusion of a part indicates an intention to include the rest. If it was not the intention of the legislature to extend the operation of the civil service act to offices and places of employment in the school service, it certainly would not have excepted a part, but would have excepted all or none.

It is next contended that the statute providing for the creation of a teachers' and employes' pension and retirement fund, in force July 1, 1895, is in conflict with the civil service act, if the latter act be held to apply to school employes, inasmuch as it provides that no teacher or other school employe elected by said board of education shall be removed or discharged except for cause, upon written charges, which shall be investigated and determined by said board, whose action and decision in the matter shall be final; that section 12 of the civil service act provides that such charges as grounds for removal shall be investigated by or be-

fore the civil service commission, or by or before some officer or board appointed by said commission for that purpose, and that the finding and decision, when approved by the commission, shall be certified to the appointing officer, and shall be by him forthwith enforced. These acts were passed at the same session, the civil service act having been approved, with an emergency clause, March 20, 1895, and the teachers' and employes' pension act, June 21, 1895; but the civil service act did not become operative until after it was adopted by the electors of the city of Chicago, and declared to be in force by the proclamation of the mayor, which proclamation was issued July 1, 1895. It is the duty of the courts to construe the two acts so as to give effect to both, as far as may be done. But it is apparent that the two acts are inconsistent, so far as the power of removal of employes of the board is concerned. There is, however, no other repugnancy between them. Giving effect to the provision of the pension act as the latest expression of the legislative will, we are of the opinion that the circuit court was right in holding that the board of education has the power to investigate and determine charges against its employes, and to remove or discharge them, but that in all other respects the civil service act applies to such employes according to its terms. This exception is necessarily created by the later act, and may well have been made because of the purpose of the act to create, and preserve under the control principally of the board of education, for teachers and employes, a pension and retirement fund. But whatever the purpose may have been, the act must have its intended effect. Finding no error, the judgment is affirmed. Judgment affirmed.

(177 Ill. 362)

EXCHANGE NAT. BANK OF POLO v. DARROW.

(Supreme Court of Illinois. Dec. 21, 1898.)

NEW TRIAL—BILL IN EQUITY—NEWLY-DISCOVERED EVIDENCE—LACHES.

1. A bill in equity for a new trial, after judgment for defendant in an action at law against an executor on a note of the decedent, on the ground of newly-discovered evidence consisting of statements of decedent, cannot be maintained, in the absence of allegations of specific acts of diligence in efforts to procure such evidence at the trial of the action at law.

2. A bill in equity for a new trial of an action at law after judgment, on the ground of newly-discovered evidence, filed more than three years after such judgment, will be dismissed for laches, in the absence of an excuse for such delay.

3. A bill in equity for a new trial of an action at law after judgment, on the ground of newly-discovered evidence, filed eight months after such evidence was discovered, will be dismissed for laches, in the absence of an excuse for such delay.

Appeal from appellate court, Second district.

Bill by the Exchange National Bank of Polo against Albert Darrow. From a judgment of the appellate court (74 Ill. App. 170) affirming a judgment for defendant, plaintiff appeals. Affirmed.

W. D. Barge, for appellant. J. M. Hunter, for appellee.

PER CURIAM. In deciding this case, the appellate court, speaking through Mr. Justice WRIGHT, delivered an opinion which, with the exception of a few omissions, is as follows:

"Appellant filed its bill in equity seeking a new trial in a case tried at law against appellee, wherein the issues were found against appellant, and final judgment rendered in bar of its action upon a promissory note for \$1,660, bearing date November 10, 1887, alleged to have been made by James H. Jenkins in his lifetime, payable to the order of Henry Metz, due in one year after date, with 8 per cent. interest, which the payee indorsed and delivered to appellant. Jenkins died in September, 1888. Appellee was appointed administrator, and, after a contested trial in the county court, judgment was rendered in favor of appellant upon the note, from which an appeal was taken by the administrator to the circuit court, where, after two trials, the second being in June, 1891, the jury found the issues against appellant; and upon that verdict final judgment was rendered, from which an appeal was taken to this court, where the judgment of the circuit court was affirmed, and an appeal, having been presented to the supreme court, resulted in an affirmation of the judgment of the appellate court. See 45 Ill. App. 466, and 154 Ill. 107, 39 N. E. 974.

"The defense to the note sued on was that it was not the note of Jenkins, that the signature thereto was a forgery, and that another note previously given by Jenkins to Metz for \$60 had been fraudulently changed in date and amount to correspond with the note in suit; the contention of appellant being that the note was genuine, and given to Metz for the actual consideration of \$1,660 on money lent by him to Jenkins on the date of the note. There was much conflict of evidence at the trial of the issues at law concerning the signature and as to the lending of the money and execution of the note, and it is now claimed by appellant, in its bill filed herein, that it is entitled to a decree awarding it a new trial of the issues at law on the ground of newly-discovered evidence, which it contends is not cumulative merely, and also conclusive in its nature. The newly-discovered evidence is presented by the bill in the form of affidavits of the proposed witnesses, who, it is alleged, would testify to the facts therein stated. A demurrer was interposed to the bill, and by the court sustained, and the bill dismissed for want of equity, from which appellant appeals to this court.

"Much of the newly-discovered evidence set out in the bill of complaint consists of the statements and admissions of the deceased, Jenkins, in his lifetime, that at the time in question, the date of the note, he had borrowed \$1,660, or a large sum of money, from Metz, the payee of the note, and that he (Jenkins) after such time was making preparations to pay the same. * * * In cases like the one presented, in which courts of equity are invoked to interpose, after verdict at law, on the ground of newly-discovered evidence after trial, which could not by ordinary diligence have been ascertained before, the rules have always been strict, almost to harshness. In 2 Story, Eq. Jur. §§ 894, 896, the doctrine is discussed and the authorities cited upon this subject, and it is there stated that relief will not be granted if the party applying has been guilty of laches as to the matter of defense or claim, or might by reasonable diligence have procured the required proofs before the trial. The general reasoning upon which the doctrine is maintained is the common maxim that courts of equity, like the courts of law, require due and reasonable diligence from all parties in suits, and that it is sound policy to suppress multiplicity of suits. 'It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere, because, if a matter has been already investigated in a court of justice according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. Rules are established, some by the legislature, some by the courts themselves, for the purpose of putting an end to litigation, and it is more important that an end should be put to litigation than that justice should be done in every case. The truth is that, owing to the inattention of parties and several other causes, exact justice can seldom be done. The inattention of parties in a court of law can scarcely be made a subject for the interference of a court of equity. * * * A bill for a new trial is watched by equity with extreme jealousy.' * * * From the reference to the text of the rules governing cases like this, and which we regard as elementary and well established, it was the duty of the appellant, as soon as it knew the note would be contested, to use ordinary diligence to discover all the evidence pertinent to the issues to be tried. It should have inquired, by specific interrogation of the persons with whom Jenkins associated and did business, whether they had ever heard him make any statements or admissions concerning the note in question, and conceding the borrowing of money of Metz and its repayment. We have searched the bill in vain to find averments of specific acts of diligence of this nature, and that would tend to elicit the particular information said to have been obtained at a later time. * * * No rule of pleading is more elementary than that the

pleading is to be most strongly construed against the pleader. Applying this rule to the averments of the bill, and admitting their truth, as does the demurrer, still by no fair intendment can it be inferred that appellant made any inquiry concerning any statement or admission of Jenkins regarding his giving the note to, or borrowing the money of, Metz; that being the particular evidence now sought by the bill to be introduced as controlling the issue at law.

"Due diligence also required the appellant to have promptly filed its bill after discovering the new evidence, and also to prosecute diligently its search for such evidence in contemplation of presenting such bill. We are forced to the conclusion it was negligent in failing to file its bill for relief more promptly. The averment of the bill is that appellant did not know of the new evidence until after the judgment was affirmed in this court. Again, applying the rule of pleading before mentioned to this statement, it would follow appellant knew of it immediately after December 12, 1892, the day of such affirmance. The bill in the case was not filed until March 2, 1896, being a delay of more than three years. The affidavits of the proposed witnesses were made from eight to nine months before the bill was filed, and no excuse is made by the bill for this delay nor for the delay in obtaining such affidavits. We cannot, by the strict rules of equity governing cases of this nature, excuse such delays, and thereby relieve appellant from the consequences of its own laches. We are therefore of the opinion the laches of appellant has been such, in the particulars designated, as to bar the relief for which by its bill it has prayed, and if injustice has been done it must be attributed to its own inattention. The demurrer was properly sustained, and the bill dismissed for want of equity, and the decree of the circuit court will therefore be affirmed."

We concur with the conclusion reached by the appellate court, and with the views above expressed, which are hereby adopted as the opinion of this court. Accordingly, the judgment of the appellate court is affirmed. Judgment affirmed.

(176 Ill. 632)

UPTON v. PEOPLE ex rel. MURRIE, County Treasurer.

(Supreme Court of Illinois. Dec. 21, 1898.)

SPECIAL ASSESSMENTS—INSUFFICIENT DESCRIPTION—PAYMENT OF ASSESSMENTS—ESTOPPEL.

1. An assessment and judgment for taxes will be void unless the property assessed is described so as to be capable of identification.

2. Lands assessed for special taxes were described as parts of lots in an assessor's plat. It was shown that the surveyor who made such plat was not the county surveyor, as required by Laws 1853, p. 3. *Held*, that such description was insufficient to authorize a judgment against such lots for delinquent taxes.

3. Where the descriptions of property for special assessments were void, payment of as-

sessments by the party assessed will not estop him from objecting to further compulsory payments.

Appeal from Lake county court; D. L. Jones, Judge.

Application by the people, on the relation of James Murrie, county treasurer, for judgment against the land of Edward L. Upton for certain delinquent special assessments for local improvements in the city of Waukegan. There was a judgment for plaintiff, and defendant appeals. Reversed.

Homer Cooke, for appellant. Lealie P. Hanna, for appellee.

CARTWRIGHT, J. The county treasurer of Lake county applied for judgment against several tracts of land described by an assessor's plat of section 16, township 45 N., range 12 E., in that county, which were delinquent as to installments of three special assessments, severally levied by the city of Waukegan for waterworks, paving, and sewer. Appellant appeared, and filed an objection that the lands were assessed by void descriptions. The objection was overruled, and judgment was entered.

Property assessed for taxes must be described so as to be capable of identification by some lawful mode, such as a government survey, or a reference to an authenticated plat, or by metes and bounds, and, unless it is so described as to be capable of such identification, the assessment and judgment will be void. *People v. Chicago & A. R. Co.*, 96 Ill. 369; *People v. Dragstran*, 100 Ill. 236; *People v. Eggers*, 164 Ill. 515, 45 N. E. 1074; *People v. Clifford*, 166 Ill. 165, 46 N. E. 770. The lands in this case were described as certain parts of lots 25 and 55 in said assessor's plat, or by metes and bounds, as portions of, and included in, such plat. The record of the plat and certificate was offered in evidence, showing that it was made July 20, 1867, by Daniel Brewer, surveyor, and it was proved that Daniel Brewer was never county surveyor or deputy of such surveyor for the county of Lake. The plat was made pursuant to the provisions of section 53 of an act of February 12, 1853, entitled "An act for the assessment of property and the collection of taxes in counties adopting the township organization law." Laws 1853, p. 3. The case of *People v. Reat*, 107 Ill. 581, was decided under the same act, and it was there held that an assessor's plat not made by the county surveyor was insufficient to authorize a judgment against lots therein for delinquent taxes. This decision must control the disposition of this case. In the assessment for the sewer there is a reference in the descriptions to a school trustees' subdivision of section 16 as well as to the assessor's plat, but there is no evidence that there was any such subdivision or plat thereof, and the description rests on the assessor's plat, which was not authorized by any law.

It appears that there was a stipulation between the city attorney and appellant for the correction of a clerical error in the amount of the assessment for paving, and that the error was corrected at the confirmation, and that appellant had paid previous installments of the assessments. It was proved that the conveyance of the lands to appellant was by another description, and not by the assessor's plat or school trustees' subdivision, or by any description contained in the delinquent list, and the elements of an estoppel are lacking. In the case of *Harts v. People*, 171 Ill. 373, 49 N. E. 539, cited by appellee, Harts had voluntarily acknowledged the plat and adopted it by describing the property in two conveyances according to such plat. He could not be heard to say that it was not a valid plat of the land, while here no such acknowledgment was ever made. If the descriptions were void, the previous payments can only be regarded as voluntary contributions on the part of appellant to the special assessment funds, and he is not estopped from objecting to further compulsory payment. The judgment is reversed and cause remanded. Reversed and remanded.

(177 Ill. 37)

CITY OF CHICAGO et al. v. NICHOLS.

(Supreme Court of Illinois. Dec. 21, 1898.)

MUNICIPAL CORPORATIONS—VALIDITY OF APPROPRIATIONS—ORDINANCES—CONCLUSIVENESS—ACTIONS BY TAXPAYER—EQUITY.

1. An order directing the expenditure of a further sum in furnishing better light to illuminate the city was passed after the city council had, in its annual appropriation bill, appropriated a specified sum for lighting the city. The expenditures of the city cannot lawfully exceed the amount provided for in the annual appropriation bill, unless (Rev. St. c. 24, § 90) an improvement is necessitated by a casualty or accident happening after such annual appropriation is made. *Held*, that the necessity for additional light, caused by the subsequent construction of elevated railroads, and the additional expense of gas and electric lights, caused by a combination of the gas and electric light companies, do not constitute "accidents," or "casualties," so as to authorize a further appropriation.

2. The declaration of a city council that that is an "accident" or "casualty" which in its very nature is clearly not so, so as to authorize expenditures for an improvement, is not conclusive in a court of law.

3. A taxpayer may sue to enjoin an unauthorized diversion of the public funds of the city which will add to the burden of the taxpayers of the city.

4. In an action by a taxpayer of a city for relief against an unauthorized act of the taxing power of the city, the pleading and proof need not disclose the amount of taxes paid or to be paid by him.

Appeal from Cook county court; M. F. Luley, Judge.

Bill in chancery by Charles M. Nichols against the city of Chicago and another to enjoin the carrying out of an appropriation ordinance. From a decree for complainant, defendants appeal. Affirmed in part.

The city council of the city of Chicago on the 18th day of March, 1897, passed the annual appropriation ordinance or bill for the fiscal year ending December 31, 1897. One item appropriated the sum of \$600,000 "for oil, kerosene and gas for lighting street and bridge lamps, cleaning, lighting and repairing, salaries for gas inspectors and watchmen at the test meters, and for electric light plant maintenance." Another item appropriated the sum of \$25,000 for the "expenses of the extension of the electric light system in the Eighteenth ward." On the 18th day of October of the same year the said city council adopted another ordinance, authorizing and directing the comptroller of the city to expend \$150,000 in providing and furnishing "better light to illuminate the thoroughfares of each of the divisions of the city," and appropriated that sum out of any moneys not otherwise appropriated for the purpose specified. This was a bill in chancery by the appellee, a taxpayer of the city, for a writ of injunction restraining the said city and Robert A. Waller, comptroller thereof, from carrying out and executing the provisions of said last-mentioned ordinance, or letting any contract or expending any sums of money by virtue thereof, or of the appropriation therein attempted to be made. A general demurrer to the bill was overruled, and the appellants made answer thereto. The answer averred that, after the passage of the annual appropriation bill or ordinance, all but one of a number of gas companies which at the time of the passage thereof were doing business separately in the city, and supplying gas to the said city and its inhabitants in competition with each other, reorganized under one charter, and formed a trust or combination for the purpose of securing a monopoly in the business of supplying gas for lights in said city; that after the passage of the said annual appropriation bill or ordinance a number of electric light and illuminating corporations, which previous thereto had been supplying the city with electric lights, entered into a combination or trust, and increased the charges and prices for electric and gas lights used by the city and by private consumers; that, after the passage of the said annual appropriation bill or ordinance, certain elevated railroad companies entered into a combination, and, acting in concert, constructed and operated an elevated railway structure on Wabash avenue and other designated streets, and built 12 stations in the principal business district of the city; that said elevated railway structures, stations, and approaches thereto "seriously darkened the streets and alleys on which the said structures were erected, or were crossed by the same, thereby rendering it necessary and imperative that many additional and increased lighting facilities should be provided by the city beyond its necessities at the time of the passage of its said appropriation bill." A hearing upon the bill and answer resulted in a decree restrain-

ing the city from appropriating or using moneys out of its treasury for the purpose mentioned in the said ordinance of October 18, 1897. This is an appeal prosecuted on behalf of the city and the comptroller.

Charles S. Thornton, Corp. Counsel, and Allan C. Story, for appellants. Stein & Platt, for appellee.

BOGGS, J. (after stating the facts). The corporate expenditures or appropriations of the city in any one year cannot lawfully exceed the amount provided for in the annual appropriation bill of that year; and no contract can be legally made or expense incurred by the city or its comptroller, unless the object of the contract or expenditure shall have been included in the general appropriation bill, and an appropriation thereof made in such annual bill, unless such contract or expenditure is warranted by the proviso to paragraph 90 of chapter 24 of the Revised Statutes, entitled "Cities," etc., which, so far as need here be noted, is as follows: "Provided, however, that nothing herein contained shall prevent the city council or board of trustees from ordering, by a two-thirds vote, any improvement the necessity of which is caused by any casualty or accident happening after such annual appropriation is made." The appellants urge that the necessity for additional light, growing out of the construction of the said elevated railways and depots, and the additional expense of gas and electric lights, caused by the alleged combination of said gas and electric light companies, constituted "accidents" or "casualties," within the meaning of those words as employed in the said proviso of said paragraph 90, and, further, the action of the city council in adopting the ordinance of the 18th day of October amounted to a declaration upon the part of the municipal corporation that the said necessity for additional facilities for lighting the city, and the increase in the price of gas and electric lights, were such "accidents" or "casualties." The further contention seems to be that such declaration is an exercise of local power conferred upon the city to determine as to the expediency of measures relating to the local government, and that the judgment of the city council, acting within the scope of such legislative authority, is not subject to the control of the courts, but is conclusive upon the question.

The ordinance of the 18th of October was preceded by a preamble, which does not in express terms declare the existence of an accident or casualty, and it may well be doubted whether such declaration is comprehended in the general terms of the preamble. But, aside from this, and aside from the question whether it is necessary the ordinance or preamble thereto should contain any declaration on the subject, we do not think even an express declaration on the part of the city would necessarily be conclusive. Power is given the

city to act in case any casualty or accident makes the ordering of any improvement necessary. In the first instance the city council must determine as to the necessity for the improvement, and whether such necessity was caused by casualty or accident. The necessity for any improvement within the power of the city to provide is a matter committed by the law to the judgment and discretion of the city council, and its determination as to such necessity is, no doubt, conclusive, in the absence of fraud. The determination of the council that that which caused the necessity to arise was a casualty or accident, within the meaning of these words as used in the statute, is to be accepted as *prima facie*, but may or may not be conclusive. It was said in *North Chicago City Ry. Co. v. Town of Lake View*, 105 Ill. 207, speaking of the power of the city councils of cities, in the exercise of the authority expressly conferred, to define and declare what should be deemed nuisances, such authorities "have no power to pass an ordinance declaring a thing a nuisance which in fact is clearly not one. The adoption of such an ordinance would not be a legitimate exercise of the power granted, but, on the contrary, would be an abuse of it." There is no accurate or accepted definition of either the word "accident" or "casualty" which would comprehend that which is here relied upon as authorizing the city council to either enter into contracts involving the expenditure of money or the appropriation of moneys over and above the amount provided for in the general appropriation ordinance. The construction of elevated railroads and depots, and the combination, though unlawful, of corporations, cannot, with any correctness of speech, be denominated "casualties" or "accidents." The declaration of a city council that that is an accident or casualty which in its very nature is clearly not so is an arbitrary and unreasonable exercise of the legislative power of the council, and is not conclusive. The chancellor correctly ruled that the matters relied upon by the council to justify its action were not "accidents" or "casualties," within the meaning of those words as used in the statute in question, and that the ordinance of October 18, 1897, was illegal. The prohibition against the appropriation or expenditure of the public funds of the city in excess of the amount provided for by the general appropriation bill or ordinance was enacted for the protection of the taxpayers, and we have neither power nor the inclination to limit its lawful application. If exceptions to such prohibition, other than those found in the statute, ought to be made, the legislative power ought to be invoked. Courts have power to construe and enforce statutes, but not to enact or amend them.

The appellee, being a taxpayer of the city, has full standing in equity to prevent by injunction illegal or unauthorized diversion of the public funds of the municipality, or the

execution of illegal contracts, or the incurring of illegal indebtedness. City of Springfield v. Edwards, 84 Ill. 628; Wright v. Bishop, 88 Ill. 302; 2 Dill. Mun. Corp. 1237, 1289.

It is not necessary that the pleading and proof should disclose the amount of taxes paid or to be paid by the complainant in such a proceeding as this. That the complainant is a taxpayer is sufficient to entitle him to ask relief against an unauthorized act of the taxing body which will add to the burden of the class of which he is a member, viz. taxpayers.

The observations of counsel, and the authorities cited, bearing upon the rules which govern the jurisdiction and procedure of courts of equity in cases where it is sought to enjoin the collection of the public revenues, have no application. The effort here is not to enjoin a tax, but to restrain illegal expenditures of the public funds of the city, and to prevent the execution of unauthorized contracts by the city.

It was not error to decree costs against appellants. It was error to award execution against the municipality, and to that extent the decree will be reversed. In all other respects the decree is affirmed. The costs will be apportioned as follows: The appellee will pay the costs in the circuit court; the appellants, the costs in this court. Decree affirmed in part.

(177 Ill. 171)

UNION NAT. BANK OF CHICAGO v. LANE.
BROWNE et al. v. UNION NAT. BANK OF CHICAGO.

(Supreme Court of Illinois. Dec. 21, 1898.)

CREDITORS' BILLS—FRAUDULENT CONVEYANCES—
EXECUTIONS—JUDGMENT CREDITORS—
PRIORITIES.

The levy of an execution on real estate conveyed in fraud of creditors, and the recording of a certificate of such levy, where the execution was returned unsatisfied, and no sale was made in pursuance of the levy, do not give such judgment creditor priority over an equitable lien obtained by a junior judgment creditor by his filing a bill in equity to set aside such conveyance, since the issuing of the execution of itself had no effect to create a lien on such real estate, none being created by the judgment, and since the statute does not provide that the levy of the execution, or the recording of a certificate of such levy, shall give or create a lien.

Appeals from appellate court, First district.

Bill in equity by P. A. Lane against the Union National Bank of Chicago and others. Afterwards the Union National Bank of Chicago filed a creditors' bill against Edward Browne, P. A. Lane, and others. Defendants filed cross bills. From a decision of the appellate court (75 Ill. App. 299) affirming a decree for the bank in both suits, except that it gave P. A. Lane priority as a creditor, the bank and Browne and others appeal. Affirmed.

On May 31, 1893, the Union National Bank of Chicago recovered a judgment against Samuel B. Barker in the circuit court of Cook county. An execution was issued on the judg-

ment, and on June 3, 1893, the sheriff levied on certain real estate which Barker, two days before the entry of the judgment, had conveyed to his wife, with the intent to hinder, delay, and defraud his creditors. The sheriff indorsed the levy on the execution, and a certificate of such levy was filed for record in the recorder's office. Nothing further was done under this execution, except to return it unsatisfied. Afterwards P. A. Lane recovered two judgments against Barker in the superior court of Cook county,—one on June 28, 1893, and the other on July 6, 1893,—on both of which executions were issued, but were not levied. Edward Browne and others also obtained judgments against Barker, on which executions were issued and returned unsatisfied, but they took no further steps in the matter. On July 1 and July 11, 1893, respectively, Lane filed bills in equity against Barker and his wife and the bank to set aside the deed to Barker's wife, and subject the land to the payment of his judgments; and service was had on the defendants in the two bills, respectively, on July 7 and 18, 1893, and the suits were afterwards consolidated. On December 13, 1893, the bank filed its creditors' bill against the Barkers, Lane, Browne, and others. Cross bills were filed by Lane and by Browne and others to the bill filed by the bank, setting up the facts and their respective claims. Issues were made, and a decree was entered finding that the deed was made in fraud of the rights of the creditors, and that the Union National Bank was entitled to priority in payment, then Lane, and last Browne et al. The appeals of Lane and of Browne et al. to the appellate court were consolidated and heard together, and the appellate court affirmed the decree in all respects, except that it was there determined that Lane was entitled to priority, in payment of his two judgments, over the bank and the other creditors. From that judgment the bank and Browne et al. have appealed to this court.

Tenney, McConnell, Coffeen & Harding, for Union Nat. Bank. Custer, Goddard & Griffin, for Edward Browne and others. Johnson & Morrill, for P. A. Lane.

CARTER, C. J. (after stating the facts). The only question of sufficient importance to be discussed here is, which of the two judgment creditors—the Union National Bank or P. A. Lane—is entitled to priority in payment out of the proceeds of the lands of Barker, which had, prior to their judgments, been fraudulently conveyed to hinder and delay his (Barker's) creditors? The circuit court adjudged that the bank was entitled to priority, but this finding was reversed by the appellate court, and Lane was adjudged entitled to have his judgments first paid; it being conceded that Browne and the other creditors came third in the race. True, Browne et al. have attacked the judgment of the bank as collusive, and have insisted that it was without consideration and should be set aside; but, after a careful

consideration of the evidence, we have reached the same conclusion arrived at in the courts below, and have found no sufficient evidence to sustain this contention. But, as before said, the question is, should the judgment of the bank be first paid, or the judgments of Lane? The judgment of the bank was obtained first, followed by the judgments of Lane; and, if these judgments became liens on the land in the order of their rendition, the bank obtained, of course, the prior lien, or if the bank obtained a lien by the levy of its execution on the land, which it is entitled to enforce in this proceeding, its judgment should be first paid, for the levy was made before Lane's judgments were recovered. But the contention of Lane is that, as the land had been previously conveyed to defraud creditors, none of the judgments became a lien on the land, and that no lien was obtained by the bank by the levy of its execution, and that the only liens obtained were the equitable liens of the complainants by filing their respective bills, and that such liens were established in the order in which the bills were filed. If this view be correct, Lane obtained the first lien, because his bills were filed before those of the bank.

It is the settled law of this state that a judgment is not a lien on real estate which the judgment debtor before the rendition of the judgment had conveyed away to defraud his creditors; the doctrine being that, as between the parties to it, the conveyance is valid and binding, and no interest, legal or equitable, remains in the grantor upon which the lien can rest. *Rapplee v. Bank*, 93 Ill. 396; *Davidson v. Burke*, 143 Ill. 139, 32 N. E. 514; *Hallorn v. Trum*, 125 Ill. 247, 17 N. E. 823; *Lyon v. Robbins*, 46 Ill. 276. The bank contends, however, that as it levied its execution on the land as the property of the judgment debtor, and caused a certificate of such levy to be filed for record in the recorder's office, before Lane had obtained his judgments or filed his bills, it thereby elected, and so gave public notice, to treat the fraudulent conveyance as void, and the land as still the property of the judgment debtor, and that thereby it obtained the first lien. These several judgments were obtained in the same county in which the lands were situated, but after Barker had made his conveyance to his wife of the lands, and the issuing of the execution had no effect to create a lien where none was created by the judgment. Nor does the statute provide that the levy of the execution, or the recording of a certificate of such levy, shall give or create a lien. In the levy upon real estate there is no manual seizure or possession of the property, but the liens provided for by the statute are constructive, and arise only by a compliance with the statute. The statute has not provided that the recording of a levy in such case shall have any effect whatever. It has provided (section 34, c. 77) that when an execution is issued to another county, and levied upon real estate, the officer making the levy shall make and file a certificate thereof in the recorder's office of his coun-

ty, and that until the filing of such certificate the levy shall not take effect as against creditors and bona fide purchasers without notice. But this section has no application to this case. Conceding the superior diligence of the bank in obtaining its judgment and in levying upon the land in question, situated in the same county, how can it be said that it thereby acquired the first lien, in the absence of any statute providing for a lien in such a case? True, it is also settled law that the judgment creditor may treat land fraudulently conveyed by his debtor as the property of his debtor, may levy upon it, have it sold, and obtain a sheriff's deed therefor, and then bring his bill to remove the fraudulent conveyance. *Gould v. Steinburg*, 84 Ill. 170; *Phillips v. Kesterson*, 154 Ill. 572, 39 N. E. 599. But it is not necessary to determine at what step of such proceedings, made effective by the sheriff's deed, the lien would attach, for the reason that the bank did not pursue this remedy, but after making its levy, and after Lane had filed his bills and obtained his pendens, it also filed its bill. Had the bank sold under its levy, it would have been the duty of the sheriff, under section 17 of chapter 77, to file in the recorder's office a duplicate of his certificate of sale, which, as the statute declares, would have been evidence of the facts therein stated. But it is unnecessary to determine whether or not, as to other creditors like Lane, such a sale, and the recording of the certificate thereof, would have related back to the levy, so as to cut off their intervening equities, for the reason, as before said, no such course was pursued. The statute makes no provision in such a case for the recording of a certificate of levy, but does provide for the recording of a certificate of sale.

We have been referred to *McClure v. Engelhardt*, 17 Ill. 47, and *Reichert v. McClure*, 23 Ill. 516; but in those cases the execution was issued to and levied upon lands in a foreign county, and they were controlled by different statutory provisions. Our attention is also called to *McKinney v. Bank*, 104 Ill. 180, and other cases holding that, where lands fraudulently conveyed have been attached, the attaching creditor acquires a lien, dependent upon the recovery of a judgment, which will not be disturbed by a decree in chancery setting aside the fraudulent conveyance, obtained by a subsequent judgment creditor. This lien, however, like judgment liens, is, of course, the creature of the statute. Section 9 of the attachment act provides that where the writ is levied upon any real estate the officer shall file a certificate of such levy in the recorder's office, and that after such filing the levy shall take effect as to creditors and bona fide purchasers without notice, and not before. There is no such provision relating to the levy of executions, except in foreign counties, as we have seen.

Counsel for the bank make the plausible contention that the provisions of the statute which we have mentioned do not create the lien, but

relate only to the question of notice; that the levy creates the lien, and the recording of the certificate is by the statute made legal notice of such levy; and they refer to *McClure v. Engelhardt*, supra, and *Reichert v. McClure*, supra. In those cases the execution was issued to and levied upon lands in a foreign county under provisions of the statute not applicable here. But if, by analogy, the reasoning be applicable to levies upon land in the same county where the judgment is rendered, the plaintiff should proceed to make his levy effective by advertisement and sale, in which case the question would arise, as before suggested, whether his recorded certificate of sale or his sheriff's deed would relate back to the levy, so as to cut off the intervening rights of creditors with or without notice. The analogy falls, however, in a case where the prior execution creditor stops with his levy,—that is, stops with an act which is not of itself, by the statute, either expressly or impliedly made a lien,—and files his bill, which gives an equitable lien even where there is no judgment lien. Following to its legitimate conclusion this line of reasoning, the bank's proceedings under its execution had not ripened into a lien when they were abandoned, and a lien secured by the filing of its bill. But we do not intend, by anything said arguendo, to express any opinion as to what would have been the effect upon the rights of the parties if the bank had proceeded to sell the property under its execution, and to obtain a sheriff's deed therefor.

It is sufficient to say in conclusion that none of the parties obtained any lien upon the lands in controversy by any judgment, execution, or levy. These were proper steps, some of them necessary to be taken, before the bills could be filed; but the filing of the bills and obtaining of service constituted *lis pendens*, and were equitable levies upon the land, and created equitable liens thereon in their proper order. *Hallorn v. Trum*, supra; *Allison v. Drake*, 145 Ill. 500, 82 N. E. 537; *Davidson v. Burke*, supra. The appellate court decided properly in holding that Lane by his bills obtained the first lien on the property, and its judgment will therefore be affirmed. Judgment affirmed.

(177 Ill. 244)

BERGMAN v. PEOPLE.

(Supreme Court of Illinois. Dec. 21, 1898.)

LARCENY AS BAILEE.

Prosecutrix was a dealer in jewelry. Defendant stated to her that certain persons, including himself, wished to make a wedding present, and that he wanted to take some jewelry to show such persons. She declined to put the jewelry in his possession without security, whereupon he delivered to her an instrument purporting to guaranty the payment of whatever jewelry defendant should buy of prosecutor, for not over \$200. Defendant thereby obtained the jewelry, and promised to return either it, or the money for it, within three days. The jewelry was not returned or paid for. The representations as to the wedding present were false, and made to obtain the jewelry. *Held*, that defendant obtained the property as a bailee, and

not as a purchaser, so as to be within Cr. Code, § 170, providing that a bailee shall be deemed guilty of larceny, if he shall convert property intrusted to his custody, with intent to steal the same.

Error to criminal court, Cook county; Frank Baker, Judge.

Robert Bergman was convicted of larceny as bailee, and he brings error. Affirmed.

Burres & McKinley and John J. Arney, for plaintiff in error. E. C. Akin, Atty. Gen. (Charles S. Deneen, State's Atty., Ben M. Smith, Asst. State's Atty., C. A. Hill, and B. D. Monroe, of counsel), for the People.

BOGGS, J. This is a writ of error brought to reverse the judgment of the criminal court of Cook county adjudging the plaintiff in error to be guilty of larceny. The indictment contained a count charging larceny as at the common law, and other counts charging larceny as bailee under the statute. The facts proven were not sufficient to support a verdict that plaintiff in error was guilty of larceny as at the common law. It is urged in behalf of plaintiff in error it did not appear from the proofs that the property alleged to have been stolen was intrusted to him as bailee, but that he obtained the property as a purchaser. It appeared from the evidence that one Dorothy Lindberg was engaged in business as a retail dealer in jewelry in the city of Chicago; that plaintiff in error came to her place of business, and told her that a number of persons, of whom he was one, contemplated making a present to a young married couple, and that he wanted to take some jewelry out to show to such persons; that she declined to put the jewelry in his possession without some security, and that he left her store, but soon returned, and delivered to her a written instrument as follows: "I, the undersigned, do hereby guaranty for the payment of whatever jewelry Robert Bergman, of 3044 Wentworth avenue, buys of Mrs. Dorothy Lindberg, for a sum not over \$200 (two hundred dollars). Gustave Swanson;" that she satisfied herself the instrument bore the genuine signature of Swanson, and plaintiff in error said to her he would return either the goods, or the money for them, within three days; that she then delivered to him a watch, chain, and diamond brooch, of the aggregate value of \$200; that he did not return the goods, nor did she see him again until he was in court to answer the charge of larceny. It is clear that the jewelry was not sold to the plaintiff in error. It was delivered to him for the purpose of exhibiting it to others, who, together with himself, as he represented, contemplated buying articles of that kind, and to be bought if satisfactory to the contemplated purchasers. The title remained in Mrs. Lindberg, and she intrusted the possession to him, expecting and intending that the identical articles of jewelry should be returned to her, or disposed of for her benefit, in the particular

way as agreed upon between her and the plaintiff in error. The guaranty of Swanson was available only in the event a sale of the jewelry was consummated. The jewelry was not sold or returned. The evidence in the record was sufficient to satisfy the jury, beyond a reasonable doubt, that the representations of the plaintiff in error that others, together with himself, contemplated purchasing jewelry as a wedding present, were but false and fraudulent representations and pretenses, and part of a scheme devised by the plaintiff in error for the purpose of enabling him to secure the possession of the jewelry, in order that he might convert the same to his own use. He was a "ballee" of the property, within the meaning of that word as employed in section 170 of the Criminal Code, which provides that a ballee shall be deemed guilty of larceny, if he shall convert property intrusted to his custody, with intent to steal the same. The doctrine of this statute is that if "the owner parts with the possession voluntarily, but does not part with the title, expecting and intending the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the ballee, so as to relate back, and make the taking and conversion a felony, if the goods were obtained with that intent." *Farrell v. People*, 16 Ill. 506; *Welsh v. People*, 17 Ill. 330; *Stinson v. People*, 43 Ill. 397; *Murphy v. People*, 104 Ill. 528; *Doss v. People*, 158 Ill. 600, 41 N. E. 1093.

We need not advert to alleged errors in the instructions. The criticisms urged are to points of minor importance. The law, and facts proven and not controverted, warranted the verdict of guilty, and the judgment of conviction. The judgment is affirmed. Judgment affirmed.

(177 Ill. 78)

ST. LOUIS, R. I. & C. R. CO. v. PEOPLE
ex rel. KINSEY, County Collector.

(Supreme Court of Illinois. Dec. 21, 1898.)

TAXATION FOR SCHOOL PURPOSES—CERTIFICATE OF
LEVY—VALIDITY—STATUTE.

1. Hurd's Rev. St. c. 122, art. 8, § 1, authorizing a school district to levy an annual tax of not exceeding 2 per cent. on all taxable property for school purposes, and not exceeding 3 per cent. for building purposes, and *Id.* § 2, prescribing the form of the certificate of levy, and requiring that the amount for each purpose be separately stated, are mandatory, and a certificate of levy for school purposes generally does not confer authority to extend a tax for building purposes.

2. A school tax not based on a lawful certificate is void.

3. A certificate for a tax levy for a school district was made and transmitted to the township treasurer. At a meeting of the school board the entry on its record was changed so as to correct a mistake of the secretary in entering the order, but no change was made in the certificate. *Held*, that the change in the record was proper as a basis for an amendment of the certificate and a new levy, but did not affect the

levy under the certificate, since the officers extending the levy act on the certificate, and not on the record of the board.

Appeal from Mercer county court; J. H. Connell, Judge.

Application by the people, on relation of Charles Kinsey, county collector of Mercer county, against the St. Louis, Rock Island & Chicago Railroad Company, for a judgment for the amount of a tax levy. There was a judgment for plaintiff, and defendant appealed. Reversed.

Grier & Stewart, for appellant. James M. Brock, State's Atty., for appellee.

CARTWRIGHT, J. School district No. 1 in Keithsburg township, Mercer county, is under the control of a board of education, and on July 3, 1897, the president and secretary of said board made and transmitted to the township treasurer the following: "Certificate of Levy. We hereby certify that we require the amount of \$7,500 to be levied as a special tax for school purposes on the taxable property of our district for the year 1897. Given under our hands this 3d day of July, A. D. 1897. J. S. Allen, President. H. P. Humbert, Secretary. Directors Dist. No. 1, T. 13, R. 5, Mercer County, Ill." The township treasurer returned this certificate to the county clerk, who filed it August 9, 1897, and extended a tax of \$374.85, by virtue of said certificate, against the property of appellant. The tax so extended exceeds 2 per cent. of the assessed valuation of appellant's property by the sum of \$133.01. Appellant paid \$241.84, being 2 per cent. on the valuation of its property, and on application for judgment objected to the excess as levied and extended without authority of law. The county court overruled the objection, and entered judgment for the tax, with interest, penalties, and costs.

The authority of boards of education to levy a tax for educational purposes is limited by statute to 2 per cent. on the valuation ascertained by the last assessment for state and county taxes. They are also authorized to levy a tax for building purposes, and in such case the limit is 3 per cent.; but, if they make levies for both objects, they are required to make a certificate in the form provided by the statute, stating therein separately the sum required to be levied for school purposes and the sum to be levied for building purposes. Hurd's Rev. St. c. 122, art. 8, §§ 1, 2. This certificate is the basis of all school taxes. It constitutes the levy and the evidence of it, and any tax not based upon a lawful certificate is null and void. *Weber v. Railway Co.*, 108 Ill. 451; *Lawrence v. Traner*, 136 Ill. 474, 27 N. E. 197. The form of the certificate is mandatory, and if it is for school purposes, and fails to state that a tax is required to be levied for building purposes, a levy beyond 2 per cent. will be void. The purpose of the statute is that the amounts required shall be separately specified, so that the county clerk can extend the tax within the limits provided

by the law, abating any excess beyond the limitation fixed by the statute. *Chicago & A. R. Co. v. People*, 163 Ill. 616, 45 N. E. 122. The property of appellant could not be taken and sold in satisfaction of the tax in this case unless the provision of the statute was substantially complied with. The certificate filed with the county clerk was for "school purposes" alone, and it did not confer authority upon the county clerk to extend a tax for more than 2 per cent. of the assessed valuation. The tax levy was excessive, and the excess which appellant refused to pay was illegal.

At the hearing the people introduced in evidence the record of proceedings by the board of education preliminary to and directing the levy of a tax. It was proved by a member of the board that on July 3, 1897, when the certificate was made and transmitted to the township treasurer, a meeting was held, and a record made corresponding with the certificate. At a subsequent meeting, held August 6, 1897, that entry on the record was erased, and it was so changed as to divide the sum of \$7,500 into separate sums, as follows: "\$5,000 for special school tax; \$1,500 for building purposes; \$1,000 for payment of bond." The witness said this was done to make the record correspond with the motion originally made, as the board understood it. No change was made in the certificate which had been transmitted to the township treasurer. In *Lawrence v. Traner*, supra, it is held that the certificate delivered to the treasurer, and filed with the county clerk, itself constitutes the levy, and is the evidence of the exercise of the taxing power by the board. The validity of any tax does not rest upon the record of the board, and is not affected by the want of such record. The only act necessary for the levy of the tax is the making and filing of the certificate. The fact that, after the certificate was made, the record was so changed that it would have authorized the president and secretary of the board to have made a different certificate and levy, could not operate to change the one already made. The change of the record to correspond with the fact, and to correct a mistake made by the secretary in writing it, was proper as a basis for an amendment of the certificate and a new levy; but no amendment or change was made in the levy, and the certificate as filed corresponds with the record as it was when the certificate was made. The only guide to the county clerk was the certificate, and his act in extending the tax under it in excess of the amount authorized by law was unlawful. The judgment is reversed. Judgment reversed.

(177 Ill. 234)

**SOUTH PARK COM'RS v. FIRST NAT.
BANK OF CHICAGO.**

(Supreme Court of Illinois. Dec. 21, 1898.)

**STATUTES—CONSTRUCTION—PARK COMMISSIONERS
—TAXATION.**

1. In interpreting a statute, its title is not conclusive as to what the legislature intended.

2. 3 Starr & C. Ann. St. (2 Ed.) p. 2894, refers in its title to park commissioners generally, and provides that, in any town included within the limits of a city in which there is a board of park commissioners having authority to acquire lands for park purposes in trust for the town, the corporate authorities authorized to assess taxes for park purposes shall, on receipt of a certificate from the park commissioners, levy a stated tax for park purposes on taxable property within said town and within the park district. The "corporate authorities" of the municipality created by the act creating the South Park commissioners are the commissioners themselves, and not the town officials of the constituent towns; and in prior acts in pari materia with said act the phrase "corporate authority of the town" has always been construed to mean the town collector, supervisor, and clerk. *Held*, that said act applies to one town and to a board of park commissioners existing within its limits only, and required to call on the town authorities to levy its taxes, and does not apply to the South Park commissioners, whose district includes three towns, and who have authority to levy their own taxes.

3. Since the South Park commissioners have power to levy their own taxes, to make said act to apply to them by construing the word "town" therein as plural would lead to the absurdity of requiring the commissioners, as a condition precedent to making a levy, to certify to themselves that they have directed it to be made. Hence that act is within the saving clause of 3 Starr & C. Ann. St. (2d Ed.) p. 3834, providing that, in construing statutes, words importing the singular number may be construed as plural, and vice versa, unless such construction be inconsistent with the manifest intention of the legislature, or repugnant to the context of the statute.

Appeal from circuit court, Cook county; E. F. Dunne, Judge.

Bill by the First National Bank of Chicago against the South Park commissioners. There was a decree for complainant, and defendants appeal. Affirmed.

The bill in this case was filed to restrain the county clerk from extending upon the collector's books a tax of two mills on the dollar on the taxable property in the park district, controlled by the appellants, amounting to \$295,164, that sum having been included in an ordinance passed by the South Park commissioners, providing that \$785,246 (the aggregate of the items specified therein) should be levied upon the property subject thereto. The park commissioners had certified said amount to the county clerk of Cook county as their tax levy for the year 1897. The defendant to the bill originally filed was Phillip Knopf, the county clerk. Knopf demurred to the bill, and, his demurrer being overruled, he elected to stand by it; and the court entered a decree perpetually enjoining him from extending the said sum of \$295,164, or any sum including it, as a tax upon the district. From the decree so entered, the county clerk took an appeal to this court; and in *Knopf v. Bank*, 173 Ill. 331, 50 N. E. 660, we reversed the decree so entered, upon the ground that the present appellants, the South Park commissioners, were not made parties to the bill; and the cause was remanded to the circuit court, with leave to the complainant, the present appellee, upon payment of all costs, to make the

park commissioners defendants. After the former decree was reversed, the cause was redocketed in the court below, and the bill was amended by making the South Park commissioners, the present appellants, parties defendant. The appellants demurred to the bill, and upon argument the court below overruled the demurrers, and, the defendants having elected to stand by their demurrers, the court entered a decree finding that the park commissioners passed an ordinance containing the sections as set out in the amended bill; that the clerk had declared his intention of extending the entire sum of \$785,246; that the sums provided for in sections 1, 2, and 3 of the ordinance were legal and valid; that the attempted levy in addition thereto, specified by section 4 of the ordinance, of \$295,164, was illegal and void, and in excess of the power of the commissioners to levy or certify to the county clerk; and, by the decree, it was ordered that the county clerk be enjoined from extending the said sum of \$295,164, or any sum including the same. From the second decree thus entered, the South Park commissioners prosecute the present appeal.

The act under which the South Park commissioners claim to have authority to levy the tax of two mills on the dollar on all the taxable property within the park district which they control is an act of the legislature approved June 17, 1895, and entitled "An act to enable park commissioners to maintain and govern parks and boulevards under their control." The act is as follows: "Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that in any town which is now included within the limits of any city in this state, in which a board of park commissioners shall now exist, having authority by law to acquire land and the appurtenances in trust for the inhabitants of such town, and for such parties or persons as may succeed to the rights of such inhabitants, and for the public, as public promenades and pleasure grounds and ways, and for no other use or purpose without the consent of a majority, by frontage, of the owners of the property fronting the same, and without the power to sell, alienate, mortgage or incumber the same, the corporate authorities of any such town authorized by law to assess taxes for park purposes shall, upon the receipt of a certificate in writing from any such board of park commissioners, on or before the first day of August in each year, levy and assess, in addition to all other taxes now authorized by law to be levied and assessed for the purpose of governing and maintaining any such parks and boulevards, two mills on each dollar of the taxable property in said town and within the park district, subject to taxation for park and boulevard purposes, according to the valuation of the same, as made for the purpose of state and county taxation; and such additional two mills on the dollar of the taxable property in said town and park district shall be used and expended by such board of park commission-

ers in governing and maintaining any parks, boulevards or pleasure ways under the jurisdiction, management and control of any such board of park commissioners, and for paying any other necessary and incidental expenses incurred in and about the management of any such parks and boulevards, and such additional two mills shall, by the officer authorized by law to assess and collect taxes for park purposes, be collected and paid over the same as other park taxes are now required by law to be collected and paid over." 8 Starr & C. Ann. St. (2d Ed.) p. 2394.

Green, Honoré & Peters, for appellants.
Willson, Moore & McIlvaine, for appellee.

MAGRUDER, J. (after stating the facts). When the present cause, which is reported as *Knopf v. Bank*, 173 Ill. 331, 50 N. E. 660, was before us at a former term, three questions were decided, to wit: First, that the South Park commissioners should have been made parties to the suit; second, that a single taxpayer had a remedy in equity to enjoin the extension of an illegal tax; and, third; that the present appellee, the First National Bank of Chicago, could maintain the bill in behalf of its stockholders. The only question then left undisposed of, and which will now be considered, is whether the act of June 17, 1895, set forth in the statement preceding this opinion, applies to the South Park commissioners. If the act does apply to the South Park commissioners, they had a right to levy the tax of two mills on the dollar, amounting to \$295,164, on all the taxable property within the park district controlled by them. If the act does not apply to said commissioners, then they had no authority to levy said tax, and the decree of the court below, enjoining its extension upon the books of the collector, was correct.

Counsel for appellants claim that the title of the act is broad enough to embrace all park commissioners, including the present appellants. The act, according to its title, is one "to enable park commissioners to maintain and govern parks and boulevards under their control." In determining the meaning of a statute, courts will endeavor to ascertain the intention of the legislature in framing it. Although the title of the act will have its due share of consideration in the effort to determine the legislative intent, yet such title is not conclusive upon the subject of such intention. The intention of the legislature may be ascertained by considering the whole act, and construing one part by another, and one clause with reference to its connection with other clauses. *People v. Gaultier*, 149 Ill. 39, 36 N. E. 576.

A consideration of all the language and clauses of this act, which consists of but one section, leads to the conclusion that the act was intended to apply only to one town, in which a board of park commissioners should exist at the time of its passage. The act

provides "that in any town which is now included within the limits of any city in this state, in which a board of park commissioners shall now exist, * * * the corporate authorities of any such town authorized by law to assess taxes for park purposes shall * * * levy and assess, in addition to all other taxes now authorized by law, * * * two mills on each dollar of the taxable property in said town and within the park district," etc. The use of the words "any town," "such town," and "said town," clearly refers to a single town, and not to several towns or more than one town. Again, the board of park commissioners referred to in the act is a board "having authority by law to acquire land and the appurtenances in trust for the inhabitants of such town." The expression "such town," as here used, refers to one town. Again, the act describes a board of park commissioners, having authority by law to acquire land, etc., "as public promenades and pleasure grounds and ways, and for no other use or purpose without the consent of a majority, by frontage, of the owners of the property fronting the same." This language is not found in the act organizing the South Park commissioners, but is found in the act organizing the West Park commissioners, in the city of Chicago. Indeed, the language of the act, which describes the authority of the park commissioners therein referred to, is taken almost literally from section 5 of the act creating the board of park commissioners in the town of West Chicago (Tuley's Laws and Ordinances of Chicago, 1873, p. 588).

Inasmuch as the act of June 17, 1895, is intended to apply to one town only, and to a board of park commissioners existing in one town only, it could not have been intended to apply to the South Park commissioners, because the park district, controlled by the South Park commissioners, includes the three towns of South Chicago, Hyde Park, and Lake. Section 1 of the act of February 24, 1869, organizing the South Park commissioners, provides "that five persons, who shall be appointed by the governor of the state of Illinois, together with their successors, be, and they are hereby constituted a board of public park commissioners for the towns of South Chicago, Hyde Park, and Lake, to be known under the name of the 'South Park Commissioners.'" Tuley's Laws and Ordinances, 1873, p. 581. This court has had occasion, in several cases, to pass upon the validity of the South Park act, and construe its provisions. In *People v. Salomon*, 51 Ill. 37, we said (page 51): "The union of these towns (South Chicago, Hyde Park, and Lake) was for a special purpose, and outside of that purpose they are left with all their functions undisturbed, precisely as they existed before the passage of the law. Establishing them with their consent as a park district deprived them of none of the franchises bestowed upon them as towns, and curtailed in no degree the fair proportion of either of

them. * * * The people of these three towns, by voting for the law, have made the commissioners corporate authorities of such towns, and empowered them to assess the requisite tax upon the property of the towns." In *People v. Brislin*, 80 Ill. 423, it was held that the towns of South Chicago, Hyde Park, and Lake were erected into a park district, and that, the people of those towns having by vote accepted the provisions of the park act, the board of park commissioners thereby created became a quasi municipal corporation, in whom was vested the power to assess and collect taxes within the park district so created. Again, in *Dunham v. People*, 96 Ill. 331, it was held that the park commissioners, controlling the district composed of the three towns above named, were to be regarded as the corporate authorities of such towns. Under the park acts passed by the legislature of this state, and under the decisions of this court interpreting those acts, there can be no doubt that two classes of park boards have been created. The first class consists of those boards, who cannot levy their own taxes, but must call upon the corporate authorities of the town to do so. The second class consists of those park boards, who are themselves corporate authorities of the towns for park purposes, and can levy their own taxes. The appellants, the South Park commissioners, belong to the second class. Section 9 of the act of February 24, 1869, already referred to, provides that "the said board of park commissioners shall, annually, on or before the first day of December in each year, transmit to the clerk of the county court of Cook county an estimate, in writing, of the amount of money, not exceeding in any one year \$300,000.00, necessary for the payment of the interest on the bonds issued by said board, and that, in addition thereto, will be required for the improvement, maintenance, and government of said park during the current year." Tuley's Laws and Ordinances of Chicago, p. 584.

In the act of June 17, 1895, "the corporate authorities of any such town authorized by law to assess taxes for park purposes" are evidently the regular corporate authorities of the town, and not the park commissioners themselves. In determining what is meant by the expression "corporate authorities of any such town," reference may be made to acts of the legislature passed from time to time upon the subject of parks and park commissioners, and their powers and duties. "Statutes which are not inconsistent with each other, and which relate to the same subject-matter, are in *pari materia*, and should be construed together, and effect be given to them all, although they contain no reference to one another, and were passed at different times. * * * In construing a given act, the meaning of words or terms, as used therein, may be gathered from the consideration of other acts in *pari materia*, in which such words or terms were also used." 23 Am. & Eng. Enc. Law, pp. 311, 316; *Reiche*

v. Smythe, 13 Wall. 162; Robbins v. Railroad Co., 32 Cal. 472.

On June 16, 1871, the legislature passed an act entitled "An act to enable corporate authorities to levy a tax to improve public parks and boulevards," etc. St. Ill. (Meyer's Ed.) p. 62. On May 31, 1870, the legislature passed an act to amend section 1 of an act entitled "An act in regard to the completion, improvement and management of public parks," etc. Laws Ill. 1870 (Bradwell's Ed.) p. 163. On June 14, 1887, the legislature passed an act entitled "An act to authorize corporate authorities of towns, having an indebtedness heretofore created, to pay the cost of procuring lands for public parks in such towns," etc. Sess. Laws 1887, p. 243. On June 12, 1891, the legislature passed "An act to authorize the corporate authorities of towns to issue bonds for the completion and improvement of public parks and boulevards," etc. Sess. Laws 1891, p. 173. On June 21, 1895, the legislature passed "An act to authorize the corporate authorities of towns to issue bonds for the completion and improvement of public parks and boulevards," etc. Sess. Laws 1895, p. 264. In all of these acts "the corporate authorities of the town" are defined to be the town supervisor, the town collector, and the town clerk. Inasmuch as the statutes thus referred to and the act of June 17, 1895, are in pari materia, and must be construed together so far as they make use of common terms, there can be no doubt that the corporate authorities of the town, as referred to in the act of June 17, 1895, are the town supervisor, clerk, and assessor. But the corporate authorities, controlling the affairs of the South Park commissioners, are the South Park Commissioners themselves, and not the town officials. It would seem to follow, therefore, that the corporate authorities referred to in the act now under consideration are not the present appellants, and that the boards of park commissioners contemplated by the act in question are such boards as are required to call upon the corporate authorities of the town to levy their taxes.

Counsel for appellants refer, however, to the third clause of section 1 of chapter 131 of the Revised Statutes, in reference to the construction of statutes, where it is said: "Words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular." 3 Starr & C. Ann. St. (2d Ed.) p. 3834. Applying the rule of construction thus laid down to the present case, counsel say that the word "town," as used in the act of June 17, 1895, may be read as the word "towns," and that, if the expression "the corporate authority of any such town" be read as meaning the corporate authorities of any such "towns," it may refer to the South Park commissioners, as they are the corporate authorities of the three towns composing their district. Such a construction as is here contended for would lead to an absurd consequence.

"Where a particular construction will lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the legislature to avoid such conclusion." People v. Gault, supra. The language of the act is: "The corporate authorities of any such town, authorized by law to assess taxes for park purposes, shall, upon the receipt of a certificate in writing from any such board of park commissioners, * * * levy and assess," etc. If the corporate authorities of any such town, as those words are used in the act, refer to and mean the South Park commissioners, then the South Park commissioners, upon the receipt of a certificate in writing from themselves, shall levy and assess two mills on each dollar on the taxable property, etc. It would seem to be absurd to require the park commissioners to make out a certificate in writing, and themselves receive it, as a condition precedent to the levy and assessment of the tax. We are therefore forced to the conclusion that the corporate authorities referred to in the act are the ordinary town authorities, to wit, the assessor, clerk, and supervisor, and not the park commissioners.

Upon the whole, our conclusion is that the act of June 17, 1895, was not intended by the legislature to refer to the South Park commissioners, whose district is composed of three towns, instead of one. This conclusion leads to the further conclusion, that the levy of the two-mill tax was illegal and void, and that the action of the court below in enjoining the same was correct. The decree of the circuit court of Cook county is affirmed. Decree affirmed.

(177 Ill. 43)

DRURY et al. v. CONNELL et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

WILLS—TRIAL—INSTRUCTIONS—ATTTESTATION—
PRESENCE OF TESTATOR.

1. A contestant of a will on the ground of undue influence cannot object to a failure to instruct that the draftsman of the will, who was an executor and a beneficiary, and who had been testator's attorney, had the burden of showing that he exercised no undue influence, where contestant made no request for such an instruction.

2. In order that a will be attested in testator's "presence," within the statute, the act of attestation must be performed within his range of vision, so that he can see the act of signing, and in such a way that he can know that it is his will which is being attested, though he may not exercise his privilege of actually seeing the act of signing.

Error to circuit court, Mercer county; Frank D. Ramsey, Judge.

Bill by Omer H. Drury and others against James H. Connell and others. Decree for defendants, and complainants bring error. Affirmed.

Bassett & Bassett, for plaintiffs in error. Brock & Graham and L. D. Thomason, for defendant in error J. H. Connell. Scott & Cooke and James W. McCreery, for defendant in error Vashti Drury.

CARTWRIGHT, J. Plaintiffs in error, as heirs at law of William Drury, deceased, filed their bill in the circuit court of Mercer county to set aside the will of said William Drury, alleging that he was of unsound mind and memory; that the will was not subscribed by the attesting witnesses in his presence; that it was not read to him, and he did not know its contents; and that it was procured by the undue influence of James H. Connell, who drafted it, and was a beneficiary under it, as well as the confidential attorney of the testator. An issue whether the writing was the will of the testator was made and submitted to a jury, and upon the trial a verdict was returned that it was his will. A decree was entered accordingly.

Counsel for the plaintiffs in error say: "It is now conceded for the contestants that the evidence on the question of unsound mind and memory, undue influence, and on the reading of or knowledge of the contents of the will by the deceased was sufficient to warrant the verdict of the jury if they had been properly instructed as to the law, and there is not much fault to be found with the instructions on those questions." The only fault that is found with the court about the instructions on those questions is that it failed to instruct the jury that the burden of proof was on James H. Connell, attorney of the testator, who was one of the executors and a beneficiary under the will, to disprove undue influence on his part. The court seems to have given all instructions asked by contestants on the subject of undue influence, and no instruction of this kind was asked for. If they desired to present the question where the burden of proof would be under such circumstances, they should have asked for an instruction presenting their view of the law. The court was not in error in failing to give an instruction not asked for, and those which were given were correct in defining undue influence.

The only other assignment of error argued by counsel relates to the giving and refusal of instructions on the question of what is a sufficient attestation of a will in the presence of the testator. The evidence on that question was that the witnesses subscribed their names to the attestation clause at a desk in the same room with the testator, who was either sitting on the side of the bed or lying down upon it. The court gave, at the request of the proponents of the will, the following instructions as to the requirements of the law: (24) "Relative to the witnessing or attestation of the alleged will in question, the court instructs the jury that the statute of Illinois provides that all wills shall be attested, in the presence of the testator, by two or more credible witnesses; and if you believe, from the evidence, that William Drury signed the alleged will in question in the presence of Arthur W. Mannon and Richard H. Roberts, and after he so signed the same they took said will to a writing desk a short

distance from the foot of the bed, and within the range of testator's vision, and that the said William Drury was sitting on said bed, and they there subscribed their names to the attestation clause of said alleged will in full and uninterrupted view of the said testator, then this is a sufficient attestation of the will in question, and a full compliance with the law on that subject." (25) "You are further instructed that if you believe, from the evidence, that at the time of the alleged attestation of William Drury's alleged will now in dispute, that the alleged witnesses were in the same room with said William Drury, and only a few feet from him, with the view between him and them uninterrupted, and they within the range of his vision; and if you further believe, from the evidence and the then surrounding circumstances proved upon the trial, in connection with the alleged attestation of said alleged will, that said William Drury, taking into account his then condition or state of health and his then position as shown by the evidence, either saw, or could have seen if he had wished to, and had looked in the proper direction, the alleged witnesses themselves, and enough of the act then being done by them to know on his part (from what he so saw or might have seen if he had wished, and from what he knew of the then surrounding circumstances) that the alleged witnesses were then signing their names as witnesses to his, William Drury's, proposed will,—then upon that question you should find the alleged will in question to have been properly attested." The court also gave the following instruction, presented by the contestants: (15) "While the presumption of the law is that, where the will is signed by the attesting witnesses in the same room with the testator, that it is signed in his presence, yet that is only a presumption; and where the evidence shows that the witnesses were in such position that the testator could not see the paper nor see the witnesses when signing it, the presumption of the law is overcome." And the following instruction was written and given by the court on its own motion: (16) "To make a legal attestation, the test is, was there an uninterrupted view between the alleged testator and the subscribing witnesses, and were the witnesses within the range of the (alleged) testator's vision (his then condition as to health and posture being considered) when the alleged attesting was done? Was the alleged will then present, and could the (alleged) testator, in his then condition and posture, have seen, if he had wished to, and had looked in the proper direction, enough of the persons of the alleged witnesses, and enough of the act then being done by them, to know on his part (from what he could so have seen if he had wished to, and from what he knew of the then surrounding circumstances) that the (alleged) witnesses were then signing their names as witnesses to the (alleged) testator's proposed will?" The court transposed the

word "not" from one place to another in the fifteenth instruction, but the meaning was not affected thereby, and the sixteenth seems to have been prepared and given as a substitute for three instructions asked by the contestants.

The first two of the instructions asked were substantially correct and might properly have been given, but we think that the one written by the court and substituted was sufficient to present fairly to the jury, with the other instructions which were given, the principles of law contained in the instructions so offered. The statute requires that a will shall be attested, in the presence of the testator, by two or more credible witnesses, who see him sign the will in their presence or acknowledge the same to be his act and deed. This act of attestation consists in the subscription of the names of the witnesses to the attestation clause as a declaration that the signature was made or acknowledged in their presence. It is this act of attestation, by subscribing their names to the will as witnesses thereto, which the statute requires to be in the presence of the testator. The object of the law, as frequently declared, is to prevent fraud or imposition upon the testator, or the substitution of a surreptitious will; and to effectuate that object it is necessary that the testator shall be able to see and know that the witnesses subscribe their names to the paper which he has executed or acknowledged as his will. The purpose of the statute is not attained by mere ability to see the witnesses, or some part of them, but the act of attestation is the thing which must be in the presence of the testator. In the case of *Witt v. Gardiner*, 158 Ill. 176, 41 N. E. 781, the rule as to what constitutes the "presence" of the testator, within the meaning of the statute, was considered and settled. The rule, as so determined, is that "contiguity with an uninterrupted view between testator and subscribing witnesses is the indispensable element of the physical signing in the testator's presence." It is immaterial that he does not see if he might have done so, but no mere contiguity of the witnesses will be sufficient if the testator cannot see them sign. Nothing will constitute a "presence," within the meaning of the statute, unless the testator can, from his actual position, see the act of attestation. We do not think that these instructions conflict in any way with this rule. Of those given for the proponents, the twenty-fourth required that the attestation clause should be signed by the witnesses within the range of testator's vision, and in his full and uninterrupted view. The twenty-fifth made the conditions of a valid attestation that the witnesses were in the same room with the testator, and only a few feet from him, with the view between him and them uninterrupted, and they within the range of his vision, and that he saw or could have seen them, and enough of the act being done,

to know that they were then signing their names as witnesses to his will. The fifteenth given for the contestants told the jury that the presumption the will was signed in the testator's presence would be overcome by evidence that he could not see the paper nor the witnesses when they signed. The sixteenth, written by the court, required that the testator, in his then condition and posture, could have seen enough of the witnesses, and also enough of the act being done, to know that they were signing their names as witnesses to his will. We do not think the jury would understand, in view of all these instructions, that it would be sufficient if the testator knew, or inferred from the surrounding circumstances, that the witnesses were attesting his will, although he could not see them sign it. It would not be an attestation in the presence of the testator if he could not see the act of attestation, but merely understood from the surrounding circumstances that the act was taking place. We think the jury would understand from the instructions, taken together, that the act of attestation must be performed within the range of the testator's vision, and in such a way that he could know that it was his will which was being attested, and could see the act of signing. This is the only matter argued, and, finding no prejudicial error in the action of the court, the decree is affirmed. Decree affirmed.

BOGGS, J., took no part in the decision of this case.

(176 Ill. 572)

GROSS v. VILLAGE OF GROSSDALE.

(Supreme Court of Illinois. Dec. 21, 1898.)

APPEAL—BILL OF EXCEPTIONS—MUNICIPAL CORPORATIONS—ASSESSMENTS FOR SEWERS—INSTALLMENTS.

1. A question as to the validity of the oath taken by commissioners appointed to levy special assessments will not be considered on appeal, in the absence of a bill of exceptions showing that the oath copied in the record was the only oath administered to the commissioners.

2. Defendant, whose lands were assessed for the construction of drains and sewers, so that the last nine installments were in multiples of \$100, as required by Act June 17, 1893, cannot complain of the assessment as being in violation of said act because the assessment proceedings as to a part of the property were dismissed after the division according to the act had been made, and said installments were not in multiples of \$100 after the amount assessed on the property so dismissed was deducted.

Error to Cook county court; O. N. Carter, Judge.

Proceedings by the village of Grossdale against S. E. Gross. From an order confirming a special assessment for the construction of certain drains and sewers, defendant brings error. Affirmed.

Young, Makeel & Bradley and Steele & Roberts, for plaintiff in error. Allen G. Mills, for defendant in error.

CRAIG, J. This was a writ of error sued out by S. E. Gross to reverse a judgment of the county court of Cook county confirming a special assessment levied and assessed by the village of Grossdale for the construction of a connected system of drains and sewers in and along the streets and avenues of the village.

It is first contended by plaintiff in error that the ordinance is void for uncertainty. In *Walker v. People*, 170 Ill. 410, 48 N. E. 1010, this ordinance was before the court, and the same question was raised, and we held that the ordinance was valid. The ruling in that case on the question again raised must be conclusive here.

It is also claimed that the ordinance is invalid because it provides that the board of trustees reserves the right to reject any proposals at its discretion. That question was also raised and disposed of in the *Walker Case* adversely to the contention of plaintiff in error, and further discussion of the question is not deemed necessary here.

It is next contended that the commissioners appointed by the court to levy and spread the assessment were not qualified as commissioners because they did not take the oath prescribed by the law. The oath copied into this record, and alleged to have been administered, was as follows: "We, the undersigned commissioners, appointed, etc., do solemnly swear that we will a true and impartial assessment make of the cost of said improvement upon the village of Grossdale, or any property benefited by said improvement, to the best of our ability and according to law." Upon the application to confirm the assessment it was a question for the court to determine whether the commissioners had taken the oath required by law. This record contains no bill of exceptions; hence what evidence was before the court in regard to the nature or character of the commissioners' oath we have no means of knowing. It nowhere appears that the oath copied into the record, and claimed to be defective, was the only one taken by the commissioners. In the absence of proof to the contrary, it will be presumed that there was ample evidence before the county court that the oath administered to the commissioners conformed to the law. If the plaintiff in error desired to call in question the judgment of the county court on the ground that the commissioners had not taken the oath required by law, he should have prepared a bill of exceptions, and shown therein that the oath copied into this record was the oath, and only oath, administered to the commissioners. Had this course been pursued, then he might properly have raised the question attempted to be raised, but upon this record the question in regard to the validity or sufficiency of the commissioners' oath does not arise.

It is next claimed that the judgment should be reversed because the assessment, as divided into installments, is not now in compli-

ance with the act of 1893, because the aggregate of the last nine installments is not in multiples of \$100. Section 8 of the ordinance provides as follows: "Sec. 8. That said assessment shall be divided into and collected by installments, ten in number, in accordance with the provisions of an act of the general assembly of the state of Illinois entitled 'An act to authorize the division of special assessments in cities, towns, and villages into installments,' etc., approved June 17, 1893, in force July 1, 1893. The first of the installments shall be due and payable on and after the confirmation thereof, and the second installment one year thereafter, and so on until all are paid. But said divisions shall be so made that the first installment shall include all fractional amounts, leaving each of the remaining installments equal in amount and multiples of \$100, which said assessments and installments shall bear interest from and after thirty (30) days succeeding the day of the confirmation, at the rate of six per cent, and be collected in like manner as is now provided by law." Under the above section of the ordinance the assessment was divided in strict conformity to the statute. This is conceded in the argument, but it appears that, after the division had been made, the assessment proceedings were dismissed as to a portion of the property embraced in the assessment roll, and, by deducting the several amounts assessed on the property so dismissed from the proceeding from the original amount of the assessment as divided by the ordinance, the aggregate of the last nine installments will not be multiples of \$100. We do not regard the position of plaintiff in error well taken. When the corporate authorities of the city, town, or village make a division of the assessment by ordinance, as required by the act of June 17, 1893, the fact that changes may subsequently be made in the amount of the several installments by the dismissal of the assessment proceedings as to a part of the property embraced in the assessment roll cannot be held as a sufficient ground to reverse the judgment of confirmation. If the corporate authorities make a division of the assessment as required by the statute, when the division is made they have fully discharged their duty, and they are under no obligation to make a subsequent division owing to the fact that some of the property embraced in the assessment may be relieved from the assessment, by trial or otherwise.

It is also claimed that the judgment is erroneous because, in the application to confirm the assessment, the petition was dismissed as to certain property embraced in the assessment roll. The same question was raised in *Walker v. People*, supra, and after full consideration we held it was not sufficient ground to reverse the judgment. The ruling in that case must control here. The judgment of the county court will be affirmed. Judgment affirmed.

(177 Ill. 248)

GROSS v. VILLAGE OF GROSSDALE.

(Supreme Court of Illinois. Dec. 21, 1898.)

NAMES—MIDDLE INITIALS—IDEM SONANS.

1. There is no variance between names that differ only by the insertion of a middle initial in one of them, as such initial is no part of the name.

2. The names "Bettie" and "Beattie" are *idem sonans*.

Error to Cook county court; Orrin N. Carter, Judge.

Assessment proceedings by the village of Grossdale against S. E. Gross. From an order confirming a special assessment to improve a certain boulevard, defendant brings error. Affirmed.

Young, Makeel & Bradley and Steele & Roberts, for plaintiff in error. Allen G. Mills, for defendant in error.

WILKIN, J. The county court of Cook county confirmed a special assessment against the property of the plaintiff in error for the purpose of improving Burlington boulevard, in the village of Grossdale, and this writ of error is sued out to reverse that judgment.

The first error assigned is that the commissioners appointed to levy and spread the assessment were not qualified to act as such, for the reason that the oath taken by them was not the one prescribed by the statute. It appears that the commissioners took an oath to make an assessment of the costs of said improvement "upon the village of Grossdale or any property benefitted," instead of "upon the village of Grossdale and the property benefitted." The substitution of the words "or any" for the words "and the," plaintiff in error contends, is such a variance from the prescribed oath as will invalidate the judgment of confirmation; that the oath taken gives the commissioners a discretion in spreading the assessment; that they might assess the whole cost against the village or against one or more properties benefitted, and not against all "the property benefitted." This precise question arose and was presented in the same manner as it is here, viz. without any bill of exceptions, in the case between the same parties decided at this term (52 N. E. 370), involving the validity of an assessment for the construction of a system of drains and sewers. What is said in the opinion in that case on the point is decisive of the same here, adversely to the contention of plaintiff in error.

The second objection urged is that the persons appointed by the ordinance to estimate the cost of the proposed improvement did not make and sign the estimate. It appears that by the ordinance one "Frank Bettie" was appointed as one of the commissioners, but the estimate returned is signed by "Frank W. Beattie." No proof is made that Frank Bettie and Frank W. Beattie are two different persons. It has frequently been held that the middle initial is no part of the name. See *Langdon v. People*, 133 Ill. 382, 24 N. E. 874;

Ersline v. Davis, 25 Ill. 251. The insertion of an "a" in the surname creates an instance obviously within the doctrine of *idem sonans*. Here all the presumptions are in favor of the validity and regularity of the judgment, and, in the absence of proof to the contrary, it will be presumed that "Bettie" and "Beattie" are one and the same person.

The final contention of plaintiff in error—that the ordinance providing for the proposed improvement is void because it reposes a discretion in the village engineer, and does not describe the nature, character, and locality of the proposed improvement—is sufficiently answered by the opinion rendered in the case of *Walker v. People*, 169 Ill. 473, 48 N. E. 694, reaffirmed in *Gross v. People*, 169 Ill. 635, 48 N. E. 1108, and *Gross v. People*, 172 Ill. 571, 50 N. E. 334, where the ordinance in question is expressly held to be good.

No complaint is made of any unfairness, injustice, or partiality in the making and spreading of the assessment. We do not think the errors assigned warrant a reversal of the judgment of the county court. Judgment affirmed.

(176 Ill. 590)

DREYER v. PEOPLE.

(Supreme Court of Illinois. Dec. 21, 1898.)

PUBLIC OFFICERS—FAILURE TO ACCOUNT FOR PUBLIC FUNDS—INDICTMENT—LIABILITY FOR INTEREST—CONTROL OF FUNDS—DEMAND.

1. An indictment against a municipal officer for failure to account to his successor for funds in his possession, which does not allege that accused's term of office had expired, or that his successor's term had begun, and which alleges that, on the day when the offense was committed, accused was such municipal officer, authorized by law to keep the funds with respect to which the prosecution is being had, does not charge an offense under Cr. Code, § 215, making municipal officers criminally liable for failure to account to their successors in office for trust funds in their possession.

2. The rule that averments of time in indictments are mere matters of form, and that the date need not be shown as laid, does not apply to an indictment under Cr. Code, § 215, against a municipal officer for failure to account to his successor for funds in his possession, where the offense is alleged to have been committed at a time when there was no obligation to account.

3. Laws 1893, p. 136, entitled "An act to compel officers and other custodians of public funds to account for interest thereon," and providing that municipal officers and other custodians of public funds shall account for interest received by them for such funds, does not make such officials the owners of funds under their control, and mere debtors for their repayment, so as to exempt them from criminal liability for failure to account therefor.

4. Laws 1893, p. 136, requiring municipal officials to account for interest on funds in their hands at the rate of 2 per cent. per annum, unless such funds be not kept in a bank or on deposit for the purpose of receiving interest, or unless there be no responsible depository willing to pay interest, requires the payment of the interest actually received, only.

5. A municipal corporation required its funds to be deposited in its name, and its treasurer so deposited them in a bank conducted by himself and another as partners. He reported monthly to the municipality, charging himself

with the moneys so deposited; and warrants payable out of the fund were drawn on him as treasurer, a marginal note thereon stating that they were payable at said bank. Neither the corporation nor any other of its officers checked against the fund. *Held*, that it was under the treasurer's control, within Cr. Code, § 215, making public officials criminally liable for failure to account to their successors in office for moneys in their possession, unless such failure be caused by unavoidable loss or accident.

6. A demand in writing to a public official to deliver public funds in his possession to his successor in office, served at his house by a person not authorized to receive the funds,—there being no office provided where the duties of such officials are to be performed,—is insufficient, under Cr. Code, § 215, making certain officials criminally liable for failure to turn over to their successors in office, on demand, public funds under their control, since such officer is only required to hold such funds ready for delivery when his successor presents himself ready to receive them.

Magruder, J., dissenting.

Error to criminal court, Cook county; Abner Smith, Judge.

Edward S. Dreyer was convicted of withholding public funds from his successor as treasurer of the West Chicago park commissioners, and he brings error. Reversed.

Moran, Kraus & Mayer, for plaintiff in error. E. C. Akin, Atty. Gen. (Charles S. Deneen, State's Atty., and Albert C. Barnes, Asst. State's Atty., of counsel), for the People.

CARTWRIGHT, J. Plaintiff in error was convicted in the criminal court of Cook county of a failure to pay over \$316,000, placed in his keeping as treasurer of the West Chicago park commissioners, to Fred M. Blount, his successor in office as such treasurer, and his punishment was fixed at imprisonment in the penitentiary. The prosecution was based on section 215 of the Criminal Code, which is as follows: "If any state, county, town, municipal or other officer or person, who now is or hereafter may be authorized by law to collect, receive, safely keep or disburse any money, revenue, bonds, mortgages, coupons, bank bills, notes, warrants or dues, or other funds or securities belonging to the state, or any county, township, incorporated city, town or village, or any state institution, or any canal, turnpike, railroad, school or college fund, or the fund of any public improvement that now is or may hereafter be authorized by law to be made, or any other fund now in being or that may hereafter be established by law for public purposes or belonging to any insurance or other company or person, required or authorized by law to be placed in the keeping of any such officer or person, shall fail or refuse to pay or deliver over the same when required by law, or demand is made by his successor in office or trust, or the officer or person to whom the same should be paid or delivered over, or his agent or attorney authorized in writing, he shall be imprisoned in the penitentiary not less than one nor more than ten years: provided, such demand need not be made when, from the absence or

fault of the offender, the same cannot conveniently be made: and provided, that no person shall be committed to the penitentiary under this section unless the money not paid over shall amount to \$100, or if it appear that such failure or refusal is occasioned by unavoidable loss or accident. Every person convicted under the provisions of this section shall forever thereafter be ineligible and disqualified from holding any office of honor or profit in this state." The indictment consists of two counts, which are identical, except as to three immaterial words. The first count is as follows: "State of Illinois, County of Cook—ss.: Of the February term of the criminal court of Cook county, in said county and state, in the year of our Lord 1898: The grand jurors chosen, selected, and sworn in and for the county of Cook, in the state of Illinois, in the name and by the authority of the people of the state of Illinois, upon their oaths present that, before and at the time of the committing of the offense hereinafter mentioned, one Edward S. Dreyer was an officer, to wit, treasurer of the West Chicago park commissioners, the same being a board of public park commissioners appointed by the governor of said state of Illinois, and confirmed by the senate of said state of Illinois, and exercising the power of corporate authorities in the supervision of public parks and boulevards in and for the town of West Chicago, a municipal corporation organized and existing under and by virtue of the laws of the said state of Illinois, duly appointed and qualified as such treasurer of said West Chicago park commissioners, a board of public park commissioners as aforesaid, and authorized by law to collect, receive, safely keep, and disburse the funds established by law for public purposes, to wit, the funds for the maintenance of public parks and boulevards in the town of West Chicago, a municipal corporation as aforesaid, required and authorized by law to be placed in the keeping of the said Edward S. Dreyer as such officer, to wit, treasurer of said West Chicago park commissioners, a board of public park commissioners as aforesaid; that the said Edward S. Dreyer received, as such treasurer of said West Chicago park commissioners, a board of public park commissioners as aforesaid, a large amount of moneys, funds, and personal property, a more particular description of which is to the said jurors unknown, of the funds for the maintenance of public parks and boulevards in the town of West Chicago, a municipal corporation as aforesaid, amounting to and of the value of \$316,000, lawful money of the United States of America; that one Fred M. Blount was duly appointed and qualified as the successor to said Edward S. Dreyer as treasurer of said West Chicago park commissioners, a board of public park commissioners as aforesaid, by the West Chicago park commissioners, a board of public park commissioners as aforesaid, on the 21st day of December, in the year of our Lord

1896; that the said Edward S. Dreyer, late of the county of Cook, on the said 21st day of December in the year of our Lord 1896, in the said county of Cook, in the state of Illinois, aforesaid, unlawfully and feloniously and willfully failed and refused to pay and deliver over to said Fred M. Blount, successor in office as treasurer of said West Chicago park commissioners, a board of public park commissioners as aforesaid, the said large amount of moneys, funds, and personal property, a more particular description of which is to the said jurors unknown, the same being the funds for the maintenance of public parks and boulevards in the town of West Chicago, a municipal corporation as aforesaid, then and there amounting to and of the value of \$319,000, lawful money of the United States of America, on demand therefor then and there made by the said Fred M. Blount, successor to said Edward S. Dreyer to the said office of treasurer of said West Chicago park commissioners, a board of public park commissioners as aforesaid, such failure and refusal on the part of said Edward S. Dreyer to then and there pay and deliver over to said Fred M. Blount, successor in office as aforesaid, the said large amount of moneys, funds, and personal property, a more particular description of which is to the said jurors unknown, as aforesaid, the funds for the maintenance of public parks and boulevards in the town of West Chicago, a municipal corporation as aforesaid, then and there amounting to and of the value of \$319,000, lawful money of the United States of America, as aforesaid, then and there not being occasioned by unavoidable loss or accident,—contrary to the statute, and against the peace and dignity of the same people of the state of Illinois.” A motion to quash this indictment was made and overruled, and an assignment of error is that the court erred in overruling said motion. The objections to the indictment under the heads, “a,” “b,” and “c,” in the brief of counsel for plaintiff in error, relate to the inconsistencies in its averments, and will be considered together.

It will be noticed that the indictment alleges that, at the time of the commission of the alleged offense by the defendant, he was treasurer of the West Chicago park commissioners, duly appointed and qualified as such, and authorized by law to collect, receive, safely keep, and disburse the funds of the board. If this averment is to be taken as true, it necessarily follows that the defendant was not bound to deliver the funds in his charge to Fred M. Blount, and that the demand alleged was not by any person to whom he was bound by law to pay or deliver the same. The indictment nowhere alleges that the term of office of the defendant had expired, or that he was removed from office; and the fact that either event had occurred appears only by inference, if at all, from the averment that Fred M. Blount was duly appointed and qualified as his successor. Inference,

of course, cannot be admitted to make the indictment good, as against a positive averment; and, if it could, the inference that defendant's term of office had expired on December 21, 1896, or that Blount's had begun, would not arise from what is stated. The averment that Blount had been appointed and qualified as defendant's successor is not necessarily inconsistent with the first allegation, since it is neither improper nor uncommon to appoint a successor, who shall qualify himself to fill the office, before his term begins. That is the law and the practice as to elective officers generally, in which case the statutes fix a time when the newly elected and qualified official shall enter upon the duties of his office. By the constitution, county officers do not enter upon the duties of their offices until the first Monday of December after their election, and state officers hold their offices from the second Monday of January next after they are elected. As a matter of fact, such was the practice of this board, and in every instance shown by its records of an election of treasurer the new treasurer was elected before the term of office of the old treasurer expired. There is no direct allegation that at the time of the demand, or the failure to pay, Fred M. Blount had become treasurer, as successor to defendant, so as to entitle him to the fund. The indictment must show that the demand and failure to pay were when the defendant was no longer treasurer, and had no right to retain the fund, and when Blount had become treasurer, and was entitled to the possession of it; and, if it could be said that the indictment shows defendant's term to have ended, yet it alleges a demand and failure to pay over on the same day that Blount was appointed and qualified, without averring that the demand took place after the appointment and qualification of Blount. It is insisted that the averments of time are mere matter of form, and need not be proved as laid. But that is not true in determining the sufficiency of this indictment. Ordinarily, upon the trial of a cause the proof need not show the commission of the offense at the time alleged by the indictment. It is only in particular cases that the law so requires. At the trial the averment of a date means any time within the statute of limitations, and the subsequent reference, “then and there,” means at any such time, and at any place within the county. In determining the sufficiency of the indictment, however, the court is to take the date alleged as the true one. Under that rule, defendant was treasurer December 21, 1896, until Blount succeeded him; and a demand on that date might be before or after such change in the incumbent of the office, and there is no averment that it was after. We cannot, by taking all the averments of the indictment together, reconcile them in such a way as to overcome the objection, but think that the indictment comes within the rule

that where the averments are inconsistent, and the time is so alleged as to disclose no crime, it must be held bad. 1 Bish. Cr. Proc. § 255; 1 Chit. Cr. Law, 231.

But it is said that the indictment was framed on the statute, and is sufficient, under the provision that an indictment stating an offense in the terms and language of the statute creating the offense is good. It does not come within that provision, for the reason that it does not state the offense in the language of the statute, or substantially so. It charges a failure by defendant to pay over to his successor in office, who is not charged or alleged to have been successor, where it alleges at the same time that defendant himself was treasurer.

The objection to the indictment stated under the head "d" is as follows: "The indictment charges Dreyer, as treasurer, with failing to pay over a fund which came within the operation of the interest act of 1893, and for whose repayment he became, under that act, a mere debtor." The statute upon which reliance is based to exempt the defendant from criminal liability for a failure to turn over the funds in his keeping, in force July 1, 1893 (Laws 1893, p. 136), is as follows: "An act to compel state, county, city, township, school and park treasurers, and other custodians of public funds, to account for interest on such funds under their control.

"Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that the state treasurer, and every county, city, township, school and park treasurer, and every other custodian of public funds, who shall be hereafter elected or appointed and qualified, shall, at the end of each fiscal year, account for interest on the daily balances of the funds from time to time in his custody, at a rate of not less than two per cent. per annum, and as much higher as solvent banks that are reasonable accessible pay on the daily balances of accounts that are subject to sight draft or check. Three-fourths of such interest shall belong to the public and be added to the fund, and the remaining one-fourth of such interest shall belong to such treasurer or custodian, and may be retained by him as extra compensation for the extra care and responsibility assumed in making the fund bear interest: provided, that nothing herein contained shall be so construed as to in any way release such treasurer or custodian or his bondsmen from any liability: and provided further, that if any such treasurer or custodian shall keep such funds, or any part thereof, in his personal possession, and not in a bank or on deposit for the purpose of receiving interest on the same, and keep the same in actual money and not in securities, and shall not in any way use such funds, or any part thereof, himself, or receive any interest or thing of value or compensation for the use of said funds, or permit them to be

used by any person, persons, co-partnership or corporation for his benefit, then he shall not be required to account for any interest on the funds so kept: provided, no responsible depository accessible shall be willing to pay interest, and in that case he shall make, sign and file an affidavit in the following form." (Here follows the form of affidavit.)

The claim made is that because this statute required defendant to select some responsible depository where the fund would bear interest, and account for such interest, he ceased to be custodian or keeper of the fund, and became the owner of it, and merely liable as a debtor to account for whatever balance might be due. In our opinion, the fiduciary character or the obligation of the position of treasurer was not destroyed by the fact that defendant was charged with an additional duty in respect to the fund, and the language of the act shows that such was not the legislative intention. It is matter of common knowledge that custodians of large funds belonging to the public were accustomed to deposit them in banks, and receive interest upon the daily balances, for which they rendered no account. The legislature, well knowing that banks paid interest on such daily balances, sought to obtain the greater portion of it for the public, allowing to the treasurer a portion of the interest as extra compensation for the care and responsibility in making the fund bear interest. The statute was plainly not intended to transfer the title of public funds to their keepers, but only to impose an additional duty, without exempting such keepers from the liabilities to which they had been before amenable. Every word in the statute implies control, custody, and safe-keeping, and not ownership, of the money by the custodian. In the title, where the subject of the act is required to be declared, and throughout the act, the funds are referred to as public funds, the treasurers or keepers as custodians, and the funds as under their control. It would be absurd to say that a "custodian" of a fund means the owner of it, or that the legislature intended to compensate such an owner for making his own money bear interest. The act contemplates, by every provision, the keeping of a fund belonging to the public, and compensation for its care; and the legislature could not possibly have conceived, from any of its provisions, that the title of the fund was to vest in the custodian.

But it is said that defendant was liable for 2 per cent. interest, unless there was no responsible depository accessible that would pay any interest at all, and that if he could get only 1 per cent., or less, he would be still bound to pay 2 per cent., and therefore would be a debtor, merely. The act must be considered in all its parts, and, when so considered, we do not think it calls for such a construction. The provision in relation to the exemption of a treasurer where no responsible bank accessible was willing to pay

interest, when taken with the rest of the act, evidently does not refer to a bank that would not pay anything, but to one which would not pay the interest which the treasurer was required to turn over or account for. The legislature could not have intended to require a treasurer to pay 2 per cent. interest when the fund would not bear that amount, and to give him one-fourth of it as extra compensation for making the fund produce the interest accounted for. That would be absurd, as well as a gross injustice, and such an intent is not to be attributed to the legislature. This objection to the indictment is, in our opinion, without foundation.

The same question of ownership is discussed with reference to the assignments of error that the verdict is contrary to the law and contrary to the evidence. The rules of the board required that the deposit account, wherever kept, should be in the name of the board. The right to select the depository was in the defendant, and he selected his own bank. He had a partner, Robert Berger, and they did business under the firm name of E. S. Dreyer & Co.; but, so far as legal responsibility is concerned, there rested upon defendant an absolute liability, as partner, for the whole amount of the deposit, and there was no particular difference in that respect between a deposit with his firm, and a deposit with him individually as a banker. All the funds were deposited in this bank, and the account kept in the name of the board; but the checks and warrants deposited were payable to the order of the defendant, as treasurer. Substance, and not form, is material, and, while the deposit was in the name of the board, it was the deposit of defendant as treasurer; and he made monthly reports of his account as treasurer, charging himself with the fund on deposit. While the account was kept in the name of the board, no checks were made against it by the board or any of its officers. The method of doing business was by drawing a warrant or draft on the defendant as treasurer. In accordance with a common method of doing such business, there was a note on the ends of the warrants that they were payable at E. S. Dreyer & Co.'s bank. This is a convenient method by which banks pay in such cases, and the treasurer, on taking up the warrants, gives his check for the amount. The funds in the bank were as effectively controlled by defendant as if they had been deposited in his name, and were so treated by all the parties. The entire method of dealing, and the action of all the parties, refute the claim that he was a mere agent, and show that the deposit in his own bank, selected by him, was his deposit and under his control.

Under the same claim that the verdict is unsupported, the question whether a legal demand was proved is raised and argued. The demand required by the statute, where it can conveniently be made, as in this case,

is a request to a treasurer who has received a fund into his keeping to perform the duty required by law, to pay the same over to his successor in office, or his agent or attorney authorized in writing. In this case a messenger not authorized to receive the fund was sent to the defendant's house, in the city of Chicago, with the following paper, addressed to defendant: "You are hereby notified that I have been duly elected and qualified as the treasurer of the West Chicago park commissioners; and you are hereby demanded to turn over to me, as your successor as treasurer of the West Chicago park commissioners, all moneys, goods, and chattels which you have received as such treasurer, and which has not been by you lawfully paid out. Fred M. Blount, Treasurer West Chicago Park Comrs. Chicago, December 21, 1896." He did not see the defendant, but handed the paper to an old lady, together with a copy, and she returned the paper to him with this written below: "Received copy of the above. E. S. Dreyer." The objection to this demand is that it was insufficient, because not made personally by the successor, nor any one duly authorized to make the demand and receive the property. The written demand reached the defendant, and was acknowledged by him, and was sufficient to furnish full notice of its purpose; but the defendant could not, at the time and place of service, perform the duty, and his successor never presented himself, in pursuance of the demand, to receive the fund. The question whether a demand so made, and a failure to comply with it, rendered the defendant criminally liable, depends, in our judgment, upon the question whether it was his duty to seek his successor and deliver the fund to him, or whether the obligation was to keep it ready to be delivered to the successor when he, or some one authorized by him in writing, should present himself to receive it. Where a duty is incumbent on one merely to keep property safely, ready to deliver it, he cannot be in fault until called upon by one authorized to receive it. A demand, to be good, must be made in such a way that the party can perform the duty by delivering the fund, and relieve himself from further liability; and if it is his duty to find his successor, and deliver the fund to him, then a demand to go and perform that duty is sufficient. If there is an office where the duties of successive officers are to be performed, then, manifestly, it is the duty of one who has been treasurer to continue to perform his duty at that place until it is completed. One who is bound by law to turn over money to a county treasurer, where, under the statute, the county provides him with an office where the business of his office is to be transacted, is bound to go to that place. In such a case a demand to perform that duty would amount to a request to go to that place and do the duty, and so in the case of a state

treasurer having an office where the books, vouchers, accounts, or funds of successive treasurers are kept, and the duties of the office performed; but if, as is the fact concerning many officers, there is no office or fixed place for the performance of duty, but the office attends the person, the officer fulfills his entire duty by discharging his obligations wherever he may be. In such a case a treasurer whose term of office has expired has as much right to consider his place of business his house or his bank where he may be found as the place for the performance of his duty, as the successor has to say that where he may be found is the proper place. The evidence in this case does not show that there was any office provided for treasurers of the board, where the business of the office was to be transacted, and where the outgoing treasurer was bound to present himself and pay over the fund. The person who called at defendant's house was not authorized to receive the fund, nor was the successor, Blount, there to receive it; and the demand merely meant that defendant should seek Blount, and deliver the fund to him, without even stating where he resided or did business, or where he would be at any particular time or place to receive the money. Under the evidence, we cannot regard the demand made as sufficient. For the reasons given, the judgment is reversed and the cause remanded. Reversed and remanded.

MAGRUDER, J., dissenting.

(177 Ill. 268)

WINNE et al. v. PEOPLE ex rel. HESS.

(Supreme Court of Illinois. Dec. 21, 1898.)

MANDAMUS—TOWNS—ACTIONS—PARTITION OF TOWNSHIP—SUPERVISORS—APPEAL AND ERROR—ASSIGNMENTS OF ERROR—SUPREME COURT—JURISDICTION.

1. A town is a party in interest, and entitled to sue out a writ of error to the supreme court to review a judgment depriving it of the right to exercise its franchises over part of the territory originally granted to it by the legislature as a minor subdivision of the state for the government of local affairs therein.

2. The question of the franchise of a town is involved in a suit to divide the town, giving the supreme court jurisdiction in error.

3. Where a party to the record prosecutes a writ of error, his interest sufficiently appears without any allegation thereof, but, if he is not a party, his interest must be alleged in the assignment of error, so as to show his relation to the suit.

4. A joinder in error will not put in issue an allegation, in the assignment of error, of interest; hence, without a special plea denying such interest, it will stand admitted.

5. Where plaintiffs in error describe themselves in their assignments of error as "supervisors of the town," such description does not show any interest, as such officials, in a judgment depriving the town of the right to exercise its franchises over the territory granted it by the legislature.

6. Under Hurd's Rev. St. c. 139, art. 5, § 2, providing that the town in a township organization shall prosecute suits in its own name, ex-

cept where town officials are authorized to sue for its benefit, its supervisors, without such authority, neither collectively nor individually, can maintain a suit in behalf of the town.

7. An allegation that plaintiffs' official jurisdiction is decreased as supervisors of a town does not give them any interest in a proceeding to divide the township and set off a new town.

8. Where an action is prosecuted against the board of supervisors, if a writ of error is prosecuted for such board, it must be in its name.

Error to circuit court, Dekalb county; George W. Brown, Judge.

Petition for mandamus by the people on relation of Henry F. Hess against the board of supervisors of Dekalb county to compel the latter to divide the town of Somonauk, and create a new town, composed of the territory therein described. There was an order granting a peremptory writ, and Charles Winne and I. M. Hay, supervisors, bring writ of error. Dismissed.

N. J. Aldrich and Theodore Worcester, for plaintiffs in error. Carnes & Dunton and Alschuler & Murphy, for defendant in error.

CARTWRIGHT, J. A petition for mandamus was filed in the circuit court of Dekalb county to compel the board of supervisors of that county to grant the prayer of a petition for the division of the town of Somonauk, in said county, and the creation of a new town, composed of territory therein described, and comprising the west part of the township. The board interposed a demurrer to the petition, and, the demurrer being overruled, elected to stand by it, and the court granted the peremptory writ. A motion has been made to dismiss the writ of error.

It appears from the record that the town of Somonauk was organized as such under the general township organization law, and included a congressional township containing 36 sections of land. The petition presented to the board of supervisors asked for the creation of a new town by taking all that portion of the township lying west of a line drawn north and south through the center of sections 3, 10, 15, 22, 27, and 34, leaving 15 square miles in the original town, and appropriating about 21 square miles to the new town. The board refused to grant the prayer and create the new town, and the peremptory writ awarded by the circuit court ordered them to proceed to grant the prayer of such petition, and create such new town. It thus appears that the town of Somonauk, which the petition for mandamus sought to deprive of the greater part of its territory, was a public, quasi municipal corporation of the general class created by the legislature as minor local subdivisions of the state for the purpose of regulating and administering the local affairs of government within its territory. It was authorized by grant of the legislature to exercise the public franchises of such corporation over the entire congressional township. The right to exercise such powers and to be

such a corporation is in itself a franchise, and, while the existence of the entire corporate franchise or right to be a corporation is not involved in this suit in the sense that the original town is deprived of all existence, yet the right to exercise the franchise over more than one-half the original territory is directly involved. The effect of the judgment awarding the peremptory writ of mandamus was to create a new town within the territory of the original town, and to deprive the town of Somonauk of the right to exercise its franchises, powers, and privileges within the territory ordered to be taken from it. In *Railroad Co. v. Dunbar*, 95 Ill. 571, it was decided that the franchise of the railroad company was involved in a bill in chancery which did not question the existence of the franchise, but sought to enjoin the corporation from exercising it within certain territory. Whether the town of Somonauk should continue of the same territory as before, or should be shorn of the right to exercise its franchises in more than one-half its territory, involves a similar question, and a writ of error from this court is proper to review such a judgment. The town of Somonauk is interested in the judgment, and entitled to sue out a writ of error.

We do not think that plaintiffs in error have such an interest as entitles them to prosecute the writ of error, which can only be prosecuted by one who is a party or privy to the record, or who is injured by the judgment or will be benefited by its reversal, or who is competent to release error. *Anderson v. Steger*, 173 Ill. 112, 50 N. E. 665. The suggestion that the question must be raised by plea in abatement, to which plaintiffs in error might reply their official relation to the town, is not in accordance with the practice. The facts which show the interest of the plaintiffs in error must appear in the transcript of the record, or be alleged in the assignment of errors. If a writ of error is prosecuted by one who is a party to the record, his interest, of course, sufficiently appears without an allegation of interest; but if he is not a party, and his interest does not appear from the record, it should be alleged in the assignment of errors, so as to show his relation to the suit. 'A joinder in error would not put in issue the fact so alleged, and, without a special plea denying it, it would stand admitted. *Gibler v. City of Mattoon*, 167 Ill. 18, 47 N. E. 319. In this case, in the assignment of errors plaintiffs in error have described themselves as "supervisors of the town of Somonauk, Dekalb county, Illinois." If this description could be taken to be an allegation of the fact that they are supervisors, it would not show any interest, as such officials, in the judgment. A supervisor is not authorized by law to prosecute such a suit as this for his town, in his name of office; and except where such authority is conferred by law the town must sue and be sued by its name. *Hurd's Rev.*

St. c. 139, art. 5, § 2. Plaintiffs in error have no other or different right than justices of the peace, constables, or commissioners of highways, and neither all of them collectively nor any of them could maintain a suit on behalf of the town. The town itself holds and represents, and may maintain and defend, the right to exercise the corporate franchise throughout the corporate limits. It is not contended that every citizen may assume such defense, and the only ground suggested in which plaintiffs in error are affected differently from other citizens is that their official jurisdiction is decreased. It is said that their right to govern and supervise the territory is taken away. It is not contended that their revenues as officials are diminished, or their personal interests affected; and the ground alleged is clearly insufficient to give them any right or interest in the litigation. Plaintiffs in error were among the number served with process for the purpose of bringing the board of supervisors into court, but that service was only for the purpose of obtaining jurisdiction of the board as such. Plaintiffs in error might vote and act as members of that body, but the action was against the board, and, if a writ of error were prosecuted for the board of supervisors, it must be in the name of the board. We think that the writ of error must be dismissed, and it is dismissed accordingly. Writ dismissed.

(177 Ill. 59)

STAGER v. CRABTREE et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

DEEDS—NOTICE—CANCELLATION—EQUIT—RETAINING BILLS FOR GENERAL RELIEF.

1. A daughter who accepted deed in fee simple from her mother is bound to take notice of the execution and existence of her father's recorded deed to an intermediary, through whom her mother derived title.

2. A father, through an intermediary, conveyed a farm of 240 acres, and one of 320 acres, to his wife. She conveyed the west half of the latter to her daughter for life, remainder to the daughter's children, if any, and, if none, to grantor's son. The east half was conveyed to the son, subject to a life estate in the grantor. The daughter's was charged with the payment of taxes and an annual sum to the grantor. The daughter accepted the deed, and paid the charges for six years, when she sought to set aside the father's deeds, as lacking legal capacity to execute them, and as procured by undue influence. *Held* that, having had constructive notice of those deeds, her acts constituted an acquiescence.

3. A bill by an heir for a cancellation of deeds made by a decedent will not be retained in order to effect an accounting of decedent's personality between complainant and defendants, her co-heirs, without an allegation that the estate was not duly administered on.

4. A bill will not be retained to effect an accounting of personality of a decedent when the time allowed for final administration had not elapsed when the bill was filed.

Appeal from circuit court, Carroll county; James Shaw, Judge.

Bill by Emma K. Stager against Howard E. Crabtree and others. There was a de-

cree for defendants, and complainant appeals. Affirmed.

The appellant and the appellee Howard E. Crabtree are brother and sister, being the only children of Matthew and Elizabeth Crabtree. The appellee Ida is the wife of Howard E. Matthew Crabtree died on the 20th day of August, 1889. His wife, Elizabeth, survived him, and died October 15, 1895. The appellant, on the 28th day of January, 1896, filed a bill in chancery against her brother, Howard E., and his wife, Ida, to obtain a decree setting aside two certain deeds purporting to have been executed by said Matthew and Elizabeth, his wife, to said Ida, and to convey to said Ida 320 acres of land, being the north half of section 29, township 25, range 7 E. of the fourth P. M., in Carroll county, and 240 acres of other land in Stephenson county. The bill asserted the alleged deeds were dated October 31, 1888, and that Ida and her husband, the appellee Howard E., on the same day executed two deeds reconveying the same lands to said Elizabeth, wife of Matthew, and the mother of the appellant and the appellee Howard E.; that all the deeds were recorded on the day following their execution, to wit, on the 1st day of November, 1888; and that said Elizabeth, on the 9th day of December, 1889, executed two deeds, one conveying the west half of the 320-acre tract in Carroll county to appellant for life, remainder to her children, if any, and, if none, to Howard E., appellant to pay taxes and \$75 per year to the grantor during her life, and the other conveyed the east half of the same tract to Howard E., subject to the life estate of the grantor. The bill alleged said Matthew was mentally incompetent to execute the said deeds to Ida, and that the execution thereof was obtained by undue influence exercised by the grantee in the deed, her husband, Howard, and the wife of the grantor. For all the purposes of the disposition of the case, it may be considered the allegations of the bill sufficiently charged lack of mental capacity of the grantor, and the exercise of undue influence on the part of the appellees and the said Elizabeth. The appellees answered the bill, denying such allegations were true, and setting up acquiescence, laches, and the sixth section of chapter 83, entitled "Limitations," as a bar to appellant's right of recovery. Appellees also filed a plea in bar setting up facts which, it is contended, barred the right of appellant to maintain the suit, under the operation of the fourth section of said limitation act. The appellant filed a general replication in chancery to the plea, and obtained leave to file, and filed, amendments to the bill, setting forth circumstances relied upon to excuse the delay in attacking the deeds, and to avoid the imputation of acquiescence in the disposition made of the land under the deeds sought to be attacked. The court, on de-

murrers presented by appellees to the replication and to the bill as amended, ruled that, from the facts alleged in the bill, the imputation of laches and acquiescence arose, and debarred the appellant of all right to be heard as to the alleged invalidity of the said deeds. The demurrers to the replication and to the amended bill were sustained. The appellant declined to amend, and decree was entered dismissing the bill.

George L. Hoffman, Volney Armour, and W. H. A. Renner, for appellant. Ralph E. Eaton and Daniel S. Berry, for appellees.

BOGGS, J. (after stating the facts). It appeared from the bill that the deeds purporting to have been executed by said Matthew were recorded on the public deed records of the proper county on the day following their execution. At the time of the execution and recording of the deeds from said Matthew, appellant and her husband resided on the west half of said section 29, in Carroll county, which belonged to said Matthew, and which was included in the lands described in one of the deeds. Matthew, his wife, Elizabeth, and the appellees, lived as one family upon the east half of the same section 29, which was also included in the same conveyance. Matthew was a paralytic, and helpless; and Howard, his son, had his home with his father and mother. The conveyances, if valid, resulted in transferring the lands of the husband, Matthew, to his wife, Elizabeth. After the death of the said Matthew, the said Elizabeth, on the 9th day of December, 1889, executed and delivered to the appellant a warranty deed conveying to her the west half of the said 320-acre tract in Carroll county, which deed contained the following conditions: "It is expressly provided that the said grantee is to have and hold the said land so long as she shall live, and at her death it shall belong to her children; and provided further, in case the said grantee dies leaving no children, then in that case the said land shall belong to Howard E. Crabtree and his heirs. The said grantee is to pay the said grantor the sum of \$75 annually. The said Emma K. Stager is to pay the taxes on said land so long as she shall live." Appellant accepted the deed, and during the lifetime of the mother paid the \$75 annually, as the deed provided she should do. This deed was filed for record on the 17th day of June, 1890, but the bill is silent as to the connection of the appellant with the filing of the same. On the same day that Elizabeth, the mother of these parties, made the conveyance to the appellant, she executed a warranty deed conveying the east half of said 320-acre tract in Carroll county to the appellee Howard, her son, reserving, however, "a home and support for life in said land." This deed was also recorded on the 17th day of June, 1890. Howard, his wife, and Elizabeth, the mother, resided upon that

tract thenceforth. The appellant preferred no objections to the disposition thus made of the property, but continued to reside and have her home on the tract conveyed to her by her mother, and paid the sum of \$75 per annum to her mother as the deed provided. Elizabeth, the mother, died October 15, 1895. Appellant filed this bill on the 28th day of January, 1896,—a period of more than seven years after the execution of the deeds made by the father which the bill seeks to have canceled, and a period of more than six years after appellant had accepted a warranty deed from the mother, which was based upon the deeds sought to be attacked. As an explanation of this delay, it was alleged in the bill the appellant had no actual notice or knowledge of the execution of the alleged deeds by her father until after the death of her mother, and that neither her father, her mother, nor her brother ever told her such deeds had been made; that, when she accepted the deed from her mother, she was told by her mother that the purpose of the deed was to release her mother's dower and homestead rights therein.

The deed which appellant accepted from her mother in express terms conferred upon the appellant an estate for her life in the land, with the remainder in fee over to her children, should she leave any her surviving. She accepted this deed, and, in the absence of any denial to the contrary, it must be assumed she placed the same upon record. The deeds from the father, by which her mother obtained the title conveyed to the appellant, were then of record, having been recorded more than a year before. She occupied the land and paid the annual sum which the deed from the mother required she should pay, and paid the taxes on the land, that also being required of her by the deed. The legal effect of the deed from the mother was to convey a fee simple absolute, and the chancellor correctly ruled that the acceptance of it by appellant, and her compliance with its terms, should be regarded as an acceptance of the deed according to its legal import. The right of the mother to make this deed depended upon the deeds executed by the father. The deed of the father was a link in the chain of the title conveyed to the appellant by the mother. It was spread at large upon the public records of the county wherein the land was situate, and where appellant resided. The appellant must be presumed to have had knowledge of all deeds of record in the line of the title, and cannot be permitted, especially after the lapse of such a length of time, and after the death of the mother, to insist she did not accept the deed made and delivered to her by her mother according to its legal import, and had no knowledge of the existence of the deeds made by the father, which appeared upon the face of the public records, by virtue of which alone the mother had power and right to execute the deed which the appellant accepted and acted upon. She was, under the circumstances, properly held bound to take

notice of a deed in the chain of title under which she held. *Railroad Co. v. Kennedy*, 70 Ill. 350; 16 Am. & Eng. Enc. Law, 798. Having notice, it must be considered, in view of all the facts, she acquiesced in the disposition of the lands effected by the deeds now sought to be invalidated.

No reason appeared for retaining the bill in order to effect an accounting as to the personal effects of the said Matthew and Elizabeth. It is not alleged the estate of Matthew was not duly administered upon, and the bill must be taken most strongly against the complainant; hence the assumption of due administration. The time allowed by law for final administration upon the estate of Elizabeth had not elapsed when the bill was filed. No ground appeared for assuming jurisdiction in equity of either of said estates. The decree is affirmed. Decree affirmed.

(177 Ill. 125)

HARDIN et al. v. SHEDD.

CLEAVELAND et al. v. SAME.

(Supreme Court of Illinois. Dec. 21, 1898.)

APPEAL AND ERROR—SECOND TRIAL—EVIDENCE—PLEADING—AMENDMENTS.

1. Where it was decreed on a former trial that a party had no title to a lake shore under a certain survey, it is not error, on a second trial, to refuse such party an amendment setting up relictions of the lake, since the validity of the survey depended on the conditions of the shore when it was made, and not at the time of the amendment.

2. Where a cause has been reversed and remanded, it is not error to reject testimony on a second trial which opens for retrial a question already tried and determined.

3. An objection to a decree as fixing the boundary lines of appellee is not available to appellants in the absence of a showing that their rights were thereby prejudiced.

Appeals from circuit court, Cook county; *M. F. Tuley, Judge.*

Separate bills in equity by Charles B. Shedd under the burnt records act against Gertrude H. Hardin and others and Franklin A. Cleaveland and others. From a decree an appeal was prosecuted, and the cause was reversed (44 N. E. 286), and from a decree on a second trial Gertrude H. Hardin, Franklin A. Cleaveland, and Chester B. Rushmore appeal. Affirmed.

Dent & Whitman and Moran, Kraus & Mayer, for appellants. William Prescott and H. S. Mecartney, for appellee.

WILKIN, J. This is a consolidation of several bills in equity under the burnt records act, filed in the circuit court of Cook county. From a decree rendered in that court an appeal was prosecuted to this, and the decree below in part affirmed and in part reversed, the cause being remanded for further proceedings in conformity with the opinion filed therein. For a statement of the pleadings and evidence in the case and the opinion then rendered, see *Fuller v. Shedd*, 161 Ill. 462, 44 N. E. 286. Upon the

cause coming on to be heard after the remandment to the circuit court, defendant and cross complainant Gertrude H. Hardin filed her motion in writing for leave to introduce further testimony. This motion set up that since the entry of the original decree a trial had been had in a suit in ejectment by her against one Conrad N. Jordan in the United States circuit court for the Northern district of Illinois, in which it was found by that court that she was seised in fee simple of certain lands claimed by her in her cross petition in this cause, and was entitled to recover such lands to the center of Wolf Lake. The motion also suggested that the testimony taken at the original hearing, before appeal to this court, had not been directed especially to the question of the extent of accretions or relictions, but more especially pertained to the questions raised by persons claiming under the survey of 1874, which this court held to be void, and offered to show by surveys and field notes the nature of the accretions and relictions, and that the lake or lakes have but little likelihood of permanence unless artificially sustained or protected. Appellants Cleaveland and Rushmore at the same time filed a petition asking leave to file a supplemental answer. The petition recited that since the trial of the cause which resulted in the decree of August 10, 1892, the waters of Hyde Lake had, because of the deepening and widening of the Calumet river, all disappeared, and the land formerly covered by that lake was now dry ground. The chancellor denied the motion of Gertrude H. Hardin and also the petition of Cleaveland and Rushmore. Thereupon a decree was entered, which, among other things, recited that "the recession was such that between the meandered lines and the water there was uncovered, and the greater part of the year was dry land around the lake, a strip twenty to twenty-five rods wide, and the marshy depression between the two ridges of land above described has become permanent dry land, the width thereof at the date of the former decree varying from at least thirty-six rods to seventy rods; that said permanent land thus accruing became attached to the said ridges of land as accretions and by reason of such recessions of the waters." Thereupon it was "decreed that said Charles B. Shedd should have and recover from each, all, and every person and persons in possession of or claiming any right, title, or interest in or to the same, or to any part thereof, the possession of the fractional southwest quarter of fractional section 20, and the fractional section 29, all in township 37 north, of range 15 east of the third principal meridian, and the lands particularly described as follows, to wit: Beginning at the northeast corner of said fractional southwest quarter of said fractional section 20, township 37 north, range 15 east of the third principal meridian; running thence south along the east line of said southwest fractional quarter of said fractional section 20 (and the extension thereof to the south) to the open waters of Wolf

Lake; thence along the open waters of Wolf Lake in a southerly or southwesterly direction to the south line (extended to the east) of the said fractional section 29; thence west along said line as extended, and said south line of said section 29, to the north and south section line between sections 29 and 30 of said township and range; thence north along the line between said sections 29 and 30, and its extension to the north to a point identical with the northwest corner of the southwest quarter of said section 29, if said section were fully squared out, and all its lines extended; thence from said point northwesterly to the waters of Hyde Lake, along a line drawn at an angle of 40 degrees with a line drawn due east and west through or at said point; thence along with the waters of Hyde Lake in a northerly or northeasterly direction to the center east and west line (extended to the west) of section 20; thence east along said line as extended and along said line to the place of beginning; together with all and singular the riparian rights and privileges and benefits incident to the position and location of said described tract or tracts of land, with reference to the lakes as aforesaid," etc.

The first question presented for our decision is whether the court below erred in refusing to open up the case for further pleadings and proofs. Adhering, as we do, to the conclusion reached upon the former appeal as to the invalidity of the survey of 1874, it must follow that the court properly refused the petition of appellants Cleaveland and Rushmore. The validity of the survey under which they claimed depended, not upon the conditions at the time leave was asked to file an amended answer, but when the original survey was made. Whether the land formerly covered by the waters of Hyde Lake is now dry or still covered by water can make no difference to these appellants, so long as they are able to show no title to the shore.

We are also of the opinion that the motion of Mrs. Hardin for leave to introduce additional evidence was properly refused. The only objection to that ruling worthy of particular attention is that the offered proof tended to show relictions and accretions in Hyde Lake since the case was originally tried. The evidence on the former hearing showed, and we so found on the former appeal, that from the meander line around the lake to the water's edge there was a recession of about 25 rods, and that the depression between the two ridges was permanent dry land; our decision then being that the riparian owners took to the water's edge, their rights to accretions and relictions following the recession of the water. Hence, to have admitted the offered evidence would have been to open up for retrial a question already tried and determined, which, under the uniform decisions of this court, is not permissible. *Wadhams v. Gay*, 83 Ill. 250; *Hough v. Harvey*, 84 Ill. 308; *Newberry v. Blatchford*, 106 Ill. 584; *Washburn & Moen*

Mfg. Co. v. Chicago Galvanized Wire Fence Co., 119 Ill. 30, 6 N. E. 191; *Sanders v. Peck*, 131 Ill. 407, 25 N. E. 508; *West v. Douglas*, 145 Ill. 164, 34 N. E. 141. On the question of the rights of riparian owners to accretions formed by the recession of waters of lakes like these, we do not consider it necessary to add anything to what we said on the former appeal. The able and earnest arguments of counsel to the contrary have received careful consideration, but have failed to convince us that the rule heretofore laid down is not the more practicable and just one.

Many objections are urged against the decree below as fixing the boundary lines of appellee, Shedd. Whether the decree gives him too much or too little of the land is not material in the decision of this case, there being no showing that the rights of appellants are thereby prejudiced. As to owners or claimants, if any, who have not had their day in court, the decree will, of course, have no binding force.

It is contended that, being the owner of the land abutting upon Hyde Lake on the west, appellant Hardin is entitled to all accretions formed on her shore line facing the east, and directly in front of the open water between the two lakes at the time of the survey in 1834. This contention is, practically, that there is but one lake instead of two. We are unable to discover any reasonable theory upon which this claim can be sustained. Under the rule laid down in our former decision, *Mrs. Hardin* can have no interest in the dry land formed between the southwest fractional section 20 and the southwest fractional section 29. At the time of the former hearing the waters had not receded to any considerable extent from the shore line. No matter how deep or shallow the waters were, she must claim whatever right she has by reason of accretions to her lands. We cannot see how the ridge of dry land between the fractional quarter sections spoken of can, under these circumstances, be treated as an accretion to lands on the west bank of the lake. To do so would be, in effect, to hold that the entire lake bed is an accretion to such land.

We are also of the opinion that the objection to the decree on the ground that it does not fairly divide the accretions between fractional section 29 and the west fraction of the southeast fractional section 30 must be overruled. The plats, with distances, in evidence, show that the division is equitable and just. The decree proceeds upon the theory that the ridge formed in a northerly direction from these fractional pieces of land is an accretion thereto, and it seeks to make an equitable partition thereof between the owners of such fraction. We are unable to see wherein the division is unfair to the parties. On the whole record the decree of the circuit court appears to be in conformity with the directions given in our former opinion, and it will accordingly be affirmed. Decree affirmed.

(177 Ill. 144)

CLEMENT v. PEOPLE ex rel. KOCHERS-SPERGER, County Treasurer.

(Supreme Court of Illinois. Dec. 21, 1898.)

TAXATION—FRAUDULENT ASSESSMENT—REMEDIES.

1. Section 86 of the revenue law affords the only remedy to a party aggrieved by the injustice and lack of uniformity of assessments, the courts having no power to revise an assessment merely because of a difference of opinion as to the valuation placed upon property.

2. Testimony by an agent of a property owner that the assessment would not have been so high if he had been willing to bribe the assessor, and that he "understood" that the assessor assessed similar property at a rate that would have valued the property at \$6,000, instead of \$12,000, as it was assessed, is not evidence sufficient to establish fraud in making the assessment.

Appeal from Cook county court; A. W. S. Wheatley, Judge.

Application by the people, on the relation of D. H. Kochersperger, county treasurer, for judgment for delinquent taxes. From an order overruling his objections, Ward Clement appeals. Affirmed.

Edgar B. Tolman and Harvey M. Harper, for appellant. Frank L. Shepard and Charles J. Jones, Asst. Co. Attys. (Robert S. Iles, Co. Atty., of counsel), for appellee.

WILKIN, J. This was an application, made at the July term, 1898, of the court below, of the county treasurer for judgment for delinquent general taxes assessed for the year 1897 against certain real estate owned by appellant in South Chicago. Appellant appeared, and filed objections to the rendition of judgment; alleging, among other objections not here urged, that his property was fraudulently assessed too high, and that his assessment was unjust, not being uniform with that levied upon similar property in the county. The court overruled the objections upon the hearing, and ordered sale of the premises, from which judgment appellant prosecutes this appeal.

The charge of injustice and lack of uniformity with other assessments in the county need not be further noticed than to say section 86 of the revenue law affords a party so aggrieved the only remedy for the correction of an unjust or excessive valuation of his property for the purposes of taxation, unless it is shown to have been fraudulently made. We have repeatedly held that the courts have no power to revise an assessment merely because of a difference of opinion as to the reasonableness of the valuation placed upon the property.

On an application for judgment against lands for delinquent taxes, it may be objected that the tax is not authorized by law, or is assessed upon property not subject to taxation, or that the property has been fraudulently assessed at too high a rate. *Keokuk & Hamilton Bridge Co. v. People*, 161 Ill. 132, 43 N. E. 691, and cases there cited. The com-

plaint made of the assessment here does not fall within either of the first two grounds, but the effort is to bring the case within the third. The only evidence of fraud appearing in the record is the testimony of one Wallace De Wolf, an agent for the trustee of appellant, who says, in substance, the assessment upon the property in question would not have been so high if he (the witness) had been willing to bribe the assessor, and that he "understood" that the assessor assessed similar property at 10 per cent. of its fair cash value, and upon that basis this property should not have been assessed at more than \$8,000, instead of \$12,000, to which sum the assessment had been reduced by the county board from the assessor's return of \$13,200. One other witness testified to the same effect. The county court held this evidence insufficient to sustain the charge of fraud on the part of the assessor. In this there was no error. The witnesses testified to no facts sufficient to establish fraud, but stated, rather, their own inferences or conclusions. The judgment and order of sale by the county court will be affirmed. Judgment affirmed.

(177 Ill. 106)

CITY OF CARLINVILLE v. CASTLE.

(Supreme Court of Illinois. Dec. 21, 1898.)

DEDICATION OF ALLEY—EVIDENCE—ADVERSE POSSESSION.

1. A grantor conveyed land, describing it as "commencing at the southeast corner thereof; thence running north 39 feet to a public alley; thence west * * * thence south 39 feet; thence east to beginning." The full width of the lot was 55 feet, and at that time there was no such alley. *Held*, that the deed was not a dedication of the 16 feet as an alley; there being neither an expressed intention to dedicate, nor a sufficient description of an alley.

2. Where land dedicated as an alley has been occupied and held adversely to a city for nearly 40 years, the abandonment or nonuser on the part of the city will bar a recovery of possession.

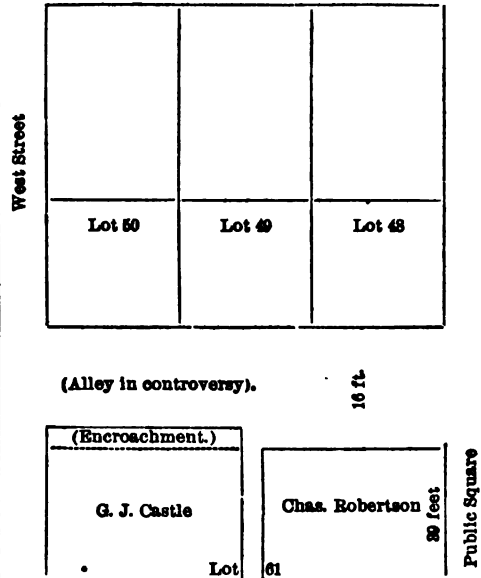
Error to circuit court, Macoupin county; Robert B. Shirley, Judge.

Action by city of Carlinville against George J. Castle. From a judgment for defendant, plaintiff brings error. Affirmed.

Edward T. Frey, City Atty., and Bell & Burton, for plaintiff in error. Rinaker & Rinaker, for defendant in error.

CRAIG, J. This was an action of ejectment brought by the city of Carlinville against George J. Castle to recover a portion of lot 61 of the original town (now city) of Carlinville. The premises sought to be recovered are alleged to be a portion of a public alley. The original plat of Carlinville was filed for record August 27, 1829. Lot 61 is situated on the west side of the public square, fronting on the square 55 feet, and extending west 198 feet to West street. A copy of the original plat, and also a plat showing location of building, and relative lines of lots, etc., ap-

pear in the record, but were not copied into the abstract. The following diagram will, however, be sufficient for the consideration of the questions involved in this cause:



No alley along the north part of lot 61 appears upon the original plat. It is contended by the plaintiff in error "that subsequent to the recording of the plat a strip of ground, of the uniform width of 16 feet, off of the north end of lot 61, was expressly dedicated as a public alley by the person being then the owner and then in the possession of lot 61; that the land so dedicated was accepted and used by the public as a public alley; that afterwards defendant in error, or some one through whom he claims title, without authority inclosed and erected a building upon a part of the 16-foot alley, being about $2\frac{1}{2}$ feet by $89\frac{1}{2}$ feet off the south side of the west end of said alley." It appears from the record that lot 61 belonged originally to Ezekiel Good; that on or about the 7th day of March, 1833, he conveyed the lot to John R. Lewis; that by a warranty deed dated March 26, 1839, and recorded March 29, 1839, John R. Lewis conveyed in fee simple to Jarrot Dugger all of said lot 61, except the 16 feet for the entire length thereof off of the north side, and described the land as follows: "Commencing at the southeast corner of said lot 61; thence running north 39 feet to a public alley; thence west to First West street; thence south 39 feet; thence east to the place of beginning;" that by warranty deed dated February 22, 1849, recorded February 23, 1849, Jarrot Dugger conveyed in fee simple to Joseph C. Dugger the said 39 feet off of the south side of lot 61, and described the property in the same language above quoted, used in the deed from Lewis to Dugger. These two deeds (one made in 1839, and the other in 1849), plaintiff in error contends, constituted a dedication of 16 feet off the north side of

lot 61 to the public for an alley. In *Village of Winnetka v. Prouty*, 107 Ill. 223, it was held that to make a good dedication, either under the statute or at common law, there should be a definite and certain description of that which is proposed to be dedicated, and an acceptance by the public before the withdrawal or abandonment of the offer to dedicate. In *Grube v. Nichols*, 36 Ill. 96, it was held essential, to make a sufficient dedication, that the owner of the soil must devote the right of way to public use, and it must be accepted and appropriated by the public to that use by travel, and a recognition as a public highway by the proper authorities by repairs or otherwise. But, when a dedication is relied upon to establish the right, the acts of both the donor and of the public authorities should be unequivocal and satisfactory of the design to dedicate, on the one part, and to accept and appropriate to public use, on the other. It is not claimed that there is here any statutory dedication, but a common-law dedication is relied upon. It must be observed that Lewis, by his deed of March 26, 1839, did not undertake to grant or convey to the public any part of lot 61. The deed merely conveys the south 39 feet of lot 61 to Dugger. The conveyance of the 39 feet, so far as can be determined from the language of the deed, was the sole purpose and object in view in executing the deed. However, in describing the land in the deed he uses this language: Commencing at the "southeast corner of said lot 61; thence running north 39 feet to a public alley; thence west to First West street; thence south 39 feet; thence east to the place of beginning." At the time this deed was made there was no alley 39 feet north of the southeast corner of lot 61,—no alley had been established there by plat or otherwise; but it is said the clause in the deed was a dedication of an alley 16 feet wide, lying north of the 39 feet conveyed by the deed. There is, however, nothing found in the deed providing for an alley 16 feet wide. Upon what ground, therefore, can it be said the grantor in the deed intended to dedicate 16 feet of land for an alley? We held in the *Winnetka Case*, supra, that it was necessary, in order to make a good dedication, that there should be a definite description of the property to be dedicated. Here no description whatever was given. Whether the alley should be 1 foot, 5 feet, or 10 feet, does not appear from anything found in the deed or elsewhere; nor is there anything to show how far west the alley should run. Whether it should extend the entire length of the lot, or only halfway along the length of the lot, does not appear. If Lewis, the owner of lot 61, had intended to dedicate 16 feet off the north side of the lot to the public for an alley when he conveyed the south 39 feet

to Dugger, his intention might have been declared in a very few words; and, in the absence of language manifesting an intention to dedicate, it cannot be held that the property in question was dedicated. What has been said in regard to the deed made by Lewis applies to the deed made in 1849 by Jarrot Dugger to Joseph O. Dugger, as the two are in all respects alike, in so far as the dedication of an alley is involved.

But, if it was conceded that the deed constituted a dedication, and that the public had used and traveled over the 16 feet, except the strip of land in controversy, for many years, still the abandonment or nonuser of the land in question in behalf of the city of Carlinville was sufficient to bar a recovery. It appears from the evidence that as early as 1856 the defendant took possession of the strip of land in question, and has occupied it ever since. Thus, for a period of 40 years the land has been held and occupied adversely to the city of Carlinville, and during all that time no effort whatever has been made by the city to regain the possession or assert any right to the property. In *City of Peoria v. Johnston*, 56 Ill. 45, it was held that where ground upon which a highway was laid out, or which was dedicated for that purpose, has been in the open and exclusive adverse possession of the owner of the land for 20 years, and a complete nonuser of the easement by the public during that time, an extinguishment will be presumed. The same doctrine was declared in *Chicago, R. I. & P. R. Co. v. City of Joliet*, 79 Ill. 25, and *Village of Winnetka v. Prouty*, 107 Ill. 218. *Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212, is also a case in point. There, as here, an action of ejectment was brought by the village to recover possession of certain alleys in a certain block in the incorporated village. Among other defenses, abandonment or nonuser was relied upon to defeat a recovery; and the court held, as the alleys had been fenced up for 20 years, and no effort had been made by the village authorities to remove the obstruction, no recovery could be had. *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 191, is also a case in point. There, in an action on behalf of the city to obtain the possession of an alley, it was held that, while the statute of limitations does not run in favor of an individual against a municipality holding streets and alleys for the general public under acceptance of a dedication, yet abandonment and nonuser may be set up in bar of a recovery.

Under the law as laid down in the cases cited, the city of Carlinville could not recover. Under the facts as they appear in the record, we are satisfied that the court decided the case correctly, and the judgment will be affirmed. Judgment affirmed.

(173 Mass. 348)

O'BRIEN et al. v. CITY OF WORCESTER.(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 6, 1899.)**MUNICIPAL CORPORATIONS—SEWERS—NEGLIGENCE
—QUESTIONS FOR JURY—DAMAGES.**

1. A city discontinued an old sewer, and built a new one. It was not required to connect the premises of plaintiffs with the new sewer. Some time after the new sewer was constructed, the city walled up the old sewer without notice to, or knowledge of, plaintiffs, which caused the sewage to back into the cellar of plaintiffs. *Held*, that the city was liable, in the absence of plaintiffs' contributory negligence, unless it took reasonable precautions to avoid injury to plaintiffs.

2. If the plaintiffs knew, or by the exercise of reasonable care ought to have known, that a new sewer was being built, and that the old sewer was walled up, and negligently omitted to connect their premises with the new sewer, or failed to take such measures of prevention as ordinary prudence would have required, they cannot recover for any damages to which such negligence contributed.

3. Such questions were for the jury.

4. The damages which a lot owner is entitled to recover, if any, from a city for its act in walling up an old sewer, and thereby causing the sewage to back into his cellar, are for the injury to his real estate, including loss of rents and reasonable compensation for his trouble and expense in respect to his property, except as to the extent to which, by reasonable care, he could have guarded against such injury.

5. The lot owner cannot recover the expense of connecting his premises with the new sewer, where it was not the duty of the city to make such connection.

6. In a joint action by the owners of a lot to recover for the acts of a city in walling up a sewer, plaintiffs cannot recover for injuries to their health.

Exceptions from superior court, Worcester county; Francis A. Gaskill, Judge.

Action by Margaret O'Brien and others against the city of Worcester to recover for injuries to plaintiffs' property and health. There was a judgment rendered on a verdict for \$100, and plaintiffs except. Exceptions sustained.

Wood & Wood, for plaintiffs. A. P. Rugg, City Sol., for defendant.

MORTON, J. The defendant was under no legal obligation to the plaintiffs to build or maintain a sewer in Bradley street. It had a right to discontinue the old sewer, and to build a new one, and it was not required to connect the premises of the plaintiffs with the new sewer. Under the regulations of the board of health, which are said in the defendant's exceptions to have been duly adopted in accordance with authority conferred on the defendant by law, it belonged to the plaintiffs to do that. But in discontinuing the old sewer the defendant was bound to proceed with due regard to the fact that the premises of the plaintiffs were connected with and drained into it; and, if it failed to do so, it was liable to the plaintiffs for the damages resulting to them therefrom, unless there was contributory negligence on their part. It is well settled in this commonwealth that towns

and cities are liable for damages caused by their negligence, or that of their servants or agents, in constructing or maintaining sewers, though not for any damages resulting from any defect in the plan or system on which the sewers are built. *Child v. City of Boston*, 4 Allen, 41; *Emery v. City of Lowell*, 104 Mass. 13; *Merrifield v. City of Worcester*, 110 Mass. 221; *Bates v. Inhabitants of Westborough*, 151 Mass. 174, 23 N. E. 1070; *Allen v. City of Boston*, 159 Mass. 324, 34 N. E. 519. There was testimony tending to show that "some time after the new sewer was constructed the city walled up the old sewer without the knowledge of the plaintiffs, and without notice to them," and that the effect of this was to cause the water and sewage to set back into the cellar of the plaintiffs, and lead to the damages and injuries complained of. The city had no right to do this without taking reasonable precautions to see that the plaintiffs were not injured thereby. The city contends that the plaintiffs knew, or ought to have known, that a new sewer was being constructed, and that they were negligent in not connecting their premises with it. These were questions of fact for the jury. If the plaintiffs knew, or by the exercise of reasonable care ought to have known, that a new sewer was being built, and that the old sewer was walled up, and negligently omitted to connect their premises with the new sewer, or failed to take such measures of prevention and precaution as ordinary prudence would have required, they cannot recover for any damages to which such negligence contributed. The defendant further contends that the sewer was walled up by its employees without its authority. But each bill of exceptions states that the sewer was walled up by the city. The defendant also insists that the plaintiffs violated the rules of the board of health in not entering the new sewer, and for that reason cannot recover. But no rule of the board of health required them, so far as appears, to enter the new sewer. When the old sewer was constructed, the predecessors in title of the plaintiffs entered it, and the premises continued to be connected with it till the plaintiffs discovered, as they claimed, that it had been walled up, and a new sewer had been built, when they entered the new sewer.

The remaining questions relate to damages. The court ruled that the action could be maintained, but ruled also, in effect, that the plaintiffs could only recover as damages the reasonable expense of connecting their estate with the new sewer, which was agreed to be \$100, and a verdict for the plaintiffs was rendered for that amount. We think that this was error. If the plaintiffs were entitled to recover at all, they were entitled to recover all the damages to their estate that were the natural and proximate results of the act complained of, and such as reasonably might be supposed to have been within the contemplation of the parties, if at the time of the doing

of the act they had taken thought of the consequences likely to ensue. *Swift River Co. v. Fitchburg R. Co.*, 169 Mass. 326, 47 N. E. 1015. Applying the rule thus laid down, we think that the plaintiffs were entitled to recover for injury to the real estate, including loss of rents and reasonable compensation for their trouble and expense in respect to their property, unless and except to the extent to which, by reasonable care and precaution, they could have guarded against such injury. See *French v. Lumber Co.*, 145 Mass. 261, 14 N. E. 113. We do not think that the plaintiffs were entitled to recover the expense of connecting their premises with the new sewer. As already observed, it belonged to the plaintiffs to make the connection. We do not see how the fact, if it was a fact, that the defendant, as against the plaintiffs, may have walled up the old sewer wrongfully, relieved the plaintiffs from the expense of entering the new sewer, and cast it upon the defendant. This is a joint action by the plaintiffs, as owners of the real estate, and we do not see how they can recover in this action for injuries to their health. The result is that in each case the exceptions must be sustained, and it is so ordered. Exceptions sustained.

(172 Mass. 398)

JOHNSON v. KIMBALL (two cases).

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 6, 1899.)

**FINDING OF AUDITOR—CONTRACT—RATIFICATION—
DECEASED PERSON—FUNERAL EXPENSES
—BURDEN OF PROOF—GIFTS.**

1. An auditor's report is not binding on the court, who may find according to his own belief on all the evidence.

2. To recover for payments or services to one since deceased, where the evidence justifies the inference that they might have been gratuities, the latter's consent or ratification must be shown.

3. To recover against the estate of a decedent for funeral expenses of his wife or for her care and nursing, it must be shown that they were incurred on the credit of the decedent, or with the intent to collect them from his estate, or that he promised to pay them.

4. In a suit against an estate for payments or services to the decedent, the burden is on plaintiff to show that they were furnished as a consideration for a legal obligation.

Exceptions from superior court, Essex county; Daniel W. Bond, Judge.

Actions by William S. Johnson and by Annie Johnson against William A. Kimball, administrator of the estate of James Johnson, deceased. The cases were submitted together, and there was a judgment for defendant, and plaintiffs except. Exceptions overruled.

Francis H. Pearl, for plaintiffs. W. S. Peters and H. J. Cole, for defendant.

HOLMES, J. The first of these actions is brought by a son against the administrator of his father's estate to recover sums of aid for taxes and repairs upon his

father's house and for the funeral expenses of the plaintiff's mother. The second action is brought by the wife of the plaintiff in the first suit, to recover for services rendered to her husband's mother. At the trial, which was without a jury, the plaintiffs relied upon reports of an auditor; but a considerable amount of evidence going to the merits of the case was introduced, of which it is enough to say that it warranted a finding for the defendant. The judge was not bound by the auditor's report, but has a right to find according to his own belief upon all the evidence. *Peaslee v. Ross*, 143 Mass. 275, 9 N. E. 657.

2. The plaintiffs asked for rulings that they were entitled to judgment. These are disposed of by what we have said. In the first case the judge ruled, in effect, that to recover for payments or services in the intestate's life, his consent or ratification, or some arrangement with him, must be shown; and that, to recover for the funeral expenses of the intestate's wife, it must be shown that they were incurred upon the credit of the intestate, or with the intent to collect them from him or his estate, or that the intestate promised to pay the plaintiff. The judge added that he was not satisfied, on the evidence, that any of the facts required by the rulings existed. In the second case the judge ruled, in effect, that the services sued for must be shown to have been rendered on the credit of the intestate, or with intent to collect for them from him or his estate, or that he promised to pay for them; adding, as before, that, on the evidence, he was not satisfied of the facts required by the rulings.

These rulings and findings seem to have been submitted to counsel in the handwriting of the judge, as they are in quotation marks. Then there follows in each case a statement, not in quotation marks and presumably first reduced to writing when the bill of exceptions was drawn, that the court also ruled that, as matter of law upon the whole evidence, the plaintiff could not recover. We think it only reasonable to read this last broad statement as made subject to what had gone before, and as meaning that the court ruled upon the evidence and the specific findings previously set forth. If we read the general ruling in this sense, the only question necessary to consider is whether the previous rulings were correct. We see no trouble with them, as applied to the aspects presented by the evidence. They require the plaintiffs to establish some ground of legal obligation. It was possible, and on the evidence even may be called probable, that the plaintiffs did what they did without thought of reward, as acts of kindness or of remote advantage to themselves; at all events, as pure gratuities. They lawfully might have done so, and, if they did, they had no case, because an executed gift is neither consideration for an express contract nor a ground for implying one as a fiction of law. This is the chief meaning

and emphasis of the rulings. They were not intended to exhaust all possible cases of legal obligation, irrespective of the evidence, nor were they intended to state any presumption of fact such as that upon which the court was divided in *Guild v. Guild*, 15 Pick. 129. See *Kirchgassner v. Rodick*, 170 Mass. 543, 546, 49 N. E. 1015; *Williams v. Williams*, 132 Mass. 304, 307; and as to presumptions, *Leighton v. Morrill*, 159 Mass. 271, 278, 34 N. E. 256. If the rulings do by implication lay the "burden of proof," according to the settled understanding of that phrase in Massachusetts, upon the plaintiffs, they are right; because, whatever the presumptions, the burden must be upon the plaintiffs to prove that what they seek to recover for was furnished as a consideration for a legal obligation. *Phipps v. Mahon*, 141 Mass. 471, 5 N. E. 835; *Starratt v. Mullen*, 148 Mass. 570, 20 N. E. 178; *City of New Bedford v. Inhabitants of Hingham*, 117 Mass. 445; *Delano v. Bartlett*, 6 Cush. 364, 366. There is nothing in the decision, nor, as we understand it, in the language, of *Burien v. Shannon*, 14 Gray, 433, 434, contrary to what we now decide.

It is suggested that, even if the plaintiffs intended their services to be gratuitous, they could not achieve their intent without the consent of the intestate, and that they did not get his assent, as he had disappeared. As to the services in looking after his place, it might perhaps be found that he assented in advance. The services to his wife, and burying her, were not necessarily done as services to him. But, further, while it is true that you cannot pass a title to another without his consent, it is not true that, if you choose to do services to his advantage which you mean to be gratuitous and which he knows nothing about, the law forces a complete or inchoate contract upon you without the consent of either party, even in a case where he is relieved of a duty and you have the power to bind him if you choose. There is no title to pass. The work is done, and the benefit of the work has accrued. If the work is done without intent to be paid for it, the law leaves the parties where they are, and does not give it the character of a compulsory consideration, in case you afterwards change your mind.

Exceptions overruled.

(172 Mass. 363)

TAFT v. QUINSIGAMOND NAT. BANK.

(Supreme Judicial Court of Massachusetts.

Worcester. Jan. 6, 1899.)

BANKS—DEPOSIT OF CHECKS — SALE OR FOR COLLECTION.

In the absence of a usage, custom, or agreement of any kind, a deposit of an indorsed check in a bank, for which it gives credit to the depositor as cash in a drawing account, is consistent with a finding of an absolute sale of the paper to the bank, especially where the checks of the depositor were honored by the

bank at times several weeks subsequent to the date when the bank knew the check was lost in being forwarded to the drawee for collection, when the depositor's account would not have been enough to meet the checks if the amount of the missing check had been charged back, and where his pass book was afterwards written up without charging back the amount of said check.

Exceptions from superior court, Worcester county; Francis A. Gaskill, Judge.

Action by George S. Taft against the Quinsigamond National Bank. There was a judgment for plaintiff, and defendant excepta. Exceptions overruled.

Geo. S. Taft, in pro. per. F. P. Goulding and W. C. Mellish, for defendant.

BARKER, J. The action is said by the bill of exceptions to be a suit to recover the amount of a check deposited by the plaintiff in the defendant bank, and credited to him upon deposit, and afterwards charged back by the bank. The declaration has two counts,—one for refusal to pay the plaintiff's check drawn upon the defendant, and the other upon an account in which the defendant is debited with the amounts of the plaintiff's deposits, and with the protest fees on his dishonored check, and is credited with the amount of his checks paid by the defendant; the balance being the amount for which, with interest, the court below found for the plaintiff. Whether the bank was indebted to the plaintiff, and bound to honor his check, depended upon the dealings with reference to the check which he deposited on August 2, 1897, and the amount of which was charged back upon the writing up of his pass book, on November 19, 1897.

The defendant contends that the finding that it became at any time a purchaser of the deposited check was unwarranted. But the purchase of negotiable paper by a bank is as clearly within its legitimate powers as is the collection of such paper by the bank as an agent. The deposit of money by a customer to his credit in a drawing account, without more, creates between the bank and the customer the relation "of debtor and creditor, not of agent and principal." *Carr v. Bank*, 107 Mass. 45. So, when, without more, a bank receives upon deposit a check indorsed without restriction, and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with, and indicates, a sale, in which, as with money so deposited, the check becomes the absolute property of the banker. The matter may be regulated by statute, as in the state of New York, or there may be general usages of business obtaining in the locality which color the transaction. So, a bank, by general notices printed on its pass books or deposit slips, or otherwise brought to the knowledge of its depositor, or by agreement with the particular depositor as to his own deposits, or by crediting negotiable paper as paper, and not as cash, or by a particular

contract in any special instance, may define its position as that of agent or purchaser. Usually the cases in which a bank is held to have been only an agent for collection have, as a controlling element, evidence of usage or notice or particular agreement. In the present case there was no evidence of usage or custom, nor was it shown that the defendant informed its customers by notices upon its pass books or deposit slips, or otherwise, that it accepted deposits of commercial paper only as an agent for collection. Nor was it shown either that such was its general arrangement with the plaintiff, or that he understood that it was the arrangement ordinarily made by the defendant with its depositors.

The conversation between the plaintiff and the teller at the time when the deposit was made is consistent with the theory that the bank took the check as an absolute purchaser, relying for reimbursement upon the plaintiff's liability as indorser if the check should not be paid, or the theory that the bank took the check as a conditional purchaser, with the option of retransferring its ownership to the plaintiff upon ascertaining, within a reasonable time, that the check was not honored upon presentment to the drawee, as well as with the defendant's theory that it took the check as an agent for collection. It is not disputed that no information was given by the bank to the plaintiff that there was difficulty in collecting the check until September 8, 1897. From that time, until the amount of the check was charged back to the plaintiff in the writing up of his pass book on November 19, 1897, there were frequent interviews and communications, none of which are decisive in favor of either party, between the plaintiff and the defendant's officers, with reference to the check. It seems that, upon the receipt of the check, the defendant sent it to its Boston correspondent, who, having no correspondent near Edgmont, S. D., where the bank on which the check was drawn was located, mailed the check in a letter directed to that bank, and that the drawee has never admitted receiving the letter. Between September 8th and November 19th the plaintiff knew of the defendant's efforts to find the check, and to induce the maker to pay the check or to give a duplicate of it. In this interval the plaintiff's checks were honored by the defendant at times when his account would not have been enough to meet them if the amount of the missing check had been charged back, and on October 23d his pass book was written up by the bank without charging back this amount. In due course of mail, the defendant's Boston correspondent should have received on August 21st, at the latest, an answer to its letter inclosing the check to the drawee. It cannot be said that these circum-

stances show conclusively that the bank took the deposited check as an agent for collection, and the finding that it became a purchaser must stand. This finding makes all questions as to the negligence of the defendant or of its correspondent immaterial. The defendant, having no right to charge back the amount of the deposited check, was a debtor to the plaintiff for money which the latter could recover upon demand, and the refusal to rule that the plaintiff's damages were merely nominal was right. See *Winslow v. Bank*, 171 Mass. 534, 51 N. E. 16. Exceptions overruled.

(173 Mass. 329)

TWICHELL v. McNABB.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 5, 1899.)

LANDLORD AND TENANT — TERMINATION OF TENANCY — EVIDENCE.

In an action on a lease with the wife of property which before the husband had leased, the termination of the husband's tenancy need not be proved.

Exceptions from superior court, Worcester county; John Hopkins, Judge.

Action for rent by Seth Twichell against Mary McNabb. There was a judgment for plaintiff, and defendant excepts. Exceptions overruled.

Prior to September, 1893, John McNabb hired a tenement of plaintiff, Seth Twichell, by a verbal contract, at \$10 per month, and with his wife, Mary McNabb, and their children, entered into and occupied it. In September, 1893, Twichell went to the tenement, and told defendant, Mary McNabb, that the rent was in arrears, and that they must move out; whereupon she said she would hire the house herself, and take it from that date, to which plaintiff agreed.

C. F. Baker and W. P. Hall, for plaintiff.
J. H. McMahon, for defendant.

LATHROP, J. The only exception in this case is to the refusal of the judge to rule that the tenancy created by the agreement between the plaintiff and John McNabb must terminate and cease, either by an eviction or by his vacating the premises, and that, if he was not evicted and did not vacate, he was in possession, and the plaintiff could not recover. The same defense, that there must be a termination of the tenancy of the husband before there could arise a tenancy of the wife, was made without success in *Rogers v. Coy*, 164 Mass. 391, 41 N. E. 652. As was said in that case: "The action, however, does not depend on privity of estate, but on contract, express or implied, between the landlord and tenant, and occupation, actual or constructive, by the latter." Exceptions overruled.

(172 Mass. 311)

COMMONWEALTH v. INTOXICATING LIQUORS.(Supreme Judicial Court of Massachusetts.
Plymouth. Jan. 5, 1899.)**INTOXICATING LIQUORS—REGULATIONS OF TRANSPORTATION — POLICE POWERS — FORFEITURE — STATUTES REGULATING PROCEDURE — CONSTITUTIONALITY—CONSTRUCTION.**

1. St. 1897, c. 271, requiring, under penalty of forfeiture, all intoxicating liquors transported for delivery in towns where certain licenses have not been granted to be transported by regular carriers, in packages plainly marked with the kind and amount of liquor and the name and address of the consignor and consignee, and requiring the carrier to keep a record of all liquors transported, is a proper exercise of the state's police powers.

2. The forfeiture of the liquor for a violation of said act is not an excessive or unusual punishment.

3. St. 1897, c. 271, regulates the transportation of liquors into towns where certain licenses have not been granted, and provides for a forfeiture of all liquors transported in violation thereof. Pub. St. c. 100, prescribes the procedure for forfeiting liquors held for sale contrary to law, requiring the proceedings to be instituted by affidavit stating that deponents believe, or have reason to believe, that liquor is kept for sale contrary to law, and a judgment of forfeiture, if it appear that such liquor be kept for unlawful sale. St. 1897, c. 487, provides that prosecutions for violation of chapter 271 shall be governed by Pub. St. c. 100. *Held*, that chapter 487 is not unconstitutional, it meaning that the proceedings provided by Pub. St. c. 100, are applicable, with proper modification of the oath and adjudication.

Exceptions from superior court, Plymouth county; Hopkins, Judge.

Proceeding by the commonwealth under St. 1897, c. 271, and amendatory acts, for the seizure and forfeiture of certain intoxicating liquors. It was contended by the claimant that the law which regulates the transportation of intoxicating liquors into no-license towns and cities was unconstitutional. The jury found that the liquors were forfeited, and claimant excepted. Overruled.

R. W. Nutter, for claimant. R. O. Harris, Dist. Atty., for the Commonwealth.

HAMMOND, J. Subject to the power of congress over foreign and interstate commerce, the right of a state to regulate, by reasonable laws, the manufacture, sale, or transportation of spirituous or intoxicating liquors within its own territorial limits, is established by numerous decisions, both of state and national courts. Such a law is not inconsistent either with the constitution of our state or that of the United States. It comes well within the authority called the "police power," subject to which, in various ways, all private property is held, and it is unnecessary to restate here the principles upon which it rests. *Com. v. Blackington*, 24 Pick. 352; *Com. v. Williams*, 6 Gray, 1; *Com. v. Kendall*, 12 Cush. 414; *Com. v. Clapp*, 5 Gray, 97; *Com. v. Bennett*, 108 Mass. 27; *Com. v. Ducey*, 126 Mass. 269; *Com. v. Intoxicating Liquors*, 115 Mass. 153; *Beer Co.*

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v. Massachusetts, 97 U. S. 25; *License Cases*, 5 How. 504; *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681; *Carstairs v. O'Donnell*, 154 Mass. 357, 28 N. E. 271; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, and cases therein cited.

And we do not see that St. 1897, c. 271, goes beyond the fair and reasonable exercise of that right. The first section provides that "all spirituous or intoxicating liquors to be transported for delivery to or in a city or town where licenses of the first five classes have not been granted, when to be transported for hire or reward, shall be delivered by the seller or consignor to a railroad corporation or to a person or corporation regularly and lawfully conducting a general express business, in vessels or packages plainly and legibly marked on the outside with the name and address by street and number, if there be such of the seller or consignor and of the purchaser or consignee, and with the kind and amount of liquor therein contained." It then provides that delivery of any part of such liquors "to any person other than the owner or consignee whose name is marked by the seller or consignor on said vessels or packages, or at any other place than thereon marked, shall be deemed to be a sale by any person making such delivery to such person in the place where such delivery is made." Section 2 provides that the carrier shall keep a certain detailed record of the reception and delivery of such liquors. Section 3 provides that all packages containing intoxicating liquors addressed contrary to the provisions of this act, or to a fictitious or unknown person, or to a person who cannot be found, shall be declared forfeited to the commonwealth. The act was manifestly intended to meet some difficulties which had been encountered by the government in the prosecution of common carriers for illegal keeping of intoxicating liquors, and to make it more difficult for the gully to escape detection when setting up the fraudulent defense that the liquors found in the possession of the carrier were for delivery by him as such to some person. It is only one of the many statutes which indicate that the policy of the commonwealth is to require that the traffic in liquors in this state shall be open, so that every step shall be exposed to the scrutiny of the authorities, and that the violation of the law may be the more easily detected. Examples of this policy are to be found in the third section of chapter 100 of the Public Statutes, requiring a druggist to keep a record of his sales, which record shall be at all times open to the inspection of certain public officers; in the ninth section, which provides that the license shall be displayed upon the premises in a conspicuous position; in the twelfth section, which provides that "no * * * licensee shall place or maintain, or permit to be placed or maintained, upon any premises used by him for the sale of spirituous or intoxicating liquor under the provisions of his license, any screen, blind,

shutter, curtain, partition, or painted, ground, or stained glass window, or any other obstruction, or shall expose in any window upon said premises any bottle, cask, or other vessel containing, or purporting to contain, intoxicating liquor, in such a way as to interfere with a view of the business conducted upon the premises"; and in the fifteenth section, which provides that certain public officers may enter upon the licensed premises to see how the business is conducted, and may take samples of the liquor for examination and analysis. Nor is there any ground for saying that the forfeiture is to be regarded as in the nature of an excessive or unusual punishment. The first seven requests, therefore, were rightly refused.

The eighth request concerns more particularly the judicial proceedings for enforcing the forfeiture. The statute named no way of enforcing such forfeiture, and so the only way was through the provisions of Pub. St. c. 104, the proceedings under which are carried on upon the civil side of the court. In this state of the law, St. 1897, c. 487, was passed, the second section of which is as follows: "The provisions of chapter one hundred of the Public Statutes relating to the seizure and forfeiture of intoxicating liquors shall apply to the provisions of chapter two hundred and seventy-one of the Acts of the Year Eighteen Hundred and Ninety-Seven." These provisions are to be found in Pub. St. c. 100, §§ 30-46, both inclusive. They were framed with great care, and contained specific and complete directions for the seizure and forfeiture of liquor illegally kept for sale. They are frequently invoked for that purpose, and we do not understand that their constitutionality as now existing is contested by the defendant. The legislature desired to have the process for perfecting the forfeitures, under St. 1897, c. 271, carried on upon the criminal side of the court, and they had already upon the statute book a complete, long-established, and constitutional system provided for similar cases, and so the second section of St. 1897, c. 487, was passed. It is contended by the defendant in his brief that these provisions of Pub. St. c. 100, "do not fit the case, and are wholly inadequate to meet the constitutional requirements. An honest effort to apply them wholly fails. They are framed to provide for the destruction of liquors intended for sale contrary to law. This is the gist of the offense. Such intent has to be sworn to before process will issue, and it must be alleged in both the complaint and the warrant." And also that "they prescribe a course of proceeding which meets all the exacting constitutional requirements, where keeping with intent to sell is the ground for the forfeiture. But they are not at all adapted or suitable for chapter 271, where no intent to sell need be shown, and where the grounds for the forfeiture are very different." An examination of these sections of Pub. St. c. 100, shows that (section 30), to procure a

search warrant, the oath or affirmation must be that the deponents have reason to believe, and do believe, that liquor is kept in a certain place, "and is intended for sale contrary to law," or has been brought into a town "in violation of the provisions of section seventeen" of Pub. St. c. 100, and the magistrate or court, "upon its appearing that there is probable cause to believe said complaint to be true, shall issue a warrant of search." The other sections provide for the service of the warrant, notice to parties, and a hearing; and (section 37), "if it appears that the liquor, or any part thereof, was at the time of making the complaint owned or kept by the person alleged therein, for the purpose of being sold in violation of law, the trial justice or court shall render judgment that such and so much of the liquor so seized as was so unlawfully kept, and the vessels in which it is contained, shall be forfeited to the commonwealth."

It appears that the whole foundation of the proceedings, and the cause and ground of forfeiture, is that the liquors are kept "for the purpose of being sold in violation of law." But the cause and ground of forfeiture declared in St. 1897, c. 271, is that the liquors are in the hands of a common carrier for transportation to a town where certain licenses have not been granted, and are intended for delivery contrary to law, and the proceedings to enforce such forfeiture, including the decree of the court declaring it, must be based upon that ground. If, therefore, the second section of St. 1897, c. 487, is to be construed as meaning that in every respect these provisions of Pub. St. c. 100, are to be followed, whether applicable or not, we have an interpretation which is not only unconstitutional, but is nonsensical. As stated in defendant's brief, "an honest attempt" to apply the provisions "wholly fails."

It is to be presumed, however, in the absence of anything to the contrary, that the legislature intended to say only that which it had the constitutional right to say, and no statute will be construed so as to render it unconstitutional if there be any constitutional interpretation reasonably possible. As was stated by Shaw, C. J., in *Com. v. Kimball*, 24 Pick. 366, 370: "It is unquestionably a well-settled rule of construction, applicable as well to penal statutes as to others, that when the words are not precise and clear, such construction will be adopted as shall appear most reasonable, and best suited to accomplish the objects of the statute; and, where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the legislature, to avoid such conclusion." Proceeding under this rule of interpretation, we think that St. 1897 c. 487, § 2, may be taken to mean that, with the proper modification of the oath and adjudication as suggested and required by the ground of forfeiture, under St. 1897, c. 271, the general form of ma-

chinery set out in the provisions of Pub. St. c. 100, for enforcing forfeitures, is applicable and is to be followed. This interpretation provides for the rights of all parties, "is best suited to accomplish the objects of the statute," namely, the judicial declaration of the forfeiture incurred under St. 1807, c. 271, appears most reasonable, violates no rule of construction, and is constitutional. The court properly refused to give the eighth request. Exceptions overruled.

(152 Ind. 680)

HODGES v. STANDARD WHEEL CO.¹

(Supreme Court of Indiana. Dec. 30, 1898.)

MASTER AND SERVANT—VICE PRINCIPAL—FELLOW SERVANT—EMPLOYERS' LIABILITY ACT—CONSTRUCTION.

1. Plaintiff, employed to grade and pile strips for wheel rims and do other common labor in defendant's factory, was directed to remove certain pieces of lumber which had been covered by the piled rims. The direction was given by one H., employed to do work similar to that done by plaintiff, but who was occasionally left in charge of a branch of the work during the temporary absence of defendant's foreman, but who was not otherwise vested with authority. H. undertook to assist plaintiff in removing the timber, but his negligence caused the rims to fall and injure plaintiff. *Held*, that as H. was the fellow servant of plaintiff, and as his negligence was the sole cause of the injury, defendant was not liable.

2. Act 1893, p. 294, § 1, subd. 2, making corporations liable for injuries to employes from the negligence of any person in the service of the corporation to whose order the employe was bound to conform, does not impose any liability for the unauthorized orders of one employed to do work similar to that done by the person injured, and who was occasionally left in charge of a branch of the work during the temporary absence of the foreman thereof, and particularly where the injury resulted, not from the order to do the work, but from such person's subsequent negligence in assisting therewith.

Appeal from circuit court, Hancock county; C. G. Offutt, Judge.

Action for damages for personal injuries by John T. Hodges against Standard Wheel Company. Defendant had judgment, and plaintiff appeals. Affirmed.

R. A. Black, Wymond J. Beckett, and D. W. Howe, for appellant. Miller & Elam, for appellee.

JORDAN, J. Appellant commenced this action in the Marion superior court to recover damages, and, on his motion, the venue was changed to the Hancock circuit court, wherein a trial before a jury resulted in a general verdict awarding him \$5,000, and with this verdict the jury returned answers to certain interrogatories. The court, on motion of appellee, rendered judgment in its favor upon the answers returned to the interrogatories, notwithstanding the general verdict. From this judgment appellant appeals, and the only question presented for our decision is, do the facts found by the

jury in answer to the interrogatories entitle appellee to the judgment rendered in its favor by the lower court, notwithstanding the general verdict?

The action is for personal injuries sustained by appellant while in the employ of appellee, and the legal questions involved are those pertaining to master and servant. The complaint is in two paragraphs, and the following may be said to be, in substance, the facts therein set forth: Appellee is a corporation engaged in the city of Indianapolis in manufacturing buggy and light wagon wheels, and, among others, employed appellant to work in its factory in the labor of assorting wheel rims and in doing other work. It was his duty, under his employment, to take these rims, which consisted of strips of green hickory seven feet long and two inches square, and grade and stack them on their ends, in stalls prepared for that purpose, against the side of the shed or building belonging to the factory. Over the department in which he worked there was a foreman employed by appellee, whom the latter had invested with the authority to direct the workmen therein, where each should work, and what work each should perform, and this foreman had authority to employ, discharge, and keep the time of the employes under him. In one of said stalls there had been piled on their ends some heavy pieces of timber about 4 or 5 feet long, 14 inches wide, and 4 inches thick. On December 24, 1895, it became necessary to move these timbers in order to secure more room in which to pile the hickory rims, and appellant was directed by the foreman to remove these pieces of timber; and, in order to do so, it was necessary for him to go, for a distance of 6 or 8 feet, between two columns of the wheel rims which had been piled in the shed, as heretofore stated. These rims, on the east side of the shed or building, extended out beyond the arms or strips which had been placed there to support them, and aside from these arms there was nothing else to support the rims or prevent them from falling; which fact was known to said foreman, but not known to appellant. While the latter was engaged in removing the timbers in question, the foreman stood at the opening of the stall, and supported the projecting rims until appellant had removed all of the timber except one or two pieces, and it was then alleged that while the latter was bending over, with his back towards the pile of rims, the foreman negligently released and abandoned his said support, and by reason thereof, and without any fault or negligence on the part of the appellant, a large number of the rims fell on appellant's back and injured him as alleged. The second paragraph is substantially the same as the first, except there is an attempt made to base it on the second subdivision of section 1 of an act of the legislature regulating the liability of railroads and other corporations, approved

¹Rehearing denied, 54 N. E. 383.

March 4, 1893 (Acts 1893, p. 294). Neither of these paragraphs was demurred to in the lower court, and, while we do not and need not pass upon their sufficiency to constitute a cause of action, that, at least, may be said to be questionable.

Both paragraphs of the complaint apparently proceed upon the theory that the accident in question was due to the alleged negligence of appellee's foreman in releasing his hold upon the wheel rims, by reason of which they fell upon appellant. The facts material to the question herein involved, as disclosed by the answers returned by the jury to the interrogatories, in substance are as follows: Appellee is a corporation engaged in the business of manufacturing parts of buggy and wagon wheels. Appellant had been in its employ as a common laborer, doing various kinds of work, for about seven years prior to the accident. About 18 months before he was injured he was transferred to the saw room of appellee's factory, and there was engaged in assorting and grading strips for wheel rims, and this, in the main, was the only kind of work which he performed; but, under his employment, he was liable to be assigned to any common labor necessary to be done about the factory. The wheel rims were sawed from green hickory lumber, and were about $1\frac{1}{2}$ by $1\frac{3}{8}$ inches square, and from 6 to 7 feet long; and these rims were ricked in stalls, being kept separate by projecting arms and pieces of timber dividing the space along the building into stalls which were about 4 or 5 feet wide. The pieces of lumber dividing the stalls were 6 feet above the ground, and projected from the wall about 4 feet. The wheel rims were ordinarily removed from the stalls, where the graders placed them, within a few days. Some time before the accident several pieces of pine lumber, about 5 by 6 inches in size and 6 feet long, were placed against the rims which had been previously piled, and, during the day of the accident, these pieces of pine lumber were covered over with other rims. One Bosler was the general manager of appellee's factory, and was usually present, superintending the work. Under Bosler there were some eight foremen in charge of different parts of the work being done in the factory. A Mr. Saulsbury was one of these foremen, and he was in charge of the saw room where appellant worked, and superintended the work in the saw room and in the yard adjoining thereto. Saulsbury had authority to employ and discharge employes under him, and he was usually in the saw room and about the premises in the yard near thereto several times during a day. Generally, about seven men were employed in the saw room; two or three operated the saws, one was engaged in bringing material from the yards to the saws, and two or three were engaged in assorting and grading the rims after they were sawed. One of the seven men working along with appellant in the saw room was named Huey, and he worked as

a grader and assorter of the strips and rims. and, in addition to this work, it was also his duty to file the saws, and he had been so engaged about two months prior to the accident. Huey, in like manner as his associates, received instructions in regard to his work from Saulsbury, the foreman, and he had no authority to either employ or discharge any of the men working with him, and had no authority to permanently transfer employes from one kind of work to another. In the absence, temporarily, of the foreman from the saw room, Huey, under instructions given him by the said foreman, was authorized to give directions in regard to bringing material from the saw room, and to direct the men employed with him in the room in respect to the details of the work being done during the time that Saulsbury, the foreman, was temporarily absent in other parts of the premises, and the foreman had directed the men to receive instructions from Huey in his absence; but no one having any connection with appellee, except Saulsbury, had given Huey any authority. At the time appellant was transferred to work in the saw room, Saulsbury informed him that he would be under the supervision of Huey, and that he should obey the instructions of the latter in matters pertaining to his work in the saw room. On the morning of the accident, Huey told appellant that it would be necessary to remove the pieces of pine lumber in question from where they had been previously placed, as one of the carpenters required their use; and he then directed appellant, who at the time was engaged in assorting strips in the saw room, to go to the north side of said room, and remove the pieces of pine lumber; and, in giving this direction or order, Huey was acting under the authority given him, as before stated, by Saulsbury, the foreman, but the latter was not present when this direction was given by Huey to appellant. The work of moving this pine lumber was not a proper part of the work of the graders or sorters, and Huey ought to have called upon Saulsbury, the foreman, to send other men to do such work. Appellant at first refused to do this work, but Huey threatened to report him to the office unless he did. Huey and appellant then went to work together to remove the pine pieces. Huey partly uncovered these pieces by removing a part of the rims which were on top of them, but did not remove all of them before appellant went into the stall. When appellant went into the stall to remove the pine lumber, Huey told him that he would stand at the mouth of the stall, and hold the slats or rims so as to prevent them from falling, and appellant relied upon what Huey said in this respect. Huey stood at the mouth of the stalls, holding the slats or rims, when appellant entered the stall, and continued to stand there until the latter had removed and deposited in the yard five or more of the pine pieces, and had returned to the stall. After appellant's return to the stall, he took hold of

a piece of pine lumber, and was trying to move it, and, while so doing, Huey, without notifying appellant of his intentions, released his hold upon the rims, and went out of the building into the yard, leaving the rims unsupported, by reason of which they fell upon appellant while he was in the act of removing the piece of pine lumber, and caused the severe injury of which he complains.

Appellant, at the time of the accident, as the jury find, was acting as a reasonably prudent man, but Huey was not so acting. No officer, agent, or employé of the appellee, and no one except Huey, had anything to do with the accident to appellant; and the jury further find that the place where appellant was at work when the accident occurred was not a dangerous one in which to do work, if Huey had continued to hold the rims or slats as he was doing. Under the averments of the complaint, the foreman or agent of appellee therein mentioned, to whom the negligence causing the accident to appellant was imputed, is alleged to have been invested with the powers or duties of a vice principal in the department over which he exercised superintendence. He had, it is alleged in the complaint, authority to employ and discharge the men who were under him as employés of appellee. The facts disclosed by the answers to the interrogatories present a case materially different from the one set forth in the complaint. Huey, to whom the negligence, under the facts disclosed by the interrogatories, is imputed, is expressly shown, by the facts, not to have had any such power which authorized him to employ or discharge any of appellant's employés. If it can be said that he occupied a position higher than that of a fellow servant, it was because the foreman, Saulsbury, would leave him in charge of the work in which he and his associates were engaged when he (the foreman) was temporarily absent in other parts of the premises. Reduced to a simple question, the facts show that Huey was the sole cause of the accident by which appellant was injured; or, in other words, the negligence of appellee, if any, consisted alone in the act of Huey releasing his hold upon the rims, under the circumstances, as he did, at the time appellant was engaged in removing the pieces of pine lumber. Neither the facts alleged in the complaint nor those revealed by the special findings of the jury go to show that the place where appellant was at work, at the time he sustained his injury, was unsafe or dangerous, and the jury expressly find that it was not, except as it may have been rendered dangerous from the fact alone that Huey withdrew the support he was giving to the rick of rims by means of holding his hands against the same. That appellee did not owe to appellant, as its employé, under the circumstances, the legal duty to support the rims in question by the hands of some one of its agents or representatives, in the manner as Huey was doing just previous to the accident, is certainly evi-

dent. If it could be said to be charged with that duty, then every corporation engaged in the same line of business as it was would, in legal contemplation, be required to be present at all times and places at its factory when lumber, timber, or iron or other heavy material of like character was being handled or moved by some of its employés, and by the hands of such agent or representative prevent such iron, timber, or lumber, or other material connected therewith, from slipping and falling upon said employés, and thereby injuring them. Huey, in lending the support which he did to the pile of rims in question, at the time he and appellant were engaged in removing the pine lumber, in no sense can be said to have been a representative of the appellee, intrusted with the duty of seeing that the place where appellant was working at the time of the accident was safe. He and appellant were associated together as employés engaged in the same common service, that of assorting and grading the strips or rims after they were sawed, and he was nothing more or less than one of appellant's fellow servants. Certainly, in the assistance which he lent to appellant while the latter was removing the pine lumber, by supporting the pile of wheel rims with which the lumber was connected, he was acting solely as fellow servant, and not as a representative of appellant's master. If it could be said, upon any view of the case, under the circumstances, that he was of a higher rank than appellant, still it must be true that his act, to which appellant attributes his injuries, was that of a fellow servant; for it is true that even an agent or representative of a high rank may, at the time an act is done, be a fellow servant of an employé who occupies a subordinate position. *Car Co. v. Parker*, 100 Ind. 181; *Taylor v. Railroad Co.*, 121 Ind. 124, 22 N. E. 876.

The facts returned by the jury clearly show that the act or omission of Huey, resulting in the injury to appellant, did not involve a duty which the master owes to his servant. The negligence, if any, is shown to have been that solely of a fellow servant, and the rule of the common law must control, and precludes a recovery. Appellant, therefore, was not entitled to be awarded a judgment upon the general verdict. The following decisions fully support this conclusion: *Drinkout v. Machine Works*, 90 Ind. 423; *Car Co. v. Parker*, supra; *Coke Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Robertson v. Railroad Co.*, 146 Ind. 486, 45 N. E. 855, and cases there cited; *Peirce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485; *Lime Co. v. Chastain*, 9 Ind. App. 453, 36 N. E. 910.

The facts revealed by the answers to the interrogatories, when stripped of conclusions and assumptions, as they must be, clearly show, also, that appellant is not entitled to recover under subdivision 2 of section 1 of the employers' liability act of 1893, supra.

That part of section 1 of the act, necessary to the consideration of the question as here involved, provides as follows: "That every railroad or other corporation, except municipal, operating in this state, shall be liable in damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases: * * *

Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé at the time of the injury was bound to conform, and did conform." Counsel for appellee assails the validity of this act so far as it relates to corporations other than railroads; but under its provisions, as the facts disclose, appellant is not entitled to a recovery, and its constitutional validity may therefore be dismissed without consideration. The facts certainly show that Huey, in the position which he occupied in the service of appellee, was not a person, contemplated by the statute, to whose orders appellant was bound to conform or yield obedience. He was but a fellow servant, engaged in the same common labor with appellant, and in no manner was he the representative of the appellee in giving the orders or directions to appellant which he did. It is shown that he had no more authority to speak or give directions for his master than had appellant. The mere fact that Saulsbury, his foreman, may have temporarily left him in charge of the work in the saw room, did not invest him with the powers of such foreman, nor put him in a position, at the time, to be the representative of appellee, so as to require his associates, engaged with him in the same labor, to conform to his orders. If Saulsbury, the foreman, could in this manner, without any authority, expressed or implied, from appellee, delegate the powers which he possessed to Huey, then the former might select any person in his place or stead to represent his master or principal, and thereby render the latter liable for the acts or orders of such person. This, it is evident under the circumstances, he could not legally do. It is a general rule of the law that the agent or representative of another, in the absence of authority, expressed or implied, from the latter, cannot delegate his powers or confer them upon another. Where the duties which he has been selected to discharge require the exercise of skill, judgment, or discretion, the reasons why he may not delegate his power or authority are obvious. The trust and confidence reposed in him by his principal is personal to him, and, without authority, he is not permitted to transfer it to another, whose ability, judgment, or discretion might not be known to the principal, or, if known, the latter might not select him as his representative or agent. *Story, Ag. (9th Ed.) § 13; Mechem, Ag. §§ 185, 186.* In fact, the jury find that Huey ought to have called upon Saulsbury, the foreman, to send other men to do the

work which appellant was directed to do, and in which he was engaged at the time of the accident. The statute in question certainly intends that, where the injury results from the negligence of a person in the service of a corporation, such person must be one who is, by it at least, expressly or impliedly authorized to give the order or direction, and thereby require the employé to obey. If he is not, then, in a legal sense, the employé is not bound to conform to his order. Huey, as we have seen, is shown by the facts not to have been invested with this power or authority by appellee, and consequently was not the person whom the statute contemplated as the one to whose orders appellant was bound to conform. This interpretation finds support in the general scope of the statute, and, as the act is in derogation of the common law, it must be strictly construed.

But, conceding that Huey was such a person at the time he directed appellant to remove the pine lumber, the negligence in question is shown not to have resulted in any manner from the order which was given to appellant, but resulted wholly by reason of the negligence of Huey in his failure to continue to support the rims by means of his hands. This negligence of Huey's, occurring subsequent to the giving of the order, when he may be said to have been engaged in assisting appellant to remove the pine pieces, is not a negligence for which appellee is liable, within the meaning and intent of the second subdivision of section 1. The following cases, some of them directly and others by analogy, support the construction which we give to the statute: *Railway Co. v. Little*, 149 Ind. 167, 48 N. E. 862; *Dixon v. Telegraph Co.*, 68 Fed. 630; *City Council v. Harris*, 101 Ala. 564, 14 South. 357; *Dantzier v. Iron Co. (Ala.)* 14 South. 10; *Lundberg v. Shevlin-Carpenter Co.*, 68 Minn. 135, 70 N. W. 1078; *O'Connor v. Neal*, 153 Mass. 281, 26 N. E. 857; *Howard v. Bennett*, 58 Law J. Q. B. 129; *Wright v. Wallis*, 3 Times Law Rep. 779; *Kellard v. Rooke*, 57 Law J. Q. B. 599; *Gibbs v. Railway Co.*, 53 Law J. Q. B. 543; *Burns v. Washburn*, 160 Mass. 457, 36 N. E. 199. To place the construction upon the statute which counsel for appellant contend, and thereby hold appellee liable, under the circumstances, for the negligence of Huey, would result in subjecting to liability every corporation in the state for the injury sustained by one of its employés through the negligence of a fellow servant, having no greater power or authority than had the injured employé. Upon any view of the case, the facts found by the jury in their answer to the interrogatories are wholly incompatible with the right of appellant to a judgment on the general verdict, and by a well-settled rule, under the circumstances, the latter must yield to the facts as specially found by the jury, and the trial court did not err in rendering judgment on appellee's motion in its favor. Judgment affirmed.

(152 Ind. 39)

ROWND et al. v. STATE et al.

(Supreme Court of Indiana. Dec. 30, 1898.)

FRAUDULENT CONVEYANCES—SURETIES—APPEAL—
REVIEW—REHEARING.

1. Where one of two sureties secured from his principal notes and a mortgage to both sureties jointly, either knowing that the mortgage was intended to defraud creditors, or participating in such fraudulent intent, the other surety, in accepting the same, takes the mortgage with all the infirmities affecting it in the hands of his co-surety, though he might, by paying the debt for which they were sureties, alone maintain an action against their principal.

2. A rehearing will not be granted in order that either party may file additional briefs, or ask for an oral argument.

3. Requests for time to file additional briefs, and for an oral argument, must be seasonably made.

4. That the clerk of the supreme court may have expressed an opinion as to when a case would be decided, or that the parties were negotiating as to a compromise, is no excuse for a failure to make application for time to file additional briefs, and for an oral argument, before the cause is decided.

Petition for a rehearing. Petition overruled.
For former opinion, see 51 N. E. 914.

PER CURIAM. Appellant Gray alone has filed a petition for a rehearing. The only questions discussed in the brief on petition for rehearing is that the evidence does not sustain the finding of the trial court against Rownd and Gray. It is insisted that appellant Gray, under the evidence, does not "stand in precisely the same condition as Rownd." Rownd and Gray were secured by the same chattel mortgage, executed to them jointly, and the notes secured thereby were payable to them jointly. It is true that Mr. Gray had no knowledge of the execution of the notes and chattel mortgage until after the mortgage was recorded; but, in the acceptance of said mortgage and notes, Rownd acted for both, and was the agent of Gray, and notice and participation in the fraudulent purpose of Rownd was notice and participation by Gray. When Gray accepted the benefit of the mortgage, the result of the meeting and arrangement with Patton, he accepted it charged with all the infirmities affecting it in the hands of Rownd. The fact that the notes secured by the mortgage were executed to Rownd and Gray on account of their liability as the sureties for Patton, which they might not be compelled to pay, or that, if Gray paid the indebtedness for which they were sureties, he alone could maintain an action against Patton, does not change the rule. If the mortgage secured notes payable to Gray alone, the rule would be the same, because, whenever any person accepts the benefits of a contract made by another as his agent, he is charged with every infirmity that would affect the contract against the agent if the agent had been acting and contracting for himself and in his own name.

It is also insisted that there can be no possible ground for holding that the evidence

discloses any fraudulent purpose and conduct on the part of appellant Gray that in any way distinguishes his security from that of the Muncie National Bank, which the trial court held good. The mortgage executed to the Muncie National Bank is not called in question by any assignment of error in this court, nor is that question before us for decision. It is not proper, therefore, for us to determine whether or not the trial court erred in finding in favor of said bank. The admission by appellant that the finding in favor of the bank was correct does not authorize or require this court to adjudge that therefore the finding against said appellant was erroneous.

Other matters are set up in the petition for a rehearing, but they are not discussed in the brief. It may be suggested, however, that a rehearing will not be granted in order that either an appellant or appellee may file additional briefs, or to enable any party to ask for an oral argument. Requests for time to file additional briefs, and for an oral argument, must be seasonably made; and, if so made, the court will grant or refuse such requests as the facts in each case may seem to require. The fact that the clerk of this court may have expressed an opinion as to when a case would or would not be decided, or that the parties were negotiating as to a compromise of the cause, is no excuse for a failure to make such applications before the decision of the cause.

After a careful review of the evidence, we are satisfied that the rule that this court cannot reverse a cause upon the weight of the evidence is clearly applicable to this case. The petition is therefore overruled.

(152 Ind. 55)

FRAIN et al. v. BURGETT et al.

(Supreme Court of Indiana. Dec. 30, 1898.)

INTEREST OF WIFE—PROPERTY ACQUIRED BY HUSBAND—ESTOPPEL—PLEADING.

1. Under Burns' Rev. St. 1894, § 2652 (Rev. St. 1881, § 2491), providing that a surviving wife is entitled to one-third of all the real estate of which her husband may have been seised in fee simple at any time during marriage, and in the conveyance of which she may not have joined, and also of all lands in which he had an equitable interest at the time of his death, the wife's interest attaches at the time of the husband's seisin, and is not an incumbrance, but an interest in the land itself.

2. Matters creating an estoppel must be specially pleaded.

McCabe, J., dissenting.

On petition for rehearing. Denied.
For former report, see 50 N. E. 873.

JORDAN, J. Counsel for appellees, in their brief filed in support of the petition for rehearing, have very elaborately and ably presented their views adverse to the holding in this case at the former hearing, which was to the effect that George Frain, husband of appellant Catharine Frain, was seised in fee

of the real estate in controversy by relation back of the title to him from Gwin, his immediate grantor, when the latter acquired title to the land by conveyance from the canal trustees, and that the inchoate interest given to appellant by the statute attached to the realty by virtue of such seisin on the part of her husband, and, as she was not made a party to the foreclosure of the mortgage in question, her equity of redemption had not been barred. At the earnest solicitation of appellees' learned counsel, we have again given the questions involved a careful consideration in the light of the authorities, and are confirmed that the conclusion reached in the original opinion is correct. At the time Miller, who appears to have been the holder of the mortgage executed by George Frain, instituted the action against him, the latter was invested with the equitable title only; the legal title to the lands at the time being, as we have seen, still in the canal trustees. After the rendition of the judgment in that action, and some 11 days before the purchase of the land by Hays at the sheriff's sale under the foreclosure decree, the canal trustees conveyed the land to Gwin. It is manifest, we think, that whatever legal title Hays, the purchaser at the sheriff's sale, obtained to the land, came to him under his said purchase, by virtue of the after-acquired title by Gwin through the conveyance of the canal trustees, which conveyance, as held, in effect served to transfer the real estate in fee to Frain, the mortgagor, through Gwin, by virtue of the latter's conveyance of April 1, 1856. It must also follow, per force of the authorities cited in the original opinion, that when the legal effect or operation of the conveyance by the trustees to Gwin, under the circumstances in the case, is considered, the result must be the same, so far as appellant's inchoate interest is concerned, as though her husband had been actually invested with the legal title to the land under or by the warranty deed executed by Gwin to him. Counsel for appellees are mistaken in their assertion that appellant acquired her interest in one-third of the land in dispute through her husband. Under section 2491, Rev. St. 1881 (section 2652, Burns' Rev. St. 1894), a wife cannot be said to take the interest given her under its provisions through her husband. She takes it, it is true, through the same title that he does, incumbered with and subject to the same liens, infirmities, and liabilities as is his title. Her right or interest in the lands begins with his seisin during coverture, and it attaches as an incident to such seisin, and it cannot be defeated or divested through any charge or conveyance made by him, unless the wife joins therein. *Grissom v. Moore*, 106 Ind. 296, 6 N. E. 629. This inchoate right of the wife, under our statutes, is considered, not in the nature of an incumbrance, but as an interest or estate in the land itself, and is unlike that of the right of dower, for there is no reversionary interest

in the person who claims through the husband. *Bever v. North*, 107 Ind. 544, 8 N. E. 576. She acquires this interest, not as an heir, but by virtue of her marital rights. Where a husband is seised in fee of lands at any time during his marriage, and his title is divested by means of an incumbrance or conveyance made by him in which his wife did not join, the latter, at his death, under section 2491 (section 2562), supra, is deemed as taking her interest therein as a purchaser for value, for marriage is the highest consideration known to the law. *Richardson v. Schultz*, 98 Ind. 429; *Bookout v. Bookout*, 150 Ind. 63, 49 N. E. 824.

It is earnestly insisted by counsel for appellees that, at the time the mortgage was foreclosed, George Frain, husband of appellant, was the only person, as they insist, who had any interest in the mortgaged premises, and inasmuch as appellant's interest had not attached at the time of the foreclosure, and as she claims through her husband, her right to redeem is barred by the foreclosure decree, by reason of his being a party thereto. But, as heretofore said, it is not true that appellant must be held to claim her interest in the land through her husband. Neither does she profess to so claim it. Neither is it true that her husband at that time was the only one interested in the mortgaged premises. The legal title thereto at that time, as we have seen, was in the canal trustees, and they were not made parties to the action. The holder of the mortgage apparently instituted and prosecuted his action to foreclose the same upon the theory that George Frain was the only necessary or proper party defendant, and it may be said, under the circumstances, that the mortgage was not actually foreclosed against any one, at that time, who was invested with the legal title to the land. Appellant's husband, at the time of the foreclosure proceedings, for aught appearing to the contrary, under the facts, did have a present right to become actually seised in fee of the land in controversy, and upon such seisin the interest of his wife would thereby attach; and this fact certainly put the wife in a position of having such an interest in the land as would render her a proper party, at least, to the foreclosure suit, in order that she might be bound thereby in the event her husband became actually seised of the land in fee, as he did by virtue of the after-acquired title under the conveyance of the trustees to Gwin. Surely it cannot be insisted that if the canal trustees, who were not parties to the foreclosure proceedings, had thereafter conveyed the legal title to either appellant or her husband, instead of to Gwin, as they did, she would be bound by the decree, and her equity of redemption, or other rights in the land, would thereby be entirely cut off and barred. Again, the statute, as we have seen, also gives the surviving wife her interest in all lands in which the husband had an equitable

interest at the time of his death. In the event appellant's husband had died after the foreclosure proceedings, but before his equitable interest in the land had passed from him by the sheriff's sale, certainly, under such circumstances, she would not have been barred of her rights by the decree of the court to which she was not a party; and to this extent, also, at least, she was a proper party to the action instituted to foreclose the mortgage against her husband. Simply making the husband a party, under the circumstances in this case, could not affect the wife in any manner; for the husband in no sense can be said to be her representative in reference to her inchoate interest in his lands. Appellant, as we have seen, does not profess to claim her interest and rights, which she is seeking to maintain in this action, through her deceased husband; but she asserts them by virtue of her marital rights under his seisin through the conveyance in question of the canal trustees, which, we may again affirm, had the effect and operation, in contemplation of law, of placing her, in respect to her inchoate interest, in the same condition as though her husband had obtained the legal title to the land under the warranty deed executed by Gwin to him on April 1, 1856. We may, however, dismiss this feature of the case, in relation to the effect of the decree upon appellant's rights in the premises, as she, under her complaint, simply seeks an accounting, in order that it may be ascertained by the court what amount is due appellees, and, upon payment thereof, that she may be permitted to redeem one-third of the land in dispute from the mortgage, etc. The effect of our decision at the former hearing was that, under the facts alleged in the complaint, a prima facie case in favor of the rights which she asserted was thereby presented. If, for any reason, appellant is estopped by the foreclosure decree, or by the rights of innocent parties, etc., as insisted by appellees, and which are said to enter into the case, all such defenses can be interposed by answer, and, if sufficient, may be made available. Under the Code, matters creating an estoppel must be specially pleaded. *Center School Tp. v. State*, 150 Ind. 168, 49 N. E. 961, and cases there cited. The petition is overruled. All concurring, except McCABE, J., dissenting.

(151 Ind. 638)

PRITCHETT v. MCGAUGHEY.

(Supreme Court of Indiana. Dec. 22, 1898.)

MORTGAGES—WIFE'S SEPARATE LIABILITY—PLEADING—WAIVER OF DEMURRER—APPEAL—PARTIES—REVIEW—RULINGS IN APPELLANT'S FAVOR.

1. Under Rev. St. 1894, § 647 (Horner's Rev. St. 1897, § 635), providing that, if part of several co-parties desire to appeal, they shall serve notice on all the other co-parties, who shall be deemed to have joined, unless they appear and decline, and, if they decline, they shall not thereafter appeal, a husband co-defendant with

his wife, who filed his declination to join in her appeal and waived notice, is not a necessary party to an appeal.

2. Cognizance cannot be taken on appeal of errors not assigned.

3. Defendant cannot complain that a demurrer to his answer, which was overruled, should have been carried back to the complaint and sustained.

4. A demurrer to a reply, as not stating facts sufficient "to constitute a cause of reply herein," is not a compliance with Rev. St. 1894, § 360 (Horner's Rev. St. 1897, § 357), providing that a defendant may demur to any paragraph of the reply on the ground that the facts are not sufficient to avoid the paragraph of the answer, or, if the answer be a counterclaim or set-off, any part thereof.

5. Where a debt secured by a mortgage by husband and wife was \$700, part of which was used to pay the husband's note, on which the mortgage was security, and part to pay for medical attendance in the husband's family, and \$200 to pay a prior lien on the wife's property, the remainder being unaccounted for, a decree against the wife for the full amount was erroneous.

Appeal from circuit court, Knox county; George W. Shaw, Judge.

Action by Jeremiah McGaughey against Elizabeth Pritchett and another. There was a decree for complainant, and defendant Elizabeth Pritchett appeals. Reversed.

Samuel W. Williams, for appellant. H. Burns, Wm. F. Townsend, and John Wilhelm, for appellee.

HOWARD, J. This was an action to foreclose a mortgage given by appellant and her husband to appellee. There was a trial and judgment of foreclosure in favor of appellee. The appellee has filed a motion to dismiss the appeal for the reason that the judgment was joint against appellant and her husband, James M. Pritchett, "and the said James M. Pritchett did not join in the appeal in said cause, nor was he made an appellant therein, and notice given to him of such appeal." It does appear, however, that, at the same time the appeal was filed in this court, there was also filed by the said judgment defendant his declination to join in the appeal and his waiver of notice of such appeal. It has been held that this is sufficient to authorize the court to entertain jurisdiction of the appeal. All the parties to the judgment are before the court in such sense as to preclude any of them from ever questioning the conclusion to be reached on the appeal. As said in *Forsythe v. City of Hammond*, 142 Ind. 505, 40 N. E. 267, and 41 N. E. 950: "The purpose of the statute (section 647, Rev. St. 1894; section 635, Horner's Rev. St. 1897) was to provide that a part of those against whom a joint judgment was rendered might appeal, without compelling the remaining judgment defendants to appeal, and yet give all an opportunity to join in the appeal, so that but one appeal might be taken in one case. Notice is consequently provided to be given to those not joining in the appeal. If, however, such parties come voluntarily before this court and decline to join in the appeal, it

would seem that as to them all is accomplished that was intended by the statute."

The appellant in her brief first calls attention to the insufficiency of the complaint. There was no demurrer filed to the complaint in the court below; neither is there any assignment in this court calling in question its sufficiency. But counsel say that appellee's demurrer to the answer should have been carried back and sustained to the complaint. It may be replied, first, that appellant has not assigned any such error, even if it existed. In the second place, it is to be observed that in this case the demurrer to the answer was overruled, and the answer consequently held good. Appellant cannot complain of a ruling in her own favor. "Where a defendant's answer is held good," it was said in *Gilbert v. Bakes*, 106 Ind. 558, 7 N. E. 257, "he cannot successfully urge on appeal that the court erred in not carrying the demurrer back to the paragraph of the complaint to which the answer was addressed." Had the court sustained the demurrer to the answer, and had appellant made proper assignment of error on such ruling, the question sought to be raised might be properly before us.

Complaint is next made that the court overruled appellant's demurrer to the second paragraph of the reply. This demurrer is in form as follows: "Comes now Elizabeth Pritchett, and files this her separate demurrer to the second paragraph of plaintiff's reply, for the reason that the same does not state facts sufficient to constitute a cause [of] reply herein." This is not a compliance with the statute. Rev. St. 1894, § 360; *Horner's Rev. St. 1897*, § 357. The provision of that statute is that "the defendant may demur to any paragraph of the reply, on the ground that the facts stated therein are not sufficient to avoid the paragraph of answer, or, if the answer be a set-off or counterclaim, any part thereof." The demurrer under consideration is merely to the effect that the facts stated in the reply are not sufficient to constitute a reply. The reason or ground of insufficiency, as the same is required by the words of the statute, must be stated in the demurrer. For a like holding as to an insufficient demurrer to an answer, see *Thomas v. Goodwine*, 88 Ind. 458.

It is finally contended by appellant that the finding of the court is not sustained by sufficient evidence. Counsel for appellee have not offered us anything in opposition to this contention, but merely say that the finding is abundantly justified and sustained by evidence adduced, without, however, pointing out any such evidence. We have consequently gone through the voluminous evidence in the record, item by item, to discover, if we might, sufficient evidence to support the conclusion reached by the court. The defense made was that the appellant was, at the

date of the mortgage, and still is, a married woman, and that the indebtedness secured by the mortgage was not incurred for her use or for the improvement of her estate, but was wholly due by her husband. It is not questioned that the husband was at the date of the mortgage, and has since continued to be, insolvent. The appellee is his step-father, and was security for him as to some of his debts, and was, besides, well acquainted with his business affairs. The amount of the note secured by the mortgage in suit was \$700. Of this sum, appellee's evidence, without taking any account of evidence given by appellant, shows but two items for which appellant could in any way be held liable. There was a former mortgage made by appellant and her husband upon a tract of about 240 acres, of which tract one of the 40-acre lots covered by the mortgage in suit formed a part. The debt thus made a lien upon the 240 acres, amounting, with interest, to \$263, was, consequently, a lien on a part of appellant's land. The evidence shows further, or at least tends in some degree to show, that \$200 more of the amount secured by appellee's mortgage was paid by appellee for a lease of land to appellant and her husband, the lease being put in appellant's name. This evidence, while somewhat shadowy, may have been deemed sufficient by the court. The remaining items of the \$700 debt to appellee are, however, clearly shown by his own evidence to be no part of appellant's legal obligations. One item of \$100 was for a note in bank due by appellant's husband, on which, moreover, appellee was himself security. The rest of the money borrowed remains practically unaccounted for. Appellee himself testifies expressly that he paid no part of it to appellant, and that he gave her no check for any of it. Part of it seems to have been intended to pay a physician's bill. This, of course, unless it should be otherwise shown, was a debt of the husband's.

One of the reasons named in the motion for a new trial is that the damages assessed are excessive. This reason plainly appears from the evidence to be well grounded. It is pretty clear that this is a complicated family trouble. The wife of appellee, who is also the mother of appellant's husband, seems to have tried to help the young people, who were suffering from sickness and financial embarrassment, and the money was, in good faith, loaned to them for this purpose. The evidence fails to show, however, that any very large part of the money so loaned was in a legal sense the debt of the wife, who, with her husband, had executed the mortgage on her land to secure it. A new trial ought to be granted, that the rights of the parties may be more carefully adjusted. Leave is also granted to amend pleadings. Judgment reversed.

(151 Ind. 642)

SIEVERS v. PETERS BOX & LUMBER CO.

(Supreme Court of Indiana. Dec. 22, 1898.)

TRIAL—HARMLESS ERROR—REVIEW—ERROR ASSIGNED JOINTLY.

1. Erroneous instructions are harmless where appellant could not have recovered in any event.

2. A motion for new trial based on two or more rulings assigned jointly or in gross should be denied, unless all the rulings assigned are erroneous.

3. Error in admitting evidence which could not have affected the result is harmless.

Petition for rehearing. Overruled.

For original opinion, see 50 N. E. 877.

PER CURIAM. Upon the facts found by the jury, in answer to the interrogatories, appellant was not entitled to a judgment against appellee even if the general verdict had been rendered in his (appellant's) favor. In no event, therefore, would appellant, under the facts found, be entitled to recover. In such a case he cannot complain of the instructions given, however erroneous they may be, because they were harmless. Judge Elliott, in his work on Appellate Procedure (section 642), said: "If it affirmatively appears from the record that in no event can the complaining party recover upon the facts, errors in the instructions, however flagrant, may be regarded as harmless." It is immaterial, therefore, whether the instructions complained of by appellant, except those in regard to the burden of proof, were or were not erroneous. It was not necessary or proper, therefore, to set out said instructions, and appellant's objections thereto, in the opinion of the court, and determine whether or not they, or either of them, were erroneous.

On a re-examination of the record, we find that appellant objected at the proper time to two questions answered by Charles Pape, a witness for appellee, instead of one, as stated in the original opinion; and appellant asks in his petition for a rehearing that we "decide as to the competency" of the one not considered. The question referred to by appellant was asked the witness Pape in regard to the purpose for which he took Kaiser, the employé who built the elevator, to see the elevator at the City Carriage Works. The action of the court in overruling the objection to said question, and permitting the same to be answered, is not assigned as a separate cause for a new trial; but said action of the court, and the action of the court in overruling the objection to the question as to what Kaiser said after he saw the elevator at the carriage works, and permitting the same to be answered (considered in the original opinion), were jointly assigned as one of the causes for a new trial. If the court did not err in both of said rulings, then said specification constitutes no ground for a new trial, for the reason that it is well settled that, when two or more rulings are assigned jointly or in gross as a cause for a new trial, to

render the same available as a cause for a new trial both of such rulings must be erroneous. *Railway Co. v. Snyder*, 140 Ind. 647, 649, 39 N. E. 912, and case cited; *Lawrence v. Van Buskirk*, 140 Ind. 481, 482, 40 N. E. 54; *Hannan v. State*, 149 Ind. 81, 82, 47 N. E. 628; *Masterson v. State*, 144 Ind. 240, 246, 43 N. E. 138; *Conrad v. State*, 144 Ind. 290, 297, 43 N. E. 221.

It was held in the original opinion that the court did not err in overruling the objection to the question in regard to what Kaiser said after he saw the elevator at the carriage works. It follows, therefore, under the authorities cited, that said cause for a new trial is not available, even if the trial court erred in overruling appellant's objection to the other question mentioned in appellant's petition for a rehearing. But suppose the question we are asked to decide was properly presented by the record; was reversible error committed? The answer to said question was, in effect, that the witness took Kaiser to see the elevator at the carriage works, because he wanted his judgment as to whether that elevator would be sufficient. It is evident that said answer could not have influenced the jury as to any fact found, or as to any issue in the case. Such question and answer may have been immaterial, but certainly the same did not prejudice the appellant.

The other questions presented were fully considered and determined in the original opinion, and, after a careful review of the same, we are satisfied that there are no legal grounds for a reversal of the judgment of the trial court. The petition for a rehearing is therefore overruled.

PITTSBURG, C., C. & ST. L. RY. CO. v. BECK.¹

(Supreme Court of Indiana. Dec. 23, 1898.)

APPEAL—OBJECTIONS WAIVED.

Where, after judgment has been entered against a party to an action, he moves to correct it, in accordance with a form set out in the motion, which the court sustains, and substitutes for the first judgment that sought, he thereby waives all erroneous rulings of the court preceding the judgment.

Monks, C. J., dissenting.

Appeal from circuit court, Grant county; J. L. Custer, Judge.

Action by Richard M. Beck against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

N. O. Ross and G. E. Ross, for appellant. John A. Kersey and Asbury E. Steele, for appellee.

HACKNEY, J. This was an action of trespass quare clausum fregit, brought by the appellee against the appellant. The action proceeded to trial, verdict, and, over appellant's motion for a new trial, a judgment for

¹ Superseded by opinion, 53 N. E. 439.

the appellee in a sum stated, the entry including the ruling upon the motion for a new trial. Some days later, the appellant moved the court to correct and modify the judgment so rendered that it might be and read according to a form particularly set out in the motion. The court sustained the appellant's motion, and, as a substitute for the judgment as first entered, adopted, in form and substance, the judgment so sought by the appellant. The judgment so entered contained no ruling upon the motion for a new trial, and differed materially from that originally entered, in that it contained a description of the lands for the taking of which the damages were awarded. There is no objection or exception to the judgment, and the omission of a ruling upon the motion for a new trial is not saved.

The appellee insists that the appellant, having obtained the identical judgment sought by it, has no cause for complaint as to any ruling of the court preceding the judgment. The authorities sustain this insistence. *Railway Co. v. Sands*, 133 Ind. 433, 32 N. E. 722; *McMahan v. McMahan*, 142 Ind. 110, 40 N. E. 661; *Weander v. Johnson* (Neb.) 60 N. W. 353; *Elliott, App. Proc.* 626-630. In *Railway Co. v. Sands*, supra, there was a controversy among three sets of parties, and, after a hearing, two sets of the parties agreed to a time of entering, and to the form and substance of the decree. The form of entry was submitted to the third set of parties, whose attorneys marked it "O. K.," and signed their names. The "O. K." was held to preclude the parties whose attorneys indorsed it from raising any question either as to the form or substance of the decree, or the proceedings leading to it. The theory upon which the ruling was based is that parties who procure the action of a court in a particular form will be estopped to question the correctness of such action. By analogy, it has many times been held that rulings as to the acceptance or rejection of evidence of a particular class cannot be questioned by a party who has procured the acceptance or rejection of evidence of the same class, nor can he question a ruling to which he has assented or acquiesced. As said in the case last cited: "It is but fair to the court, and but just to the adverse party, to require a party contesting a case to object to a ruling made against him at the time, or withhold his consent to the rendition of a judgment, if he desires to contest its validity; and it is unjust and unfair to hold that a party may induce and consent to a ruling or a judgment, and then secure a reversal on account of that being done which is requested." The case of *McMahan v. McMahan*, supra, is in direct analogy to the present case. The court rendered a decree for divorce and alimony in favor of the appellee over a motion by the appellant for a new trial. The appellant moved to substitute another finding and decree, setting out the form in which he desired it en-

tered. The court sustained this motion, and entered the finding and decree in the form so requested. It was held that the appellant had waived the question of the sufficiency of the facts found to support a decree, and the questions upon the motion for a new trial. The rule underlying these holdings would have been more clearly illustrated if the appellant, instead of delaying until the court had entered its decree in favor of the appellee, had moved the court to enter the decree which was entered upon its motion. The effect of appellant's motion and of the court's ruling thereon is not diminished by the delay.

The only questions made upon the pleadings arise upon a motion to strike out parts of the complaint, and a motion to paragraph the complaint so as to state separately the supposed two or more causes of action pleaded. If not waived, we might say, as to the first, it is conceded that the existing rules of practice admit no question for reversal. The second we do not believe possesses merit. The theory of the complaint was single, and reasonably definite and certain. The judgment is affirmed.

JORDAN, J., doubts.

MONKS, C. J. I cannot concur in that part of the opinion of the majority which holds that appellant, by its motion to modify the judgment, waived all errors committed previous to the sustaining of said motion, nor do I think the authorities cited sustain said doctrine. If the rule declared by the majority prevails, whenever a court sustains a motion to modify a judgment, the party making the motion cannot question any previous ruling or action of the court; but, if the court overrules such motion, the right of the party to call in question previous rulings of the court is not waived. The case of *Railway Co. v. Sands*, 133 Ind. 433, 32 N. E. 722, cited in the majority opinion, is one where the judgment was rendered upon a written agreement, signed by the parties. This court, at page 439, 133 Ind., and page 724, 32 N. E., said: "The judgment having been entered upon and in pursuance of an agreement of the parties, the particular averments of the complaint are not material, as well as the form of the decree, and the evidence necessary to support it. By the agreement 'that the judgment shall be rendered herein in favor of the above-named plaintiffs,' the defendants signing the agreement or consenting to the judgment confess their liability, and the plaintiffs' right to a judgment; and further, in the same agreement, they stipulate what the terms shall be, and in what language the judgment and decree shall be entered, requesting the court to have the decree entered in the particular language in which it is entered. After this has been done, it is manifest that no party to such agreement can or ought to be permitted to have the decree modified or changed without showing some

fraud or mistake by which he was induced to enter into the agreement, and ask the court to enter the decree, or without showing some valid reason why he should be released from it." In *McMahan v. McMahan*, 142 Ind. 110, 40 N. E. 661, cited in the majority opinion, the appellant filed a motion for a new trial, which was overruled. He also moved to modify the judgment rendered by the court. The rulings of the court on the motion for a new trial and on the motion to modify the judgment were assigned as error. After the trial court had overruled the motion for a new trial and the motion to modify the judgment, the court, on motion of the appellant, in effect set aside its finding and judgment, and substituted a new finding and decree in place of the one already entered; and this court held that, his motion for a new trial and motion to modify the judgment having been overruled before the new finding and decree were made and rendered, they presented no questions as to said rulings. This holding was correct, because the finding and judgment to which said motions were addressed had been set aside, and nothing was left to which they could apply. In *Weander v. Johnson* (Neb.) 60 N. W. 353, the judgment was entered by consent, as shown by the record, and the rule declared in *Railway Co. v. Sands*, supra, was held to apply. The doctrine declared in sections 626-630 of Elliott's Appellate Procedure is that one who expressly or impliedly asks a designated ruling cannot make such ruling available for the reversal of a cause on appeal.

In this case the appellant has not urged that the court erred in overruling its motion to modify the judgment, nor is appellant asking a reversal on that ground. Neither was the judgment rendered by agreement or consent. Appellant did not, by its motion, procure the court to render judgment against it. On the contrary, appellant moved the court to render judgment in its favor on the special verdict, which motion the court overruled, and rendered judgment against the appellant, for the sum of \$800 and costs. This judgment was rendered for the value of certain real estate appropriated by the appellant for its right of way. After its rendition, appellant moved to modify the same by adding thereto the description of the real estate appropriated, and the statement that the judgment was recovered for the appropriation of said real estate by appellant, and for the damages to the residue of appellee's real estate not taken.

The errors assigned by appellant are that the court erred (1) in overruling the motion to strike out parts of the complaint; (2) in overruling the demurrer to the complaint; (3) in overruling appellant's motion for a new trial; (4) in overruling appellant's motion for a judgment in its favor on the special verdict, and rendering judgment in favor of the appellee. It is clear, we think, that appellant did not, by its motion to modify the judgment, waive the error, if any, of the

52 N.E.—26

court, in overruling the motion for a new trial, appellant's demurrer to the complaint, or the motion to strike out part of the complaint.

DRIVER v. DRIVER.¹

(Supreme Court of Indiana. Dec. 23, 1898.)

DIVORCE — CRUELTY — WHAT CONSTITUTES — ALIMONY — APPEAL — CORRECTION OF RECORD — PRACTICE.

1. Notice of motion to correct the record after the same has been filed on appeal may be served on the opposite party's attorney, who has perfected the appeal, and who is, therefore, not out of the case, particularly as Sup. Ct. Rule 32 provides that notice of motion for certiorari to correct a record may be given to the opposite party, or to his attorney.

2. A correction of the record so as to incorporate evidence given on the trial, that the witnesses called to prove the residence of plaintiff in divorce were themselves resident householders and freeholders of the county, may be made, although there was no writing upon which to base the correction.

3. That the husband, nearly three months after his wife gave birth to a child, denied his paternity, and thereupon abandoned wife and child, is such cruelty as will authorize a divorce.

4. In an action for divorce on the ground of cruelty, alleged to have consisted in the husband's denial of his paternity of his wife's child, and his abandonment of them, letters written by the husband to the wife after the birth of the child, and before the abandonment, are admissible to prove the harmonious relation existing between the parties, where the husband had detailed confidential communications of opposite tenor made during that time.

5. On the question of alimony to be paid by the husband, evidence of the value of his father's property is not improper.

6. Alimony of \$450, with \$4 a month for child, and \$25 for expenses, allowed against a young physician, is not excessive.

Appeal from circuit court, Howard county; J. C. Blackledge, Judge.

Action for divorce and alimony by Mary E. Driver against Charles M. Driver. From the judgment rendered, defendant appeals. Affirmed.

Gavin, Coffin & Davis and Flippen & Purvis, for appellant. R. B. Beauchamp, for appellee.

HOWARD, J. This was an action brought by appellee against appellant for divorce and alimony. There was a finding and judgment for appellee, and a reversal is asked on the ground that the court erred in overruling appellant's motion for a new trial.

After the filing on appeal of the original record and brief by appellant, the appellee procured a correction of the record in the lower court, which, by agreement of parties, was filed in this court in lieu of proceeding by writ of certiorari. It is now contended by appellant that the notice of intention to make this correction, being given to appellant's attorney instead of to appellant himself, was insufficient. We are of opinion that neither appellant nor his attorney was so out of court that notice to either

¹ Superseded by opinion, 54 N. E. 389.

of them might not be given of an intention to correct the transcript of the record taken by them to this court. The requirement as to such motions is that the notice of intention to make them should be reasonable, so as to give the party concerned "ample time to make all needful preparations." *Latta v. Griffith*, 57 Ind. 329. There is no claim here that the attorney had gone out of the case. On the contrary, it is shown he had himself taken up the transcript on appeal, and had also filed his brief in this court. If the transcript so taken up by the attorney of record did not disclose what had actually taken place on the trial, we think that notice might properly be given him of the defect occasioned by himself, and of the intention to correct the same. By rule 32 of this court, notice of motion for certiorari to correct a record may be given to the opposite party or his attorney, and we see no good reason why like notice of motion in the court below to correct a record should not also be deemed sufficient. The case of *Tate v. Hamlin*, 149 Ind. 94, 41 N. E. 356, as to notice of appeals to this court, is not in point. Notice of appeal is given for the purpose of bringing a party back into a case. Here the appellant came back into the case himself, or, rather, stayed in; and with him his attorney.

The correction made was to show that evidence had been given on the trial that the witnesses called to prove the residence of the plaintiff were themselves resident householders and freeholders of the county. Counsel contend that the correction could not be made, for the reason that there was no "memorial, memorandum, entry, or writing of any kind upon which to base the correction." The reasoning and authorities of counsel have relation to correction of pleadings, writs, returns, verdicts, judgments, executions, and the like, rather than to the supplying of omitted statements of witnesses. It is not denied that the omitted testimony was given, or that the witnesses in question were at the time actual resident householders and freeholders of Tipton county. Even in the case of correcting a judgment, the court, in *Jenkins v. Long*, 23 Ind. 460, in answer to the question, "Was any evidence admissible, upon the hearing of the motion, outside of the judgment sought to be corrected?" said, "This question can receive only an affirmative answer. It would be in vain to seek relief against a clerical error, unless such error may be shown to exist." And in *Makepeace v. Lukens*, 27 Ind. 435, citing 1 Tidd, Prac. 713, it was held that a verdict might be corrected "by the plea roll, memory or notes of the judge, or notes of the associate or clerk of assize, and, if special, by the notes of counsel, or even by an affidavit of what was proved upon the trial." If an affidavit reciting evidence given on the trial may be received to show that a verdict, as transcribed, is incorrect, why may not evi-

dence also be received to show that a finding of the court, as set out in the transcript, is correct, and based upon proof adduced on the trial? We are of opinion, therefore, that, in the interest of justice and fair dealing between the parties, the court should be allowed to make a correction as to words inadvertently omitted from the testimony of a witness before the court. In *Gluck v. State*, 40 Ind. 263, the right of the trial court to make such correction as to omitted evidence is fully recognized. See, further, as bearing generally on the subject, 1 Black, Judgm. § 135; *Freem. Judgm.* § 63; *Matheson's Adm'r's v. Grant's Adm'r*, 2 How. 263.

In support of their contention that the finding is contrary to law, and not sustained by sufficient evidence, counsel for appellant say that the only cruelty shown was that appellant, nearly three months after the birth of the child born to appellee, denied his paternity, and thereupon abandoned wife and child. If the accusation of want of chastity thus made by appellant against his wife was proved to the satisfaction of the court to have been false, and if it was likewise shown that appellant had deliberately abandoned his wife and child, without making any provision for their support, the charge of cruelty was certainly made out. A man of 26 years of age could hardly practice a greater wrong upon a 17 year old girl than to first seduce her, and then, after marriage, abandon her and her infant on the false accusation that some one else was the father of the child; thus also slandering his wife in her most sacred relation as woman, and defaming his own child. Such conduct has frequently been characterized as cruel and inhuman treatment.

It is next contended that the court erred in admitting in evidence certain letters written by appellant to his wife, for the reason that such letters were privileged communications. These letters, better than any other evidence that could be offered, showed the seemingly tender conjugal relations of the parties from the time of their marriage until long after the birth of their child, no less than the solicitous interest of appellant in the well-being of mother and child, both of whom he frequently visited, and to both of whom he refers in the most endearing terms. In a suit for divorce, the thing most necessary is to make known to the court the true relations of the parties. Each of them is made a proper witness as to those matters, and it would seem to be a failure of justice to cover up the truth under any cloak of privilege. But, however this may be, before those letters were introduced in rebuttal of appellant's evidence appellant had himself opened the door to such evidence, in detailing his own confidential communications with his wife, and in reciting his accusations made to her, that he was not the father of her child. He cannot, therefore, well complain that she has introduced his letters to

show that the testimony so given by him, and the accusations so made against her, were false. He must not be heard recounting his own alleged communications to her, and her replies thereto, and then seek to refuse her the privilege of giving like evidence in contradiction of his statements.

Evidence in relation to the value of the property of appellant's father was objected to, and its admission by the court is objected to here. It does not appear that the amount of the alimony, or of the allowance for support of the child, was based on this evidence. It is the right of the court to hear evidence fully on the situation, condition, and surroundings of the parties. Not only the present property of the husband, but his health, occupation, and future prospects of making money, may be taken into account. The wife and child have a right to partake, at least in some degree, in the fortune of the husband and father. To arrive at a proper knowledge of all the elements going to make up the husband's station and prospects in life, the evidence adduced was not improper. The alimony allowed (\$450, with \$4 a month for the child, and \$25 for expenses) does not seem excessive, even without taking any account of appellant's property. The youth, health, and earning capacity of one who had chosen the medical profession as his calling in life, and who lived in the station and surroundings shown by the evidence, ought to entitle his wife and child to the allowance made by the court. See *Logan v. Logan*, 90 Ind. 107. Judgment affirmed.

(151 Ind. 667)

HUTCHINS v. STATE.

(Supreme Court of Indiana. Dec. 23, 1898.)

BURGLARY—CHANGE—NEW TRIAL—AFFIDAVIT—NEWLY-DISCOVERED EVIDENCE—WITNESS—IMPEACHMENT—CONFIDENTIAL COMMUNICATIONS—ATTORNEY AND CLIENT.

1. An instruction set out the information against accused charging him with feloniously breaking and entering a storehouse in the nighttime, and taking away certain property. The following instruction defined the offense charged, and set out its ingredients, and concluded by stating that, if the jury found all the ingredients to exist beyond a reasonable doubt, they should find accused guilty. Held, that the second instruction was not defective in authorizing conviction without proof that it was accused who committed the crime, when construed with the first instruction.

2. An affidavit for new trial based on information and belief of misconduct of the jury is insufficient.

3. Newly-discovered evidence going merely to impeach a witness is not ground for new trial.

4. Newly-discovered evidence consisting of a confidential communication from client to attorney is not ground for new trial, since the attorney could not be compelled to testify to it if the new trial were granted.

Appeal from circuit court, Steuben county; Frank S. Roby, Judge.

Chester Hutchins was convicted of burglary, and he appeals. Affirmed.

Woodhull, Gilbert & Hutson, for appellant. W. L. Taylor and Merrill Moores, Atty. Gen., for the State.

MCCABE, J. The appellant was convicted, over his motion for a new trial, on an information charging him with burglary and larceny. Error is assigned by appellant on the action of the circuit court in overruling his motion for a new trial.

It is first contended under that motion that the court erred in giving the fourth instruction asked by the state. The objection to the instruction is that it attempts to state the elements of the crime of burglary, concluding with a direction to find the defendant guilty if all of those elements are established beyond a reasonable doubt. The objection to the instruction is that it does not require the defendant to have any connection with the crime in order to his conviction. But, in order to properly understand instruction 4, it must be read in connection with instruction 3 of the same series. Indeed, the two instructions should be read as one single instruction. The two instructions read as follows: "No. 3. The first count of the information charges the defendant now on trial with having, at this county and state, upon the 5th day of December, in the year 1896, unlawfully, feloniously, and burglariously, in the nighttime, broken and entered into the storehouse of Alphonso M. Caswell and Almarion A. Caswell, with the unlawful and felonious intent to then and there, in said storehouse, take, steal, and carry away certain articles and property described in the first count of the information, and alleged as being the personal goods and chattels of the said Alphonso M. Caswell and Almarion A. Caswell. No. 4. Among the ingredients of the offense charged in the first count of the information are: (1) That said storehouse was broken and entered into; (2) that said storehouse was broken and entered into in the nighttime; (3) that the breaking and entering into said storehouse occurred in the county of Steuben, in the state of Indiana; (4) that said storehouse was broken and entered into within the last two years; (5) that the breaking and entering into said storehouse was done with the unlawful and felonious intent to commit a felony, by then and there, in said storehouse, unlawfully and feloniously taking, stealing, and carrying away the goods, property, and chattels described in said indictment, or some portion of them. And, gentlemen of the jury, if you find all these ingredients exist, beyond a reasonable doubt, then you should find him guilty as he stands charged in the first count of the information." The particular objection to this instruction is that it authorizes the jury to convict the defendant without any proof that he was the person who perpetrated the crime the elements of which are set forth in the instruction. That contention would be correct, and ought to be upheld, if the instruction stood alone. This fourth instruction is very

awkwardly drawn, and, standing alone, cannot be upheld, because it is incomplete. But it must be construed along with instruction 3 of the same series, just preceding it, because the first is also incomplete in the absence of instruction 4. It is well settled that instructions must be considered and construed with reference to each other, and as an entirety, and not separately and in dissected parts; and if the instructions as a whole correctly and fairly present the law to the jury, even though some particular one, standing alone, would be erroneous, it affords no ground for reversal. *Newport v. State*, 140 Ind. 299, 39 N. E. 926; *Shields v. State*, 149 Ind. 395-406, 49 N. E. 351, and cases cited.

But in the first line of instruction 4 it is said, "Among the ingredients of the offense charged in the first count," etc. The inquiry arises: What was the offense charged in the first count? The preceding instruction tells. It says the first count charges the defendant now on trial with having committed the crime the elements of which are enumerated in the fourth instruction. Therefore, when the court, concluding the fourth instruction, says to the jury, "If you find all these ingredients exist beyond a reasonable doubt, you should find the defendant guilty as he stands charged in the first count of the information," it evidently had reference to the same crime spoken of in the preceding instruction 3, and that was the burglary charged against the defendant. The elements or ingredients described in the instruction could not exist without an actor or perpetrator. And the instruction, while inexcusably defective, clearly had reference to some actor in doing the things which it denominates the ingredients of the crime. And, when the two instructions are taken together, there can be no doubt that the actor or perpetrator intended and meant in the fourth instruction was the defendant then on trial, and that, when these ingredients or acts were established beyond a reasonable doubt, the defendant should be convicted, because his acts are referred to as constituting the ingredients or elements of the crime of burglary charged.

It is next urged, under the motion for a new trial, that the circuit court erred in giving instructions 7, 8, 10, 13, 14, and 31 asked by the state. Appellant admits that said instructions are correct statements of the law in the abstract, but it is contended that they are not applicable to the evidence. We think otherwise.

The next reason urged in support of the motion for a new trial is certain alleged misconduct of the jury while in the jury room, deliberating upon their verdict, prejudicial to the rights and interest of the defendant. The only proof of such misconduct is an affidavit of the defendant's attorney setting forth the fact that such misconduct of the jury took place in the jury room while they were deliberating upon their verdict, and that the affidavit was made on information and belief. The attorney general, on behalf of the state,

insists that such affidavit furnishes no legal proof of the alleged misconduct, and hence cannot be considered. It certainly makes but little difference whether an affidavit of an outsider, charging misconduct of the jury in the jury room, states that it is made on information and belief, or is silent as to the source of affiant's belief. As no persons other than members of a jury can lawfully be in their room while they are deliberating upon their verdict, an affidavit by any person other than a member of such jury, stating that they while so deliberating in their room have been guilty of misconduct, without any statement as to the source of affiant's knowledge, implies that such knowledge must have been derived from some one or more of the members of the jury, because otherwise the court must presume that some one has violated the law by admitting an unauthorized person into the jury room while the jury is deliberating on the verdict. But the presumption of law is that everybody has obeyed the law until the contrary is made to appear. In *Stanley v. Sutherland*, 54 Ind. 339, defendant made an affidavit in support of the ground of his motion for a new trial charging the jury with misconduct while deliberating on their verdict in the jury room, the affidavit concluding with the words "as affiant believes." Worden, J., speaking for this court in that case, said: "The affiant does not state how he obtained information of the alleged misconduct of the jury. It is not to be supposed that he was in the jury room, and it would do him injustice to suppose that he was furtively hovering around outside, listening to the deliberations of the jury. If the information came to him from the bailiff in attendance upon the jury, it seems to us that the affidavit of the bailiff ought to have been filed. If it came to him from some of the jurymen, it could not be received, for it has long been settled in this state that the affidavits of jurors cannot be received to impeach their verdict; much less could their statements be received at second hand. The affidavit may have been true as affiant believed, and yet the information may have been derived from some of the jurors, whose affidavits could not have been received. Without determining what would be the effect of the alleged misconduct of the jury if legally established, we are of opinion that the court committed no error in overruling the motion on the affidavit." The supreme court of California decided the same question the same way. *People v. Williams*, 24 Cal. 31. That court, on page 40, in that case, said: "It does not appear except by the affidavit of the prisoner, upon information and belief merely, unsupported by any other evidence, that it even came to the knowledge of the jury that the obnoxious papers were in the room where the jury were deliberating. It is not to be presumed that the jurors violated their duty by hunting up and reading evidence not given to them in the progress of the trial in open court,

under the sanction of the judge. The presumption is that they performed their duty in accordance with the oath which they had all taken before entering upon the trial of the case. To overthrow this presumption, there must be some direct positive testimony tending to show misconduct on the part of the jurors in this particular. It is not enough that this objectionable matter was inadvertently left in the room, with other books and papers, where the jury might by chance have found it. There must be some positive testimony by some person, who has knowledge of the facts which he states, showing that the jurors, or some one of them, read the testimony referred to, or, at least, that they found it, or that it in some way came to their notice." This case clearly and strongly supports *Stanley v. Sutherland*, supra, and so do *Pleasants v. Heard*, 15 Ark. 411; *Allison v. People*, 45 Ill. 39; *Taylor v. State*, 52 Miss. 87. To the same effect are *Burgess v. Langley*, 5 Man. & G. 722, 44 E. C. L. 377; *Clum v. Smith*, 5 Hill, 560; *Cain v. Cain*, 1 B. Mon. 213; *Aylett v. Jewel*, 2 W. Bl. 1299; *State v. Wright*, 98 Iowa, 705, 68 N. W. 440; *Borer v. State* (Tex. Cr. App.) 28 S. W. 951; *Parker v. State* (Tex. Cr. App.) 30 S. W. 553; *Gallihar v. State* (Tex. Cr. App.) 37 S. W. 329; *Gonzales v. State*, 32 Tex. Cr. R. 621, 25 S. W. 781; *Williams v. State*, 33 Tex. Cr. R. 136, 25 S. W. 629, and 28 S. W. 958.

The appellant in this case insists that misconduct of "jurors in the jury room can only be established on information and belief, as the law presumes no one is present within said jury room except the members of the jury, and they cannot be heard to impeach their own verdict." Appellant's counsel do not cite them, but there are two cases in this court sustaining such contention. They are *Houk v. Allen*, 126 Ind. 568, 25 N. E. 897, and *Railway Co. v. McDaniel*, 134 Ind. 166, 32 N. E. 728, and 33 N. E. 769. The affidavit in *Houk v. Allen*, supra, was made by the husband of the appellant to misconduct of the jury in their deliberations on their verdict in their room. It, as appears, contained no statement how the affiant obtained knowledge of the misconduct sworn to by him. It is said in that case that "whether the affidavit was made from information, or from actual knowledge, is unimportant." This case proceeds upon the theory for its justification that if affidavits of outsiders, who do not state the source of their knowledge, cannot be received to impeach a verdict for misconduct of a jury in the jury room, then such misconduct is beyond reach, and the injured party is without a remedy therefor. As a palliation for so unseemly a thing as overturning a verdict on mere hearsay or second-hand statements, it is said in the case that the affiant might have been called to the witness stand, and examined orally, with a view of ascertaining the weight which the affidavit should receive; and affidavits of the members of the jury, or their oral testimony, might have

been introduced to contradict the affidavit. But no reference to or mention of *Stanley v. Sutherland*, supra, is made in the entire case. And so in *Railway Co. v. McDaniel*, supra, there is no reference to or mention of *Stanley v. Sutherland*, supra, whatever. Indeed, such mention or reference in either of the cases we are discussing would have involved the necessity of either overruling that case, or the decision of the two cases mentioned contrary to the way they were decided. In the *McDaniel Case*, supra, it is still more strongly sought to uphold the ruling there, by arguing, as in the *Houk v. Allen Case*, that, if the misconduct of the jury cannot be shown in the way it was, the injured party had no remedy. It is there said: "While the unauthorized method by which a jury arrived at a verdict is a matter very difficult of proof, the legality of the verdict is easily established by an affidavit, as the jurors are competent witnesses to sustain their verdict, and the method by which it was arrived at is peculiarly within their knowledge." And for that reason the inference is sought to be enforced in that case that a mere hearsay or second-hand statement should be deemed sufficient to put the party in whose favor the verdict is returned on the defense thereof, or it shall be set aside. This line of reasoning loses sight of the principle of law that surrounds and guards the sanctity of a verdict. It acknowledges that the law has been settled for centuries that the statements of jurors who know more about the conduct of the jury in making the verdict than anybody else cannot be received to impeach that conduct or the verdict, whether under oath or not. How absurd, then, it would be for that same law to turn around and receive a statement impeaching such conduct and verdict from one who, in the nature of things, cannot and does not know anything about the conduct of the jury, except as he is informed by members of the jury themselves. There would be no good reason and far less sense in forbidding jurors, who know all about the conduct of the jury in making the verdict, from making statements impeaching that conduct and verdict, and at the same time receive such statements from one who, in the nature of the case, cannot know anything about the truth of such statements so received. The law presumes the verdict is right, and that the jury, in making it, has been free from misconduct. This presumption prevails until it is overcome by some sort of legal proof to the contrary. If the law permitted the integrity of the verdict to be put in issue by a mere unverified complaint, a party has gained but little when, at the end of a long, tedious trial, he has obtained a verdict. He must in that event fight another battle before his verdict is available. And a statement of a person not a juror, though verified, that the jury were guilty of misconduct in the jury room, without stating the source of his knowledge or how he came to know the fact, is no better than an unverified com-

plaint. The court judicially knows that he could not very well know the fact of his own knowledge, unless he was in the jury room at the time; and such presence would be a violation of law. *Rickard v. State*, 74 Ind. 275. The presumption of law is that no such violation of law occurred. Therefore, in the absence of any showing to the contrary, the presumption is that he must have derived his knowledge from some member of the jury. And as such statement, verified or unverified, could not be received from the juror to impeach the verdict or the conduct of the jury in making it, such statement cannot be received from one deriving his knowledge from a juror (at second hand); otherwise, the inhibition of the law against jurors impeaching their verdict is frittered away and destroyed.

We do not mean to be understood as holding that the affidavit of no person outside of the jury room can be received to impeach the conduct of the jury in making the verdict. On the contrary, where the affiant shows in his affidavit that he has the means of actually knowing personally of the alleged misconduct, his affidavit may and ought to be received, but not without such showing. This is so because the court cannot say, as matter of law, that it is physically impossible in all cases that persons other than jurors can actually know of such misconduct of their own knowledge. But such knowledge by such persons, in the nature of the surroundings, must be so rare and exceptional as to call for a statement of how such knowledge was acquired or derived; otherwise, the courts may be overthrowing verdicts on the mere unauthorized statements of jurors from whom the affiant derives all his knowledge. That would be authorizing something to be done indirectly that the law forbids to be done directly. If, in the interest of the correct administration of justice, the law forbids jurors, who know better than anybody else about their conduct, to open their mouths in impeachment of that conduct, certainly that same law will not permit others to do so, who are not shown to know anything at all about it, and who, in the nature of things, cannot know anything about it. If the law holds that the verdict is possessed of so much sanctity in the interest of public justice that it will not permit a juror who knows all about how it was made to impeach it even under oath, why should it allow others to do so who know nothing about it? It would be far more reasonable to allow the juror who knows the facts to impeach it than to permit one to do so who knows nothing about the facts. The law would be singularly inconsistent with itself to forbid the impeachment of a verdict by jurors, who know all about the facts, and at the same time receive the statements of others to impeach it, who know nothing about such facts. *Houk v. Al-*

len, supra, is in direct conflict with *Stanley v. Sutherland*, supra, and is in conflict with the current of authority everywhere on the point now under consideration; and it is also in conflict with sound reason as well as authority. And the same is true of *Railway Co. v. McDaniel*, supra, except that it is founded on *Houk v. Allen*, supra. Both cases wholly fail to speak of or refer to *Stanley v. Sutherland*, supra, and make no reference to or mention of any other authorities either pro or con on the subject. Nor does either of them state any satisfactory or sound reason why the question should be decided as it was in each. We therefore cannot regard them as well-considered decisions, and hence they ought to be, and are, overruled, in so far as they conflict with the conclusion here reached. We adhere to the rule laid down in *Stanley v. Sutherland*, supra, and hold that the circuit court did not err in overruling the motion for a new trial on said affidavit.

The next ground for a new trial is alleged newly-discovered evidence. That evidence is as to an alleged agreement of one Phillips, who was jointly charged with the appellant in the information, but separately tried, convicted, and sent to the state prison. He was a material witness against appellant on his trial; and the newly-discovered evidence was that the attorney of said Phillips states that said Phillips had entered into an agreement with the prosecuting attorney that, if said Phillips gave certain evidence against appellant, the prosecuting attorney would let Phillips off easy. Phillips, on the witness stand, on cross-examination, denied making any such agreement with the prosecuting attorney. It appears in the affidavit in support of this cause for a new trial that the attorney of Phillips received this information as a professional and confidential communication of his client, while engaged to defend him, and refused to make an affidavit to the facts on that ground. The fact that the newly-discovered evidence goes merely to contradict and impeach the witness Phillips is a sufficient justification of the court's refusal of a new trial on this ground. *Morel v. State*, 89 Ind. 275; *Sutherlin v. State*, 108 Ind. 389, 9 N. E. 298; *Hamm v. Romine*, 98 Ind. 77; *Pennsylvania Co. v. Nations*, 111 Ind. 203, 12 N. E. 309; *Smith v. State*, 143 Ind. 685, 42 N. E. 913. The ruling was also justified by the fact that the communication was a confidential one, made by client to his attorney, and hence the attorney could not be compelled to testify to it if the new trial was granted. *Rev. St. 1894*, § 505, subd. 3 (*Rev. St. 1881*, § 497; *Horner's Rev. St. 1897*, § 497); *Borum v. Fouts*, 15 Ind. 50; *Bower's Adm'r v. Briggs*, 20 Ind. 139; *Bigler v. Reyher*, 43 Ind. 112. It follows that there was no error in overruling the motion for a new trial. The judgment is therefore affirmed.

(151 Ind. 579)

STATE ex rel. TAYLOR et al. v. MOUNT et al.

(Supreme Court of Indiana. Dec. 23, 1898.)

On petition for rehearing. Denied.
For former opinion, see 51 N. E. 417.

HOWARD, J. The petition for a rehearing of this appeal is in some respects a remarkable one. None of the parties seem to have any interest left in the case. The honorable judges sitting on the appellate bench were not at any time parties to the action, and having been chosen at the recent election for a term ending only with the life of the court, January 1, 1901, they are certainly not now concerned with the decision. The relators were candidates and voted for at the election, and, having failed to receive a majority of the votes for appellate judge, are also no longer interested. Finally, the board of election commissioners, having, without delay or formality, complied with the law as declared by this court, and having no further possible action to take, can have no further interest. The duties of that high body are confined by statute to matters preliminary to the election. They have faithfully and impartially performed the duties there prescribed. A new board must be organized to prepare for the next general election. Hence it would seem that the appellee board is now functus officio. In truth, so far as parties are concerned, the case before us "is now simply a moot-court question." Courts of final resort, however, ought not to be engaged in passing on moot-court questions; there should be actual parties in interest. This was, in effect, the decision reached in overruling the petition for a rehearing in *Parker v. State*, 133 Ind. 178, 32 N. E. 836, and 33 N. E. 119. Here, as there, it may be said that, to all intents and purposes, "the parties have litigated the matters in issue between them, and have withdrawn, in so far as they can, from the jurisdiction of the court."

As far as argument is concerned, every plausible suggestion that could be advanced in support of the position taken by counsel for appellees was presented in the briefs and oral argument on the original hearing. The views so presented were then fully considered, and held insufficient to sustain the judgment of the trial court, and to that decision we still adhere. We have not the shadow of a doubt as to the correctness of the conclusion then reached. Men cannot be elected to fill the office of judge for a longer time than the term of the office itself, as fixed by the law in force at the date of the election. Neither can the legislature extend the term of the existence of a court, and then name those who shall be judges for the term so extended. Still less can the legislature prevent the people from electing judges at the general or special election provided by law for that purpose. Petition overruled.

(152 Ind. 310)

BRUNSON et al. v. HENRY et al.

(Supreme Court of Indiana. March 16, 1899.)

MORTGAGES—FORECLOSURE—PLEADING—EVIDENCE
—FINDINGS—REVIEW—STATE DECISION—
HUSBAND AND WIFE.

1. Questions raised by a demurrer to a complaint, and decided in the appellate court against the party demurring, become the law of the case in subsequent appeals, although the demurrer was sustained on other grounds.

2. Parol evidence is not admissible to change the terms of a mortgage as to consideration, unless there is a plea of non est factum, or an allegation of mistake in this respect, with a prayer for reformation.

3. In a suit to foreclose a mortgage, in which the mortgage requires construction, a copy of it is properly set forth in the finding of fact, as such mortgage is an inferential fact.

4. Objections to findings of fact, not presented by assignments of error, will not be considered on review.

5. In a suit to foreclose a mortgage, it is not necessary to make a finding as to the debts of the mortgagee.

6. Where a special finding is silent as to a material fact, that fact must be taken as against the party obliged to prove it.

7. Where a mortgage is given to secure the purchase money of real estate, the wife of the mortgagor has no interest in the land as against the mortgagee.

8. In a suit to foreclose a mortgage given to secure purchase money of land, to be paid to the children of the mortgagee, the complaint alleged that certain of the children had died intestate, leaving no debts, and that no administrator had been appointed. *Held*, that complainant need not prove that the estates of such children had been settled.

9. Where some of the children of a mortgagee, for whose benefit a purchase-money mortgage was taken, are dead, and their administrator in the settlement of their estates did not take into account their interest in the mortgage, the failure of the administrator to make inquiries concerning the indebtedness of the mortgagor to the estates does not affect the rights of the parties to the mortgage.

10. The owner of land left as his heirs a widow and children. The widow, who had an undivided one-third interest in the land, sold "all her right, title, and interest" in the entire property to one of the children, who had purchased the interest of several other children. He gave a purchase-money mortgage on the "right, title, and interest" of the widow so conveyed to him. *Held* that, in a suit to foreclose the mortgage, a finding that the widow owned in fee simple all the real estate described in the deed to the mortgagor was error.

Appeal from superior court, Marion county; Vinson Carter, Special Judge.

On rehearing. Reversed in part.

For former opinion, see 47 N. E. 1063.

W. V. Rooker, for appellants. W. P. Atkinson, for appellees.

MONKS, C. J. This action was brought by appellees against appellants to foreclose a mortgage. The mortgage was executed by appellant Asher C. Brunson to Mary Ann Threlkeld, who was the mother of mortgagor, to secure the unpaid purchase money for the real estate described in said mortgage, which money, so secured, was, by the terms of said mortgage, to be paid to the children and grandchildren of the mortgagee named in said mortgage; and also to secure said mortgagee the possession and enjoyment, and free use and control, of said real estate during her life. This is the second appeal of said cause. On the former appeal the case was reversed, with instructions to sustain the demurrer to the complaint. See *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256, where the complaint and the nature of the controversy are fully set forth. On the return of said cause to the court below, the demurrer was sustained to the complaint, as directed by this court, and appellees filed an amended complaint containing the allegations which this court had held were necessary to render the same sufficient. The separate demurrer of said appellant Brunson

was overruled to said amended complaint. Said appellant Brunson then filed an answer in seven paragraphs. Appellees' demurrer for want of facts was sustained to the second, third, fifth, sixth, and seventh paragraphs of said answer. Julia A. Brunson, the wife of said appellant Brunson, the mortgagor, who did not join in the execution of said mortgage, also filed an answer. Appellees filed a reply to the answers of Brunson and his wife, and, at the request of said appellants, the court made a special finding of the facts, and stated its conclusions of law thereon, and over separate motions by said appellants, Brunson and wife, for judgment in their favor, and their several motions for a new trial, rendered judgment in favor of the appellees.

The questions raised by the demurrer to the amended complaint, and by the demurrer to the second, third, fifth, sixth, and seventh paragraphs of the separate answer of appellant Asher C. Brunson, were determined against said appellants on the former appeal, and the doctrine there declared is the law of this case, binding alike upon the parties and courts through all stages of the cause thereafter. *Board v. Bonebrake*, 146 Ind. 311, 45 N. E. 470, and cases cited. It is insisted, however, by said appellants, that this rule does not apply, because, when the court held the complaint insufficient on the former appeal, the appeal was decided, and if the court went beyond that, and decided any other questions, the same were obiter dicta. The rule is that all questions presented by the record, decided by a court of last resort on appeal, become the law of the case from that time forward, binding upon all the courts and parties, whether the question arises each time in the same manner or not. *Board v. Bonebrake*, supra. Some of the paragraphs of said answer are drawn upon the theory that said appellant can contradict and change, by parol evidence, the terms of the mortgage as to the consideration for which it was executed. On the former appeal this court, on page 462, 140 Ind., and page 258, 39 N. E., held that this could not be done, except upon a plea of non est factum, or an answer alleging a mistake in the mortgage in this respect, with a prayer for reformation. The paragraphs of answer referred to contained no such plea or answer, and are clearly bad, under the law of this case as decided on the former appeal.

It is next insisted that the court erred in overruling appellant Asher C. Brunson's motion for a judgment in his favor on the special finding. It is stated, among other things, in the special finding, that the mortgage mentioned and set out in the complaint was executed by Asher C. Brunson to Mary Ann Threlkeld, which mortgage is copied into said finding, and that said mortgage was executed to secure the payment of the purchase money for the real estate described in said mortgage.

The court stated seven conclusions of law, to each of which Brunson and wife separately excepted. It is first urged that the part of the finding setting forth a copy of the mortgage sued upon is purely evidentiary, and not the finding of an inferential fact, and should be disregarded. It is true that said mortgage was an evidentiary fact, but it was more than evidence; it was also the inferential fact. *Rowley v. Sanns*, 141 Ind. 179, 187, 40 N. E. 674; *Railway Co. v. Miller*, 141 Ind. 533, 550, 37 N. E. 343; *Railway Co. v. Peterson*, 144 Ind. 214, 220, 221, 42 N. E. 480, and 43 N. E. 1. In *Rowley v. Sanns*, supra, this court, on page 187, 141 Ind., and page 677, 40 N. E., said: "The provisions of the will inserted in the special finding were evidence, it is true, but they were also more than evidence; they were the ultimate and highest facts or inferential facts upon the issues they tended to prove." The construction to be placed upon said mortgage was not to be stated in the finding of facts, but in the conclusions of law. There may be cases where it is not necessary to set forth in the finding of facts a copy of the mortgage or other contract which is the foundation of the action or defense, but in this case it was proper to do so.

Objections are also urged to the facts found in regard to the children of Jane Henry, and the settlement of the estates of the deceased children, and it is claimed that they are not sufficient to entitle them to a judgment and foreclosure of said mortgage. We are not required to determine this question, because the same is not presented by any assignment of error or otherwise.

It is next urged that the motion for judgment in favor of the appellants should have been sustained because there was no finding as to the debts of Mary Ann Threlkeld. It was not necessary for appellees to prove, or for the court to make, any finding as to the debts of Mary Ann Threlkeld, the mortgagee.

Appellant Julia A. Brunson, wife of Asher C. Brunson, the mortgagor, insists that the court erred in overruling her motion for a judgment in her favor on the special finding. Since this appeal was filed, a nunc pro tunc entry has been made in the court below, over the objections of appellees, showing that said appellant filed a separate answer to the amended complaint, in which she alleged that "prior to the execution of the mortgage described in the complaint, she was, and ever since has been, and now is, the wife of her co-defendant Asher C. Brunson; that she did not join in the execution of said mortgage; and that the mortgage was not executed to secure the payment of the purchase money. Wherefore she prays judgment that the court protect her interest." This paragraph of answer is substantially the same as one by the same appellant held insufficient on the former appeal. This is not material, however, as the special finding was against said appellant as to the matter therein alleged. It is

found in the special finding that said mortgage was given for the purchase money, and the special finding does not state that she was the wife of her co-defendant Asher C. Brunson, at the time said mortgage was executed. Under the well-settled rule, this fact must be taken as found against said appellant. *Archibald v. Long*, 144 Ind. 451, 454, 43 N. E. 439, and authorities cited. Moreover, as the mortgage was given for the purchase money of the real estate covered thereby, Mrs. Brunson had no interest therein as against the mortgagee, even if she was the wife of her co-appellant when he executed the mortgage. *Burns' Rev. St. 1894, § 2656* (*Horner's Rev. St. 1897, § 2495*); *Baker v. McCune*, 82 Ind. 339; *Bowman v. Mitchell*, 97 Ind. 155, 157; *Butler v. Thornburgh*, 141 Ind. 152, 155, 40 N. E. 514; *Butler v. Thornburgh*, 131 Ind. 237, 30 N. E. 1073.

Appellant Asher C. Brunson filed a motion for a new trial, which was overruled. The action of the court in overruling said motion is assigned as error by said appellant. During the trial appellees offered in evidence the mortgage sued upon, and said appellant objected to the same being read in evidence without it being first shown by the evidence that the estate of the Henry children, alleged in the amended complaint to be deceased, had been settled. The court overruled the objection, and the mortgage was read in evidence. This action of the court is assigned by said appellant as a cause for a new trial. The amended complaint alleged that the Henry children, alleged to be dead, severally died intestate, leaving no debts, and that no administrator had been appointed on account of their said estates. Under such an allegation, it was not necessary to prove that the estates of said children had been settled. The court did not err, therefore, in overruling said objection.

Appellees called as a witness one F. A. Fisher, who had been administrator of the estate of Charlotta Whitesell, which estate had been settled and said administrator discharged, and proved by him that the interest of said Charlotta Whitesell in said mortgage was unknown to him as such administrator, and that the same was not taken into account in any way in the settlement of her estate. On cross-examination appellant asked him as to any inquiries he had made concerning the indebtedness of Asher C. Brunson to said estate, and appellees objected to such question, which objection was sustained by the court. If the interest of said estate in said mortgage was not taken into account or administered upon in the settlement of said estate, it was not material whether the administrator made any inquiry concerning the same or not. The making of such inquiries, or the failure to

make them, could not affect in any way the rights of the parties to said mortgage.

Mary Ann Threlkeld conveyed to appellant Asher C. Brunson "all her right, title, and interest, of whatsoever description, in and to," describing the real estate. Afterwards, to secure the purchase money therefor, said appellant Brunson executed a mortgage to Mary Ann Threlkeld on the "right, title, and interest of Mary Ann Threlkeld in said real estate so conveyed to him by her." The court found that Mrs. Threlkeld owned the real estate described in the deed to said Brunson in fee simple, and the decree entered upon the finding ordered the same sold to pay the judgment for the indebtedness secured by the mortgage. There was no evidence given that Mrs. Threlkeld owned all the real estate described in the deed to Brunson in fee simple. On the contrary, there was evidence tending to show that said real estate was owned by the first husband of Mrs. Threlkeld, who died in 1859, and left as his heirs at law his widow and children, who inherited said real estate. Asher C. Brunson was one of the children, and appellees were either children or grandchildren of said Brunson, who died the owner of the real estate. Asher C. Brunson purchased of several of the other children their interest in said real estate, and the interest of the widow, who afterwards married one Threlkeld, was an undivided one-third, or about 35 acres if partition was made. The mortgage only covered the interest in said real estate described in the mortgage owned by Mrs. Threlkeld at the time she executed the deed to her son, the appellant Asher C. Brunson, while the decree ordered the entire tract described in the mortgage to be sold, and this seems to include not only the interest in said real estate conveyed to him by his mother, but also the interest in said real estate inherited by Asher C. Brunson from his father, as well as what he purchased from his brother and sisters. It does not follow, however, that appellants are entitled to a new trial for this reason, because the finding that Mrs. Threlkeld owned all of said real estate was without the issues. Said finding, therefore, must be disregarded. Disregarding said finding, appellees, under the facts found, are entitled to a decree of foreclosure directing the sale of the interest in said real estate covered by said mortgage. It follows, then, that the personal judgment against appellant Asher C. Brunson was correct, and the sixth conclusion of law and decree of foreclosure were erroneous. The personal judgment against Asher C. Brunson is affirmed, and the decree of foreclosure is reversed, with instructions to restate the sixth conclusion of law, and render judgment foreclosing said mortgage, in accordance with this opinion.

(21 Ind. App. 323)

**BALTIMORE & O. S. W. RY. CO. v.
SPAULDING.**

(Appellate Court of Indiana. Dec. 23, 1898.)

MASTER AND SERVANT — PERSONAL INJURIES — PLEADING—DEGREE OF CARE — KNOWLEDGE OF DANGER—PROXIMATE CAUSE—TRIAL — INSTRUCTIONS—CHARGES ALREADY GIVEN — DIRECTING VERDICT—APPEAL—REVIEW—CONFLICTING EVIDENCE—ERROR CURED.

1. An allegation that a "scrap bin" was maintained for the purpose of storing scrap iron, and that it was plaintiff's duty to go there to get scrap iron to use in a blacksmith shop, and that the employer knew that it was the servant's duty, sufficiently pleads that the scrap bin was a place provided by the master for his servant to work in, and that the iron was promiscuously stored therein.

2. A servant, whose duties called him into a scrap bin, where sheet iron was so piled as to be liable to fall, was not bound to carefully examine it, to see that it was not dangerous, but only to exercise ordinary care to avoid apparent dangers, relying on the master's duty to keep the place in a reasonably safe condition.

3. Where sheet iron was piled in a scrap bin so as to be in danger of falling on persons going into the bin, and was so allowed to remain for three days, the master was chargeable with knowledge of the unsafe condition of the bin, as regards his servant whose duty it was to go there.

4. A verdict must stand, if there is evidence from which the jury might reach the conclusion they did.

5. An objection to instructions as having been given on a certain theory, and that "some of them fall far short of stating the law, even upon that theory, fully and correctly," is too general to present error.

6. An instruction that plaintiff might recover, "if he prove to [the jury's] satisfaction" the material allegations of either paragraph of the complaint, was cured where the charge elsewhere required facts to be established by a preponderance of evidence before there could be a recovery.

7. An instruction that a master is not an insurer of his servant's life and limbs, and cannot be held liable for an injury sustained by a servant, unless he was guilty of some negligence which resulted in the injury, and which was not contributed to by the carelessness or negligence of the servant himself, is correct, without referring in terms to the doctrine of proximate and remote cause.

8. An instruction that if a servant received an injury because of a danger to which he was exposed, and of which he had equal opportunities with the master to know and "fully understand," he cannot recover for an injury as the result of such danger, does not prejudice the master by the words "fully understand," since they impose an additional burden of care on the servant.

9. The refusal of instructions tendered is not error, if others given covered all those which correctly stated the law.

10. An instruction to find for defendant was properly refused, as invading the province of the jury, where the evidence was conflicting.

Appeal from circuit court, Daviess county; J. W. Ogdon, Special Judge.

Action by Thomas J. Spaulding against the Baltimore & Ohio Southwestern Railway Company. There was a judgment for plaintiff, and defendant appealed. Affirmed.

Gardiner & Gardiner and E. W. Strong, for appellant. Padgett & Padgett, for appellee.

WILEY, J. Appellee sued appellant to recover damages for injuries received while in the service of appellant as an employé. The complaint upon which the case was tried was in two paragraphs, and a brief statement of its allegations will suffice. In the first paragraph it is averred that appellant maintained and operated machine shops in the city of Washington, Daviess county, Ind., connected with which was a blacksmith shop, wherein a large number of blacksmiths and their helpers are employed; that appellee was helper of one of the blacksmiths employed therein; that near said blacksmith shop appellant kept and maintained a scrap bin, in which scrap iron was thrown and kept; that some sheet iron had been put in said scrap bin, with one end leaning against the wall; that it was a part of the duty of appellee to, and his employment frequently called him to, go to said scrap bin for pieces of iron to be used by the blacksmith whose helper appellee was; that when the doors of said shop building were left open, as they frequently were, in the warm weather, to let the air circulate through the building, if the wind was strong it would blow the fire and smoke from the forge upon the blacksmith, and that upon such occasions it was the duty of appellee to go to said scrap bin and procure a piece of sheet iron, and set it up in front of the forge, to protect the blacksmith from fire and smoke, all of which was known to appellant; that said scrap bin was constructed with walls on each side, with one end closed and the other open, where the employes were to enter in the discharge of their duties, and that it was about 12 feet wide; that, long prior to the time appellee was injured, appellant had caused to be carried into said bin large and heavy pieces of sheet iron, and had carelessly and negligently placed said pieces of iron on end, and set the same against one of the sides of said building in almost a perpendicular position, and in such a negligent and careless manner that some was liable to topple over and fall on persons entering said scrap bin; "that said pieces of sheet iron had been in said dangerous and unsafe condition for a long period of time, to wit, for the period of three days or more, and defendant knew or might have known of the unsafe condition of said scrap bin occasioned thereby, by the use of due diligence; that plaintiff had no knowledge * * * of the unsafe and dangerous condition of said scrap bin; that, * * * while in the discharge of his duty under his employment," he "entered said scrap bin to get a piece of sheet iron to set up against said forge to protect said blacksmith from the heat and smoke which was blowing against and upon him, * * * and while exercising due care and diligence, and without any fault or negligence upon his part," and while so engaged, said pieces of sheet iron which were standing against the wall toppled over and fell upon him, etc. The second paragraph of the complaint is like the first, except that in the sec-

and it is alleged that the pieces of sheet iron that fell upon and injured appellee were standing on the floor, on one edge, with one edge leaning against the wall; that some of the pieces nearer the wall were crooked and uneven, while those on the outside were straight; and that he was thereby deceived as to their actual condition. A demurrer was overruled to each paragraph of the complaint for want of sufficient facts, and an exception reserved. The case was put at issue by general denial, and tried by a jury, resulting in a general verdict for appellee. Appellant's motion for a new trial was overruled, and it has assigned errors; challenging the overruling of the demurrer to the complaint, and overruling its motion for a new trial.

As to the first paragraph of the complaint, appellant urges that there is no averment that the scrap bin was a place provided by the master for its servants to work in, or that scrap iron was placed therein in any particular manner. We do not think this position is tenable, in the light of the averments. It is charged that the bin was kept and maintained by appellant for the purpose of storing scrap iron; that it was the duty of the employees to go to said bin from time to time to get scrap iron to use in and about the forges in the blacksmith shop; that this was one of the duties of appellee in the course of his employment; that on the occasion of his injury he went into said bin for the specific purpose of getting a piece of scrap iron to put up at the forge to protect the blacksmith for whom he was helper; that appellant knew that that was a part of his duty; and that while thus engaged he was injured. It is true, as appellant suggests, the complaint does not aver that scraps were placed in such bin in any particular manner; but we do not think such averment was necessary. The term "scrap bin," as used in the complaint, implies the character of the place, and denotes that it is a place where old and scrap iron is stored promiscuously. The fact that it was a place where appellant's servants were required, in the line of their duty and employment, to go in discharge of their obligations to their master, brings it within the unvarying rule that the master must provide an ordinarily safe place in which the servant is required to work. That the master must do this is so thoroughly established by the authorities that it is no longer a debatable question, and a citation of the cases so holding would be a waste of time. In the case before us, if it was the duty of appellee, within the scope of his employment, to go to the scrap bin,—and the demurrer admits this,—then it was the duty of appellant to keep it in a reasonably safe condition, so as to protect the servant from injury, except such as was incident to the character of his employment, and which the law says he must assume. We are not unmindful of the rule that a servant cannot subject himself to known and apparent danger, and yet hold the master responsible for

resulting injury; but that question is not here presented. The appellee had the right to assume that the scrap bin was in a reasonably safe condition when he entered it to perform a service for his employer, and it was not an obligation resting upon him to make a minute and careful inspection and examination before performing the service that called him there. He was only required to exercise ordinary care and caution, and when he had done this, and he was not in the presence of apparent or known danger, he had a right to presume that he could perform the service in safety. It seems to us that the complaint shows he did this. As the scrap bin was a place where appellee was required to go to discharge his duty to appellant, it was the duty of appellant, as we have seen, to keep it in a reasonably safe condition. It is averred that appellant knew or might have known of the unsafe condition of the scrap bin, by the use of due diligence. As to what is "due diligence" depends largely upon the facts in each particular case, and under the facts stated in the complaint, it appearing that appellant's servants were required to go to this scrap bin to perform their duties to it, it was the duty of appellant, in the exercise of "due diligence," to keep it in a safe condition, even if it required an inspection by some duly-authorized officer for that purpose. *Railroad Co. v. Duel*, 134 Ind. 156, 33 N. E. 355; *Railway Co. v. Corps*, 124 Ind. 427, 24 N. E. 1046; *Railway Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Taylor v. Railroad Co.*, 121 Ind. 124, 22 N. E. 376. So, under the facts charged, we must hold that appellant was chargeable with the knowledge of the unsafe condition of the bin, and the specific objection to the first paragraph of complaint is not well grounded. *Elliott, R. R. § 1307*, and authorities there cited. We cannot conceive it to have been the duty of the appellee, under the facts charged, to have examined with care the sheet iron that fell upon and injured him. It was not his duty to take hold of it and move it, to see if it would fall upon him. He saw it leaning against the wall of the bin, and assuming, as he had a right to assume, that it was safe, he relied upon his apparent safety from danger, and went about the discharge of his duties. It seems to us that he used ordinary care, under the circumstances. Appellant has not cited us to any authorities in support of its insistence that the complaint is insufficient, and we have been unable to find any so holding. The second paragraph of complaint is so nearly identical to the first that what we have said applies to both. The complaint is sufficient, and the court did not err in overruling the demurrer.

Appellant's motion for a new trial was grounded on three reasons: (1) That the verdict is not sustained by sufficient evidence; (2) that the verdict is contrary to law; (3) that the court erred in giving certain instructions on its own motion, and in refusing to give certain instructions tendered by appel-

lant. Appellant has failed to discuss the second reason assigned in its motion for a new trial, and hence, under the rule, it is waived. The other two we will dispose of in their order:

(1) That the verdict is not sustained by sufficient evidence: Appellant insists that the verdict and judgment cannot stand, because the evidence does not sustain them. The evidence is somewhat voluminous, and it would not serve any good purpose to refer to it, even in the abstract; yet, after a careful examination of it, we find that there is an abundance of evidence to support every material averment of the complaint. True, there is some conflict of the evidence, but in such case the appellate tribunal cannot weigh it. It is only when there is no evidence to sustain the verdict of a jury that the court of last resort can disturb it because it is not sustained by the evidence. There being evidence in the record from which the jury might reach the conclusion as expressed by their verdict, it must stand. *Fertilizer Co. v. Byfield*, 9 Ind. App. 180, 34 N. E. 451, and 36 N. E. 438; *Town of Ladoga v. Linn*, 9 Ind. App. 15, 36 N. E. 159; *Coryell v. State*, 130 Ind. 51, 29 N. E. 369.

(2) The instructions: The appellant first makes a general attack on the instructions given by the court, because they proceed, as appellant insists, upon the theory that it was the duty of appellant to keep its scrap bin in a safe condition; and, as to this, counsel say: "While some of them [the instructions] fall far short of stating the law, even upon that theory, fully and correctly, yet we are not disposed to split hairs in attempting to point out distinctions that probably had nothing to do with the action of the jury." Such a general objection to instructions as a whole is not sufficient. It is not the duty of this court to take up the instructions given, and examine them as a whole, where the complaining party has failed to point out the particular instruction or instructions charged to be erroneous. Appellant has, however, called to our attention some of the instructions by number and reference to the transcript, which it is our duty to examine, to which we will now direct our attention. The fourth instruction, it is urged, is erroneous, because in it the court submitted the case to the jury on both paragraphs of the complaint, and that, as the first paragraph is defective, such instruction was fatal. This probably might be true, if the first paragraph was bad; but, as we have held that it stated a cause of action, the objection is unavailing. This instruction is also criticised because in it the court instructed the jury that they might find for the appellee, "if he prove to your satisfaction the material averments of either paragraph of his complaint" (quoting the language of the court). Counsel urge that as the court, in this instruction, did not tell the jury that appellee must prove every material averment

of his complaint by a preponderance of the evidence, it was erroneous. This instruction, standing alone, might not be a technically correct statement of the law, as it told the jury that it would be sufficient, if appellee had proven the material facts to their "satisfaction"; yet, when we come to consider all the instructions, and construe them together, appellant's objection is obviated, for in other instructions the court specifically told the jury that, before plaintiff could recover, it was incumbent upon him to establish the material averments of his complaint by a fair preponderance of the evidence. Instructions should be construed as a whole, and not in detached portions. *Clanin v. Fagin*, 124 Ind. 304, 24 N. E. 1044; *Conway v. Vizzard*, 122 Ind. 266, 23 N. E. 771; *Todd v. Danner*, 17 Ind. App. 368, 46 N. E. 829. The eighth instruction is as follows: "A railroad company is not an insurer of the lives and limbs of its servants, and it cannot be held liable for an injury sustained by its servants, unless it was guilty of some act of negligence which resulted in the injury, and which was not contributed to by the carelessness or negligence of the servant himself." Appellant insists that this instruction was erroneous, because it wholly disregarded the question as to whether appellant's negligence was the proximate or remote cause of the injury. The instruction is not subject to the objection urged. It stated the law clearly and plainly, and we do not know how it could be more forcibly and explicitly expressed. The tenth instruction reads as follows: "It is the duty of a railway company not only to provide, but maintain, reasonably safe places for its servants to work in; and it cannot delegate this duty to another, and thereby relieve itself from responsibility. And a servant engaged in the service of a railroad company has a right to rely upon the company to furnish him with a reasonably safe place in which to work, and it is the duty of the company to maintain such place in a reasonably safe condition while the service continues." Appellant says this instruction is erroneous, because it is not applicable to the facts alleged and proven. We cannot so regard it. It states the law in strict harmony with what we have said in the former part of this opinion in regard to the duty of a master to provide and maintain a safe place or safe premises in which his servants are required to work. Instruction 12 is: "It is the duty of one engaged in a hazardous employment to keep a constant lookout for the danger that besets him, and if he receive an injury because of a danger to which he is exposed, of which he had equal advantages and opportunities with the master to know and fully understand, he cannot recover for an injury as a result of such danger." Appellant's learned counsel insist that this instruction is vitiated and rendered bad by the expression "and fully understand." The instruction, in our judgment, states the law

most advantageously to the appellant. The objection, at most, is highly technical. It would have been good with these words omitted; and the appellant could not have been prejudiced by them, because it placed upon appellee an additional burden, and for this appellant cannot complain. The appellant at the proper time tendered to the court a series of instructions, numbered from 1 to 14, and requested that they be given to the jury. The court gave Nos. 1, 3, 4, 7, 8, 9, and 12, and refused to give Nos. 2, 5, 6, 10, 11, 13, and 14. After a careful examination of these instructions which the court refused, and comparing them with the instructions the court gave, we are clearly of the opinion that those tendered by the appellant which correctly stated the law were fully covered by other instructions given, and in such case refusing to give the instructions asked is not error. The fourteenth instruction requested by appellant was a plain direction to find for appellant. The court correctly refused this instruction, because to have given it, under the evidence, would have been an invasion of the rights of the jury. The court is only authorized to direct a verdict for defendant where there is no evidence to support the plaintiff's cause of action. See *Gregory v. Railroad Co.*, 112 Ind. 385, 14 N. E. 228; *Wolfe v. McMillan*, 117 Ind. 587, 20 N. E. 509; *Hanna v. Railroad Co.*, 119 Ind. 316, 21 N. E. 903; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, and 22 N. E. 990; *Moore v. Baker*, 4 Ind. App. 115, 30 N. E. 629; *Adams v. Kennedy*, 90 Ind. 318; *Pennsylvania Co. v. McCormack*, 131 Ind. 250, 30 N. E. 27.

After a careful consideration of the evidence and the instructions, and looking at the entire record, we cannot say that there is any error for which the judgment should be reversed. Judgment affirmed.

(21 Ind. App. 315)

SLOAN v. SLOAN.

(Appellate Court of Indiana. Dec. 22, 1898.)

WITNESS—COMPETENCY—PERSONAL TRANSACTIONS WITH DECEDENT.

Burns' Rev. St. 1894, § 506 (Horner's Rev. St. 1897, § 498), providing that in suits in which an administrator is a party involving transactions with decedent, where a judgment may be rendered for or against an estate, one who is a necessary party to the issue, whose interest is adverse to the estate, shall not be a competent witness against such estate, does not apply to a suit between two estates; and, where one estate is prosecuting a claim against another, the parties to the issue on either side can testify to personal transactions with the opposing administrator's decedent.

Appeal from circuit court, Marion county; Henry Clay Allen, Judge.

Action by Melissa E. Sloan, administratrix of the estate of William G. Sloan, against Oliver B. Sloan, administrator of the estate of William Sloan. There was a judgment for plaintiff, and from an order denying a new trial defendant appeals. Reversed.

Spencer & Ferris, for appellant. F. J. Van Vorhis, for appellee.

ROBINSON, J. William Sloan, appellant's decedent, died in 1895. William G. Sloan, a son, held a note against his father, which he filed against the estate. Appellant refused to allow the claim. Before the case was tried, William G. Sloan died, and appellee, as administratrix of his estate, prosecuted the claim. A trial by jury resulted in a verdict for appellee, and judgment was rendered accordingly. The only error assigned is overruling appellant's motion for a new trial.

Oliver B. Sloan, administrator, is a son of William Sloan, and a brother of William G. Sloan, deceased. Hester I. Sloan, wife of Oliver B. Sloan, was called as a witness in behalf of appellant, and testified to certain statements and admissions made to her by William G. Sloan, some time in the spring of 1897. On motion, her evidence was struck out. It is not necessary to set out at length the testimony struck out, for the reason that the question presented is not so much the competency of her evidence as the competency of the witness herself. The general rule in this state as declared by statute (section 504, *Burns' Rev. St. 1894*; section 496, *Horner's Rev. St. 1897*), is that all persons, whether parties to or interested in the suit, are competent witnesses in a civil action. But to this general rule there are several exceptions. Among these exceptions, and so far as pertinent to this case, are the following: "In suits or proceedings in which an executor or administrator is a party involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate." *Burns' Rev. St. 1894, § 506 (Horner's Rev. St. 1897, § 498)*. "In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor." *Burns' Rev. St. 1894, § 507 (Horner's Rev. St. 1897, § 499)*. "When the husband or wife is a party, and not a competent witness in his or her own behalf, the other shall also be excluded." *Burns' Rev. St. 1894, § 509 (Horner's Rev. St. 1897, § 501)*. Since the act of March 15, 1879, husband and wife are competent witnesses for and against each other in all cases except as to communications made to each other during marriage, and in an action by the husband for the seduction of the wife. So that, in the case at bar, if Oliver B. Sloan would be a competent witness, Hester I. Sloan

would not be incompetent by reason of her marital relations. If this claim had been prosecuted by William G. Sloan in person, it is clear that, under the sections of the statute above set out, neither the witness nor her husband would be incompetent as a witness. They would not be incompetent by virtue of section 506 (498), because they would not be necessary parties to the issue or record whose interest is adverse to the estate; nor would they be incompetent under section 507 (499), because it would not be a suit by or against heirs, founded on a contract with the ancestor, to obtain title to or possession of property of or in right of such ancestor. It is equally clear that in that case William G. Sloan would have been an incompetent witness, under section 506 (498), because he would be a necessary party, whose interest is adverse to such estate.

It is argued by counsel for appellee that, as there are two estates involved, section 506 (498), *supra*, if properly construed, applies to one of them as much as to the other, and that, while the witness might be a competent witness for the estate of which her husband is administrator, she would not be a competent witness against the estate in favor of which the claim is being prosecuted. But the fact that the claim is prosecuted by the deceased claimant's administratrix does not make the witness incompetent. The statute, as we have seen, is an exception to the general rule, and, as such exception, it should be held to apply only to such cases as the wording of the statute manifestly intended. The true spirit of section 506 (498), *supra*, is that when one party to a transaction is dead, and his rights have passed to another, who represents him, the surviving party to that transaction shall not testify to matters occurring during the lifetime of the decedent. Thus, it is said in *Durham v. Shannon*, 116 Ind. 403, 19 N. E. 190: "Generally speaking, three things must concur in order to exclude the testimony of the surviving adversely interested party: (1) The transaction, or the subject-matter thereof, must be in some way directly involved in the action or proceeding, and it must appear that one of the parties to the transaction about to be proved is dead. (2) The right of the deceased party must have passed, either by his own act or that of the law, to another, who represents him in the action or proceeding in the character of executor, administrator, or in some other manner in which he is authorized by law to bind the estate. (3) It must appear that the allowance to be made or the judgment to be rendered may either directly or indirectly affect the estate of the decedent." The term "party," as used in section 506 (498), *supra*, means a party to the issue, and not merely a party to the record. A person is not incompetent as a witness simply because he may be a party to the record, but it must appear that he has some interest in the result of the suit in common with the party

calling him. If he has such interest, he is incompetent as a witness. *Upton v. Adams' Ex'r*, 27 Ind. 432; *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726. The reason for the rule embodied in that section of the statute has often been declared to be to prevent inducements for fraud and perjury by permitting a party to make out his claim by his own testimony which cannot possibly be met by the testimony of the other party. *Sullivan v. Sullivan*, 6 Ind. App. 65, 32 N. E. 1132; *Henry, Prob. Law* (2d Ed.) § 483; *Nelson v. Masterton*, 2 Ind. App. 524, 28 N. E. 731; *Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. 907. But, when one estate is prosecuting a claim against another estate, they stand upon an equal footing so far as any undue advantage is concerned, and the above reason for the rule is gone. In the numerous cases in this state which have had under consideration this section of the statute, the fact that one of the parties to the transaction was dead, and the other living, has been recognized as the basis upon which the rule rests. Our attention has been called to no decision, and we know of none, in this state, where the competency of a witness under this section has been considered in a case where a claim was prosecuted by one estate against another. The statute, as we have said, is an exception to the general rule as to the competency of witnesses; and, unless the wording of the statute embraces an exception like that at bar, we cannot extend its application to such a case. We think it manifest from the wording of the statute itself, and from the language of the decisions placing upon it a construction, that its provisions do not extend to a claim prosecuted by one estate against another. Sustaining the motion to strike out the testimony of Frank Sloan, a grandchild and heir of William Sloan, deceased, and excluding the testimony of Eliza M. Coffee, a daughter of William Sloan, deceased, present the same question as that presented above; and, for the same reasons, they were not incompetent witnesses. The motion for a new trial should have been sustained. Judgment reversed.

(21 Ind. App. 320)

O'HARA v. STATE.

(Appellate Court of Indiana. Dec. 22, 1898.)

ASSAULT—TOWN TRUSTEES — TAXPAYER — PUBLIC MEETING.

A taxpayer at a public meeting of town trustees made himself offensive before the meeting came to order, and was ordered by the president to keep still or he would be put out. He went out, and afterwards returned, and was making no disturbance except to answer in a whisper a question of the marshal's, but the president saw him, and ordered the marshal to put him out. The marshal used no violence, but took him by the coat, and he then went out. *Held*, that the president was guilty of assault, the taxpayer having a right to be there.

Appeal from circuit court, Lake county; John H. Gillett, Judge.

Edward O'Hara was convicted of assault and battery, and from an order denying a new trial he appeals. Affirmed.

John W. Wartman, John P. Peterson, and John G. Erdlitz, for appellant. The Attorney General, for the State.

COMSTOCK, J. This prosecution was commenced before a justice of the peace of Lake county upon an affidavit charging Clay Collins, Edward O'Hara, and John W. Wartman with having committed an assault and battery upon one Charles Pitzele. Collins was not arrested. After hearing the evidence, the justice of the peace found O'Hara and Wartman guilty as charged, and assessed a fine of one dollar against each and the costs of the action. From this judgment of the justice of the peace O'Hara and Wartman appealed to the Lake circuit court. A trial before said court, without the intervention of a jury, resulted in the conviction of O'Hara, and the assessment of a fine of one dollar, without costs, against him, and the acquittal of Wartman. Appellant's motion for a new trial, upon the ground that the finding and judgment of the court were contrary to law and contrary to the evidence, and not supported by the evidence, was overruled. This action of the court is the only error assigned.

On the 29th day of July, 1897, the date named in the affidavit, the board of trustees of the town of Whiting, in said county, met in special session in its regular place of meeting, the town hall. Appellant, O'Hara, was president of the board; Wartman was the town attorney; Collins was the town marshal. Some 20 or 30 persons were present, including the prosecuting witness, besides the members of the board. Before the board had been called to order for the transaction of business, the prosecuting witness had talked and conducted himself in a manner offensive to, at least, the president of the board and the town attorney, and he was ordered to take his seat and be still, or he would be put out. After some words he did so. He soon after left the hall, threatening to have the attorney arrested for insulting him. In 15 or 20 minutes he returned to the hall, and resumed his seat by the side of the town marshal, in the front row of the seats occupied by the spectators, 12 or 15 feet from the president of the board. There is evidence that he answered in a whisper a question put to him by the town marshal. O'Hara discovered the prosecuting witness, saw that he was talking, and told the town marshal to put him out. The town marshal hesitated to obey the order, and asked the town attorney if he had the right to put him out, and O'Hara and Wartman "both directed him to put him out." The marshal next to whom he sat upon his return to the hall testified that he made no noise and said nothing after his return to the hall but answer the question he put to him, which he did in a whisper. The testimony of the pro-

secuting witness was to the same effect. Thus, while the prosecuting witness was doing and saying nothing to disturb the meeting, the appellant directed the marshal to take him outside, and see that he stayed out. The marshal requested him to go out. He answered, "You will have to drag me out." The marshal took him by the coat, and said, "Come, and go outside." At this time a third party told Pitzele that he wanted to see him outside, and the three (the prosecuting witness, the marshal, and the stranger) walked out of the hall, and the prosecuting witness remained out. He testified that he did not return to the hall for the purpose of creating a disturbance, but to witness the proceedings of the board. The meetings of the board were public. Pitzele had attended other meetings. From this brief summary of the evidence, it appears that the prosecuting witness was present at a public meeting, and therefore, in a sense, by invitation, although it is equally apparent that to the board he was persona non grata. When the marshal placed his hand upon him for the purpose of obeying the order of the president of the board, the evidence shows that he was doing nothing calculated to disturb the orderly transaction of business, whatever his conduct may have been prior to that time. The trial court, in view of this evidence and of the fact that he was a citizen and a taxpayer, held, in effect, that he had a right to be where he was so long as he did not interfere with the business and objects of the meeting, and that when the officer took hold of him to put him out the touching was unlawful, although it was not violent. The court, having heard all the evidence in the cause, found that an assault and battery had been committed. Appellant, having directed the acts of the marshal constituting a misdemeanor, was, with the marshal, a principal. The board of trustees had the undoubted right to maintain order; to remove any one interfering with the transaction of the business; but not arbitrarily to eject, or attempt to eject, one who was not thus offending. There was evidence that from the time the prosecuting witness returned to the hall a second time he had remained in his seat, and had done nothing to disturb the meeting, and upon this evidence the trial court properly held that the act complained of was unlawful. Judgment affirmed.

(21 Ind. App. 656)

CITY OF HUNTINGTON v. BURKE.

(Appellate Court of Indiana. Dec. 20, 1898.)

CITIES—DEFECTIVE WALK—NOTICE—LIABILITY—PLEADING—VERDICT—NEW TRIAL—BILLS OF EXCEPTIONS—INTERROGATORIES—DECLARATIONS—EVIDENCE—MORTALITY TABLES—EXCESSIVE DAMAGES.

1. A complaint in an action against a city for injury resulting from a defective sidewalk contained a description of the hole in the walk, and the time it had negligently been allowed to exist, and averred that in traveling along the

walk, without negligence or any knowledge of the hole, plaintiff stepped into it. *Held* to show that the injury was caused by the city's negligent failure to repair the defect.

2. Where a special verdict is insufficient to warrant a judgment, a new trial is properly ordered.

3. A special finding that a defendant city in an action for injury resulting from a defective sidewalk had no notice of the defect before the day of the injury does not entitle defendant to a verdict, notwithstanding a general verdict for plaintiff, since the city might have had notice of the defect in time to repair it before the accident, which occurred in the night of the day stated.

4. Where the bill of exceptions does not show when interrogatories were submitted to the court, they being refused, it will be presumed that they were not presented in time.

5. Declarations of an injured person indicative of existing pain are competent, though made long after the injury, which was permanent.

6. In actions for personal injuries which become permanent, mortality tables are competent to prove expectancy of life.

7. Error in excluding a question as calling for a conclusion of the witness cannot be reviewed, counsel propounding it making no statement as to what facts he expected to elicit by the answer.

8. Error in excluding a question as to the condition of a sidewalk, because calling for a conclusion, was harmless, the witness afterwards describing its condition.

9. It is not error to refuse a requested charge which is covered by charges given.

10. The appellate court will not disturb a judgment for contradictions in the evidence.

11. A judgment will not be set aside for excessive damages where they are not so excessive as to induce the belief that the jury acted from partiality, prejudice, or corruption.

Appeal from circuit court, Wabash county; H. B. Shively, Judge.

Action by Jane Burke against the city of Huntington. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Kenner & Lesh and J. F. France, for appellant. Ibach & Ibach, Warren Sayre, and H. C. Pettit, for appellee.

COMSTOCK, J. Action by appellee against appellant to recover damages on account of personal injuries sustained by reason of a defective sidewalk in the city of Huntington. The case was tried in the Wabash circuit court on change of venue. This is the second appeal. The former appeal is reported in 12 Ind. App. 133, 39 N. E. 170. The judgment of the lower court was reversed, because the complaint did not show that the appellant knew of the particular defect in the sidewalk, through which appellee was injured, a sufficient length of time prior to the accident to have repaired the same in the exercise of reasonable care, or that the defect had existed for such length of time that appellant, in the exercise of reasonable care, should have discovered and repaired it. It appears also from the opinion that there was no description in the complaint of the hole and broken place in the sidewalk, nor any allegation that it existed for any definite time prior to the accident. In the trial (being the third of the cause) resulting in the judgment

from which this appeal was taken, the cause was put at issue upon an amended complaint in three paragraphs. The jury returned a general verdict, assessing the damages of appellee at \$2,000, and, with the general verdict, returned answers to interrogatories, upon which the court rendered judgment in favor of appellee, for the amount named in the verdict.

The first, second, and third specifications in the assignment of errors question the sufficiency of each paragraph of the complaint. Appellant's learned counsel address their argument to the third paragraph, with the statement that the three are very similar but that the first and second are weaker than the third. Counsel urge as an objection to this paragraph that it does not appear what the conduct of the appellee was in going upon the walk,—whether she exercised her sense of sight, or how she proceeded, and whether, by using her senses, she could or would have discovered the defective place, and avoided it. The complaint does not even aver that the injury was caused by, or was the result of, the negligence of the appellant. Omitting the allegations as to the municipality of appellant and its duties in reference to its public streets, said paragraph alleges, in substance, that on the 6th day of December, 1890, there was on the western side of Charles street, in said city, a sidewalk elevated from 18 inches to 2 feet above the ground beneath; that said walk was one of the permanent sidewalks of the city, much traveled and used by the citizens thereof and others; that there was in said walk at said date, at or near a lot known as "Chambers Lot," an opening, about six inches wide and two feet long, extending halfway across said walk, making a dangerous hole, about two feet deep, which was by the defendant negligently allowed to remain in said walk for a period of at least two to four months prior to said day, and during said period defendant had sufficient time and opportunity to learn and know of such hole, but negligently failed to repair the same and close the same up: that, during the nighttime of about said date, it was still then and there negligently suffered to remain open and exposed, without guards or other protection or notice to citizens and travelers, so as to avoid stepping into said hole, and of which hole this plaintiff had no notice; and, on the night aforesaid, this plaintiff, in the ordinary mode of walking, was traveling along on said sidewalk, and without fault or negligence on her part in entering upon said walk, and without any knowledge of said hole, did, without fault on her part, step into said hole, etc., receive the injuries complained of, caused by the negligence of defendant, without fault on her part. This paragraph is manifestly framed to meet the defect pointed out in the original complaint upon the former appeal. It contains a description of "the hole and broken place" on the sidewalk. Its size is

given, and the time it had existed prior to the accident, viz. from two to four months. It avers that in traveling along the walk, without negligence, and without fault, and without any knowledge of said hole, appellee stepped into it. We think it sufficiently appears that the injury was occasioned by the negligent failure of appellant to close up the defect in the walk. "It is settled in this state that a complaint charging the defendant with an act injurious to the plaintiff, with a general allegation of negligence in the performer of the act, is sufficient to withstand a demurrer to the complaint for want of sufficient facts." *City of Huntington v. Burke*, 12 Ind. App. 135, 39 N. E. 171. This paragraph is not open to the objections pointed out. The court did not err in overruling the demurrer.

The third paragraph alleges that the injury was received on the 6th day of December, 1890. The first and second paragraphs fix the date of the injury at December 25, 1890. The answers to interrogatories show that the injury was received December 6, 1890. The verdict, accordingly, being upon the third paragraph, it is not necessary to pass upon the other two.

The fourth specification of error questions the action of the court in overruling appellant's motion for judgment on the special verdict returned in the second trial. The jury upon that trial assessed appellee's damages at \$3,500. We have considered the interrogatories and answers thereto, composing the special verdict; and, while it is clear that the court would not have been justified in rendering judgment on that verdict in favor of appellee (and this disposes of the cross error assigned by appellee), we think the trial court, in view of all the facts found, best subserved the ends of justice by overruling the motions of appellant and appellee for judgment on said verdict, and sustaining appellant's motion for a new trial. In numerous adjudged cases, the supreme and this court have directed a new trial when reversing judgments rendered on special verdicts held to be insufficient to warrant the judgment rendered thereon by the trial court.

The fifth specification of error is the refusal of the court to render judgment on the answers to interrogatories, notwithstanding the general verdict. It is claimed that appellant was entitled to judgment upon the answers to the two interrogatories following, for the reason that they show that appellee had no notice of the defect in the sidewalk. Interrogatory 23: "If you find that there was a board broken and gone in such sidewalk, did the city of Huntington have notice or knowledge of such defect prior to December 6, 1890?" Answer: "No." Interrogatory 41: "What notice or knowledge did the city of Huntington have prior to December 6, 1890, that there were boards broken and gone from the sidewalk of Charles Street?" Answer: "None." The judgment was rendered under

the verdict law in force March 4, 1897 (*Horner's Rev. St. 1897*, § 546; *Acts 1897*, p. 128). It substantially re-enacts section 546, *Rev. St. 1881* (section 555, *Rev. St. 1894*). A general verdict being returned, neither party was bound to set forth in interrogatories all the facts relied upon, but could submit to the jury interrogatories to elicit one or more of the facts involved. In their general verdict the jury necessarily found the absence of negligence on the part of the appellee contributing to her injury; the negligence of appellant as the proximate cause of the injury; entering into this finding of appellant's negligence was the reasonable notice to appellant in time to have repaired the walk before the accident. The accident occurred on the night of December 6, 1890. The rule laid down in *City of Ft. Wayne v. Patterson*, 3 Ind. App. 34, 29 N. E. 167, has been applied by the supreme and this court in numerous cases. It is: "If, taking all the special findings together, and adding to them any other facts that might have been proved under the issues, an irreconcilable conflict with the general verdict can be avoided, the answers to the interrogatories will not be allowed to control." See *Sponhaur v. Molloy* (decided at the present term of this court) 52 N. E. 245. We think, under the issues, other facts might have been proven, which would have avoided such conflict. Actual knowledge of some officer of the city might have been proven on the morning of December 6th. It would have been for the jury to have determined whether that notice gave a reasonable time in which to have repaired a dangerous break in a much-used thoroughfare; and, on such finding, an irreconcilable conflict might, if it existed, have been avoided.

The sixth specification calls in question the action of the court in overruling appellant's motion for a new trial. We will consider the reasons for the motion for a new trial in the order in which they are presented in appellant's brief.

The first reason discussed is the refusal of the court to submit to the jury three interrogatories set out in a bill of exceptions. Numerous decisions under section 546, *Horner's Rev. St. 1897*, have held that a person desiring to have interrogatories submitted to the jury must make the request and submit the interrogatories to the court before the argument commences, or they may be properly refused. *Ollam v. Shaw*, 27 Ind. 338; *Malady v. McEnary*, 30 Ind. 272; *Miller v. Voss*, 40 Ind. 307; *Glasgow v. Hobbs*, 52 Ind. 239. It does not appear from the bill of exceptions when the interrogatories were submitted to the court. As every presumption must be in favor of the rulings of the trial court, it will be presumed that the interrogatories were not presented in time to the court.

The next two reasons discussed may be considered together. They relate respectively to the portions of the testimony of Drs. Wright and Ford, witnesses in behalf of appellee.

Counsel for appellant, in their brief, say that Dr. Wright was permitted to testify that in his examination of appellee's ankle, made seven years after the alleged injury, she said it hurt her, and manifested pain. An examination of that part of the record to which we are cited shows that the only expression of pain manifested was the retraction of the limb when it was moved. Dr. Ford testified to an examination made of the injured ankle of appellee four years after the accident. He repeated nothing that she said, but testified that, in his examination, she evinced pain. Both witnesses testified that, in their opinion, the injury was permanent. But, even if these witnesses had testified to verbal expressions of present pain, such testimony would have been proper. The interval of time between the injury and the expression of pain would go to the weight of the testimony, but not its admissibility. Upon the subject of the declarations of an injured person, indicative of existing pain, see *Board v. Leggett*, 115 Ind. 544, 18 N. E. 53, and the cases there cited.

Counsel claim that the court erred in permitting the introduction in evidence of a page of the Agents' Road Book, Mutual Life Insurance Company of New York. The record shows that the page introduced gave the expectancy of life, according to the American Table of Mortality, between the ages of 35 and 42. Plaintiff's age was 35 years. In this there was no error. Such evidence is proper in cases of this character.

The next reason assigned is the overruling of an objection by appellant to a question propounded to appellee, which question was not answered.

Appellant next claims that the court erred in sustaining an objection to a question propounded by appellant to N. W. Sufford, a witness for appellant. The witness had testified that he lived in the vicinity of the walk in question, passed over it from four to six times a day, and knew its condition. He was then asked the following question: "Now, tell the jury what was the condition of that sidewalk, as to being safe for ordinary travel, during that time." The question called for a conclusion of the witness. Counsel made no statement to the court as to what facts they expected to elicit by the answer; so that, if the question had been proper, we find that the question was not reserved. Besides, in answer to a subsequent question, the witness was permitted to describe the condition of the sidewalk.

Under the thirteenth reason for a new trial, counsel complain of instruction No. 34½, given to the jury. Said instruction is as follows: "The court charges you that it is the duty of the city authorities to keep the streets in repair, and to prohibit obstructions or defects therein, so far as this can be done in the exercise of reasonable care and prudence; and that any person traveling upon the sidewalk, when using the same with due diligence and care, has a right to presume and act upon the

presumption that it is reasonably safe for ordinary travel, throughout its entire width, and free from all dangerous holes, obstructions, or other defects. And if you believe from the evidence that the plaintiff, while passing along one of the sidewalks in said city of Huntington, was injured as alleged in her complaint, and that the injury would not have happened to her if the said sidewalk had been in a reasonably good repair and safe condition, then the defendant is liable for such injury; provided the jury believe from the evidence that the plaintiff was exercising reasonable care and caution to avoid injury while passing over said sidewalk, and that said city did not use reasonable care to keep said sidewalk in safe condition." Counsel claim that this instruction is misleading, is contradictory with itself and others given, and therefore misleading. Another instruction is complained of as "confusing and misleading"; another, as "a bundle of generalities." Considering all the instructions together, we do not find them open to the objections specified.

Appellant further complains of the refusal of the court to give the following instruction: "What I mean by due care and caution is this: One who goes upon a sidewalk must use his or her eyes to see if any danger is in the way, and, if any person does not look at such a time, he or she cannot recover, if, by looking, the danger or defect could have been avoided." The instruction requested, we think, was covered by instructions 22 and 23, given by the court: (22) "A sidewalk may have become insecure from use or breaks, or planks may have become loose or displaced by the action of the elements or by accident, so that persons are liable to stumble and fall; but this does not necessarily involve the city in liability, so long as the defect can be readily discovered and easily avoided by persons exercising due care, provided the defect be of such a nature as not of itself to be dangerous to persons so using the walk." (23) "The court charges you that the reasonable care and caution required of the plaintiff, as mentioned in the foregoing instructions, means such an exercise of the sense of sight, and such a degree of care and caution while walking over the sidewalk in question, which might reasonably be expected from an ordinarily prudent person under the circumstances surrounding the plaintiff at the time of the alleged injury."

The twenty-third reason for a new trial challenges the sufficiency of the evidence to sustain the verdict; the twenty-fourth, that it is contrary to law. Neither of these reasons is tenable. On an examination of the record, we found evidence to sustain the verdict. If it contains contradictions, they were for the jury to reconcile; and under the well-known rule, upon this ground, this court cannot disturb the judgment.

The last reason urged for a new trial is that the damages assessed are excessive. The damages assessed are not so great, in view of

the evidence, as to induce the belief that the jury acted from partiality, prejudice, or corruption; and therefore, under numerous decisions of the supreme court, we would not be justified in setting the judgment aside. *Lauter v. Duckworth*, 19 Ind. App. 543, 48 N. E. 864, and cases there cited.

We have passed upon all the questions discussed, except appellee's motion to dismiss the appeal. We find no error for which the judgment of the trial court should be reversed. Judgment affirmed.

(22 Ind. App. 479)

HAMILTON v. STATE.¹

(Appellate Court of Indiana. Dec. 21, 1896.)

CRIMINAL LAW — HEAVY HAULING — HIGHWAYS — LOAD — INTENT — INSTRUCTION.

1. An oil wagon had the front and rear wheels held together by side bars, between which rested an iron tank bolted permanently to the side bars by iron straps. There was no coupling pole to the wagon. Held, that the tank was a part of the load, and not of the wagon, within Rev. St. 1894, § 2047, prohibiting hauling a load of more than 2,500 pounds on a broad-tired wagon over gravel roads, when they are thawing through, etc.

2. In a prosecution for heavy hauling, intent is not of the essence of the offense, and hence accused's belief as to whether he had a lawful load is immaterial.

3. A charge was properly refused where it was not signed by the party asking it or by his counsel.

Appeal from circuit court, Randolph county; Albert O. Marsh, Judge.

Frank Hamilton was convicted of heavy hauling, and he appeals. Affirmed.

Engle & Parry, for appellant. Wm. L. Taylor, Atty. Gen., A. E. Dickey, and Merrill Moores, for the State.

WILEY, J. In 1889 the legislature enacted the following law: "It shall be unlawful for any person to haul over any turnpikes or gravel roads at any time when the same is (are) thawing through, or is (are) by reason of wet weather, in a condition to be cut up and injured by heavy hauling, a load on a narrow tired wagon of more than twenty hundred pounds, or on a broad tired wagon or (of) more than twenty-five hundred pounds, and any person violating the provisions of this act shall be fined not less than five dollars, nor more than fifty dollars, for each load so hauled." Section 2047, Rev. St. 1894. Appellant was indicted for a violation of this statute, which indictment was in two counts. In the first count it is charged "that one Frank Hamilton, late of said county, on the 27th day of February, 1896, at said county and state aforesaid, did then and there unlawfully haul in a wagon, then and there having broad tires, to wit, three inches, a load of more than twenty-five hundred pounds weight, over and upon a certain gravel road then and there situate, and running from the city of Winchester to the city of Union City, known as the Winchester and Union City

gravel road, at a time when said road was then and there thawing through, and by reason of wet weather was then and there in a condition to be cut up and injured by heavy hauling, contrary," etc. The second count is substantially the same, except that the date is left blank, and it is charged that appellant hauled a load of more than 2,000 pounds in a narrow-tired wagon, to wit, the tire being 2½ inches. Appellant moved to quash each count of the indictment, which motion was overruled. Appellant entered a plea of not guilty, and, on trial by jury, he was found guilty. Appellant's motion for a new trial was overruled, and judgment pronounced on the verdict. He has assigned as error (1) that the court erred in overruling his motion to quash each count of the indictment; (2) that the court erred in overruling the motion to quash the first count of the indictment; (3) the court erred in overruling the motion to quash the second count of the indictment; (4) the court erred in overruling the motion for a new trial.

As the first, second, and third specifications in the assignment of errors present the same question, we will consider them together. It appears from the record that the wagon in question was a wagon constructed for hauling oil, and for a description of it, which seems to be fair, accurate, and full, we quote from appellant's brief: "The wagon in question is one of peculiar design, built and constructed expressly for the purpose of transporting petroleum and oil, and is composed of four wheels, two front and two rear, held and retained together by iron axles, upon each of which axles rest heavy platform springs. Upon these platform springs, and at the outer edge thereof, next to the wheels, and running the full length of the wagon on each side thereof, are two heavy timbers or side bars, and in this manner the front and rear gear are partially attached together. Upon the platform springs and bolsters, and between these two timbers or side bars, rests an iron tank or boiler, which is securely strapped, bolted, and fastened to the running gears and side bars by means of large iron straps encircling the tank, and the ends projecting through the timbers, and on these ends is attached a nut, which is drawn on by threads on the ends of these straps, which fastens this tank and boiler very securely and tight to the gear of the wagon. Thus it is that this bed is placed upon this wagon. At the front end of the boiler or tank is placed the driver's seat, and the same is so designed as to allow the seat to rest upon the tank, the tank at this point being only half as high, and flat on the top. Over this seat is placed a top for the protection of the driver, similar in design to an ordinary top buggy."

Counsel for appellant insist that the motion to quash should have been sustained for the reason that it does not show that the indictment was indorsed, "A true bill," or that it was signed by the foreman of the grand jury.

¹ Rehearing denied.

If the indictment failed to show this, the motion to quash would have been well taken. *Strange v. State*, 110 Ind. 354, 11 N. E. 357, and authorities there cited; *State v. Buntin*, 123 Ind. 124, 23 N. E. 1140. But, unfortunately for appellant's insistence, the record, as it comes to us, does show that the indictment is properly indorsed as required by statute, as follows: "No. 8,648. *State of Indiana vs. Frank Hamilton. Charge, heavy hauling. A true bill. G. O. Thompson, Foreman.*" The indictment also bears the signature of the prosecuting attorney, and on the back thereof are indorsed the names of the state's witnesses.

Another objection urged to the indictment is that the language used is not sufficient to charge a crime, within the language and meaning of the statute, because the words "cut up," as used in the statute, are omitted. In this also appellant is in error. The indictment does not omit said words, for it is charged that the road was "in a condition to be cut up and injured by heavy hauling." The indictment in its charging the crime is in the identical language of the statute, and it is not subject to the objections urged. It is fair to appellant's counsel to say that, since their brief was filed, a writ of certiorari was petitioned for by the state, and granted, whereby the record was amended to show that the indictment contained the words "cut up," which appear to have been omitted from the transcript as originally filed, and also the record has been corrected so as to show the indorsements on the indictment. Each count of the indictment was good, and the court did not err in overruling the motion to quash.

In his motion for a new trial, appellant assigned 20 specific reasons therefor, but they may all be properly grouped and classified under four subdivisions or heads: (1) As to the admission and rejection of evidence; (2) alleged error in refusing and giving certain instructions; (3) the verdict is contrary to law; and (4) the verdict is contrary to the evidence.

It is the theory of appellant that the tank, which has been above described, was a part of the wagon, and not a part of the load; and if it was a part of the wagon, and the oil in it weighed less than the amount fixed by statute, then there is no violation of the statute, and there could not be a conviction. As the question is of controlling importance in the case, we will now consider it for the purpose of determining whether or not the tank was a part of the wagon, under the facts and within the meaning of the statute. This question settled will make easier the solution of other questions presented and discussed. Counsel for appellant say that in the court below counsel for the state conceded that if the tank was a part of the wagon, and not a part of the load, there would be no violation of the statute and could not be a conviction. In considering this question, it is proper for us to look to and ascertain, if

we can, the intention and object of the legislature in passing the law upon which the prosecution rests. Courts take judicial knowledge of the laws of the state, and hence we know that, by virtue of such laws, certain authorities are empowered to construct free gravel roads. We know by the common history of the state, and by common experience and observation, that many hundreds of miles of such roads have been constructed. The construction of such roads has proven a great burden to those whose lands have been assessed for their construction, and an additional burden is imposed on the public to maintain them. It follows that such roads should be protected and preserved, in the interest and for the convenience of the public, by the best means possible. At certain seasons of the year, when the frost is leaving the earth, the roads are "thawing through," or in extreme wet weather they are "in a condition to be cut up and injured by heavy hauling," and it was to protect them from such injury that the statute was passed. To state it differently, it was the intention of the legislature, in passing the law, to protect the roads from injurious burdens by hauling over them exceeding in weight, by the load, the amount fixed by law. It certainly was not intended that one class of vehicles should be at liberty to pass over the roads, although the burdens to them would be greater than that defined by the statute, while others carrying like burdens would be prohibited. So, the only reasonable conclusion, based upon an intelligent and rational construction of the statute, is to hold that the legislature intended to protect the highway, to which the statute applies, from the injury resulting from its violations. Our supreme court has laid down a wholesome and correct rule for the construction of statutes, as follows: "Underlying all the rules for the construction of the statutes is the cardinal and general one that, in construing a statute, the court will seek to discover and carry out the intention of the legislature in its enactment. In the search for that intention, the court will look to each and every part of the law upon the subject, if any; to other statutes upon the same subject; or relative subjects, whether in force or repealed; to contemporaneous legislative history; and to the evils and mischiefs to be remedied." *Paving Co. v. Edgerton*, 125 Ind. 460, 25 N. E. 436, and many cases cited. The following definition is given of the word "wagon" by Anderson in his *Dictionary of Law* (page 1097): "In a statute exempting property from execution, a common vehicle for the transportation of goods, wares, and merchandise. * * * The term is general. Vehicles known as 'wagons' differ in style, form, and dimensions, depending upon the character of the use, the nature of the business, and the pleasure or notions of the manufacturer or owner. A 'hearse' is a wagon." Webster defines the word "wagon" as fol-

lows: "A wheeled carriage; a vehicle on four wheels, and usually drawn by horses; especially one used for carrying freight or merchandise." In the case before us it is shown that the vehicle used by appellant was on four wheels, and within the definition was a "wagon." There were cross bars on either side of the wagon, reaching from the front to the rear axles, and between these bars the tank rested. Appellant insists that this tank constituted the coupling to the wagon, and hence became a part of it. In fact, it is shown that there was no coupling pole in the wagon. If, as appellant contends, the tank was the coupling to the wagon, because there was no coupling pole in fact, and that by reason thereof the tank became a part of the wagon, then, by a like course of reasoning, it could be said that if a person were engaged in hauling sawlogs of extreme length, so that he could not use the ordinary coupling pole, he could lash the hounds of the wagon to the sawlog, thus making it the coupling, and when so lashed the log would become a part of the wagon. This would be a sophistry which the law would not tolerate or sound reason approve.

Taking the statute as we have above construed it, the intention of the legislature as we have endeavored to ascertain it, and the facts applicable to the question under consideration, we must hold that the tank was not a part of the wagon, but a part of the load. To hold otherwise would, in many instances, defeat the very purpose for which the law was enacted, and be a license in similar cases for its violation. To so hold would be to grant privileges to one class of persons which are denied to others, and would subvert the purposes of the lawmaking power of the commonwealth in passing the statute, to protect from injury, and almost ruin, the public thoroughfares it sought to protect.

It appears from the record in this case that the appellant was an employé of the Standard Oil Company, and for the offense for which he was prosecuted we find that, on the occasion of his driving over the road in question, the wheels of his wagon cut through the gravel, mired into the clay, and, though he was driving three horses, they could not pull the wagon out. Can it be insisted, in this instance, that a greater privilege shall be accorded this oil company than the farmer whose lands have been assessed to construct the road and taxed to maintain it? Such a doctrine would be monstrous, and not only a reproach to the law, but a shock to the conscience. This conclusion disposes of several questions presented in the motion for a new trial, where evidence was introduced, over appellant's objections and exceptions, as to the weight of the tank. As the tank was a part of the load, it was competent to prove its weight.

Appellant next complains because the court refused to allow him to answer the following question: "You may tell the jury, Mr.

Hamilton, at the time upon this occasion, whether you then believed you had a lawful load,—a load that you had a right to haul over that road, under the law." It is insisted that it was error not to permit appellant to answer this question, for the reason that a person charged with crime may, in giving his evidence, testify as to what his intention was. As to whether the question elicited an answer as to his intent we do not decide, but, concede that it did, it does not necessarily follow that it was error to refuse to permit him to answer it. It seems to be firmly established in this state that a defendant in a criminal case may testify as to his intention only when such intention is a material part of his defense. The rule is clearly stated in *Ross v. State*, 116 Ind. 495, 19 N. E. 451, as follows: "Now that defendants are permitted to testify in their own behalf, there can be no valid reason assigned why they should not be allowed to testify to the intent with which any act was done, where such intent is a fact necessary to be ascertained." The same rule is also stated in *White v. State*, 53 Ind. 595, and it obtains in civil cases. See *Over v. Schiffing*, 102 Ind. 191, 23 N. E. 91; *Heap v. Parrish*, 104 Ind. 36, 3 N. E. 549; *Bidinger v. Bishop*, 76 Ind. 244; *Stratton v. Lockhart*, 1 Ind. App. 380, 27 N. E. 715. In this case the intent was not the essence of the offense, and it does not seem to us that it can be so contended, with any show of reason. The offense with which appellant is charged, as all offenses, crimes, misdemeanors, and felonies in this state, is statutory, and hence comes within the rule laid down in 3 Am. & Eng. Enc. Law (2d Ed.) p. 291, wherein it is said: "The legislature may enact laws for the mere violation of which, irrespective of the criminal intent, penalties are attached, as for selling liquors to minors; selling adulterated foods and drugs; allowing minors to frequent saloons; changing and obstructing public roads; maintaining a nuisance; disposing of mortgaged property." *Toops v. State*, 92 Ind. 13, is in point. Appellant was indicted for obstructing a public highway. The court said: "In prosecutions for statutory offenses, such as obstructing highways, selling liquor without license, obstructing public drains, and the like, it is not incumbent on the state to prove malice. A malicious motive or design is not an element of the case." See, also, *State v. Baltimore, O. & O. R. Co.*, 120 Ind. 298, 22 N. E. 307; *Nichols v. State*, 89 Ind. 298.

The state insists that the question asked appellant was not one calling for an answer as to his intent, but whether he knew he was violating the law, and we are rather inclined to this view. In any event, his intent being entirely immaterial in this case, the court did not err in excluding the evidence. The appellant is presumed to know the law; and as it is shown that the oil he was hauling weighed 1,917½ pounds, and he knew it, and that the tank, which was a part of the load,

weighed from 1,500 to 1,800 pounds, and he knew it, he knew he was hauling a heavier load than that prescribed by statute, and it is clear his intention was wholly immaterial.

Appellant insists that the court erred in refusing to give to the jury instruction No. 2, tendered by him. That instruction is as follows: "If the jury believe from the evidence that the load which the defendant is charged with hauling was a load of coal oil, which was in a large tank on a wagon, and that such tank was bolted and fastened on the axles and bolsters in such way as to form a part of the wagon as a bed forms a part of the ordinary farm wagon, and that such wagon was not complete without such tank, then the weight of such tank could not be considered in estimating the weight of the load." We need not discuss this instruction further than to say that, in view of the fact that we have held that the tank was not a part of the wagon, but a part of the load, it did not properly state the law. But we might further say that this instruction is not properly before the court, for it does not appear that any of the instructions tendered by the appellant were signed by him or his counsel. Unless it appears from the record that this was done, there was no available error in refusing to give them. *Houk v. Branson*, 17 Ind. App. 119, 45 N. E. 78; *Hindman v. Timme*, 8 Ind. App. 416, 35 N. E. 1046; *Bank v. Bennett*, 8 Ind. App. 679, 36 N. E. 551; *Darnell v. Sallee*, 7 Ind. App. 581, 34 N. E. 1020.

Appellant also complains of instruction No. 5, given on the court's own motion, which is as follows: "If you believe from the evidence that the wagon of defendant mentioned in the indictment was constructed with four wheels, two front, and two rear or hind, wheels, the wheels being joined by axles on which rest bolsters, bars, or springs, and if the bolsters, bars, or springs are connected from front to rear by side bars or reaches or platform, by which, when a team is attached to the tongue of such wagon, the same could be hauled and moved about; and if you believe that, after such construction of said wagon, a boiler or tank of iron was placed upon said wagon to be used for transporting oil, and so fastened to said wagon, its said side bars, bars, or platforms and bolsters, as to hold and keep the same in place when filled with oil,—then the said boiler or tank was a part of the load on said wagon equally with the oil contained therein." This instruction is a correct exposition of the law, as applied to the facts in this case. It is so well stated, so clear and to the point, that further discussion is unnecessary.

There are other instructions given by the court to which objections are urged, but after a careful examination of them, and construing them together, as we must, we are of the opinion that they fairly state the law, and that appellant was not injured by them.

It is next insisted that the judgment should be reversed because (1) the verdict is contrary to law, and (2) the verdict is contrary to the evidence. Appellant's contention is that the verdict is contrary to law because the tank was a part of the wagon, and not a part of the load, and aside from this the evidence does not show that the load exceeded in weight the amount fixed by statute. We have disposed of this question by what we have already said, and it follows for that reason that the verdict is not contrary to law. As to the verdict being contrary to the evidence, we can only say that there is abundant evidence upon which it rests. It clearly appears that the load appellant was hauling was largely in excess of the weight fixed by the statute, and that he was hauling such load at a time which the statute prohibits. Looking at the entire record, we are clearly of the opinion that a correct result was reached in the trial court, and that there are no available errors in the record for which there should be a reversal. Judgment affirmed.

(21 Ind. App. 313)

STATE v. JOHNSON.

(Appellate Court of Indiana. Dec. 21, 1898.)

CRIMINAL LAW—APPEAL FROM JUSTICE—NECESSITY OF BOND.

Burns' Rev. St. 1894, § 1712 (Rev. St. 1881, § 1643), allowing one convicted before a justice to appeal on giving a recognizance, does not authorize an appeal in the absence of the bond, although the appellant remains in custody.

Appeal from circuit court, Sullivan county: W. W. Moffett, Judge.

Morgan Johnson was convicted before a justice of defrauding a boarding house, and appealed to the circuit court, where he was acquitted. From the action of the circuit court denying a motion to dismiss the appeal, the state appeals. Appeal sustained.

Chas. D. Hunt, Pros. Atty., and W. A. Ketcham, Atty. Gen., for the State. W. S. Maple, for appellee.

HENLEY, J. The appellee was prosecuted by affidavit filed before a justice of the peace. He was charged, under section 7254a, 4 *Burns' Rev. St. 1894*, with defrauding a boarding house. He was tried and found guilty of the offense, and judgment rendered accordingly. In some manner, and, we suppose, upon the request of the appellee, and without filing any recognizance bond, or bond of any kind, the justice of the peace before whom the cause was tried certified a transcript of the proceedings to the circuit court as upon appeal. Appellee was committed to jail upon failure to give the required bond. Appellee was convicted on the 7th day of April, 1898. On the 12th day of April, 1898, the cause appearing in the Sullivan circuit court appellant moved to dismiss appellee's appeal because no recognizance or bond of any kind

had been filed with the justice of the peace before whom the same had been tried. This motion the court overruled. On the 23d day of April, 1898, appellee was tried in the circuit court of Sullivan county, and acquitted of the charge against him. The appellant complains of the action of the lower court in overruling its motion to dismiss the appeal from the justice of the peace. The record properly presents the question.

Appeals are governed by the statute. There can be no appeal from the decision of a court which has by the statute jurisdiction of the subject-matter of the action, and has acquired jurisdiction of the person, unless an appeal is by statute expressly authorized. Appeals must be taken in the manner directed by the statute authorizing them. It is provided in section 1712, Burns' Rev. St. 1894 (section 1643, Rev. St. 1881), as follows: "Any prisoner, against whom any punishment is adjudged, may appeal to the criminal court, and, if there be none, then to the circuit court of the county, within ten days after the trial, on entering into recognizance for his appearance at the next term of said court, as in other cases; and such appeal shall stay all proceedings." It seems clear to us that, under the plain meaning of this statute, no appeal could be granted without first entering into the recognizance as is provided therein. The entering into this recognizance is a condition precedent, and must be complied with before any valid appeal could be taken. The appellee in this cause being unable to give the bond required by the justice of the peace, and desiring to appeal his cause to the circuit court, submitted himself to the actual custody of the court, instead of the constructive custody by which a bond would have held him. He remained in jail until he was tried by the judge of the Sullivan circuit court and found not guilty. It is for the legislature of the state of Indiana to say whether or not such a situation should be permitted without a remedy. Under the authority of the statute, the motion of the appellant to dismiss the appeal from the justice of the peace ought to have been sustained. The appeal of the state is therefore sustained, at the cost of the appellee.

(22 Ind. App. 192)

JENKINS et al. v. CRAIG.¹

(Appellate Court of Indiana. Dec. 22, 1898.)

SALE OF LAND SUBJECT TO LIEN — WARRANTY — BREACH.

Lot A of land subject to a judgment lien was sold by the owner to defendant. Lot B was thereafter sold to plaintiff. Afterwards, defendant, by warranty deed, conveyed lot A to plaintiff. Plaintiff, by warranty deed, conveyed lot B to M. Lot A was sold under the execution issued on the judgment, and purchased by M. Held, in an action for breach of warranty, that an answer failing to state the nature of the conveyance from the original owner to defendant stated no defense.

¹Rehearing denied, 53 N. E. 427.

Appeal from circuit court, Hamilton county; James V. Kent, Special Judge.

Action by Abijah M. Jenkins and others against William H. Craig for breach of warranty. There was judgment on demurrer for defendant, and plaintiffs appeal. Reversed.

Christian & Christian, for appellants. Gavin, Coffin & Davis, for appellee.

BLACK, O. J. This was an action brought by the appellants to recover damages for breach of covenants in a warranty deed, whereby the appellee conveyed to the appellants certain real estate in the city of Noblesville. The court overruled the demurrer of the appellants to the second paragraph of the appellee's answer. The first paragraph of answer was withdrawn, and, the appellants standing by their demurrer and refusing to plead further, judgment was rendered for the appellee. The overruling of the demurrer is assigned as error.

The essential facts discussed by counsel, upon which the court determined the cause in favor of the appellee, as gathered from the complaint and answer, were substantially as follows: One Alexander Castor was the owner of two parcels of real estate in said city, which, for convenience, we will designate as "Lot A" and "Lot B," both being subject to the general lien of a judgment obtained in 1889 against said Castor by one William Vestal, when, in August, 1889, said Castor sold and conveyed lot A to the appellee, who immediately went into possession thereof. It does not appear whether or not this conveyance was by warranty deed; nor is the character of the conveyance stated. In January, 1890, Castor sold and conveyed to the appellants lot B, and they immediately went into possession thereof. In October, 1890, the appellee sold and by warranty deed conveyed said lot A to the appellants, at and for the sum of \$500. In January, 1893, the appellants sold and by warranty deed conveyed, to one David F. Moss, said lot B. In June, 1895, an execution was issued on said judgment, said Moss still being the owner, through said warranty deed of the appellants, of said lot B, and the appellants the owners of said lot A. Prior to the issuing of said execution, said Moss called the attention of the appellants to the fact that said judgment was a lien on the real estate conveyed to him by warranty deed executed by them, and that, under the terms of said deed, they were liable for the payment of said judgment. The appellants failed and refused to take any steps for the satisfaction of said judgment, or to secure the release of the lien thereof on said real estate, and thereupon the execution was issued at the instance of said Moss. In July, 1895, the sheriff levied the execution on said lots A and B; and in the same month, under the direction of said Moss, the sheriff sold said lot A to said Moss for \$66.82, in satisfac-

tion of the judgment, the appellants having full knowledge of said sale. The attention of the appellee was not called to the judgment prior to the sale, of which he had no knowledge. Said Moss received the sheriff's certificate of sale, and, the real estate so sold not having been redeemed, the sheriff, at the expiration of the year for redemption, issued a sheriff's deed therefor to said Moss, who thereunder took possession of said lot A, and evicted the appellants therefrom. Said lot B, at all the times mentioned, was of the value of \$200 or more,—an amount largely in excess of said judgment, including interest and costs. Said lot B was not offered for sale on said execution.

The complaint stated a good cause of action in favor of the appellants upon the covenants of the warranty deed of the appellee, but it is claimed that the additional facts presented by the answer constituted an equitable defense. The rule which it is sought to apply is spoken of in *Bank of Commerce v. First Nat. Bank*, 150 Ind. 588, 593, 50 N. E. 568, as "the universally established equitable rule that property subject to a lien. If sold by the debtor in parcels, is subject to a resale, for the discharge of the lien, in the inverse order of its alienation." For applications of this rule and statements thereof, see *Day v. Patterson*, 18 Ind. 114; *Aiken v. Bruen*, 21 Ind. 137; *Alsop v. Hutchings*, 25 Ind. 347; *McCullum v. Turple*, 32 Ind. 146; *McShirley v. Birt*, 44 Ind. 382; *Sidener v. White*, 40 Ind. 588; *Houston v. Houston*, 67 Ind. 276; *Hahn v. Behrman*, 73 Ind. 120; *Henderson v. Truitt*, 95 Ind. 309; *Merritt v. Richey*, 97 Ind. 236; *Richey v. Merritt*, 108 Ind. 347, 9 N. E. 368; *Bank v. Black*, 129 Ind. 595, 29 N. E. 396; *Jennings v. Moon*, 135 Ind. 168, 34 N. E. 996. Under some of the statements of the doctrine in these cases, it would seem from the general form of the rule announced that the grantee of the parcel first sold, in seeking to assert the equitable right against the purchasers of parcels subsequently conveyed by the same grantor, need not, in pleading, state the character of the conveyance to such first grantee, but may simply allege, as in the case before us, that his parcel was "sold and conveyed" to him. "If a mortgagor conveys the mortgaged land in separate parcels by warranty deeds, and afterwards pays the mortgage debt, he is not entitled to contribution from the purchasers, because he pays merely his own debt, which his covenants bound him to pay." 2 Jones, *Mortg.* § 1090. "If a mortgagor sells portions of the mortgaged premises in different parcels at different times, by warranty deed, that which he retains is, in equity, primarily liable as against all but the mortgagee for the whole debt; and such grantee is not required to contribute." 2 Jones, *Mortg.* § 1091.

The foundation of the doctrine that, where the owners of the several parcels subject to a mortgage hold under the mortgagor by titles successive in order of time, the first

grantee has an equitable priority as against the later grantee, so that the parcel last conveyed by the mortgagor is primarily chargeable with the whole mortgage debt, is said to be found in the equities which subsist between the mortgagor and such first grantee of a part of the mortgaged premises. 3 Pom. *Eq. Jur.* § 1224. It is there said: "Whenever the mortgagor conveys a portion of the land 'subject to' a mortgage by a warranty deed, and retains the residue of the land in his own hands, that portion of the land retained by the mortgagor becomes, as between himself and his grantee, at all events, the fund primarily liable for the whole mortgage debt. The form of the deed shows that the grantee not only assumed payment of no portion of the mortgage debt, but did not buy his parcel even subject to the mortgage; and the entire burden, therefore, was left upon the portion of the land remaining in the ownership of the mortgagor." It is further said: "The inference is natural, even if not necessary, that the same burden follows this portion when subsequently conveyed by the mortgagor to a second grantee." In the next section the learned author says: "The doctrine stated in the foregoing paragraph is one of purely equitable origin, and is not an absolute rule of law, and, if the peculiar equitable reasons on which it rests are wanting, it ceases to operate. * * * The doctrine, in its full scope and operation, primarily depends upon the relation subsisting between the mortgagor, or other owner of the entire mortgaged premises, and his grantee of a parcel of the land. This relation, in turn, results from the form of the conveyance, which, being a warranty deed, or equivalent to a warranty, shows conclusively an intention between the two that the grantor is to assume the whole burden of the incumbrance as a charge upon his own parcel, while the grantee is to take and hold his portion entirely free. * * * When the deeds to the successive grantees are not warranty or equivalent thereto, but simply purport to convey the mortgagor's right, title, and interest in the parcel, the intention is clear that the grantees respectively assume their portions of the burdens. Their several parcels are all liable ratably, and not in the inverse order."

In *Gulon v. Knapp*, 6 Paige, 35, it is said: "The principle of charging different parcels of the mortgaged premises, which have been sold at different times, subsequent to the mortgage, in the inverse order of their alienation, is not always confined to the original alienations by the mortgagor who is personally liable for the payment of the debt. The principle is equally applicable to several conveyances at different times, by a grantee, of the whole or a part of the mortgaged premises, where he conveys with warranty," etc. See, also, *Aiken v. Gale*, 37 N. H. 501; *Welch v. Beers*, 8 Allen, 151; *Gill v. Lyon*, 1 Johns. Ch. 447; *Skeel v. Spraker*, 8 Paige, 182. In

Carpenter v. Koons, 20 Pa. St. 222, it was said by the court: "A man who purchases part of a tract covered by a mortgage, buying the title out and out, clear of incumbrances, and paying a full price for it, has a plain right to insist that his vendor shall allow the remainder of the mortgaged premises to be taken in satisfaction of the mortgage debt before the part sold is resorted to. This being the right of the vendee against the mortgagor himself, the latter cannot put the former in a worse condition by selling the remainder of the land to another person. The second purchaser sits in the seat of his grantor, and must pay the whole value of what he bought, towards the extinguishment of the mortgage, before he can call on the first purchaser to pay anything. The first sale having thrown the whole burden on the part reserved, it cannot be thrown back by the second sale. In other words, the second purchaser takes the land he buys subject to all the liabilities under which the grantor held it. But, if the rule is to cease when the reason of it ceases, it cannot extend to a case where the first sale was made subject to a mortgage; and that is the condition of the present one. The defendant's deed is older than his adversary's, but it conveys him nothing but the equity of redemption. * * * There is a wide and palpable difference between one who buys land subject to a mortgage, and has a reduction in the price equal to the amount of the lien, and another who pays its full value, and stipulates for a title clear of incumbrances. Such a distinction is anything in the world but a 'theoretical subtlety.'" In *Day v. Patterson*, 18 Ind. 114, it was said: "It is probably a rule of law that where a mortgagor sells the equity of redemption in the lands mortgaged at different times, to different purchasers, the first of such purchasers may compel the mortgagee to exhaust the portions later sold before selling his." The case was not disposed of upon this question. It was made to proceed upon the agreement of the second purchaser with his grantor, the mortgagor, that such second purchaser would pay off, as a part of the purchase money of his parcel, the mortgage which was a lien upon it, and also upon the parcel first sold by the mortgagor; being an agreement that the second purchaser would assume the entire mortgage, which was treated by the supreme court as a promise made for the benefit of the grantee of the first parcel sold. It was said of *Day*, the first grantee, that his grantors, the mortgagors, "were bound to satisfy the incumbrance on the land sold to him. In a sale to *Patterson*," the second purchaser, "they in effect left with him the amount of money necessary to discharge that incumbrance, as the consideration of his agreement to pay it off for the benefit of *Day*." In *McShirley v. Birt*, 44 Ind. 382, it was said that, under the rule, the 80-acre tract, which was the last conveyed, would have

been the first liable, as between the several vendees of the mortgagors, to the payment of the mortgage, without any stipulation by the purchasers of said 80 acres to pay the mortgage debt. It was shown that the prior conveyance of 39 acres of the mortgaged property was by warranty deed, and that, in the subsequent sale and conveyance of the remaining 80 acres to another grantee, it was stipulated in the deed that the grantee therein should pay the mortgage as a part of the consideration for the 80 acres. In *Merritt v. Richey*, 97 Ind. 236, the court said: "It is well settled that when a judgment is a lien upon several parcels of land, which are afterwards sold to various persons at different times, a court of equity will compel the sale of such land in the inverse order of its alienation. * * * This being the rule in equity, it follows as a sequence that, as between the first and any subsequent purchaser, it becomes the duty of the latter to pay the judgment by allowing the land purchased by him to be first applied to its payment; and when such subsequent purchaser, upon whose land the writ issued upon the judgment has been levied, either pays the judgment, or takes an assignment of the same to protect his land, such judgment must thereafter, as against a prior purchaser, be deemed extinguished, if the land levied upon was of sufficient value to pay it." In *Henderson v. Trullitt*, 95 Ind. 309, it was said: "Where a mortgagor sells a part of the mortgaged land by warranty deed, such deed exempts the land conveyed by it from contribution in favor of the mortgagor, or any one else claiming the remaining lands under him, with notice of the conveyance. 2 Jones, Mortg. §§ 1090, 1091. As we have seen, the purchase of *Henderson* of a part of the mortgaged land was nearly a year subsequent to the time at which *John McClamrock* received a warranty deed for the part purchased by him. *Henderson*, therefore, became the purchaser of that portion of the mortgaged lands which remained in *Jones* after he and his wife had conveyed and warranted a part to *McClamrock*. Consequently, applying the doctrine as deduced from the authorities as above to the facts as we find them in the complaint, the lands purchased by *Henderson* became primarily liable for the payment of the note sued on by *Binford*." In *Jennings v. Moon*, 135 Ind. 168, 34 N. E. 996, it was said: "When *Freeman* and wife sold the undivided one-half of lot 8, by warranty deed, to appellees, the obligation to pay the mechanics' liens on all said lot remained upon *Freeman* and wife, and any property owned by them was primarily liable for the payment of the liens. When, therefore, afterwards, *Freeman* and wife sold the remaining undivided one-half of said lot to appellants, they conveyed to appellants only the title which they then possessed, which title was coupled with a primary liability to pay the liens on the whole lot." In *Clowes v. Dickenson*, 5

Johns. Ch. 235, which is cited in *Sidener v. White*, 48 Ind. 588, and which is a leading case upon the doctrine now under examination, it will be observed in the statement of the facts that the plaintiff, the first purchaser of one of the two incumbered lots, received from his grantor a deed of conveyance in fee, with covenant of warranty. In *Sidener v. White*, supra, the doctrine was applied in aid of a purchaser of personal property subject to the lien of an execution, the seller, the execution defendant, having other property, real and personal, out of which the execution might be made in full, without the sale by the sheriff of the property so sold by the execution defendant. In *Bank v. Black*, 129 Ind. 595, 29 N. E. 396, liens for wages due employés of a corporation, which covered all its property, were enforced. A certain contract for the delivery of scrap iron, which was held to be property of the corporation, and which had been sold and assigned by the corporation, being the last property transferred by it, was held to be subject to the payment of the liens of the employés before resort to property transferred by the corporation at an earlier date. It was said that all who acquired title to the property of the corporation, or liens upon it, acquired such title or liens subject to the prior and superior liens of those to whom wages were due, and that, for the payment of such superior liens, the property last owned by the corporation should be first exhausted, etc. The sale of a chattel in possession of the seller carries with it an implied warranty of title. *Marshall v. Duke*, 51 Ind. 62; *Bash v. Young*, 2 Ind. App. 299, 28 N. E. 344; *Thurston v. Spratt*, 52 Me. 202.

The warranty of title will be implied, whatever may be the character of the personal property which is offered for sale. The doctrine extends not only to all kinds of goods, but also to all kinds of incorporeal personality, such as choses in action, both negotiable and nonnegotiable notes, bonds, and open accounts, corporate stock, and patent rights. See *Tied. Sales*, § 185. "The warranty of title amounts to an assurance that the seller has a free and perfect title. Hence the warranty is broken by the enforcement, if not by the mere existence, of prior incumbrances, mortgages, pledges, or liens." *Tied. Sales*, § 186, and cases there cited; *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694; *Hunt v. Sackett*, 31 Mich. 18.

The character of the conveyance from the judgment defendant, Castor, to the appellee, not being shown, we cannot hold the appellee's answer sufficient. That defect in the pleading renders it insufficient on demurrer, and we need not and do not decide the question as to what would be the rights of the parties, under the situation which has accrued as shown by the pleadings, upon an additional showing of a conveyance to the appellee of some supposable particular character. The judgment is reversed, with instruc-

tion to sustain the demurrer to the second paragraph of answer.

WILEY and COMSTOCK, JJ., took no part in this cause.

(177 Ill. 306)

HEALEY et al. v. PEOPLE.

(Supreme Court of Illinois. Dec. 21, 1898.)

CRIMINAL LAW—TRIAL—DELAY—RIGHT TO A DISCHARGE—JURY COMMISSIONERS' ACT—CONSTRUCTION—PRESUMPTION—SELECTION OF JURY—HOMICIDE—INSTRUCTIONS.

1. Where the trial of an accused was postponed under an agreement of all parties, the delay thus occasioned happened "on the application of the prisoner," within 1 Starr & C. Ann. St. 1896, c. 38, par. 623, § 18, providing for his discharge, if he is not tried at a term of court beginning within four months from his commitment, "unless the delay shall happen on the application of the prisoner."

2. Jury Commissioners' Act June 9, 1897, § 2, provides for the preparation in certain counties by commissioners of a list of electors possessing the necessary legal qualifications for jury duty, but does not expressly declare what shall be necessary to qualify a jury. *Held*, that the "necessary legal qualifications for jury duty" relate to the qualifications prescribed by the general act in relation to jurors (Act Feb. 11, 1874, § 2).

3. Where there is nothing to show the contrary, it will be presumed that Jury Commissioners' Act June 9, 1897, providing in certain counties a particular mode of securing juries, from lists prepared by commissioners appointed for that purpose, was in actual operation July 12, 1897, since the act became effective July 1, 1897.

4. Since Jury Commissioners' Act June 9, 1897, provides in certain counties a particular mode of securing juries from lists prepared by commissioners appointed for that purpose, it excludes in those counties the operation of any other mode.

5. Where a jury were selected by a special bailiff appointed by the court, over defendant's objection, instead of being selected, as they should have been, from a list prepared by jury commissioners under Act June 9, 1897, it is reversible error.

6. In a prosecution for murder, against police officers, for unnecessarily shooting deceased with 38-caliber cartridge revolvers while endeavoring to apprehend him, they defended on the ground that deceased was shot by an unknown person, who was engaged in a fight with him, and who ran away on the attempted arrest, and that the ball taken from the body was smaller in size than that fired from their revolvers, and had not been in a cartridge. The court instructed that there was in evidence a leaden bullet, said to have caused the death of deceased, and that the jury, in deciding whether it was shot from a 38-caliber revolver in the hand of one of the defendants, should consider the testimony of experts, and might consider the bullet's appearance, or the absence from it of any distinguishing mark, if there be such absence, and the fact that it was shown to the experts, and produced before the jury, separated from the cartridge shell, and that such shell was not shown to any of the experts, or produced before the jury. *Held*, that the instruction was objectionable, because assuming that the ball was contained in a cartridge shell.

7. The instruction was also objectionable because it selected particular alleged features of the testimony, inconclusive and merely evidentiary, so as to impress the jury with the belief

that the court attached special significance thereto.

8. The instruction was also objectionable because argumentative.

Error to criminal court, Cook county; Abner Smith, Judge.

Michael J. Healey and another were convicted of manslaughter, and they bring error. Reversed.

John C. King, Geo. W. Brown, and J. E. Ingram, for plaintiffs in error. E. C. Akin, Atty. Gen. (Charles S. Deneen, State's Atty., Harry Olson, Asst. State's Atty., and Haynie R. Pearson, Asst. State's Atty., of counsel), for the People.

BOGGS, J. At the July term, 1897, of the criminal court of Cook county, the plaintiffs in error were convicted of the crime of manslaughter. This is a writ of error sued out to review the judgment of conviction.

On the 12th day of July, 1897, the plaintiff in error Moran presented a petition to the said criminal court of said Cook county, setting forth that in default of bail he was then confined in the common jail of said county to answer said charge; that he had been so confined in such jail continuously from and including the 17th day of February, 1897; that he had not been tried at any term of court commencing within four months of the date of his commitment to the said jail; and that the delay in placing him upon trial for said alleged criminal offense had not happened upon the application of the petitioner. The petition was verified by the affidavit of said plaintiff in error. The statute upon which the petition is based is as follows: "Any person committed for a criminal or supposed criminal offense and not admitted to bail, and not tried at some term of the court having jurisdiction of the offense, commencing within four months of the date of commitment, * * * shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner, or unless the court is satisfied that due exertion has been made to procure the evidence on the part of the people, and that there are reasonable grounds to believe that such evidence may be procured at the next term, in which case the court may continue the case to the next term." 1 Starr & C. Ann. St. 1896, c. 38, par. 623, § 18. It is assigned as for error that the court denied the prayer of the petition. The statutes provide that a term of the criminal court of Cook county shall be begun and holden on the first Monday of every month. Rev. St. p. 334, c. 37, par. 53. Four terms of said court, viz. March, April, May, and June, had intervened between the date of the commitment of the plaintiff in error Moran to the common jail, and the July term, to which the petition for discharge was presented. The June term, however, "commenced within four months of the date of commitment"; and the statute does not purport to affect the power of the court to detain and try the plaintiff in error at any time during that term, though beyond the

said period of four months. It appears from the record that the cause against Moran and his co-defendant was set for hearing on the 28th day of June, 1897, being one of the judicial days of said June term, during which it was lawful to detain and try him, and that on that day the cause was, by consent of all the parties thereto, and without objection on the part of any one, reset, by agreement, to be tried on the 6th day of July, 1897. The statute, the benefit of which plaintiff in error invokes, is not operative, if "the delay shall happen on the application of the prisoner." All the parties to the cause consented that the case should not be heard on the 28th day of June, and agreed that the trial should be postponed, and the cause reset for trial on the 6th day of July. An order of the court was, however, necessary to make the agreement effective. In order to secure the approval of the court, the agreement and desire of the parties must have been in some manner manifested to the court; that is, the court must have been applied to, to sanction the postponement and resetting of the case. Delay thus occasioned must be deemed to have "happened on the application" of each and all of the parties to the proceeding. On the 6th day of July the cause was again continued, by agreement of all the parties, to July 12, 1897, and reset for trial on the last-named day. On the 12th day of July the plaintiff in error filed the petition for an order setting him at liberty. The prayer of the petition was properly denied.

On the 12th day of July, being one of the judicial days of the July term of said court, a challenge was presented to the array or regular panel of petit jurors, and such challenge was sustained. The court thereupon, upon its own motion, over the protest, objection, and exception of both the plaintiffs in error, ordered that a special venire issue, commanding that 100 good and lawful men be summoned from the body of the county of Cook to serve as petit jurors on the trial of the cause; and on the motion of the state's attorney, over the objection of the plaintiffs in error, the court appointed one Frank G. Jackson a special bailiff to serve the venire, to which the plaintiffs in error also excepted. The venire was made returnable on the 14th day of the same month, on which day it was returned as having been duly executed. Counsel for plaintiffs in error entered a challenge to the array of jurors thus summoned, on the ground, among others, that they were ordered, selected, and summoned without authority of law. The challenge was overruled, and the plaintiffs in error preserved exceptions to such ruling. The parties were required to proceed to the selection of the jury for the trial of the cause out of the persons so summoned by said special bailiff by virtue of the special venire, to all of which the plaintiffs in error objected and entered exceptions. A jury not being obtained from the persons in attendance under the command of the said venire,

on the motion of the state's attorney other venirees were ordered to be issued, and were issued, commanding that other designated numbers of persons be summoned from the body of the county, until, in all, seven venirees had been issued and served. Each of these venirees was ordered to be served by the said special bailiff, Frank G. Jackson. At all stages of these proceedings to procure the jury by summoning persons from the body of the county by the said special bailiff, acting under the authority of the venirees issued by the court, the plaintiffs in error presented their objections to the court, and challenges to the array, and, such objections and challenges being overruled, preserved exceptions thereto. Plaintiffs in error were required by the court, over their objections and exceptions, to proceed with the selection of a jury until a jury was obtained. The cause was heard by the jury, and a verdict returned finding plaintiffs in error guilty of manslaughter, and fixing their punishment at imprisonment in the penitentiary for a term of four years each. We think the court erred in requiring the plaintiffs in error to submit their case to a panel of jurors to be selected from the persons brought into the court by the venirees. When the challenge to the regular panel of jurors was sustained, and the panel quashed, the necessity still existed for the attendance of a jury, to the end that the court might proceed to dispose of the causes pending on the docket for hearing. The duty and power of a court of general jurisdiction, when a challenge to the array or regular panel has been sustained and the panel discharged, has received the attention of this court in other cases. In *Stone v. People*, 2 Scam. 326, it was declared that the court, in such exigency, possessed ample power to command the attendance of the requisite number of jurors for the trial and disposition of cases remaining upon the docket for decision, and expressly stated "that, if it [the power] was not sufficiently conferred by statute, it did exist at common law." In *Lincoln v. Stowell*, 73 Ill. 246, we said: "Had there been no provision in the statute for obtaining a jury, when at the same time the court was required to be held until the business was disposed of, perhaps recourse might have been had to the common-law power of the court for the purpose of obtaining a jury, as was done in *Stone v. People*, 2 Scam. 326. But in this case no such difficulty had arisen. A mode was provided by the statute by which a jury could be obtained." It is thus seen that while the power which, under the doctrine of the common law, rested inherently in courts to provide juries in such emergencies, is recognized as still existing in courts of general and original jurisdiction in our state, such power is subordinate to that, if any, conferred by the express provisions of the enactments of the general assembly. In the absence of a statutory provision clothing the

court with the necessary power, the inherent power of the common law may be exercised; but, if a statute points out the course to be pursued, it is not to be departed from. The importance of selecting persons to act as jurors who possess the requisite qualifications to enable them to intelligently and impartially consider and determine the civil and criminal rights and interests of litigants, and of removing it from the power of any litigant or any interest to participate in any way in the selection or choosing of persons to compose the panel of jurors, has long been a matter of general public concern, which has found expression in various enactments of the general assembly framed for the purpose of avoiding the evils of former prevailing methods, and of procuring for this important public service only such persons as were fitted to discharge it intelligently and without the intervention of outside influences, or any character of prejudice or bias. This being true, the wisdom of the rule adopted by this court, that the method of selecting jurors which prevailed at the common law should only be resorted to in the absence of statutory directions as to the course to be pursued, is manifest. It then must be determined whether the statute in force at the time of the trial of this cause invested the trial court with power to provide a jury for the trial of the case, and, if such power was conferred by statute, whether the directions of the statute were observed by the court.

Counsel for the people contend that the jury in the case at hand was summoned in accordance with the provisions of sections 12 and 13 of chapter 78, entitled "Jurors." 2 Starr & C. Ann. St. pp. 2390, 2391. Section 12, referred to, directs the steps to be taken in order to secure a full panel of jurors at the opening of a term, and provides that, if a jury be needed for the trial of a cause before a full panel has been obtained, the court shall order the sheriff to summon from the bystanders a sufficient number of persons having the qualifications of jurors to fill the panel. Said section 13 relates to the course to be pursued after a regular panel has been secured, but has been exhausted by challenges, sickness of jurors, or otherwise, so that a trial panel for a pending trial cannot be obtained from the regular panel; and the provision of such section in such exigency is that the court shall direct the sheriff to summon a sufficient number of persons having the qualifications of jurors to fill the regular panel, unless one of the parties to the cause or trial shall object to the sheriff performing such duty, and, if such objection is made, the court may appoint a special bailiff. Counsel for the plaintiffs in error insist that the enactment of the act of the general assembly entitled "An act to authorize judges of courts of record to appoint jury commissioners," etc., in force in said Cook county on the 1st day of July,

1897, expressly provided the mode for the selection of the jury in the present case. They further contend that the jury was not summoned as authorized by said sections 12 and 13 of chapter 78 aforesaid, or either of them, but that, against their objections and over their protest, the court, instead of directing the sheriff to execute the venire, as is the express direction of each of said sections, appointed and authorized a special bailiff to perform that duty. They further urge that no objection was made to the sheriff as the officer to serve the venire by either party to the cause, and that the action of the court in appointing a special bailiff was in direct violation of the provisions of both of said sections 12 and 13.

The first section of the act entitled "An act to authorize judges of courts of record to appoint jury commissioners," approved June 9, 1897, and in force July 1, 1897, provides that in every county in this state which then contained or should thereafter contain more than one hundred thousand inhabitants, the judges of the several courts of record in such county, or a majority of them, should choose three competent and discreet electors to serve as jury commissioners; that said commissioners in such counties as then contained the required number of inhabitants [the county of Cook being one of such counties] should be chosen on the first Monday of July, 1897. Section 2 of the act provides that said commissioners, upon entering upon the duties of their office, and every 4 years thereafter, should prepare a list of all electors between the ages of 21 and 60 years possessing the necessary legal qualifications for jury duty, and should enter the name of each of such persons in a book or books to be kept for that purpose, and should enter opposite each name the age, occupation, and residence (giving street and number, if any) of such person, whether or not he was a householder residing with his family, and whether or not he was a freeholder. Section 3 of the act authorized the commissioners to appoint clerks and assistants, and invested the commissioners with certain powers, to enable them to obtain certain information that might be necessary to the discharge of their duties. Section 4 of the act is as follows: "Sec. 4. The said jury commissioners shall, from time to time, select from said jury list the requisite number of names, which shall each be written on a separate ticket, with the age, place of residence and occupation of each, if known, the whole to be put into a box to be kept for that purpose, and to be known as the jury box. In like manner they shall select the necessary number of names from said jury list, which names shall each be written on a separate ticket, with the age, place of residence and occupation of each, if known, and put the whole into another box to be kept for that purpose, and known as the grand jury box. The jurors so selected shall, as near as may be, be residents of different parts of the county, and of different

occupations; and one or more of the judges of said court shall certify to the clerk of the court the number of jurors required at each term. The said clerk shall then repair to the office of the jury commissioners, and in the presence of at least two of said commissioners, and also in the presence of the clerk of said commissioners, if there be one, proceed to draw at random from said jury box, after the same shall have been well shaken, the necessary number of names, and shall certify the same to the sheriff, to be by him summoned according to law. If more jurors are needed during said term the court shall so certify, and they shall be drawn and summoned as above provided forthwith: provided, that it shall be the duty of said jury commissioners to have and maintain at all times in said jury box not less than fifteen thousand (15,000) names and in said grand jury box not less than one thousand (1000) names." The remaining sections of the act relate to the manner of selecting grand juries, and to the compensation of the commissioners and their clerks and assistants.

This act became effective as law in Cook county on the 1st day of July, 1897, but under its provisions the jury commissioners could not be named and authorized to act until the first Monday of July, being the first day of the July term of said criminal court of Cook county. But we need not follow the argument of counsel bearing upon the question whether it was practicable to secure a legal panel of petit jurors by virtue of the enactment to serve at the opening of such July term, for the reason that the question presented to us is whether its provisions were effective to enable the court to secure a jury on the 12th day of July. If it clothed the court with power to bring into court a legal panel of jurors to meet the exigency which existed because of the discharge of the regular panel, then the court should have secured a jury in accordance with its provisions. Section 2 of the act provides for the preparation by the commissioners of a list of all electors in the county between the ages of 21 and 60, and possessing the necessary legal qualifications for jury duty, and directs that such list shall also contain certain other information as to residence, etc., of electors. The act does not expressly declare what shall be necessary to qualify an elector for jury duty, but that such electors shall possess the necessary legal qualifications. Section 2 of the act concerning jurors, in force February 11, 1874, declares the qualifications of jurors; and it must be assumed that the words "necessary legal qualifications for jury duty," in section 2 of the jury commissioners' act, relate to the qualifications prescribed by said section 2 of the general act on jurors. Section 4 of the jury commissioners' act, which we have hereinbefore set out in full, contains all that is found in the act with reference to the matter of selecting names from the list to compose the regular panel of jurors at each term of the different courts in the counties

where the law is in force, and of selecting others jurors, if others are needed, at any time during the continuation of a term. It provides that the commissioners shall select the necessary number of names from said jury list, which names shall be written on a separate ticket, with the age, place of residence, and occupation, if known, and shall put such tickets in a box to be kept for that purpose, called the "jury box"; that the judges of the courts in the county shall certify to the clerk of the court the number of jurors required at each term; and that the clerk shall repair to the office of the jury commissioners, and in the presence of at least two of the commissioners, and of the clerk of the commissioners, if there be one, shall draw at random from the said jury box, after the tickets shall have been well shaken, the necessary number of names. Said section also directs the course to be pursued if it shall be found necessary to procure other jurors during the term of court. The provision of the section in this respect is as follows: "If more jurors are needed during the term the court shall so certify, and they shall be drawn and summoned as above provided forthwith." When the enactment is carefully considered, it will be observed the chief design is to accomplish two purposes: First, to place upon the list of those who may be chosen and summoned to serve as jurors the names of those electors, and of those only, who should possess the qualifications which the lawmaking power deemed necessary and requisite to the proper discharge of the duties of a juror; and, second, to so control the selection from such list of the persons who should be summoned to render jury service that no interested person and no interest could in any manner participate in such selection,—the ultimate design being to secure for the trial of causes qualified and impartial jurors, not only on the regular panel, but in the trial of each particular cause. In *People v. Onahan*, 170 Ill. 449, 48 N. E. 1003, we held the enactment a valid law. When the regular panel was quashed this law was in full force, and we find nothing in the record to indicate that it was not in actual operation. We cannot assume it was not, for that would be to presume that those upon whom the law imposed duties and conferred authority had ignored its provisions, and refused to discharge official acts which it directed and authorized them to perform. This being true, the duty of the trial judge when the regular panel of the jury was quashed was, it seems to us, clear. He should have certified, as authorized to do by the fourth section of the act, that "more jurors were needed" in his court, and upon that certificate the necessary names should have been drawn from the jury box in accordance with the directions of the said section.

The insistence that the course pursued by the court to bring a jury into court for the purpose of trying the cause is authorized by sections 12 and 13 of chapter 78, entitled "Ju-

rors," hereinbefore set out, cannot be accepted. Neither of those sections authorizes the court to clothe a special bailiff with power to select and summon persons into court, to be tendered to litigants as jurors, unless one or the other of the parties to the cause objects to the exercise of such power by the sheriff. In this case no objection was made to the sheriff, and the contingency upon which the sections in question authorized the appointment of a special bailiff did not occur.

It is urged by counsel for the people that the venire were directed, in the usual manner, "To the Sheriff of Said County," and were returned by Jackson as deputy sheriff. We find in the record an order made by the court with reference to who should have power to serve the venire, and in what capacity such person should act. The order is as follows: "On motion of Charles S. Deneen, state's attorney, it is ordered by the court that Frank G. Jackson be appointed special bailiff to serve special venires in this cause." "The court, of its own motion, doth order that a special venire issue out of this court, commanding Special Bailiff Frank G. Jackson to summon one hundred good and lawful men from the body of Cook county to serve as petit jurors, returnable at ten o'clock Wednesday morning." It is true that, notwithstanding the express order of the court, "a special venire issue out of this court, commanding Special Bailiff Frank G. Jackson to summon one hundred good and lawful men," etc., the clerk used a printed form of venire intended to be used when the sheriff should be directed to summon a special jury, and also true that in making the return upon the same the special bailiff, Jackson, used the printed form of return thereon, and wrote his name on a blank at the end of which the word "Deputy" is printed; but the name of the sheriff does not appear in any way upon the venires or the return thereof, and there is nothing in the record in any way to indicate that Jackson was deputy to the sheriff. There is no room for an argument that the jurors were selected and summoned by the sheriff acting by his deputy. Aside from this, the jury commissioners' act was in force, and was the later enactment; and if said sections 12 and 13 did, as counsel for the state argue, direct a different mode or course than that provided by the jury commissioners' act, the latter, being the later act, must prevail. It provided a legal, convenient, and sufficient mode of securing a jury, and, it is perfectly clear, excluded the operation of any other mode, either common-law or statutory.

It, then, being clear that the jury was not selected and summoned as the statute contemplated and directed, the question whether the refusal of the court to sustain the motion of the plaintiffs in error to quash the array was an error reversible in character is presented for determination. It seems that, in general, the provisions of statutes in the respect of the mode of the preparation of jury lists and of obtaining jurors are directory; that a substan-

tial compliance with the requirements of the statute is sufficient, and a mere irregularity in the drawing of jurors does not invalidate the panel, unless fraud has been practiced, or some great wrong done. 12 Am. & Eng. Enc. Law, 328, 330, 332-334. In many jurisdictions the rule has been established that in criminal cases a strict accordance with the statute and its provisions is required, and that the mode and manner of drawing the array of jurors prescribed by the law must be pursued in the administration of the criminal law. *Id.* 333, 334. But this principle of law has not met with full approval in this court. In *Murphy v. People*, 37 Ill. 447, on the trial of an indictment for murder, a panel of jurors was chosen for the third week of the term, and the venire so issued, but was afterwards changed, without authority, requiring the attendance on the second week; and the jurors so attended accordingly, and also on the third week. The trial commenced during the third week, and this was regarded as a mere irregularity, and not sufficient to demand a reversal. In *Wilhelm v. People*, 72 Ill. 468, which was a criminal proceeding, it was held that the challenge to the array was based upon a mere irregularity in drawing the jury, and, as it was not shown that any positive injury was done to the accused, it was not error to refuse to sustain the challenge. In *Mapes v. People*, 69 Ill. 523, in which the plaintiff in error was charged with a misdemeanor, the ground of the challenge to the array of jurors was that the duties in connection with the drawing of the jury, which the law required should be discharged by the county clerk, were not in fact performed by the legal incumbent of that office, but by one Benjamin F. Lee. It appeared that by an act of the general assembly the duties of the office of county clerk of Winnebago county, wherein said prosecution was pending, devolved upon two persons or clerks, one of whom, who was charged with certain of such duties, was to be appointed by the board of supervisors of that county, and the other held his office by virtue of an election, as other county clerks. Both of these officials were present at the drawing from the box of the names of persons to compose the jury, and took part therein; but it appeared that the clerk upon whom devolved the duties of shaking the box and drawing the tickets therefrom did not perform those acts, but that the box was shaken and the tickets drawn by the other clerk. In all other respects the requirements of the statute were observed, and it was ruled that there was no misconduct in the preparation of the lists, and no unfairness in the drawing of the tickets from the box, and that the error was too trivial and slight to constitute a ground of challenge to the array, or a reversal of the judgment. In *Siebert v. People*, 143 Ill. 571, 32 N. E. 431, in which the plaintiff in error was charged with murder, the trial court ordered the clerk of the court to draw the names of additional persons from the jury box, the regular panel

being exhausted, when, in the emergency presented, the statute provided that the court should direct the sheriff to summon from the body of the county a sufficient number of persons to fill the panel. This action of the trial court was declared but a mere irregularity, and, as the record failed to show that the rights of the defendant were impaired, or his cause prejudiced, it was ruled that the irregularity was not sufficient to demand a reversal of judgment of conviction. The rule which is to be drawn from a consideration of these cases from our own state is that slight and trivial departures from the directions of the statute with relation to the mode of obtaining the jury, and which do not appear to have prejudiced the right of a defendant in a criminal case, will not be deemed error of reversible character. An act required by the statute to be done is not deemed indispensable, if it is but in the nature of a direction as to the course of the proceedings adopted by the legislature to be pursued in order to accomplish the ultimate object of the enactment; and the omission of such an act, or the defective execution thereof, will not work reversal of the verdict of the jury, unless it should appear that the cause of the defeated suitor or defendant in a criminal case has been prejudiced by the failure to observe the statute in its strictness. The right of a defendant in a criminal case to a hearing in accordance with the law of the land is not, however, to be infringed by judicial construction; and within this right is included the right to have his cause submitted to and decided by a jury which had been selected in substantial accordance with the requirements of the statute. In the case at bar the objection is not that some step provided by the statute to be taken in the course of the proceedings marked out by the statute for procuring legal jurors has been omitted, or some direction thereof not observed, but that the entire statute, and every requirement and provision of it, has been omitted, and the jury selected in a manner which it was the especial purpose and design of the statute to supersede. In criminal cases jurors act as judges of the law and fact, wherein lies the greater reason for, and importance of, the rule that the requirements of a statute framed for the purpose of admitting to the list of qualified jurors only such persons as possess the qualifications required by law in order to legally enter on the discharge of the duties of jurors shall be substantially observed and fulfilled. The statute which was in operation in Cook county at the time the plaintiffs in error were tried committed the duty of determining who of the electors of the county should be deemed qualified to decide, as jurors, the contentions of litigants, and the law and facts upon which the guilt or innocence of persons charged with crime should be determined, to three commissioners, to be selected by the judges of the courts of record in that county with especial view to their competency and discretion. The action of the court in the case at bar committed this duty

and power to a special bailiff of the court, who, if such action is to be upheld, was empowered to select such persons as his judgment, convenience, or desire might dictate. If a defendant upon a criminal charge may be forced, over his protest and against his challenges, to submit his cause to such jurors as he may be best able to select out of the number so chosen by a special bailiff, then it is undeniable that the precise evils which the jury commissioners' act was designed to remedy may be legally inflicted upon him, notwithstanding the legislative enactment framed for the especial purpose of securing to the citizen immunity therefrom. We can but regard the action of the trial court as a substantial violation of both the letter and spirit of the statutes, and as altogether without the rule that mere irregularity in the matter of obtaining a jury will not constitute such error as to demand a reversal of a judgment of conviction, unless it can be seen from the record that such action prejudiced the cause of the defendant. To hold otherwise would be to nullify the statutes.

Other alleged errors are assigned and argued, of which one should be noticed. The case for the people was that the two plaintiffs in error, who were policemen, and claimed they were endeavoring to apprehend the deceased, in so doing each fired two shots at him from their revolvers, under circumstances which did not justify the use of deadly weapons on the part of the officers of the law, and that the deceased was struck and killed from a bullet fired from one of said revolvers. The revolvers made use of by the plaintiffs in error were cartridge revolvers, 38 in caliber. One of the defenses to the charge was that the ball or bullet which was exhibited to the jury as having been, as the plaintiffs in error claimed, taken from the body of the deceased, and as having caused his death, was smaller in size than the ball or bullet fired from their revolvers; that the deceased, immediately before they attempted to arrest him, was engaged in a fight with an unknown man, who ran away from the place of the difficulty, and that the line of his flight was such that he might have fired the shot which killed the deceased while the latter was fleeing from the officers; and that there was evidence tending to show that shots were fired other than those from the revolvers of the plaintiffs in error. Other evidence in the case tended to show that the bullet introduced in evidence was only a part of the original bullet, and that it could not be told what its size was when discharged from the revolver. The revolvers of the plaintiffs in error were loaded with cartridges, and the tendencies of the evidence were, pro et con, as to whether the ball or bullet taken from the body of the deceased had been in a cartridge, or was a bullet from a muzzle-loading firearm. Evidence, expert and otherwise, was produced on behalf of the respective parties bearing upon the question whether the ball or bullet said to have been found in the body of the

deceased was or not a ball or bullet which came from the revolver of one or the other of the plaintiffs in error, and the solution of that issue of fact was an important duty devolving upon the jury. At the request of the people the court gave to the jury the following instruction: "The court instructs the jury that in this case has been produced in evidence a leaden bullet, said to have caused the death of Swan Nelson, and to have been found in his body, and that, in determining whether or not this bullet was shot from a revolver by one of the defendants, they are to consider all the evidence of the case, and, in deciding whether or not the said bullet was shot from a 38 revolver in the hand of one of the defendants, they are to consider, in connection with all the other evidence in the case, the testimony of the expert witnesses; and, in determining which of them is correct in his statement of opinion, the jury may consider the appearance of the bullet, the absence from it of any distinguishing mark, if there be such absence, and the fact that it was shown to such witnesses, and produced before the jury, separated from the shell which contained it, and that such shell was not shown to any of the expert witnesses, nor produced before the jury." This instruction is open to more than one objection. It assumes that the ball or bullet had been contained in the shell of a cartridge, which was a strongly-contested question of fact. It selects particular alleged features of the testimony, not conclusive in character, but merely evidentiary, and directs the special attention of the jury thereto, and thereby gives such parts of the testimony undue prominence, the effect of which is to impress the jury with the belief that the court attaches special significance thereto. It is argumentative in form, structure, and effect. Such instructions have been frequently condemned by this court. For the reason that the jury was not legally drawn and impaneled, as herein indicated, the judgment must be reversed, and the cause remanded. Reversed and remanded.

(177 Ill. 280)

MILLER et al. v. WESTERN COLLEGE OF TOLEDO.

(Supreme Court of Illinois. Dec. 21, 1898.)

NOTES—VALIDITY—TIME OF PAYMENT—CONSIDERATION—WILLS—GIFTS—REVOCATION.

1. A note is not invalid though it is made payable on or before a certain date.
2. A note to become due at the maker's death is not invalid on account of the uncertainty of time of payment.
3. The fact that a note is payable on the death of the maker does not constitute it a testamentary paper that must be executed according to the statute of wills.
4. A note that is a gift to a college is not invalid for want of consideration after the college has erected a building on the faith of it.
5. A college let a contract to erect a building and began to erect it with the expectation that the maker of a note that was a gift to the col-

lege by the maker would advance money on the note. He made no such advances, but donated the cost of the building, taking back certificates which secured to him life annuities. *Held*, that the note was not invalid for want of consideration.

6. A gift of money to a college, to become its property, and for its benefit, is not revocable by an agreement of the college to pay the donor a certain per cent. per annum on the sum given during his life.

Appeal from appellate court, Second district.

In the matter of the estate of Mary Beatty, deceased, the Western College of Toledo obtained a judgment against Jacob Miller and another, executors, and they appealed to the appellate court, which affirmed the judgment (71 Ill. App. 587), and they again appeal. Affirmed.

Mary Beatty lived in her lifetime at Dover, Bureau county, Ill. She died testate on December 7, 1893, at the age of about 74 years. By her will she made Jacob Miller and Darius F. Fay executors, to whom letters testamentary were issued on January 5, 1894, by the county court of Bureau county, where her will was admitted to probate. On March 20, 1894, the appellee filed a claim against the estate of Mary Beatty in said county court, which claim was the note hereinafter described. The matter of the claim was subsequently taken by appeal to the circuit court of Bureau county. In the county court and in the circuit court, appellants, as executors of the estate of Mary Beatty, filed the certificates hereinafter described as a set-off against the claim of the appellee. The case was tried in the circuit court before the court and a jury. Testimony was taken, and instructions were given by the court, and the trial resulted in verdict and judgment for the appellee for the sum of \$6,361 against the estate of Mary Beatty to be paid as a claim of the seventh class. An appeal was taken from this judgment to the appellate court, and the judgment has been there affirmed. The present appeal is from such judgment of affirmance.

The note, filed as a claim against the estate of the deceased, is as follows:

"\$7,000.00. Dover, Ill., Dec. 9, 1887. In consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition, I promise to pay to the order of the treasurer of Western College, of Toledo, Iowa, for the erection of the Ladies' Boarding Hall of said college, on or before the first day of December, 1910, the sum of seven thousand dollars, without interest: provided, that in the event of my death before the maturity of this note it shall become then due. Mary Beatty. P. O.: Dover. County: Bureau. State: Ill. Witness: H. H. Maynard. W. M. Beard-shear."

The certificates, filed by the appellants as a set-off to the claim of appellee, are as follows, to wit:

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"In consideration of the agreement on the part of Western College, of Toledo, Iowa, that it will keep up and maintain its college and increase its facilities for a Christian education, and in further consideration of the payment to Mrs. Mary Beatty of one hundred eighty-seven and $\frac{50}{100}$ dollars each and every year of her natural life, the first payment to be made one year from the date hereof, the said Mrs. Mary Beatty has deposited with the said Western College the sum of twenty-five hundred dollars for the benefit of, and to become and be the property of, said Western College, and to be used as the board of trustees or executive committee thereof may direct. Witness my hand, this 6th day of August, 1889.

"\$187.50. L. H. Bufkin, Treasurer."

And on the back thereof appears the following, to wit:

"We hereby guaranty the payment of the within annuity. L. H. Bufkin, M. S. Drury.

"Aug. 6, 1890, paid one year's annuity.

"Oct. 9, 1891, paid one year's annuity."

"In consideration of the agreement on the part of Western College, of Toledo, Iowa, that it will keep up and maintain its college and increase its facilities for a Christian education, and in further consideration of the payment to Mrs. Mary Beatty of fifty-two and $\frac{50}{100}$ dollars each and every year of her natural life, the first payment to be made one year from the date hereof, the said Mrs. Mary Beatty has deposited with the said Western College the sum of seven hundred dollars for the benefit of, and to become and be the property of, said Western College, and to be used as the board of trustees or executive committee thereof may direct. Witness my hand, this 4th day of April, 1889.

"\$52.50. L. H. Bufkin, Treasurer."

And on the back thereof appears as follows:

"We guaranty the payment of the within annuity. L. H. Bufkin. M. S. Drury.

"April 4, 1890, paid within year's annuity.

"April 4, 1891, paid on the year's annuity. Mary Beatty.

"April 15, 1892, paid one year's annuity."

"In consideration of the agreement on the part of Western College, of Toledo, Iowa, that it will keep up and maintain its college and increase its facilities for a Christian education, and in further consideration of the payment to Mrs. Mary Beatty of two hundred sixty-two and $\frac{50}{100}$ dollars each and every year of her natural life, the first payment to be made one year from the date hereof, the said Mrs. Mary Beatty has deposited with the said Western College the sum of thirty-five hundred dollars for the benefit of, and to become and be the property of, said Western College, and to be used as the board of trustees or executive committee thereof may direct. Witness my hand, this 16th day of November, 1888.

"\$3,500.00. L. H. Bufkin, Treasurer."

And on the back thereof appears the following, to wit:

"We hereby guaranty the payment of the annuity to Mrs. Mary Beatty according to the terms of the within certificate. L. H. Bufkin. M. S. Drury. W. M. Beardshear.

"Received on the within, \$262.50, Dec. 5, 1889. Mary Beatty.

"Received on the within, \$262.50, Dec. 5, 1890. Mary Beatty.

"Paid on the within, \$262.50, by note dated Nov. 16, 1891."

Appellants also introduced as a part of their chain of set-off a note for \$262.50 given for one of the installments of interest or annuity due upon the certificate for \$3,500, which note is as follows, to wit:

"\$262.50. Toledo, Iowa, Nov. 16, 1891.

"One year after date, for value received, I promise to pay to Mary Beatty or order, at Dover, Ill., two hundred and sixty-two and $\frac{50}{100}$ dollars, with interest thereon at eight per cent. per annum from date, until paid.

"Western College,

"By J. S. Mills, Pres.

"J. S. Mills.

"M. S. Drury."

The appellee is a college located at Toledo, in the state of Iowa, and is under the management of the denomination known as the United Brethren in Christ. Prior to December, 1887, the college had commenced the erection of a building to be known as the "Ladies' Boarding Hall" of the college, and had expended upon the stone foundation thereof the sum of \$2,000, donated to it by a man in Ohio, named Dodds. In December, 1887, representatives of the college appealed to the deceased, Mary Beatty, at her home in Dover, Ill., for a donation of \$10,000, to complete the erection of said hall, she being a member of the denomination to which the college belonged. On December 9, 1887, she was visited by H. H. Maynard, a soliciting agent of the college, and W. M. Beardshear, president of the college. On December 3, 1887, she had given to Maynard \$500 in cash, a note for \$1,500, payable on or before December 3, 1890, and a note for \$5,000 of like tenor with the note for \$7,000 above set forth. On December 9, 1887, she destroyed the \$5,000 note, and gave to Maynard and Beardshear the \$7,000 note above described, and also a short-time note for \$1,000. The note for \$1,500 and the \$500 in cash were allowed to remain in their hands. The two notes for \$1,000 and \$1,500 were paid before July 10, 1888, making \$3,000 in cash received from the deceased by the college up to the latter date. Nothing was paid by the deceased upon the note for \$7,000 during her lifetime. But she paid the \$6,700 named in the three certificates at the respective dates thereof, to wit, \$3,500 November 16, 1888, \$700 April 4, 1889, and \$2,500 August 6, 1889. A contract was let for the construction of the building upon the foundation already referred to in the latter part of July, 1888. The building was finished and dedicated on September 4, 1889, after the amounts named in said

certificates had been paid in full. The evidence showed that nearly all, if not all, of the \$6,700 mentioned in the certificates was used in the construction of the building. The proof also shows that the \$3,000 paid before July 10, 1888, was used in the construction of said building.

Scott & Davis and Geo. S. Skinner, for appellants. Owen G. Lovejoy, for appellee.

MAGRUDER, J. (after stating the facts). In this case, the appellants claim that the note for \$7,000 filed as a claim against the estate of Mary Beatty was without consideration, and was a mere promise to make a donation or gift to the college of the sum evidenced by said note after the death of the donor, and, as such, was testamentary in its nature, and in violation of the statute of wills, and therefore of no binding force or validity, and not a legal claim against the estate of the deceased. Appellants also claim that the sum of \$6,700 represented by the three certificates set forth in the statement preceding this opinion was only deposited conditionally with appellee, and was only to become the money of the appellee upon the performance of the conditions set forth on the face of the instruments; that such conditions are conditions precedent, and were to be performed before the title to the money could vest in the appellee; that, when Mary Beatty died, installments of money were due to her on each of said certificates, payment of which had been demanded of the appellee in the lifetime of the deceased, and had been refused; and that thereby the appellee had forfeited its right to retain the \$6,700 deposited with it. Appellants also insist that the sums constituting the \$6,700 were not complete and executed gifts, and that the title to the money did not vest in the appellee, because it was deposited conditionally; and that, therefore, the gift was not complete at the death of Mary Beatty, and was revoked by her death. On the other hand, the appellee claims that the note for \$7,000 is supported by a good and sufficient consideration; that it is not testamentary in character, and is a valid claim against the estate; also that the sums of money amounting to \$6,700, and represented by the certificates, were executed gifts of such money to appellee; that the title thereto vested in the appellee before the donor's death. Appellee, however, admits that the note for \$262.50, with interest thereon, and the unpaid installments of interest or annuity due upon the certificates, together with interest thereon, should be deducted from the face of the note for \$7,000 and interest thereon at 5 per cent. from the death of Mary Beatty. The judgment rendered was made up in the way thus indicated. The instructions given by the trial court for the appellee substantially embodied the theory and contention of the appellee as thus stated. The instructions asked by the appellants and

refused by the trial court embodied the theory and contention of the appellants as above set forth. We deem it unnecessary to make any more detailed statement of the propositions embodied in the instructions on both sides.

Several objections are urged against the note for \$7,000, which cannot be regarded as tenable. In *Dorsey v. Wolff*, 142 Ill. 589, 32 N. E. 495, we said that, in general terms, a promissory note "may be defined to be a written promise by one person to pay to another person therein named or order a fixed sum of money at all events, and at a time specified therein, or at a time which must certainly arrive." The note for \$7,000 substantially corresponds with this definition. It is not invalid because made payable on or before the 1st day of December, 1910. In *Dorsey v. Wolff*, *supra*, we said: "A note is none the less negotiable because it is made payable on or before a named date." The note promises to pay the \$7,000 "for the erection of the Ladies' Boarding Hall of said college." This language would seem to limit the purpose for which the money promised to be paid is to be used. But the statement in a note of the consideration upon which it is founded, or of the effect to be given to the payment, does not affect its negotiable character. 4 Am. & Eng. Enc. Law (2d Ed.) p. 80; *Treat v. Cooper*, 22 Me. 203; *Chesney v. St. John*, 4 Ont. App. 150; *Preston v. Whitney*, 23 Mich. 260; *Martin's Ex'r v. Lewis' Ex'r*, 30 Grat. 672; *Ellett v. Britton*, 6 Tex. 229. The fact that the note is to become due in the event of the death of the maker thereof does not make it invalid. In the recent case of *Shaw v. Camp*, 160 Ill. 425, 43 N. E. 608, we have held that a promissory note may be made payable on the death of a certain person, or at a fixed time thereafter, or on demand after such death. Where a note is to become due on the death of the maker, it becomes due upon the happening of an event which is certain to occur, and therefore there is no such uncertainty in the time of payment as makes the note invalid. A note payable "on demand after my decease" has been held to be valid. *Bristol v. Warner*, 19 Conn. 7. A note payable "one day after date or at my death" has been held valid. *Conn v. Thornton*, 46 Ala. 587; 1 Rand. Com. Paper, § 113. The mere fact that a note is payable upon the death of the maker, or at a certain day after the death of the maker, does not make it a testamentary paper, nor constitute it a will in such sense as to require its execution in accordance with the statute of wills. It is an obligation to pay, and, being delivered to the payee as an evidence of debt, and being made payable to order, it is a promissory note. *Bristol v. Warner*, *supra*. In *Price v. Jones*, 105 Ind. 543, 5 N. E. 683, it was insisted that a note payable one day after the death of the maker was invalid as being an attempt to make a testamentary disposition of property. The

court there said: "There is no attempt to make a testamentary disposition of property, for the instrument contains no provisions resembling those of a will. It is a promise to pay money. It differs from an ordinary promise in the single particular that it fixes the time of payment at a period subsequent to the promisor's death. It is, nevertheless, a promise to pay money, absolutely and at all events, to a person named, and it has, therefore, all the essential features of a promissory note." See, also, *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835. In *Hegeman v. Moon*, 131 N. Y. 462, 30 N. E. 487, it was held that a promissory note, payable after the death of the maker, was valid, and that the objection that it was of a testamentary character, and void because not executed in accordance with the statute of wills, was not well founded. The theory upon which these cases rest is that the dispositions made by will are in the nature of gifts, but that such instruments as are referred to in these cases are made to carry out or perform obligations made and entered into by the makers thereof, and therefore are not, in their essence, wills, but are in the nature of contracts. As contracts, their validity does not depend upon their conformity to the requirements of the statute of wills, but to the requirements which are necessary in the making of valid contracts. *Schouler, Wills*, § 451; *Emery v. Darling*, 50 Ohio St. 160, 33 N. E. 715.

It is contended, however, that the note for \$7,000, filed as a claim in this case, was executed and delivered without any valid consideration to support it. The note recites upon its face that the maker thereof promises to pay "in consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition." It is unnecessary to discuss the question whether this note, upon its face, imports a consideration or not. The general rule is that, when a note contains the words "for value received," the consideration is imported. *Meyers v. Phillips*, 72 Ill. 460. Whether this note, upon its face, imports a consideration or not, it is well settled that proof may be introduced to show the facts in regard to the consideration of the note. The evidence tends to show that the deceased availed herself of the privilege, specified in the note, of sending one student four years free of tuition. The certificate embodying such privilege was issued to Mrs. Beatty, and was made use of by a female student upon the order of Mrs. Beatty. We do not deem it necessary, however, to decide whether or not the privilege specified upon the face of the note, and the use of it made by the deceased, constituted a valid consideration. The proof tends to show that the note for \$7,000 was a gift or donation to the college. Such a note partakes of the nature of a voluntary subscription to raise a fund or promote an object. It is well settled that a promissory note without consideration, and

intended as a gift to the payee by the maker thereof, is but a promise to make a gift in the future, and is not enforceable. As a gift it is always revocable until it is executed, and is not executed until it is paid. "The promise stands as a mere offer, and may, by necessary consequence, be revoked at any time before it is acted upon." *Pratt v. Trustees*, 93 Ill. 475. In *Blanchard v. Williamson*, 70 Ill. 647, we said (page 652): "If a party delivers his own promissory note as a gift, it is but a promise to pay a sum certain at a future day, and we are not aware such a promise can be enforced, either at law or in equity. It could not be enforced against the maker in his lifetime, and his representatives could defend against it on the ground there was no consideration." *Shaw v. Camp*, supra; *Williams v. Forbes*, 114 Ill. 167, 23 N. E. 463; *Richardson v. Richardson*, 148 Ill. 563, 36 N. E. 606; *Pope v. Dodson*, 58 Ill. 360. But, while such a note, amounting to a mere gift, is open to the defense of a want of consideration, yet that defense cannot be made to it if money has been expended, or liabilities have been incurred, in reliance upon the note. If money has been expended, or liabilities have been incurred, which, by legal necessity, must cause loss or injury to the person so expending money or incurring liability, if the note is not paid, the donor or maker thereof is, in good conscience, bound to pay; and the gift will be upheld upon the ground of estoppel, and not by reason of any valid consideration in the original undertaking. We have said: "It is the expending of money, etc., or incurring a legal liability on the faith of the promise, which gives the right of action; and without this there is no right of action." *Pratt v. Trustees*, 93 Ill. 475; *Beach v. Church*, 96 Ill. 177; *Hudson v. Seminary Corp.*, 113 Ill. 618. In *Simpson Centenary College v. Tuttle*, 71 Iowa, 596, 33 N. W. 74, the supreme court of Iowa said: "Where a note, however, is based on a promise to give for the support of the objects referred to [founding a school, church, or other institution of similar character], it may still be open to this defense [want of consideration], unless it shall appear that the donee has, prior to any revocation, entered into engagements or made expenditures based on such promise, so that he must suffer loss or injury if the note is not paid. This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor should be estopped from pleading want of consideration." *Wesleyan Seminary v. Fisher*, 4 Mich. 514; *Amherst Academy v. Cowls*, 6 Pick. 427; *Roberts v. Cobb*, 103 N. Y. 600, 9 N. E. 500; *Johnson v. Wabash College*, 2 Ind. 555; *Roche v. Roanoke Classical Seminary*, 56 Ind. 198; *Simpson Centenary College v. Bryan*, 50 Iowa, 293; *Vierling v. Horton*, 27 Ill. App. 263; *Pryor v. Cala*, 25 Ill. 263; *Methodist Episcopal Church v. Kendall*, 121 Mass. 528.

There was evidence in the case at bar tend-

ing to show that the appellee expended money in the construction of the building known as "Ladies' Boarding Hall" upon the faith of the promise made by the deceased as embodied in the note for \$7,000. It is true that the money represented by the three certificates was all, or nearly all, used in the construction of the building. But the contract for the construction of it was let in the latter part of July, 1888, and the erection of the building was begun about August 1, 1888. This was some months prior to the gift of the \$3,500 represented by the first certificate, dated November 16, 1888. The correspondence introduced in evidence, and the statements of many of the witnesses, show that the contract was let, and the work upon the building was begun and prosecuted, with the expectation that the deceased would advance money upon the note for \$7,000. It makes no difference that she did not advance any money upon that note, but preferred to donate \$6,700, and take back certificates, which secured to her the payment of annuities thereon during her life. The instructions given by the court to the jury required them to find whether or not the college, during the lifetime of Mary Beatty, entered into a contract to build and erect, and did build and erect, and expend moneys and incur liabilities in building and erecting, the Ladies' Boarding Hall on the faith and strength of the note for \$7,000. The question as to the expenditure of such moneys and the incurring of such liabilities upon the faith and strength of the note was a question of fact, which was submitted to the jury by the instructions. The judgment of the circuit court in favor of appellee, and the judgment of the appellate court affirming the judgment of the circuit court, are final determinations of this question of fact, so far as we are concerned. In the present state of the record, we are obliged to assume that the jury found in favor of such expenditures of money and the incurring of such liabilities on the part of the appellee. This being so, the appellee is entitled to its right of action, even if the note for \$7,000 was without consideration before it was thus acted upon. Upon this branch of the case, therefore, we are of the opinion that the courts below committed no error in holding the claim of appellee to be a valid claim.

As to the certificates, which were introduced by the appellants below as a set-off to the claim of the appellee, it is contended by appellants that such certificates show a mere conditional gift, which was not executed in the lifetime of the donor. The theory of the appellants is that there was no gift in present of the money named in the certificates because of the conditions annexed to the proposed gift, and that the donor could revoke the gift, because it was not absolute, and that the death of Mary Beatty did revoke it. We are unable to give our assent to this theory. The moneys named in the certificates were actually paid over by Mrs.

Beatty to the college, as her donee, during her lifetime, and at the respective dates named in the certificates. The money which was the subject-matter of the gifts was actually delivered to the donee. The certificates recite that the moneys were paid "for the benefit of" the college, "and to become and be the property of" the college, and "to be used as the board of trustees or executive committee thereof may direct." If the money was delivered to the college to be the property of the college, and to be used as the board of trustees of the college should direct, then the donor, Mrs. Beatty, parted with all her right to control it, and with her actual control over it. The title to the money was vested in the college. It is true that the college agreed to pay to Mrs. Beatty an annuity amounting to $7\frac{1}{2}$ per cent. per annum upon the sums mentioned in these certificates during her lifetime. But the requirement of the payment of such annuities did not make the gift of the money conditional, or less absolute than it otherwise would have been. If the payments of the annuities were conditions, they were in the nature rather of conditions subsequent than of conditions precedent. A precedent condition is one which must take place before the estate can vest, and which delays the vesting of the right until the event happens. A subsequent condition is one which operates upon an estate already created and vested, and renders it liable to be defeated. *Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145. Where an act on which an estate or right depends does not necessarily precede the vesting of an estate or right, but may accompany it or follow it, the condition is a condition subsequent. *City of Chicago v. Chicago & W. I. R. Co.*, 105 Ill. 78. Here the payment of the annuities is not an act which necessarily precedes the vesting of the estate or right to the money, but rather accompanies or follows it. A court of equity, as a rule, will not lend its aid to divest an estate for a breach of a condition subsequent. 4 Kent, Comm. (8th Ed.) marg. p. 130. "But, where a compensation can be made in money, courts of equity will relieve against such forfeitures, and compel the party to accept a reasonable compensation in money." *Gallaher v. Herbert*, 117 Ill. 180, 7 N. E. 511. In the case at bar, the principal named in the certificates, which was delivered to the college, will not be forfeited, but the college will be compelled, and, by the judgment in this case has been compelled, to pay to the appellants all of the unpaid annuities, and interest thereon as compensation.

In *Doty v. Willson*, 47 N. Y. 580, it was held that a gift was not necessarily invalid because the right to call for 6 per cent. interest was reserved; and it was there said that, if there was a gift of the money therein specified, "the title and control of the money immediately vested in the donee, and his promise to pay the donor six per cent.

in no degree affected such title or control. * * * The donor could never recover back the principal, nor in any manner control it, and it is not material to inquire whether he could recover the interest." In case of a gift *inter vivos*, the delivery is absolute, and the title vests immediately. If a condition is attached to the delivery, it will invalidate the gift; but a promise of the donee, which does not constitute a condition of delivery of title, but is consistent with it, will not have the effect of invalidating the gift. *Id.* The case of *Doty v. Willson*, *supra*, was approved in the case of *Young v. Young*, 80 N. Y. 422. In the latter case it was said, in discussing the question whether it is practicable to make a valid gift in present of an instrument securing the payment of money, reserving to the donor the accruing interest, and, if so, by what means such a gift can be made, that the object could be accomplished "by an absolute delivery of the security, which is the subject of the gift, to the donee, vesting the entire legal title and possession in him, on his undertaking to account to the donor for the interest which he may collect thereon." It was also said in the latter case: "If an absolute delivery of the bonds to the donee with intent to pass the title was made out, the donor reserving only the right to look to the donee for the interest, the transaction may be sustained as an executed gift." *Gallaher v. Herbert*, *supra*; *Williams v. Evans*, 154 Ill. 98, 39 N. E. 698.

We are of the opinion that in the present case there was an executed gift to the college of the moneys named in the certificates, and that the reservation of an annuity to be paid to the donor did not invalidate the gift. The certificates were merely written evidence of the transaction, and, the money having been delivered to the college, the delivery of the certificates to the college was unnecessary. The absolute character of the gift is not in any way affected by the fact that such certificates were retained by the donor, Mrs. Beatty. We concur with the appellate court when they say in their opinion delivered in the decision of this case: "The deceased accepted the certificates, and thereby bound herself by the terms thereof, and is given by them only a right of action against the appellee for the annuities in case of nonpayment. The title to the money is effectually vested in the college, and to be used by it, thereby placing it beyond her power to reclaim." The judgment of the appellate court is affirmed. Judgment affirmed.

(176 Ill. 541)

BOWLER v. BOWLER et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

DEEDS—CONSTRUCTION—VALIDITY.

Deceased and plaintiff, his wife, executed to defendants, his children by a former mar-

riage, deeds to land, one of which was declared to be in full of the grantee's share in the estate of deceased, and set forth that the grantors thereby remised and quitclaimed to the grantee and his heirs, after the father's death, the property described, the object being to give the grantee control of the estate during the father's life, but the title was not to vest in him until after the father's death, and, if the grantee died before the father, the conveyance was to be void. The other conveyance was a bargain and sale deed, containing a clause that it was not to take effect until after the father's death. *Held*, that the deeds were not void, under the statute of wills, as testamentary in their nature, but conveyed a present remainder after the father's death,—the first on condition subsequent that the grantee should accept it for his share in the estate.

Appeal from circuit court, St. Clair county.

Bill by Elizabeth J. Bowler against William H. Bowler and others. From a judgment dismissing plaintiff's bill, she appeals. Affirmed.

Turner & Holder, for appellant. Dill & Wilderman, for appellees.

WILKIN, J. This was a petition by appellant, Elizabeth J. Bowler, in the circuit court of St. Clair county, to recover dower in 200 acres of land lying in Madison and St. Clair counties; also, in certain property in the city of Collinsville, Ill. The petition alleges that appellant and William P. Bowler were married on March 22, 1877; that on July 10, 1897, he died, leaving her his widow, and John W. Bowler, Mary H. Sisson, and W. H. Bowler, his children by a former marriage, his only heirs at law; that William P. Bowler during his marriage with petitioner was seised in fee of the property described, and at the time of his death occupied the Collinsville property as a homestead. William H. Bowler answered, claiming ownership in the 200-acre tract in fee, by virtue of a deed from William P. Bowler and wife executed September 12, 1877, and delivered a short time thereafter. Mary H. Sisson also answered, alleging her ownership of the Collinsville property by virtue of a deed from William P. Bowler and wife executed July 2, 1891, and delivered soon thereafter. The execution and delivery of these instruments are not disputed by appellant, but she insists they were testamentary in their nature, and as such void, under the statute relating to wills. The instrument executed to William H. Bowler, after the formal parts, provided: "That the said parties of the first part, for and in consideration of the love and affection they bear to the party of the second part, and also in full of the share of William H. Bowler in and to the estate of William P. Bowler at the time of his death, in case said William H. should survive said William P. Bowler, do hereby remise, release, and quitclaim to said William H. Bowler, his heirs and assigns, after the death of the said William P. Bowler, and to his heirs and assigns, upon the conditions, qualifications, limitations, and reservations hereafter stated and set forth [then

follows the description of the 200 acres] together with, all and singular, the privileges and appurtenances thereunto belonging, including all homestead rights therein, under the laws of this state; the object and intention of this deed being to give the said parties of the first part the possession and control of said real estate during the lifetime of the said William P. Bowler, and the title to the same is not to vest in the said William H. Bowler, his heirs and assigns, until after the death of the said William P. Bowler; and it is further understood, and is a condition in this conveyance, that, if the said William H. Bowler should depart this life before the said William P. Bowler, that in that case this conveyance is to be null and void." Then follows the habendum clause, upon the conditions named. This deed was duly executed in conformity with the requirements of conveyances of real estate, the wife being examined separate and apart from her husband relative to her acknowledgment.

The granting clause of this instrument, "do hereby remise," etc., "after the death of said William P. Bowler," unaffected by the remainder of the deed, admits of but one interpretation, and is a present grant of a future estate. The words, "after the death of the said William P. Bowler," we think, merely limit the grant to the remainder after his death. In the light of numerous authorities this construction would hardly be questioned, were it not for the subsequent clauses. The language, "the object and intention of this deed being to give the said parties of the first part the possession and control of the said real estate during the lifetime of the said William P. Bowler, and the title to the same is not to vest in the said William H. Bowler, his heirs and assigns, until after the death of the said William P. Bowler," is inconsistent; the effect of the first clause being to vest the remainder in the grantee presently, with the condition attached. To hold that the grantor did not intend to pass a present interest in the remainder would be equivalent to holding his act in executing the instrument a nullity. This the law does not favor, and will not permit, if it can be avoided without doing violence to well-established rules. That the grantor, in using the word "vest" in the second clause above, did not use it in a technical sense, seems reasonable. What he meant by it was, doubtless, to emphasize the condition that the grantor was to retain the property during his lifetime. The instrument also provides that the property should be in full for the share of the grantee in the estate of the grantor; but this provision is reconcilable with the granting clause as a condition subsequent, and, as such, the acceptance of the deed, and the conduct of the grantee after the death of the grantor, bind him to the fulfillment of the condition. The instrument also provides, as a condition to the enjoyment of the remainder by the grantee, that he should be alive at

the death of the grantor. It is claimed by counsel for appellant that this is a condition precedent to the vesting of the remainder in William H. Bowler. Whether it should be treated as a condition precedent or subsequent depends upon the intention of the grantor, and, considering the whole instrument together, we think it was clearly meant as a condition subsequent. As such, the grantee having outlived William P. Bowler, the condition has been fulfilled.

The conveyance to Mary H. Sisson in 1881 was the usual form of a bargain and sale deed. After the description, it contained the following clause: "This deed not to be of any force and effect until after the death of said William P. Bowler," etc. That this instrument was a present conveyance of a remainder after the death of William P. Bowler is too well settled by previous decisions of this court to need extended discussion. The question arose in *Shackelton v. Sebre*, 86 Ill. 616, and *Harshbarger v. Carroll*, 163 Ill. 636, 45 N. E. 565; and it was held in both cases that similar instruments were sufficient to vest the remainder of the fee in the grantee after the death of the grantor, upon the delivery of the deed.

No other questions are presented for our decision. The decree of the circuit court will be affirmed. Decree affirmed.

(177 Ill. 91)

CHICAGO & A. R. CO. v. PEOPLE ex rel. BEGOLE, County Treasurer.

(Supreme Court of Illinois. Dec. 21, 1898.)

CITY—TAXATION—LIMITATION—PAYMENT OF JUDGMENT.

Under Hurd's Rev. St. c. 24, art. 8, § 1, prohibiting a city organized under the general law from levying taxes for all purposes, except bonded indebtedness, exceeding 2 per cent. of the equalized valuation of its taxable property, a city so organized cannot levy a tax exceeding the limitation for the payment of a judgment not for bonded indebtedness, though the entire 2 per cent. levy was necessary to pay its ordinary expenses.

Appeal from St. Clair county court.

Suit by the people, on the relation of Henry C. Begole, county treasurer of St. Clair county, against the Chicago & Alton Railroad Company, to subject defendant's property to the payment of a tax. From a judgment in favor of plaintiff, defendant appeals. Reversed.

M. J. Scrafford and William Brown, Jr. (William Brown, of counsel), for appellant. Forman & Browning, for appellee.

CARTWRIGHT, J. The treasurer of St. Clair county applied to the county court of said county for a judgment against the property of appellant for a balance of taxes levied by the city of East St. Louis for the year 1897, which appellant had refused to pay. Appellant appeared, and made objection that the unpaid balance was levied and extended

without authority of law. The objection was overruled, and there was a judgment and order of sale.

The city of East St. Louis is organized under the general law for the incorporation of cities and villages, and the aggregate amount of taxes which it may levy in any one year, exclusive of the amount levied for payment of bonded indebtedness, with interest thereon, is limited to 2 per cent. upon the aggregate valuation of all property within said city subject to taxation therein, as the same was equalized for state and city taxes for the preceding year. Hurd's Rev. St. c. 24, art. 8, § 1; *People v. Lake Erie & W. R. Co.*, 167 Ill. 283, 47 N. E. 518. The tax in question exceeded 2 per cent. of such aggregate valuation, after eliminating from the levy the sums appropriated for the payment of a judgment against the public library and reading room, for the maintenance of the library, and for the payment of the judgment of *W. McK. Hubbard* against the city for bonded indebtedness, about which items there is no dispute. The remaining items, as stated in the ordinance, are as follows:

| | |
|---|----------|
| For supplying water to the city..... | \$17,000 |
| For electric street lighting..... | 16,000 |
| For streets, alleys, and bridges..... | 20,000 |
| For sewerage | 2,000 |
| For police department..... | 10,000 |
| For fire department..... | 12,500 |
| For officers' fees and salaries..... | 5,000 |
| For public buildings and grounds..... | 2,000 |
| For election purposes..... | 3,500 |
| For printing | 2,000 |
| For litigation expenses..... | 1,500 |
| For city court..... | 5,000 |
| For contingent expenses..... | 1,000 |
| For payment of judgment, interest, and costs, case of <i>J. M. Freels v. City of East St. Louis</i> | 8,000 |

It was agreed at the hearing that the judgment in favor of *Freels* was for legal services, and not for bonded indebtedness. It was, therefore, to be included with the other items in the levy, which, in the aggregate, must not exceed the limitation of 2 per cent. It was agreed that a levy of 2 per cent. was necessary to pay the ordinary expenses of the city for which the levy was made, and it is insisted that a levy for the payment of the judgment might be in excess of the statutory limitation. We can see no foundation for this claim. It might be very convenient and desirable to raise as much as the law will permit, and expend it for other purposes, and make an additional levy to pay the judgment, but the statute cannot be evaded in that way. The only difference in respect to the judgment is that a legal liability has been fixed, and the city is bound to pay it, and, being bound to keep within the limitation, must abate from the sums which the officials would like to expend sufficient to bring the entire levy within the 2 per cent. The decisions in *City of East St. Louis v. Amy*, 120 U. S. 600, 7 Sup. Ct. 739, and *City of East St. Louis v. People*, 124 Ill. 655, 17 N. E. 447, have no relation to this question. In each of those cases the ob-

igation was a bonded indebtedness, which the constitution required the city to levy a sufficient tax to pay, and was of a class excepted from the limitation by the statute under consideration. The judgment against appellant's property for the excess in the amount levied for current expenses, and the payment of the Freels judgment, above the 2 per cent. limitation, was erroneous. The judgment will be reversed, and the cause remanded. Reversed and remanded.

(172 Mass. 278)

NUGENT v. GREENFIELD LIFE ASS'N.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 3, 1899.)

LIFE INSURANCE—APPLICATION — POLICY — FALSE STATEMENTS—EVIDENCE.

1. Under St. 1890, c. 421, § 21, providing that a correct copy of the application shall be attached to every policy which refers to it as part of the policy or as having any bearing on the contract, and that, unless so attached, it shall not be received as evidence nor considered as a part of the policy, an application which differs from the copy so attached in giving the amount of other insurance as \$100 instead of \$1,000, and in leaving unanswered the question whether a member of the applicant's family had died of an inherited disease, where the copy answered "No," was properly rejected.

2. The insurer could not prove by parol any false statements of assured in his application, the latter being inadmissible.

3. Clerical errors, not affecting the meaning of the application, and misspelling, are immaterial.

4. Where insured accepted a life policy with what purported to be a copy of the application annexed to it, as required by law, and paid the premium which was payable before delivery, and the subsequent premium, and suit was brought on the policy as it was written, without objecting to the inaccuracy of the copy annexed, it did not estop the beneficiary from raising in the action the question of a discrepancy.

Report from superior court, Bristol county; James B. Richardson, Judge.

Action by one Nugent against the Greenfield Life Association. There was a verdict for plaintiff. Case reported, and judgment ordered on verdict.

J. W. Cummings, E. Higginson, and C. R. Cummings, for plaintiff. H. A. Dubuque, for defendant.

BARKER, J. Our statutes deal differently with assessment insurance, the contracts of fraternal beneficiary organizations, and ordinary premium insurance. The principal respective enactments are St. 1890, c. 421, governing assessment insurance; St. 1894, c. 367, relating to the operations of fraternal benefit organizations; and St. 1894, c. 522, which regulates ordinary premium insurance. Neither of these statutes is generally or as of course applicable to the kinds of insurance regulated by the other acts. See St. 1890, c. 421, §§ 1, 27; St. 1894, c. 367, § 18; *Id.* c. 522, §§ 2, 3. The present defendant is an assessment

insurance company, organized under St. 1890, c. 421, and the contract or policy on which it is sued in this action is one of assessment insurance, and therefore is governed by the provisions of the statute. The declaration is upon a policy written on July 7, 1896, on the life of the plaintiff's son, who died on August 25, 1896. The answer, in addition to a general denial, alleged that the policy was issued upon representations in an application therefor, and which were part of the policy, and were false and untrue, and made with an actual intent to deceive, and were false as to matters increasing the risk of loss, and also that the insured warranted the truth of his answers in the application, and that the warranties were untrue. At the trial it was admitted that the policy was issued pursuant to a written application, a copy of which purported to be annexed to the policy. Upon comparing this supposed copy with the original application, a number of differences between them were pointed out, and the presiding justice found that the copy attached to the policy was not a correct copy, as required by law, and for that reason ruled that the original application was not admissible in evidence. In putting in its defense, the defendant offered to show that the answers of the insured to certain questions in the application and in the medical examiner's report, which it contended was part of the application, were false, fraudulently made with intent to deceive, and that they materially affected the risk. The presiding justice excluded the evidence, and ruled that the defendant, having failed to comply with St. 1890, c. 421, § 21, could not put in evidence of the untruth of answers of the insured in his application, or in the part relating to the medical examiner, and refused to allow the defendant to put in any evidence tending to show that the insured made false answers. The question for decision is whether these rulings were correct.

This statute was not the first instance in which our legislature regulated the form of policies, and the construction to be given to insurance contracts. By St. 1861, c. 152, it provided that in fire insurance the condition of the insurance should be stated in the body of the policy, and that neither the application of the insured nor the by-laws of the company, as such, should be considered as a warranty or as a part of the contract. This provision was so changed by St. 1864, c. 196, as to provide that neither the application nor by-laws should be considered as a warranty or a part of the contract, except so far as incorporated in full into the policy, and so appearing on its face. See Pub. St. c. 119, § 138; St. 1887, c. 214, § 59; St. 1894, c. 522, § 59. By St. 1878, c. 157, it was provided that no misrepresentation made in obtaining a policy of fire or life insurance should be deemed material, or defeat or avoid the policy, or prevent its attaching, unless made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss. See

Pub. St. c. 119, § 181; St. 1887, c. 214, § 21; St. 1894, c. 522, § 21. See, also, *White v. Society*, 163 Mass. 108, 39 N. E. 771; *Levie v. Insurance Co.*, 163 Mass. 117, 39 N. E. 792; *Stocker v. Association*, 170 Mass. 224, 49 N. E. 116, and St. 1895, cc. 271, 281. The earliest provision requiring a correct copy of the application to be contained in or attached to every policy which contains any reference to the application, either as forming part of the policy or contract, or having any bearing on the contract, is found in the statute under which the defendant was incorporated. St. 1890, c. 421, § 21. This section is quite full and minute in its directions, and a penalty is provided in a subsequent section for neglecting to comply with any provision of the act. St. 1890, c. 421, § 26. One provision of section 21 is that, "unless so attached and accompanying the policy, no such application * * * shall be received as evidence in any controversy between the parties to or interested in said policy or certificate, and shall not be considered a part of the policy or of the contract between such parties." A somewhat similar provision with reference to applications for life insurance was incorporated into the general law regulating premium insurance by St. 1893, c. 434, now re-enacted in St. 1894, c. 522, § 73. This provision came before the court in *Considine v. Insurance Co.*, 165 Mass. 462, 43 N. E. 201; and it was there held that the provision was applicable to all premium life insurance; that where it rendered the application inadmissible, and forbade it to be considered as part of the contract, the defendant could not show what was said by the insured at the time of his medical examination; and that the provision was within the constitutional power of the legislature. After this decision, the section now under discussion (St. 1890, c. 421, § 21) was before this court in *Boyd v. Association*, 167 Mass. 242, 45 N. E. 735, so far as it related to the by-laws of the insurer; and, no copy of the by-law being contained in or attached to the policy, it was held that the rights of the parties must be determined as if there were no such by-law. The policy sued on in the present case differs from those before the court in the two cases last cited, in that there is annexed to it what purports to be a copy of the application, while in those cases no copy was contained in or annexed to the policies. It is not contended that the statute is merely directory, in the sense that it only commands the insurer to insert in or attach to the policy a correct copy, and leaves the rights of the parties otherwise unaffected. The answer to such a contention would be found in the language of the section, which explicitly provides that, unless the correct copy is so inserted or attached, the application shall not be received in evidence or considered a part of the policy or of the contract.

The defendant contends that by accepting the policy with what purported to be a copy

of the application annexed to it, paying the premium which was payable before its delivery, and the premium payable in the following August, and retaining and bringing suit upon the policy as it was written, without making objection to the inaccuracy of the copy actually annexed, the insured and his beneficiary have waived all objections to the copy, and assented to the copy as it was, so that the plaintiff is now estopped from raising the question of discrepancy. One difficulty with this contention is that it does not appear that the insured or his beneficiary had knowledge that the copy was not correct. The documents which constituted the application were not in their custody, but in that of the defendant; and they might well rely upon the defendant's assertion that a copy of the application was in fact annexed. Another difficulty is that the defendant in no way changed its position for the worse, relying upon the acceptance and retention of the policy as it was delivered. There is no occasion to consider what would have been the situation if the defendant had made inquiry, and had received an assurance from the insured that the copy was correct, or had requested to be allowed to correct any discrepancies. In bringing suit upon the policy, the plaintiff made no explicit or implied affirmation of the contract as it purported to be made, with the application as a part of it, rather than as it actually was under the operation of the statute. We find nothing which should be considered as a waiver, or should estop the plaintiff; and it is not necessary to consider whether there are considerations of public policy which, under different circumstances, might require us to hold that the effect of the statute could not be waived by the contracting parties.

The consideration of the question whether the finding that the copy annexed to the policy was not a correct copy, as required by law, and the ruling that, for that reason, the application was not admissible in evidence, were right, requires us to construe the expression "correct copy," contained in the statute. It is to be noticed that the purpose of the section is not alone to declare what construction shall be placed upon the contract, but also to impose upon corporations and their officers a positive duty in respect to the issuing of policies containing any reference to the application, or where the application has any bearing upon the contract. In other words, the section is a regulation, under a penalty, of the manner in which those who write assessment insurance shall write their contracts, as well as a rule for determining the construction to be given to such contracts. Neither aspect of the section requires us to hold that the copy must be exactly and literally correct in order to be a compliance with the law. Mere clerical errors, which do not affect or alter the sense of the document, and cannot vary or alter the rights or obligations of the parties in any possible event, or in any way tend to mislead or prejudice any one, are not

matters to which, in either of its aspects, the statute is directed; and such clerical errors do not prevent a copy in which they may be found from being a correct copy, within the meaning of the law. On the other hand, it cannot reasonably be held that no errors of substance will render the copy incorrect, within the meaning of the law, unless they are in themselves material to the questions on trial in the action in which it is in dispute whether, by reason of the incorrectness of the copy, the application is admissible in evidence, or to be considered part of the contract. The law is not complied with if there are errors of substance in the copy; and, where the law is not complied with, the explicit command is that the application shall not be received as evidence, and shall not be considered a part of the policy or of the contract. If this seems a harsh provision, and one which may be used by the insured as a weapon with which to do wrong, rather than as a shield to protect himself from wrong, it is yet a necessary construction, which we cannot refuse to make without interfering with the province of the legislature. A copy which differs in substance from the original cannot be a correct copy, in the common acceptance of terms, and the double purpose of this statute precludes us from seeking to find for the language used a meaning different from its ordinary sense. If, in any case, an insurer suffers from having unintentionally annexed a copy which is not correct, it is because, having the means of annexing a correct copy, and so being able to rely upon defenses open to a contract of which the application is a part, he breaks the law by annexing an incorrect copy, or no copy at all, and is thereby precluded from defenses founded upon the application.

In the present case the discrepancies between the application and the copy annexed to the policy were in part merely clerical and of no consequence, and in part matters of substance. It is not essential to specify them all. The omission of the heading, "Application for Assurance in the Greenfield Life Association of Greenfield, Massachusetts," we consider immaterial, as the heading was no part of the application itself, which states explicitly in the body of the instrument that it was made to the defendant. The heading, like the filing, printed on the other side of the same piece of paper, was merely something printed for convenience on the same paper with the application, but not a part of it. If the heading had been referred to in the body of the application, or if its presence was the only means appearing on the paper of determining to whom the application was made, it might be a material part of the application. So, too, the statements of the medical examiner which follow the signature of the applicant to that part of the application headed "Medical Examiner's Report" are merely a report to the insurer by one of its own officers upon the application as made and signed by the insured, and are not a part of the ap-

plication, within the meaning of the law, the language of which is "a correct copy of the application as signed by the applicant." The applicant signed twice, once upon each of two separate pieces of paper, and, when his signatures were made, the blanks on which the medical examiner afterwards made out a statement of the result of his personal examination were unfilled, and that statement was not part of the application "as signed by the applicant." For this reason the omission of that statement did not make the copy incorrect. Nor do we consider the heading of the medical examiner's report a part of the application, and we think the partial omission of the heading of no importance. Such discrepancies as the omission of the preposition "in" before the words "Fall River," in answering as to the applicant's place of residence; the misspelling of "temperate" as "temporant"; the omission of the word "get" from the answer, "Get cold four years ago two days, no bad effects remaining," and of the preposition "for" in copying the answer, "For cold," to the question for what the applicant last consulted a physician; the substitution of "or" for "and" in the phrase "so far as you know and believe"; and the omission of "got" and "the" in copying the answer, "Got hurt in the mine,"—are all merely clerical, not affecting the meaning of the application, and not preventing the copy in which they appear from being a correct copy, within the meaning of the statute.

Whether the omission of the name of the county in copying the applicant's statement of his place of birth can be held a mere clerical error, and whether several of the other discrepancies are such as to prevent the copy from being correct, within the meaning of the law, we do not stop to decide, as there are discrepancies which are plainly matters of substance, which might, in circumstances easily conceivable, affect the rights of the parties, and which, in our opinion, required the presiding justice to find that the copy was not a correct copy as required by law, and to refuse to admit the original in evidence. These discrepancies were the incorrect answer given in the copy to the question as to the amount in which the applicant's life was then insured, the answer in the application being "\$100," and in the copy "\$1,000," and the erroneous insertion of the answer "No" to the question, "Has any member of your father's family died of an inherited disease?" which was left unanswered in the original application. An omission to answer is not, of course, ordinarily a negative answer, and merely founds a waiver of the answer by the insurer. *Hall v. Insurance Co.*, 6 Gray, 185, 191; *Liberty Hall Ass'n v. Housatonic Mut. Fire Ins. Co.*, 7 Gray, 261. The amount of previous insurance, and the presence or absence of inherited disease in the family of the applicant, are deemed important by insurers; and an untrue statement in respect of either might well be the occasion of future

controversy as to the insurance written upon the strength of such a statement.

The application being inadmissible in evidence, and no part of the policy or contract, it necessarily followed that the defendant could not be allowed to put in any evidence tending to show that the insured made false statements in his application, including those made by him to the medical examiner. Such evidence could not be admitted without disobeying the law, which says that those statements shall not be considered a part of the contract. *Considine v. Insurance Co.*, 165 Mass. 462, 466, 43 N. E. 201. See *Bardwell v. Insurance Co.*, 122 Mass. 90.

The policy sued on was issued on July 7, 1896, and it failed to comply with the provisions of St. 1896, c. 515, § 1, requiring the words "Assessment Plan" to be printed in bold type upon both the policy and the application. The defendant now contends that this statute is merely directory. As no question as to that statute appears to have been raised at the trial, and it does not appear to have had any part in the decisions there arrived at, we have now no occasion to consider its meaning or effect. None of the rulings to which the defendant excepted being wrong, by the terms of the report the verdict is to stand, and judgment is to be entered thereon for the plaintiff. So ordered.

(172 Mass. 303)

FARR v. ROUILLARD.

(Supreme Judicial Court of Massachusetts.
Hampden. Jan. 4, 1899.)

TOWNS—CITIES—CONSTABLES' BONDS—DAMAGES—MEASURE—EVIDENCE.

1. Pub. St. c. 27, § 113, provides that a constable shall give a bond "to the inhabitants of a town," and shall serve no civil process until he gives such bond. Chapter 28, § 2, provides that chapter 27 shall apply to cities, so far as consistent with other provisions. Section 9 provides that constables' bonds in the city of Boston shall run to the city treasurer. *Held*, that a constable's bond in cities other than Boston should run to the city, and not to the treasurer.

2. Although a constable's bond is given to the treasurer of a city, instead of to the city, as required by statute, yet, being voluntarily executed, and there being nothing in the condition contrary to law, it is a valid bond at common law.

3. Where an obligor on a constable's bond intended to comply with the statute, but instead of making the bond run to the city, as required, made it run to the city treasurer, by implication it was taken in trust for the city; and, hence, the damages should be measured by the interest of the city, and not of the treasurer.

4. An answer not signed by defendant in an action against a constable for tort is not proof of the averments therein, in an action against his bondsmen.

Exceptions from superior court, Hampden county; Elisha B. Maynard, Judge.

Action by Dennie L. Farr, treasurer of the city of Holyoke, against Samuel Rouillard, on the official bond of Fred S. Williams, constable. There was a judgment for plaintiff,

and defendant excepts. Exceptions sustained.

R. O. Dwight, for plaintiff. A. L. Green and F. F. Bennett, for defendant.

LATHROP, J. The principal question in this case is whether the action can be maintained upon the bond, as the obligee mentioned therein is "the treasurer of the city of Holyoke," instead of the city of Holyoke. The bond in question was accepted by the board of aldermen of Holyoke, and the form was approved by the city solicitor. By Pub. St. c. 27, § 113, provision is made for a constable giving a bond "to the inhabitants of a town"; and the section ends with the words, "and no constable shall serve any process in a civil action until he gives such bond." By chapter 28, § 2, chapter 27 and all other laws relating to towns shall apply to cities, so far as they are not inconsistent with the general or special provisions relating thereto. By section 9 of this chapter it is provided, "Constables' bonds in the city of Boston shall run to the city treasurer." The fair inference from these provisions is that a bond given by a constable in a city other than Boston should run to the city, and not to the treasurer. The defendant contends that as the bond ran to the treasurer, and not to the city, it is void, and relies upon the case of *Whitney v. Blanchard*, 2 Gray, 208. This was an action of tort against a constable of a town for neglecting to serve and return a writ sued out by the plaintiff, and committed to the defendant for service. The constable had given no bond, and this was held to be a good defense, on the ground that he could not be held liable in damages for omitting to do that which he could not legally do. This case has no bearing on the one before us. A case more nearly resembling the present is *Sweetser v. Hay*, 2 Gray, 49, where a bond was given by a town treasurer and collector to the selectmen of a town, instead of to the town, as required by statute; and it was held that this was a valid bond at common law, and that the selectmen might maintain an action upon it for the benefit of the town. See, also, *Woodward v. Pickett*, 8 Gray, 617; *Bank v. Kingman*, 16 Gray, 473; *Miner v. Coburn*, 4 Allen, 136; *Bank v. Smith*, 5 Allen, 413; *Holbrook v. Klenert*, 113 Mass. 268; *Mosher v. Murphy*, 121 Mass. 276; *Brooks v. Whitmore*, 139 Mass. 356.

The bond in suit was voluntarily executed, there is nothing in the condition thereof contrary to law, and it is a valid bond at common law. Treating the bond as a common-law bond, it is contended by the defendant that only nominal damages can be recovered; but it is plain that the obligor intended to comply with the statute, and, therefore, by implication it was taken in trust for the benefit of the same persons who could take advantage of a bond in the statutory form. The damages, therefore, will be measured by

the interest of the cestui que trust, not by that of the obligee. *Sweetser v. Hay*, 2 Gray, 49, 53. See, also, *Drummond v. Crane*, 159 Mass. 577, 580, 35 N. E. 90; *Lloyd v. Harper*, 16 Ch. Div. 290.

The plaintiff was allowed to put in evidence, against the defendant's exception, the record in the action of Mary Bray against Fred S. Williams. This appears by the declaration to have been an action of tort for the conversion of certain personal property. The answer is a general denial, and contains the following: "And the defendant, further answering, says that he is a constable of the city of Holyoke; that, as to the property alleged to be converted, as much thereof as he may have taken into his possession he took as a constable of the city of Holyoke, and by virtue of a certain writ in which the plaintiff in this action was the defendant." This answer is signed by an attorney. The record further showed that the plaintiff recovered judgment. The difficulty with the plaintiff's case in this respect is that, unless the statement in the answer is admissible in evidence against the defendant, there is nothing to show that his tortious act was in the performance of his duty as constable, and therefore a breach of his bond. If this answer had been signed by him, it would, without doubt, have been admissible; but it was signed merely by his attorney, and there was nothing to indicate how far the attorney was instructed by the defendant in this particular. This precise point was decided in *Dennie v. Williams*, 135 Mass. 28. The plaintiff seems to have relied entirely upon this statement in the answer, for we find no other evidence to show that the tortious act of Williams was done *colore officii*. As the statement in the answer was not admissible for this purpose, the entry must be: Exceptions sustained.

(172 Mass. 301)

VANDERCOOK v. O'CONNOR et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Jan. 4, 1899.)

CONVERSION—REVIEW—EVIDENCE—SUFFICIENCY—
QUESTION NOT RAISED BELOW—WIT-
NESSES—COMPETENCY.

1. An objection to the sufficiency of evidence to show that defendants, charged with a joint conversion, were partners, not made on the trial, will be overruled, where a witness who was employed by defendants as a foreman testified that the property was used in the defendants' business when necessary.

2. A witness testified that he had been in the bottling business 30 years, and that he knew the value of bottlers' supplies during that time. *Held*, that he was competent to testify to the value of the bottles in question alleged to have been converted.

Exceptions from superior court, Hampden county; Daniel W. Bond, Judge.

Action by C. E. Vandercook against Patrick J. O'Connor and others. There was a judgment for plaintiff, and defendants bring exceptions. Exceptions overruled.

N. P. Avery, for plaintiff. A. L. Green, for defendants.

HOLMES, J. This is an action for the conversion of 27 gross of bottles, and the case is here on exceptions. The first exception is to a refusal to direct a verdict for the defendants. There was evidence that the plaintiff had sold the bottles to one Esther J. Winn upon condition that the title should not pass until the bottles were paid for, and that they had not been paid for. Mrs. Winn sold out her business to the defendants, and the defendants converted the bottles. This exception is not much pressed. It is put on the ground that the evidence that the defendants were partners—that is, we suppose, that they were jointly liable for the tort—was insufficient. As this objection, to all appearance, is an afterthought, and as there is no indication of any question having been made upon the point at the trial, slight evidence, uncontroverted, will be deemed sufficient here. The sale was to P. J. O'Connor & Co. Mrs. Winn's husband, who remained in the defendants' employment as their foreman, testified to the bottles having been used by the defendants in their business as required. Under the circumstances, at least, this is enough.

Another exception, also not much pressed, was taken to the admission of the testimony of the same witness to the market value of these bottles at the time of the conditional sale in Holyoke. He had been in the bottling business over 30 years, and in Holyoke 11 years, and he testified that he knew the market value of bottlers' supplies in Holyoke at this time. He bought these very bottles with his own name blown in them, and previously, it would seem often, had bought bottles with other men's names blown in them. If we assume what is not expressly stated, and take it that we have all the evidence of the witness' experience before us, we cannot say that it shows that the judge exercised his discretion wrongly in admitting the evidence.

On cross-examination of the plaintiff, it was brought out that he had taken a mortgage of certain goods from Mrs. Winn before the date of her sale to the defendants, and after the plaintiff's alleged conditional sale of these bottles to her. The defendants offered to prove that the date of the mortgage had been changed after recording, so as to show contrary to the fact that it was recorded in time and was valid. This evidence was excluded. It is urged that it should have been admitted, on the ground that this fact, if true, throws light upon the alleged conditional sale, and strengthens the defendants' argument, from various circumstances, not necessary to be stated, that the document purporting to make the conditional sale was fictitious, and was got up after the mortgage was discovered to be invalid. The short answer to the exception is that there was no evidence that the

mortgage covered the bottles in question, and there was express evidence that it did not cover them, in which case the whole argument falls to the ground.

Exceptions overruled.

(172 Mass. 294)

TELEGRAM NEWSPAPER CO. v. COMMONWEALTH.

GAZETTE CO. v. SAME.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 4, 1899.)

CORPORATIONS—LIABILITY FOR CONTEMPT — PUNISHMENT—NEWSPAPER ARTICLE—PROCEDURE.

1. A corporation may be liable for a criminal contempt of court, though that crime involves a specific intent as a necessary element.

2. Although a corporation cannot be arrested or imprisoned for crime, it may be punished by fine, which may be enforced by execution against its property.

3. Where a corporation engaged in the publication of a newspaper publishes an article concerning a pending trial, in the place where the trial is had, which is calculated to prejudice the jury and prevent a fair trial, it is guilty of a criminal contempt, though there was no criminal intent in such publication.

4. Where a corporation publishes matter concerning a pending trial calculated to prevent a fair trial, the court may, of its own motion, and without complaint made, proceed against it for contempt, although the contempt was not strictly committed in the presence of the court.

5. It is not necessary that matter published in a newspaper during the trial of a case, calculated to prevent a fair trial, should be shown to have been read by members of the jury, in order that the publisher should be guilty of contempt; but it is sufficient that it was published and circulated in the place where the trial was had, and might have been read.

6. During the trial of an action to recover damages for property taken by a city for public purposes, a newspaper published an article, which was circulated in the place where the trial was in progress, stating, "The town offered plaintiff \$80 at the time of taking, but he demanded \$250." *Held*, that such fact, if true, not being admissible in evidence, was calculated to prejudice the jury and prevent the due administration of justice, and was, therefore, a contempt of court.

Error to supreme judicial court, Worcester county; W. A. Field, Judge.

The Telegram Newspaper Company and the Gazette Company were convicted of contempt in the publication of an article concerning a pending cause during its trial, and bring error. Affirmed.

F. P. Goulding, D. Manning, and W. C. Mellish, for plaintiffs in error. Herbert Parker, Dist. Atty., and G. S. Taft, Asst. Dist. Atty., for the Commonwealth.

FIELD, C. J. These are two writs of error, and, although the pleadings may possibly raise issues of fact as well as issues of law, the cases were entered, without objection on the part of any of the parties, upon the docket of the full court, and each case was heard upon the plea, "In nullo est erratum." The Telegram Newspaper Company is a Massachusetts corporation, having

its usual place of business in Worcester, and publishing there a daily newspaper. The Gazette Company is a corporation established under the laws of the state of Maine, having its usual place of business in Worcester, and publishing there a daily newspaper. It is understood that it had complied with St. 1884, c. 330, and had made the commissioner of corporations its attorney, upon whom legal process might be served. The record in the cases recites that the corporations, respectively, appeared in the superior court, with counsel, in obedience to the summons of that court to show cause why they should not be adjudged in contempt for publishing certain articles in their newspapers, of the dates of January 13th and 14th, respectively, of the year 1898, which articles dealt with and discussed the matter of the trial before said court of the action or petition of Silas H. Loring against the town of Holden, and that the corporations appeared, and were heard, so that any question of due service of the summons upon the foreign corporation has become immaterial.

The petition of Silas H. Loring against the town of Holden at the time of the publication of the articles in the newspapers was on trial before the superior court then sitting at Worcester, and it was a petition for the assessment of damages suffered by the taking of land of the petitioner for the abolition of a grade crossing of the Fitchburg Railroad Company. The portion of the articles published which the court found was calculated to obstruct the course of justice in said court, and prevent a fair trial of said petition, was, after describing the petition of Loring against the town of Holden, the following: "The town offered Loring \$80 at the time of the taking, but he demanded \$250, and, not getting it, went to law," which appeared in the Worcester Daily Telegram; and "The town offered the plaintiff \$80, but he wanted \$250," which appeared in the Worcester Evening Gazette. Whether there is any truth in these statements does not appear. The facts stated, even if they were true, were not admissible in evidence at the trial of the petition before the superior court; and, so far as appears, they were no part of the proceedings at the trial, and, if they were brought to the knowledge of the jurors before they rendered their verdict, were calculated to influence them upon the amount of the damages to be given by their verdict. The newspapers were published and circulated in Worcester, and it was not improbable at the time of publication that the articles would be read by some of the jurors before the trial of the petition was finished.

The record before us in each case, after setting out the whole of the articles published, and the summons, service, and appearance of the corporation, and the hearing, concludes as follows: "When, after hearing all matters and things concerning said publication by said respondents, it appearing to

said court that said article was calculated to obstruct the course of justice in said court, and prevent a fair trial of said case, and that it was a contempt of said court for said corporation to publish the said article during the said trial, it was, therefore, ordered by said court that said respondent corporation be adjudged guilty of contempt of said court for said publication of said article; and it was thereupon ordered by said court that said respondent corporation pay a fine of \$100, and it was further ordered that, if said fine be not paid within twenty-four hours, an execution be issued against said respondent corporation for the collection of said fine by a levy on its property."

It is contended that a corporation cannot be guilty of a criminal contempt of court, although it may be fined for what is called a "civil contempt." It is said that an intent cannot be imputed to a corporation in criminal proceedings. It has been decided in this commonwealth that a corporation may be liable civilly for a libel or a malicious prosecution. *Fogg v. Railroad Co.*, 148 Mass. 513, 20 N. E. 109; *Reed v. Bank*, 130 Mass. 443. We think that a corporation may be liable criminally for certain offenses, of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings; but its property may be taken, either as compensation for a private wrong or as punishment for a public wrong. In most of the states of this country corporations may be formed, under general laws, for the purpose of doing almost any kind of business, as easily as partnerships, and many of the newspapers are published by corporations. Although natural persons who publish or assist in publishing a libel in a newspaper owned by a corporation may be punished criminally by fine or imprisonment, or both, yet, if the corporation cannot be punished by a fine, it will escape all criminal liability. The authors of libels are often irresponsible persons, and the remedy by private action against corporations for the publishing of libelous statements is often inadequate. That a corporation may be indicted for a misfeasance as well as for a nonfeasance has been decided in this commonwealth. *Com. v. New Bedford Bridge*, 2 Gray, 339. See *Reg. v. Great North of England Ry.*, 9 Adol. & E. (N. S.) 315, 326. A corporation may be indicted for a libel. *State v. Atchison*, 3 Lea, 729, 31 Am. Rep. 663, and note; *Brennan v. Tracy*, 2 Mo. App. 543; *Pharmaceutical Soc. v. London & Provincial Supply Ass'n*, 5 App. Cas. 857, 869, 870; 2 Bish. New Cr. Law, §§ 9, 35; *Newell, Defam.* (2d Ed.) 362, 363; *Odgers, Sland.* (3d Ed.) 436; 5 *Thomp. Corp.* § 6418 et seq. The publication of an article in a newspaper which is printed and circulated in the place where a trial is had, pending the trial, and which

concerns the cause on trial, and is calculated to prejudice the jury in the cause and prevent a fair trial, often has been held to be a criminal contempt of the court trying the cause. *O'Shea v. O'Shea*, 15 Prob. Div. 59; *Ex parte Green*, 7 Times Law R. 411; *Daw v. Eley*, L. R. 7 Eq. 55; *Ramsbotham v. Senior*, L. R. 8 Eq. 575; *People v. Wilson*, 64 Ill. 195; *In re Sturoc*, 48 N. H. 428; *In re Cheeseman*, 49 N. J. Law, 137, 6 Atl. 513; *State v. Frew*, 24 W. Va. 416; *Oswald, Contempt* (2d Ed.) p. 58 et seq.; 7 Am. & Eng. Enc. Law (2d Ed.) tit. "Contempt," p. 59. If a corporation publishes the article, we see no reason why it should not be held liable for a criminal contempt. 5 *Thomp. Corp.* §§ 64, 68, et seq.; 7 Am. & Eng. Enc. Law (2d Ed.) p. 847, on corporations and cases cited. There are no statutes in this commonwealth regulating the proceedings in the trial and punishment of contempt of court. "The summary power to commit and punish for contempt tending to obstruct or defeat the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our declaration of rights." *Cartwright's Case*, 114 Mass. 230, 238; *Tinsley v. Anderson*, 171 U. S. 101, 18 Sup. Ct. 805.

In the present cases it was not necessary that a formal complaint should first have been made to the court. The contempt, if there was one, was not, strictly speaking, committed in the presence of the court, but it related to a trial then proceeding before the court. In each case a summons to the plaintiffs in error was issued by the court, of its own motion, and without complaint made, to show cause why the corporations should not be adjudged in contempt for publishing an article dealing with a matter on trial before the court. When it comes in any manner to the knowledge of the presiding justice of a court that articles are published in a newspaper circulated in the place where the court is held which are calculated to prevent a fair trial of a cause then on trial before the court, the court, of its own motion, can institute proceedings for contempt. Such a power in the court is necessary for its own protection against an improper interference with the due administration of justice, and it is not dependent upon the complaint of any of the parties litigant. If the publication amounts to a contempt of court, because it interferes with the due administration of justice in a cause before the court, the contempt is analogous to a contempt committed in the presence of the court. The proceedings in the present cases, after the service of process, show that the plaintiffs in error were specifically informed of the nature of the charge against them, and were given a full opportunity to be heard with the aid of counsel.

The most important question is whether the

publication of these articles under the circumstances stated could be adjudged a contempt. The articles published were not defamatory, either as regards the presiding justice of the court, or the jurors before whom the cause referred to was being tried, or the parties to the cause. In one case the court discharged the treasurer and manager of the newspaper, and in the other the editor and the publisher, on the ground that they were not shown to be directly responsible for the publications. It is probable (although this does not expressly appear in the papers before us) that the person or persons employed to report for each newspaper the proceedings of the court wrote the articles, and caused them to be published. The superior court has not found that there was an intent to influence the trial of the cause referred to on the part of anybody. The articles are objectionable only because they purport to state the amount of money which they said the town offered to pay the plaintiff, and the amount the plaintiff demanded, before the petition was brought. The law encourages attempts to settle or compromise disputes, without subjecting the parties to any liability, if the attempts fail, of having any concessions therein made to avoid litigation put in evidence against them in the subsequent litigation. *Upton v. Railroad Co.*, 8 Cush. 600; *Harrington v. Inhabitants of Lincoln*, 4 Gray, 563; *Gay v. Bates*, 99 Mass. 263; *Draper v. Inhabitants of Hatfield*, 124 Mass. 53. We are content to assume that the person or persons who wrote and caused the articles to be published did not know this rule of law, and acted without any intent to pervert the course of justice. As the only intent which can be imputed to the corporation is the intent of its officers or agents, the question is whether the publication of these articles without any intent to pervert the course of justice can be adjudged a contempt. In *Hall Co. v. Lake*, 58 Law J. Ch. 513, it is said that it must be shown that the articles were published with knowledge of the pending cause, and that appears in the present cases. In *Cartwright's Case*, supra, it is said by the court, "But the jurisdiction and power of the court do not depend upon the question whether the offense might or might not be punished by indictment." "As regards the question whether a contempt has or has not been committed, it does not depend upon the intention of the party, but upon the act he has done." By *Taney, J.*, in *Wartman v. Wartman*, *Taney*, 362, 370, Fed. Cas. No. 17,210." If a person talk with or send a statement to a juror about a cause, during the trial of it, in such a manner that it may cause prejudice or bias in the cause, although the intent with which the person acted may affect the amount of his punishment, he cannot justify his conduct by showing that he had no evil intent, and knew no better.

It was not necessary that the superior court should find that the articles published actually had been read by some of the jurors while

trying the cause to which the articles referred. They plainly had been read by the presiding justice during the trial, and it was likely that they had been read by some of the jurors. The intention of the publisher of a newspaper is that it should be bought and read by persons within the place where it circulates. Cases should be determined on the evidence presented in court. It is an inevitable perversion of the proper administration of justice to attempt to influence the judge or jury in the determination of a cause pending before them by statements outside of the court room, and not in the presence of the parties, which may be false, and, even if they are true, are not in law admissible in evidence. We cannot say that it appears that the superior court erred in adjudging that the publication of these articles, under the circumstances stated, was a contempt of that court; and it was for that court to determine whether it was necessary to institute proceedings for contempt in order to vindicate its authority to secure the due administration of justice in a cause pending before it. The publications contained statements of facts, evidence of which was not competent at the trial, and was not introduced at the trial; and they were so made that it was likely that the presiding justice and the jurors would read them during the trial, and the natural and probable effect of them was improperly to influence the court and jury in the determination of the cause.

The proper method of collecting a fine imposed upon a corporation is by levy of an execution, to be issued by the court. *Rex v. Woolf*, 2 Barn. & Ald. 609, 1 Chit. 583; *Huddleson v. Ruffin*, 6 Ohio St. 604; 1 Chit. Cr. Law (2d Ed.) 811; 1 Bish. New Cr. Proc. § 1303 et seq. Judgments affirmed.

(172 Mass. 306)

FORBES, Judge of Probate, v. WARE.
(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 5, 1899.)

GUARDIAN AND WARD—ACCOUNTING—SET-OFF—
EVIDENCE—INTEREST.

1. At the death of their mother the grandmother took her grandchildren home with her, and supported and cared for them, with their father's consent. There was no showing that she expected to be paid, and there was no contract that she should. *Held*, that her administrator could not set off the cost of such support against a debt owing as guardian to her daughter's estate.

2. Evidence by the administrator as to what his intestate said as to the terms on which the children were taken is not admissible.

3. The fact that a guardian mingled trust funds with his own, and neglected to pay them over, does not justify charging him with compound interest; no fraud nor demand on him being shown, and his neglect not warranting the presumption that he received, or ought to have received, such interest.

Exceptions from supreme judicial court, Worcester county; Charles Allen, Judge.

Action by William T. Forbes, judge of probate, against Charles E. Ware, administrator

of the estate of Mary J. Miles, deceased, who was guardian of Mabel Augusta Miles, on a guardian's bond. There was a judgment for plaintiff, and defendant excepts. Exceptions sustained.

C. A. Russell and W. S. B. Hopkins, for plaintiff. C. E. Ware and Herbert Parker, for defendant.

MORTON, J. We treat the assessor's report as in the nature of a master's report. See *Flisk v. Gray*, 100 Mass. 191; *Paddock v. Insurance Co.*, 104 Mass. 521; *McKim v. Blake*, 139 Mass. 593, 2 N. E. 157. Exceptions to it were taken by both parties. The plaintiff has not argued the first exception taken by him, and states, in effect, that he does not now insist upon the others. We, therefore, regard the plaintiff's exceptions as waived.

The substance of the defendant's exceptions is that the master erred in regard to the matter of set-off and payment, and in excluding evidence that was offered by defendant in support of it, and also in computing interest at 6 per cent., with annual rests, on the balance found due from defendant's intestate to the estate of her ward.

The claim on which the defendant relies in set-off and payment did not arise till after the death of the intestate's ward, and is for the support and maintenance by defendant's intestate of the children left by her former ward. If we assume that the administrators of the ward's estate could have bound it by an agreement with defendant's intestate that the estate which they represented should be liable to her for such support and maintenance (in regard to which there are great, if not insuperable, difficulties), there is nothing tending to show that any such agreement was entered into, either in the facts agreed to at the hearing before the master, or in the evidence that was offered and excluded. Nor do we see anything from which such an agreement can be implied. All that appears is that after the mother's death the grandmother took the children home with her, and supported and cared for them till her death, except that in the summer they made visits at their father's home, in Gloucester, and that they lived with their grandmother the rest of the time, with his knowledge and consent. There is nothing to show that she expected payment for what she did. She was not the guardian of the children, or legally liable for their support. The father was their natural guardian, and was bound to maintain them. Nothing occurred, so far as appears, to relieve him from that obligation. The fact that he had no property, except such as he would receive from his wife's estate, had no tendency to show that the defendant's intestate had a valid claim against the estate of her former ward for the children's support and maintenance after the ward's death. We discover no ground on which it justly can be held that what the defendant's intestate did

in supporting and maintaining the children operated as a payment in whole or in part of what was due from her to the estate of her ward, or should be so treated in equity and good conscience. The evidence which was offered by the defendant as to what his intestate said respecting the terms and conditions under which the children were living with her was rightly excluded. The defendant could not put in evidence in his own favor the declarations of his intestate. Even if we assume that the other evidence which was offered by the defendant should have been admitted, its exclusion did the defendant no harm, as it fell far short of establishing a payment as a right to a set-off. We think that the rulings of the assessor on this part of the case were correct, and that the defendant's exceptions, so far as they relate to the matter of payment or set-off, and evidence offered in support thereof, must be overruled. We have considered the questions on their merits, without regard to certain technical objections which have been urged by the plaintiff.

The remaining question relates to the matter of interest. The assessor found that on December 10, 1887, there was a balance due from defendant's intestate of \$10,795.32, reckoning simple interest at 6 per cent., and that subsequent to that date she mingled this sum with her own property, "used the same as her own, neglected to pay over the same to the representative of the ward, and retained the same under such circumstances as warrant the court in imposing compound interest"; and he, accordingly, in finding the amount due, computed compound interest at 6 per cent. The evidence is not reported. We understand that the ruling of the assessor "that, as matter of law, compound interest should be computed on the balance," was based on the facts found by him as before stated in regard to the manner in which the guardian had dealt with the trust property, and that, when he states that the guardian retained the sum due the ward's estate under such circumstances as warrant imposing compound interest, he means that she mingled it with her own property, used it the same as her own, and neglected to pay it over. It does not appear that the guardian was engaged in business, and employed the ward's property in it, what use the guardian made of the property, or that she received any income or profit from it, or that there was any wrongful intent on her part. It is not found that a demand was made upon her by the representatives of the ward, or that she refused to account. There is no finding as to what the property of the ward consisted of. It is stated that her own consisted largely of real estate standing in her own name and that of a third person, but that is all. It is not found, in terms, at least, that there was any willful breach of trust; and it is not unlikely that the manner in which she dealt with the property was due to a failure to dis-

criminate clearly between relations arising out of the fact that the ward and her children were her daughter and grandchildren, and her duties as probate guardian. And the question is whether the fact that the guardian mingled the property of the ward's estate with her own, used it the same as her own, and neglected to pay it over, justifies, without anything more appearing, the imposition of compound interest at the rate established by law in this commonwealth for simple interest. We do not think that it does. Simple interest at 6 per cent. will undoubtedly yield more than the guardian would have been able to realize from any investment that she would have been authorized to make. In some cases it is said that compound interest is imposed as a penalty, but the more correct view seems to be that it is imposed because in the particular case it has been received, or is presumed to have been received, or ought to have been received, or the circumstances were such that the court was unable to determine whether the person charged had or had not received it, and compelled him to account for it in order to make sure that the cestuis que trustent received all to which they were entitled. *Attorney General v. Alford*, 4 De Gex, M. & G. 843; *Burdick v. Garrick*, 5 Ch. App. 233, 241, 243; *Vyse v. Foster*, 8 Ch. App. 309, 333; *Schleffelin v. Stewart*, 1 Johns. Ch. 620; *Perry, Trusts* (2d Ed.) § 471. In other words, the principle of liability is accountability for what has been received, or ought to have been received, or must be presumed to have been received, and not punishment for a breach of duty. A guardian has no right to mingle the funds and property of his ward with his own, but it is doubtful whether the fact that he has done so will justify, without more, the imposition of compound interest. *Forbes v. Allen*, 166 Mass. 569, 44 N. E. 1065; *McKim v. Blake*, 139 Mass. 593, 2 N. E. 157; *Same v. Hibbard*, 142 Mass. 422, 8 N. E. 152; *White v. Ditson*, 140 Mass. 351, 4 N. E. 606; *Dunlap v. Watson*, 124 Mass. 306. A guardian is bound to exercise strict fidelity and a sound discretion in caring for the interests of his ward, and, if his neglect in paying over or investing is culpable, he will be charged with interest, on the ground that it will be presumed that he received it, or ought to have received it; but it seems to us that he ought not to be charged with compound interest, unless the neglect is so gross as to warrant the presumption that he received, or ought to have received, that also. *Lamb v. Lamb*, 11 Pick. 371, 374, 375; *Wyman v. Hubbard*, 13 Mass. 232; *Fay v. Howe*, 1 Pick. 527; *Boynton v. Dyer*, 18 Pick. 1; *Elliott v. Sparrell*, 114 Mass. 404; *Attorney General v. Solly*, 2 Sim. 518; *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508; *Manning v. Manning*, 1 Johns. Ch. 527; *Ex parte Ogle*, 8 Ch. App. 716. Such an inference will be drawn with less difficulty where there is an element of fraud in the conduct of the guardian or trustee,

but in this case none is found. Generally the cases in which compound interest has been allowed have been cases in which, in violation of his trust, the trustee or guardian has employed the trust property, in trade, business, speculation, or some other manner, for his private benefit, and has received an income or profit therefrom, or cases in which there was an element of fraud, or where there were productive stocks and securities which he had converted to his own use, or where there were express directions to pay over or to invest, or where there were other circumstances tending to show gross delinquency on his part. *Robbins v. Hayward*, 1 Pick. 523, note; *Jennison v. Hapgood*, 10 Pick. 77, 104, 105; *Boynton v. Dyer*, supra; *Elliott v. Sparrell*, supra; *Hook v. Payne*, 14 Wall. 252; *McKnight's Ex'rs v. Walsh*, 23 N. J. Eq. 136; *Farwell v. Steen*, 46 Vt. 678; *Jones v. Foxall*, 15 Beav. 392; *Swindall v. Swindall*, 43 N. C. 285; *Schleffelin v. Stewart*, supra; *Perry, Trusts* (1st Ed.) § 471; 2 Story, Eq. Jur. (10th Ed.) § 1277. A majority of the court do not think that the circumstances in this case are such as to justify the imposition of compound interest, but that simple interest at 6 per cent. should be reckoned from the 10th day of December, 1887, down to the issuing of the execution. The result is that on this branch of the case the defendant's exceptions are sustained. Decree to be entered in accordance with this opinion. So ordered.

(152 Ind. 359)

THIEME v. ZUMPE.¹

(Supreme Court of Indiana. Jan. 5, 1899.)

WILLS—LEGACIES—CONSTRUCTION—REPLEVIN—PLEADING—DEMURRER.

1. A legatee under a will bequeathing to her certain property subject to the condition that a certain trustee shall take charge of it, and pay her the income annually, and deliver the property to her children on her death, is not entitled to possession of the property as against the trustee.

2. A complaint in replevin is demurrable for want of an allegation of a demand, notwithstanding it alleged that defendant had possession without right, where there was a specific allegation showing that defendant had possession under a claim of right.

3. General allegations, in a complaint in replevin, that plaintiff is entitled to possession, and that defendant's possession is unlawful, are of no avail on demurrer, where it also contains specific allegations as to the character of plaintiff's title, showing him not entitled to possession.

Appeal from circuit court, Tippecanoe county; William G. L. Taylor, Judge.

Replevin by Sophia Zumpe against John Henry Thieme. From an order overruling a demurrer to the complaint, defendant appeals. Reversed.

John M. La Rue and A. Orth Behm, for appellant. John F. McHugh, for appellee.

BAKER, J. The parts of the will of Elizabeth Thieme, necessary to the decision of

¹ Rehearing denied.

this case, read: "Item 4. I give, devise, and bequeath to my children Charles C. Thieme, Sophia Zumpe, John Henry Thieme, Frederick Thieme, and my grandchildren Edward Thieme and John Thieme, children of my son William Thieme, deceased, all the remainder of the real and personal property of which I may die seised or possessed; the said grandchildren, both together, receiving the undivided one-fifth part thereof. * * * And the share bequeathed by this clause to my daughter, Sophia Zumpe, is made subject to the provisions contained in item ten of this will." "Item 10. My daughter, Sophia Zumpe, is afflicted with deafness, and is now the mother of nine children; and it is for these reasons that I have favored her and her children by giving them the farm they now reside on (item three of the will), over and above her full share in my estate. And that she may not be taken advantage of by any one, I hereby appoint my son John Henry Thieme a trustee for her, and direct that he take charge of all the property, real and personal, bequeathed to her by this will, except, however, the said farm, and that he pay to her annually the net income or profits derived from her said share, and that upon her death he turn over said property to her children, if of age, or to their legally appointed guardian, if minors." Sophia Zumpe brought this action in replevin against John Henry Thieme, as trustee, alleging that by the will she was the owner and entitled to the immediate possession of personal property particularly described. Demurrer to complaint overruled. Judgment for plaintiff on defendant's refusal to plead further.

Item 4 refers to item 10. The two must be read together. Taking all that relates to appellee and her ownership of personalty, there results: "I bequeath to Sophia Zumpe one-fifth of the remainder of the personal property, * * * subject to the provisions * * * that John Henry Thieme, as trustee for her, take charge thereof, and that he pay her annually the net income therefrom, and that upon her death he turn over said property to her children." Appellee contends that item 4 gives her the absolute ownership, and that item 10, instead of diminishing her quantity of interest, attempts to deprive her of the rights of possession and of disposition, inseparable attributes of unqualified title. *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659; *Jones v. Thresher Co.* (Ill. Sup.) 49 N. E. 700. Item 4 contains not merely words that, taken alone, would pass absolute title; it states that the bequest to appellee is made "subject to the provisions of item ten"; that is, "I give this property to my daughter, Sophia, to the extent and in the manner provided in item ten." Item 10 directs the trustee, upon the death of Sophia Zumpe, to "turn over" the property to her children. An unqualified direction in a will to "turn over" personalty to a legatee is as effectual to pass title as would be the use of the words "give and be-

queath." Item 10 directs the trustee to "take charge of" this personalty, and to "pay to appellee annually the net income" during her life. The direction to take charge of the personalty gives the right of possession. The direction to the trustee to pay the annual net income to the legatee during life gives a life interest only. For appellee's want of absolute ownership and right of possession, the demurrer to her complaint should have been sustained.

Appellant urges, also, that the complaint is bad for failing to allege demand before action. The complaint sets forth the will, avers settlement of the estate, and appellant's possession of the personalty described. Relating to appellant's possession, the allegation is: "Plaintiff further alleges that the defendant, claiming to act under clause ten of said will, holds said property, and refuses to deliver the same to plaintiff." There is also the averment "that the defendant has possession thereof without right, and unlawfully detains same from plaintiff." The specific averment that appellant is in possession, claiming under item 10, which would give him the right of possession, if good, and a color of right, if voidable, overcomes the general allegations of unlawful possession and wrongful detention. For this reason, too, the demurrer should have been sustained.

Appellee insists, however, that, irrespective of the construction to be placed upon the will, the averments that she is owner and entitled to immediate possession, and that appellant's possession is unlawful, and detention wrongful, make a sufficient complaint. In view of the specific statement of the character of appellee's title, these general allegations are overborne, and become mere conclusions of the pleader. Judgment reversed.

(152 Ind. 60)

RAINS v. STATE.

(Supreme Court of Indiana. Jan. 3, 1899.)

ASSAULT TO MURDER—EVIDENCE—OPINION—INSTRUCTIONS—MALICE—SELF-DEFENSE—REASONABLE DOUBT—CHARACTER—APPEAL—REVIEW.

1. Erroneous charges on malice as an element of assault to murder did not prejudice accused, who was convicted of assault to commit manslaughter.

2. A charge on self-defense was not vitiated by addition of the words, "The law does not permit a person to revenge himself in any case."

3. A charge embodying the statement that the doctrine of reasonable doubt does not require the jury to be satisfied beyond a reasonable doubt of "each link in the chain of evidence relied upon," while inaccurate, is not prejudicial, when read with accompanying charges that the rule extends to every material allegation of the indictment, and may arise either from evidence or lack of evidence.

4. A charge that, if the jury believed beyond a reasonable doubt that accused was guilty, they should convict, though he had previously been of good reputation for peace and quietude, did not lead them to disregard evidence of his good character, which was elsewhere submitted by proper charges as to its weight and effect.

5. Rulings on evidence are not presented for review, unless exceptions are reserved thereto.

6. Testimony that a revolver used in committing an alleged assault would not probably kill at a given distance is inadmissible, as opinion.

Appeal from circuit court, Tipton county; W. A. Mount, Judge.

Charles Rains was convicted of assault with intent to commit manslaughter, and he appealed. Affirmed.

Oglebay & Oglebay, for appellant. T. M. Butler, for the State.

JORDAN, J. Appellant was charged by indictment with an assault on one George Goar, with intent to commit murder in the first degree. A trial by jury resulted in his being convicted of an assault with intent to commit the felonious crime of manslaughter, and over his motion for a new trial he was sentenced by the court to be imprisoned in the State's Prison, North, for a period of not less than 2 and not more than 14 years.

The only errors discussed by counsel for appellant are based on the action of the trial court in denying the motion for a new trial. This motion enumerated some 35 reasons, which in the main relate to alleged errors of the court in giving and in refusing to give certain instructions to the jury, and also in modifying some of the instructions tendered by the appellant, and in giving them to the jury in a modified form. Several of the charges of which appellant complains pertain to the elements which enter into the crime of murder in the first and second degrees, and to matters relating to these two degrees of homicide. Therefore, if it were conceded that all of these are erroneous, they would be considered harmless, and appellant would not be in an attitude to assail them, for the reason that he stands convicted only of perpetrating an assault with the intent to commit the crime of manslaughter, the lowest degree of homicide; and as the element of malice, with or without premeditation, does not enter into this latter degree, it is not apparent how the instructions criticised by counsel for appellant, which relate to the question of malice, and other questions pertaining wholly to the higher degrees of homicide, could have exerted any favorable influence over the jury in arriving at the verdict which they returned. Jarrel v. State, 58 Ind. 293; Long v. State, 95 Ind. 481.

There is no merit in the contention of appellant that instruction 14, given by the court in the series of those requested by the state, is prejudicial to his rights. This latter charge deals with the question of self-defense interposed in the case, and the only objections urged are that it is but a repetition of what the court had previously advised the jury upon the same question, with the addition that "the law does not permit a person to revenge himself in any case."

The court, in its instructions upon the sub-

ject of reasonable doubt, seems to have very fully advised the jury in reference to the law applicable to that subject. Some of the court's charges upon this feature of the law are condemned by counsel for appellant. Especially do they criticize No. 18 given at the request of the state. By this instruction the court substantially told the jurors that the rule which required them to be satisfied of the guilt of the defendant beyond a reasonable doubt did not require that they should be satisfied beyond a reasonable doubt of "*each link in the chain of evidence relied upon to establish his guilt.*" (Our italics.) The court, continuing in the charge, closed it with the following statement: "It is sufficient if, taking the evidence all together, the jury are satisfied beyond a reasonable doubt that the defendant is guilty." The part of this charge italicized, which informed the jurors that each link in the chain of evidence relied upon to establish the defendant's guilt was not required to be proven beyond a reasonable doubt, standing alone, may be said to be inaccurate, and, therefore, objectionable. The court had previously advised the jury, by an instruction tendered by appellant, that the rule of reasonable doubt extended to every material allegation of the indictment, and had also said in another instruction that such a doubt might arise either from the evidence or lack of evidence in the case. The latter part of the instruction in question, in effect, it may be said, advised the jury that if all of the evidence, taken together, satisfied them beyond a reasonable doubt of the defendant's guilt, which was the ultimate question to be determined in the case, it was sufficient. The rule, as settled by the decisions of this court, is that instructions upon a subject must be considered and construed together, and are not to be considered in detached parts, and, when so considered, if they, as a whole, correctly declare the law, they will not be overthrown, although some fragmentary or isolated parts thereof are not accurate or clear. Tested by this rule, it may be said that, when the entire series of instructions which the court gave on the question of reasonable doubt is considered and construed together, the jury were properly advised on that subject; and, therefore, appellant's attack on that part of the instruction in controversy cannot be available in securing a reversal. Koerner v. State, 98 Ind. 7; Rhodes v. State, 128 Ind. 189, 27 N. E. 866; Newport v. State, 140 Ind. 299, 39 N. E. 926; Hawk v. State, 148 Ind. 238, 46 N. E. 127, and 47 N. E. 465; McIntosh v. State (Ind. Sup.) 51 N. E. 354. It is true that the doctrine of reasonable doubt is applicable only to the constituent elements of the crime of which an accused party is charged, and to facts or groups of facts which constitute the entire proof of the material or elementary facts, and the rule does not apply or extend to each item of mere matters of subsidiary evidence. Wade v. State, 71 Ind. 535; Davidson v. State, 135 Ind. 254, 34 N. E. 972;

Hauk v. State, *supra*. The proposition which the court, no doubt, intended to announce by the figurative expression, "each link in the chain of evidence," was that the state was not required to prove beyond a reasonable doubt every subsidiary or minor fact or circumstance in evidence which tended to establish the material or essential facts upon which the ultimate question of the defendant's guilt depended. This proposition is a correct one, and is supported by the cases last cited, and other authorities. The metaphor used by the court might be liable to misconstruction, and is, therefore, open to criticism; but, to repeat what we have heretofore said, when the court's charge upon the subject of reasonable doubt is considered as an entirety, this inaccurate expression is no ground, under the circumstances, for a reversal. It is claimed by the state's attorney that the instruction in question was borrowed from the decisions of a sister state. It may be said that the doctrine of reasonable doubt has been so fully expounded by the decisions of this court that it would seem to be a rare occasion which would require a trial court to go into other states in search of the law upon the subject.

The court, in one of its series of instructions, told the jury, in effect, that if they believed the defendant to be guilty, as charged in the indictment, beyond a reasonable doubt, it would be their duty to convict him, although they might be satisfied that prior to the alleged shooting in question the defendant sustained a good reputation for peace and quietude. The court had previously properly instructed the jury upon the question of the defendant's good character, which had been given in evidence, and as to the manner in which they were to weigh and consider this feature of the case along with all the other evidence, and had informed them relative to the effect and bearing which such character had upon the question of his guilt. Certainly all that can be inferred from the instruction of which appellant complains, when it is considered along with the other charge upon the subject of good character, is that if the jury, upon the consideration of all the evidence, found the defendant guilty beyond a reasonable doubt, then, under the circumstances, the mere fact that they were satisfied that his reputation for peace and quietude was good could not avail him as a defense; and this is the only reasonable inference that the jury could have drawn from the charge in controversy. We have carefully examined all the instructions, given, refused, or modified, to which the argument or objections of appellant's counsel can be said to extend, and are fully satisfied that, when the entire charge of the court to the jury is considered, it, as a whole, is as favorable to the defendant as he could legally demand; and we feel satisfied that none of his substantial rights in the premises can be said to have been prejudiced by the action of the trial court in either giving or refusing to give the instructions, and,

therefore, his attack upon the rulings of the court in this respect must fail.

It is next urged that the court erred in not permitting the witnesses Mrs. Boomershrine, Mrs. Goar, and Mary Rains to testify relative to certain matters. The record does not, however, disclose that appellant reserved the necessary exceptions to such rulings of the court; hence no question thereon is presented for our consideration. Appellant introduced a Mr. Recobs as a witness, and inquired of him if a person, at a distance of 114 to 160 or 170 feet, would be in any danger of a shot fired from a pistol which was exhibited to the witness; it being the weapon used by the appellant at the time of the alleged assault. The witness replied that he could not tell whether it would shoot with sufficient force to kill a man at that distance. Counsel for appellant seemingly were not content with this answer, and again propounded substantially the same question to the witness, and, upon an objection being interposed by the state and sustained by the court, then said, "We offer to prove by this witness that there would be no probability of inflicting any injury upon a person from 114 to 170 feet away with this revolver, except the one firing it was a skilled marksman." This evidence, as offered, the court rejected. It is apparent that by this evidence appellant sought to obtain but the bare opinion of the witness; and, therefore, it was properly excluded for this reason, if for no other.

The judgment is fully sustained by the evidence, and it in no manner appears that appellant has been prejudiced in the trial in any of his substantial rights. Therefore sound and well-settled legal principles forbid us to interfere in the result reached in the lower court. Judgment affirmed.

(152 Ind. 80)

LA PLANTE v. STATE ex rel. GOODMAN,
Pros. Atty.

(Supreme Court of Indiana. Jan. 6, 1899.)

TAXATION—FAILURE TO LIST—PENALTIES—EVIDENCE—SUFFICIENCY—PLEADING—APPEAL—HARMLESS ERROR—DECISIONS REVIEWABLE—OBJECTIONS AND RULINGS THEREON—INSTRUCTIONS.

1. In an action against a taxpayer for penalties for failing to list property, each year's failure should be stated in a separate paragraph of the complaint.

2. An erroneous refusal to require the state, in an action against a taxpayer for penalties for failing to list property, to state each year's failure in a separate paragraph, is harmless, where the state elected to ask a recovery for one particular year only.

3. A defendant cannot, on appeal, assail a complaint for absence of plaintiff's legal capacity to sue, where he did not demur to the complaint, assigning such cause, under Burns' Rev. St. 1894, § 342 (Rev. St. 1881, § 339).

4. An action by the state for penalties for failing to list property for taxation is properly brought on the relation of the prosecuting attorney.

5. A complaint to recover penalties for failing to list cash, money, bonds, and mortgage notes

for taxation need not allege the value of the property.

6. In an action for penalties for failing to list property for taxation for a certain year, the tax list or schedule which defendant made need not be filed as an exhibit with the complaint.

7. Where defendant owned bonds, money, stocks, and mortgage notes subject to taxation worth more than \$27,000, and he omitted from his tax list over \$20,000 of the property, and converted \$1,800 in money to evade taxation, an assessment of a penalty of \$1,500 is not excessive.

8. An order permitting a plaintiff to amend during the trial is not reviewable, where the court did not abuse its discretion to the prejudice of defendant's substantial rights.

9. The mere reservation of an exception to a ruling sustaining an objection to a question asked by appellant of a witness is not sufficient to present any question for consideration on appeal.

10. Inaccuracy of an isolated part of a charge is not reversible error, where the charge, construed as a whole, is correct.

11. A judgment against defendant will not be reversed for erroneous instructions, where the evidence clearly shows that he is guilty of an alleged wrong condemned by statute, as Burns' Rev. St. 1894, § 670 (Rev. St. 1881, § 658), prohibits a reversal where the case has been fairly tried on its merits.

Appeal from circuit court, Knox county; G. W. Shaw, Judge.

Action by the state, on the relation of John T. Goodman, prosecuting attorney, against John B. La Plante. Judgment for plaintiff, and defendant appeals. Affirmed.

Cauthorn, Dailey & Cauthorn, for appellant. Cullop & Kissinger and J. T. Goodman, for appellee.

JORDAN, J. This action was prosecuted against appellant, in the name of the state, on the relation of the prosecuting attorney, under section 8465, Burns' Rev. St. 1894 (Acts 1891, p. 217, § 55), to recover a penalty on account of his making a false and fraudulent list or schedule of his taxable property. A trial by jury resulted in a finding in favor of the state, and the penalty assessed by the jury was \$1,500; and, over appellant's motion for a new trial, judgment was rendered upon the verdict.

The complaint, among other things, charges that appellant failed and refused to give a true list of his personal property subject to taxation on the 1st day of April for the years 1881 up to and including the year 1896; that when the assessor called upon him in each of said years for a list of all of his personal property, including money, rights, credits, bonds, and choses in action, he returned to said official a list, which was not a true and correct one, of his money, rights, credits, bonds, and choses in action, but that he returned a false and fraudulent list, in this, to wit, that he omitted from his said list in each of said years certain described mortgage notes, bonds, cash, and choses in action, which he (appellant) held and owned subject to taxation on the 1st day of April of each of said years. The complaint also charges other fraudulent omissions and con-

versions by appellant of his property for the fraudulent purpose of avoiding taxation, and an itemized statement of the property which he failed to list is filed with and made a part of the complaint.

Appellant unsuccessfully moved the court to require the plaintiff to paragraph its complaint, in order that his failure to list property for each of the years, as therein charged, should be stated in separate paragraphs. The action of the court in denying this motion is complained of, and it is claimed that it constitutes reversible error. In actions of this kind, to recover penalties for a failure to list property upon the part of a taxpayer, each year's failure constitutes a separate cause of action, and ought to be stated in separate paragraphs of the complaint. *State v. Halter*, 149 Ind. 292, 47 N. E. 665. The record, however, in the case at bar, discloses that the court, in its instructions to the jury, stated to them that the plaintiff had elected to ask a recovery against the defendant for the year of 1895 only; and it further directed the jury, in its instructions, to confine their inquiry, under the evidence, to that year alone. Therefore, under the circumstances, it may be said that it affirmatively appears from the record that the recovery against appellant was for the year 1895, and no other; hence the ruling of the court upon the motion to paragraph must be deemed to be harmless, and is not available to constitute reversible error. The court has held that, as a general rule, denying a motion to paragraph a complaint is not sufficient ground for a reversal of a judgment. *Railway Co. v. Rooker*, 90 Ind. 581.

Appellant challenges the constitutional validity of the provisions of the statute in question, but we need consume no time upon the consideration of this question, as the validity of the law is fully sustained by the decisions of this court. *Burgh v. State*, 108 Ind. 132, 9 N. E. 75; *State v. Halter*, supra.

A demurrer to the complaint upon the grounds of improper joinder of causes of action and insufficiency of facts was overruled, and this ruling is assigned as error; and thereunder counsel for appellant specify four reasons which, as they claim, render the complaint fatally defective: First, it does not show the capacity of the relator to prosecute this action; second, it does not appear from the complaint that the suit was instituted by the proper relator; third, it does not allege that the property omitted by appellant was of any value; fourth, a copy of appellant's tax list for the year of 1895 ought to have been filed with, and made a part of, the complaint. Absence of legal capacity to sue is prescribed by the Code as one of the causes of demurrer to a complaint. Section 342, Burns' Rev. St. 1894 (section 339, Rev. St. 1881). Appellant, as we have seen, did not assign this cause as one for demurrer; hence, he is not now in a position to assail the complaint upon that ground. *Edwards v. Beall*, 75 Ind.

401. The complaint sufficiently discloses that the action was instituted on the relation of the proper person, and it also shows that the omitted property consisted of cash, money, bonds, mortgage notes, etc., subject to taxation. This was sufficient, without averring the value of this particular property. *Swift v. State*, 3 Ind. App. 285, 29 N. E. 488. A copy of appellant's tax list or schedule for the year 1895 was not required to be filed as an exhibit with the complaint. *State v. Halter*, supra. It is true, as insisted by appellant's learned counsel, that the complaint is not a model pleading; but it sets out facts which constitute the wrong which the statute condemns, and is substantially sufficient to repel a demurrer.

It is next insisted that the court erred in overruling the motion for a new trial, and the first contention is that the penalty assessed is excessive, and not sustained by the evidence. There is evidence in the case which shows that appellant on April 1, 1895, owned and held bonds, money, stocks, mortgage notes, etc., subject to taxation, of the value of \$27,000 and over. It appears from the evidence that in that year he omitted from his tax schedule or list over \$20,000 of this property, besides converting a certain sum of money, of about \$1,800, for the purpose of avoiding taxation. We have examined the evidence, and are satisfied that it fully sustains and justifies the verdict of the jury, and the judgment of the court thereon.

After the jury was impaneled, and during the trial, the court permitted the plaintiff to make an amendment to the complaint, and objections are urged in regard to this action of the court. The amendment, however, was a discretionary matter with the trial court, and it does not appear that it was abused to the prejudice of any of appellant's substantial rights; hence, under a well-settled rule, the action of the court in permitting the amendment is not open to review in this court.

The complaint is also made that the court erred in not permitting a witness named to answer a certain question propounded to him by appellant. The record, however, discloses only that this witness was asked the question by counsel for appellant, to which counsel for appellee objected, and this objection was sustained by the court, and an exception reserved on the part of appellant. This is not sufficient to present any question for our consideration in respect to this ruling of the court. *Elliott*, App. Proc. § 743, and cases there cited; *Rains v. State* (at this term) 52 N. E. 450.

Counsel for appellant claim that two of the instructions given by the court are erroneous. We have examined the entire charge of the court given to the jury, and when the instructions are considered and construed as a whole, and not in detached and isolated parts, they correctly advised the jury relative to the law by which they were to be controlled in arriving at a verdict; and hence,

if the insistence of counsel relative to the inaccuracy of the instructions in question be granted, it would not operate in reversing the judgment. *Rains v. State*, supra, and cases there cited. Again, upon another view of the case, the evidence so clearly establishes that appellant is guilty of the wrong imputed to him under the complaint, and the one which the statute condemns, that, were the alleged errors relative to the instructions in question conceded to exist, this court, in consideration of section 670, *Burns' Rev. St. 1894* (section 653, *Rev. St. 1881*), would not be justified in disturbing the judgment of the trial court. The death of appellant since the submission of this appeal being suggested, the judgment is therefore ordered by the court to be affirmed as of the date of submission.

(152 Ind. 75)

GISE v. COOK et al.

(Supreme Court of Indiana. Jan. 4, 1899.)

COMPLAINT—CONCISENESS—CAUSE OF ACTION—ACCOUNT—CONCLUSION.

Under *Burns' Rev. St. 1894*, § 341 (*Horner's Rev. St. 1897*, § 338), requiring a complaint to contain a statement of facts constituting the cause of action in plain, concise language, in such manner that a person of common understanding can know what is intended, and section 365 (362), requiring a pleading founded on an account to have filed with it a copy of the account, a complaint is insufficient which alleges that "plaintiff and defendants have had mutual dealings for two years, each keeping his own accounts, the items of which are numerous; * * * that there is due plaintiff as a balance on said mutual accounts about \$200,"—since no copy of the account is attached, and it is not stated whether it was for labor, goods, or money, and the statement of the amount due is a conclusion.

Appeal from circuit court, St. Joseph county; Lucius Hubbard, Judge.

Action by Daniel Gise against William Cook and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Talbot & Talbot, for appellant.

MONKS, C. J. Appellant brought this action against appellees. Appellees' demurrer to the complaint for want of facts was sustained, and, appellant refusing to plead further, judgment was rendered against him on demurrer. It is insisted by appellant that the court erred in sustaining the demurrer to the complaint. It is alleged in the complaint that the "plaintiff and defendants have had mutual dealings for two years, each keeping his own accounts, the items of which are numerous; that at various times before this day, September 12, 1898, the plaintiff offered to produce his accounts, and requested the defendants to produce theirs, in order to come to a settlement of the said accounts, but the defendants refused to produce their accounts, and to come to an adjustment; that there is due the plaintiff, as a balance on said mutual accounts, about \$200." Prayer for accounting and judgment. Appellant contends that the

complaint was sufficient to withstand the demurrer, for the reason that "equity assumes jurisdiction when accounts are mutual." Whether or not this action was one of equitable jurisdiction prior to the Code of Civil Procedure is not material, because such fact only goes to the question of whether the cause is triable by the court or jury, and cannot affect the sufficiency of the complaint. Section 341, Burns' Rev. St. 1894 (section 338, Horner's Rev. St. 1897), provides that a complaint shall contain "a statement of the facts constituting the cause of action in plain concise language, without repetition and in such manner as to enable a person of common understanding to know what is intended." Section 365, Burns' Rev. St. 1894 (section 362, Horner's Rev. St. 1897), provides that "when any pleading is founded on a written instrument or account the original or a copy thereof shall be filed with the pleadings." The complaint in question does not comply with the requirements of these sections. It does not state the nature of the dealings between appellant and appellees. The allegations in this respect are not such that a person of common understanding can know what is sued for, whether it is work or labor, goods, wares and merchandise, money had and received, or what. The allegation that there is due appellant as a balance on said account about \$200 is a mere conclusion of the pleader, and not the statement of a fact. It is alleged that each party kept his account, and yet appellant has not filed his account, or a copy of it, with the complaint, as an exhibit, or otherwise made the same a part of the complaint, as required by section 365 (362), supra. The complaint was, therefore, insufficient for this reason. *Peden v. Mall*, 118 Ind. 556, 558, 20 N. E. 493; *Lassiter v. Jackman*, 88 Ind. 118, 120; *City of Connersville v. Connersville Hydraulic Co.*, 86 Ind. 235; *Wolf v. Schofield*, 38 Ind. 175, 176, 181, 182. It is manifest that the court did not err in sustaining the demurrer to the complaint. Judgment affirmed.

(152 Ind. 77)

WOOLVERTON et al. v. TOWN OF ALBANY et al.

(Supreme Court of Indiana. Jan. 5, 1899.)

MUNICIPAL CORPORATIONS — DISANNEXATION OF TERRITORY — JURISDICTION.

Under Burns' Rev. St. 1894, §§ 4228, 4230 (Horner's Rev. St. 1897, §§ 3247, 3249), prescribing that boards of commissioners, on petition of the common councils of cities and boards of town trustees or city councils, on petition of property owners, may change the boundaries of municipal corporations, an action will not lie to disannex part of a municipality's territory, because that function is solely legislative.

Appeal from circuit court, Delaware county; G. H. Koons, Judge.

Action by Halliet A. Woolverton and others against the Town of Albany and others. There was a judgment for defendants, and plaintiffs appealed. Affirmed.

Ryan & Thompson and Mann & Lesh, for appellants. Gregory, Silverburg & Lotz, for appellees.

MONKS, O. J. In 1893 appellee was duly incorporated as a town by order of the board of commissioners, under the provisions of sections 4314-4322, Burns' Rev. St. 1894 (sections 3299-3301, Horner's Rev. St. 1897). Several tracts of unplatted land used exclusively for agricultural purposes were included within the boundaries of said incorporated town. Afterwards, in 1896, each of appellants, being the owners of such tracts of land, filed his petition with the board of trustees of said town, under the provision of section 4230, Burns' Rev. St. 1894 (section 3248, Horner's Rev. St. 1897), asking the board of trustees of said town to modify the boundaries of said town so as to exclude therefrom said tracts of land, and the board of trustees refused to act upon said petitions. Afterwards, on January 4, 1897, three years and one-half after the order incorporating said town was made, appellants commenced this action in the court below to disannex said tracts of land from said town. The foregoing facts are set forth in said complaint, and, in addition, it is alleged, in substance, that the promoters of said incorporation represented to appellants that their land should not be taxed for town purposes, which representation was believed and relied upon by appellants, and by the citizens and voters of said town, and that by means of said representations the said lands of appellants were included within the incorporated limits of said town; that said lands are not necessary to the growth of said town, nor are they needed for any town purposes, and are less valuable, and receive no benefit, by reason of their being within the corporate limits of said town, and the only benefit said tracts of lands are to said town is on account of the tax derived therefrom. Appellees' demurrer, assigning as grounds therefor want of facts, and want of jurisdiction over the subject-matter of the action, was sustained to said complaint, and, appellants refusing to plead further, judgment was rendered against them. The errors assigned call in question the action of the court in sustaining the demurrer to the complaint.

It is settled law that the creation, enlarging, and contraction of the boundaries of municipal corporations are legislative, and not judicial, functions, and may be exercised by the legislature without the consent and against the remonstrance of those interested. *Paul v. Town of Walkerton*, 150 Ind. 565, 50 N. E. 725, and authorities cited; 1 Dill. Mun. Corp. (4th Ed.) §§ 37, 85, 183, 186, 186; *Cooley, Const. Llm.* (6th Ed.) 228; *Martin v. Dix*, 52 Miss. 53; *Norris v. City of Waco*, 57 Tex. 635; President, etc., of City of Paterson v. Society of Useful Manufacturers, 24 N. J. Law, 385; *Montpelier v. East Montpelier*, 29 Vt. 12; *Coles v. Madison Co.*, 1 Breeze, 154; *Grady v. Commissioners*, 74 N. C. 101; *Manly v. City of*

Raleigh, 57 N. C. 370; City of St. Louis v. Russell, 9 Mo. 507; City of St. Louis v. Allen, 13 Mo. 412; Walden v. Dudley, 49 Mo. 421; Giboney v. City of Cape Girardeau, 58 Mo. 141; McCormick v. Railway Co., 20 Mo. App. 640; Darby v. Sharon Hill, 112 Pa. St. 66, 4 Atl. 722; Smith v. McCarthy, 56 Pa. St. 359; Devore's Appeal, Id. 163; State v. Lake City, 25 Minn. 404; Coolidge v. Inhabitants of Brookline, 114 Mass. 592; Stone v. City of Charlestown, Id. 214; McCallie v. Mayor, etc., 3 Head, 317; Wade v. City of Richmond, 18 Grat. 583; Mt. Pleasant v. Beckwith, 100 U. S. 514; Kelly v. Pittsburg, 104 U. S. 78; Town of Milwaukee v. City of Milwaukee, 12 Wis. 96; State v. City of Cincinnati (Ohio Sup.) 27 Lawy. Rep. Ann. 737, and note (s. c. 40 N. E. 508); Metcalf v. State, 49 Ohio St. 586, 31 N. E. 1076; Blanchard v. Bissell, 11 Ohio St. 96; People v. Carpenter, 24 N. Y. 86. General laws providing the conditions upon which cities and towns may be incorporated as municipal corporations, with or without the consent of those interested, and vesting the power in judicial bodies to determine whether such conditions exist, and, if so, to order such incorporation, are valid. Paul v. Town of Walkerton, supra, and cases cited; Forsythe v. City of Hammond, 142 Ind. 505, 516-519, 40 N. E. 267, and 41 N. E. 950; Id., 68 Fed. 774; State v. City of Cincinnati, supra; Blanchard v. Bissell, supra; People v. Carpenter, supra; Devore's Appeal, supra; Beach, Pub. Corp. §§ 399, 406, 408. In such case the creation of the corporation is not the act of the court or other body, but is the act of the law. If the facts exist under the law, the board of commissioners or the court on appeal has no discretion, and can exercise none, but must order the incorporation of such town or city. Forsythe v. City of Hammond, 142 Ind., on pages 517, 518, 40 N. E. 267, and 41 N. E. 950. Appellants, by filing their petition with the board of trustees of appellee, under section 4230, Burns' Rev. St. 1894 (section 3248, Horner's Rev. St. 1897), to disannex their lands from said town, and by bringing this action against the town for the same purpose, recognize the existence of appellee as a municipal corporation. The theory of the complaint is that appellee was incorporated, but, for the reason set up in the complaint, appellants are entitled to have the boundaries of appellee so changed as to exclude their lands. The only statute on that subject to which our attention has been called provides that such power may be exercised by the boards of commissioners on petition of the common councils of cities, and the boards of trustees of towns or by the common councils of cities and the board of trustees of towns upon petition of the owners of such real estate, upon the conditions therein set forth. Burns' Rev. St. 1894, §§ 4228, 4230 (Horner's Rev. St. 1897, §§ 3247, 3249). Under the authorities cited, the power to contract or change the boundaries of a city or town is a legislative power, and cannot be exercised by the courts; and, as no law fixing the condi-

tions upon which this may be done, and vesting the power in the court to disannex territory or otherwise change such boundaries, if such conditions exist, the court below had no jurisdiction in this action. It follows from what we have said and the authorities cited that the court did not err in sustaining the demurrer to the complaint. Judgment affirmed.

(22 Ind. App. 83)

HEYDE et al. v. SULT et al.¹

(Appellate Court of Indiana. Jan. 6, 1899.)

MECHANIC'S LIEN—NOTICE—COMPLAINT—SUFFICIENCY—APPEAL—DEMURRER—EVIDENCE—ERROR.

1. Where the notice creating a mechanic's lien, filed with and made a part of the complaint to foreclose the lien, when construed with the complaint, shows who are the owners of the property, the insufficiency of the complaint, as not showing such fact, cannot be first questioned on appeal; and this though the complaint might have been bad against a demurrer.

2. Where a mechanic's lien notice was of a lien on lots 1 and 2, and the proof showed the house to be on lots 1 and 3, the owner cannot complain that the lien was decreed on lot 1 only.

3. Where there is some evidence to sustain a verdict, the appellate tribunal will not interfere.

Appeal from circuit court, Marshall county; A. O. Capron, Judge.

Foreclosure of mechanics' liens by Conrad Sult and John Rallsback against Philip Heyde and others. There was a judgment for plaintiffs and defendant Stansbury, and from the judgment and an order denying a new trial the other defendants appeal. Affirmed.

Harley A. Logan, for appellants. W. B. Hess and J. A. Shunk, for appellees.

ROBINSON, J. Appellees Conrad Sult and John Rallsback, under the firm name of Sult & Rallsback, began suit against appellants Philip Heyde and Maggie Heyde to foreclose a mechanic's lien on lots 79 and 83 in Corbin's Continued addition to Coogle's Independence addition to the town (now city) of Plymouth, Ind., for material furnished in the erection of a building thereon. Other lienholders were made defendants. Appellant Harley A. Logan was made a defendant, the complaint alleging that he held a mortgage on the real estate. Appellants Heyde, Heyde, and Logan answered—First, in general denial; and, second, payment. Appellant Maggie Heyde answered separately that, before the furnishing of the material as alleged in the complaint, her husband and co-appellant, Philip Heyde, was the owner of the real estate described in the complaint; that she and her husband executed a purchase-money mortgage on said real estate, now payable to appellant Logan; that she is still the wife of Philip Heyde; and that she has not joined her husband in the creation of any lien or any conveyance, except said mortgage. Appellant Logan answered,

¹ Rehearing denied.

separately, the execution of the mortgage, and its assignment to him, on the real estate described, and on two other certain lots adjoining, the recording of said mortgages, and that the same were for purchase money; that the building erected upon said real estate as alleged in the complaint is situated partly upon the lots upon and against which the lien was filed, and partly upon the other lots, upon which appellant Logan now holds the mortgages; that there is now due on said mortgages \$150. Appellee Stansbury filed a cross complaint asking the foreclosure of a mechanic's lien on the same lots for work and labor done and materials furnished. The errors assigned question the sufficiency of the cross complaint of appellee Stansbury, and the overruling of appellants' motions for a new trial.

The sufficiency of the cross complaint is questioned for the first time in this court. Where a pleading is questioned for the first time in the appellate court, it will be held sufficient, unless it appears that some material averment is wholly omitted from the pleading. The notice creating a mechanic's lien is regarded as the foundation of the action, and it is required that the original, or a copy thereof, be exhibited with, or made a part of, the complaint. In this case the notice is made a part of the cross complaint, and filed with it. And, while the cross complaint might have been bad against a demurrer, yet where the cross complaint and the exhibit are construed together, as must be done, it cannot be said that no facts are averred showing who are the owners of the property against which the foreclosure of the lien is sought. *Warden v. Nolan*, 10 Ind. App. 334, 37 N. E. 821. In the case of *Warden v. Nolan*, supra, the rule is thus stated: "Where the defects in the complaint are such as may be supplied by the evidence, they will be held cured by the verdict and judgment when the pleading is questioned for the first time by an assignment of error here; and in such case, if the complaint contain enough substance to bar another action for the same thing, it will be sufficient to withstand such attack. *Bronnenburg v. Rinker*, 2 Ind. App. 391, 28 N. E. 568."

It is argued that the motion for a new trial should have been sustained, because the undisputed evidence shows that the dwelling house, for the construction of which appellees Sult & Railsback were given a lien upon lot 83, is also situate a part upon an adjacent lot. We do not see how appellants can complain of this. The notice, it is true, was of a lien upon lots 79 and 83, and the proof showed the house to be on lots 83 and 82; but the court decreed a lien only on lot 83. The fact that more land is included in a notice of intention to hold a mechanic's lien than is necessary to discharge the lien does not render the lien invalid, nor does it make it necessarily indefinite. *Scott v. Gold-berghorst*, 123 Ind. 268, 24 N. E. 333; *White*

v. Stanton, 111 Ind. 540, 13 N. E. 48. In the case of *Maynard v. East*, 13 Ind. App. 432, 41 N. E. 839, cited by appellants' counsel, the descriptions of the real estate were held insufficient to convey title in a sale upon the decree, for the reason that by them neither the exact location nor the boundary of the real estate to be sold could be determined. But in the case at bar no such question as that can arise.

It is further argued that the evidence shows the notice of the lien by appellees Sult & Railsback was not filed within 60 days from the furnishing of the last material. There was some dispute whether the last item furnished was a part of the original bill for the lumber. But there is evidence to sustain the court's conclusion on that question, and that is sufficient. It is not disputed that the notice was filed within 60 days after the furnishing of that item. Where there is some evidence to sustain a finding, the appellate tribunal will not interfere. We find no error in the record, and the judgment is affirmed.

(21 Ind. App. 371)

CITY OF TERRE HAUTE v. FAGAN.

(Appellate Court of Indiana. Jan. 6, 1899.)

APPEAL—ASSIGNMENTS OF ERROR—WAIVER.

Where specifications in the assignments of error are stated as causes in a motion for new trial, which is overruled, they cannot be considered, if the ruling on the motion is not assigned as error.

Appeal from circuit court, Vigo county; J. E. Plety, Judge.

Action by James Fagan against the city of Terre Haute. There was a judgment for plaintiff, and defendant appeals. Affirmed.

G. E. Pugh, for appellant. Peter M. Foley, for appellee.

BLACK, C. J. This was an action brought by the appellee against the appellant to recover damages for a personal injury. The assignment of errors contains six specifications. In the first, second, and third specifications the appellant assigns error in the giving of instructions numbered 1, 2, and 4. In the fourth specification it is assigned that the damages awarded by the jury are excessive. In the fifth specification it is assigned "that there was no notice, actual or constructive, of the existence of the alleged obstruction." The sixth specification is as follows: "The court erred in refusing to allow expert witnesses to testify as to the unsafe condition of the wall; also erred in refusing to allow counsel for defendant to state what he intended to prove by the witness, and have the same made a part of the record, as shown on page 48 of the general bill of exceptions on line 6." A motion for a new trial made by the appellant was overruled, but that ruling is not assigned as error.

We observe that the first four specifications in the assignment of errors were stated as

causes in the motion for a new trial. If the overruling of that motion had been assigned as error, those reasons might have been brought by argument of counsel to our attention, and we might thus have been required to examine the questions so presented. In the motion for a new trial it was stated as one of the causes that the verdict was not supported by sufficient evidence. To that cause the matter stated in the fifth specification of the assignment of errors would have been referable if the overruling of the motion had been assigned as error. In the sixth specification of alleged errors it was attempted to embrace a number of separate rulings upon the trial, each of which should have been stated with definiteness in the motion for a new trial, and then, if the ruling upon that motion had been assigned as error, such matters would have claimed our attention. We find that counsel have failed to properly present any question upon any matter in the voluminous transcript brought to this court. The judgment is affirmed.

(21 Ind. App. 333)

KRAG-REYNOLDS CO. v. ODER et al.
(Appellate Court of Indiana. Jan. 3, 1899.)
CONTRACTS—ENFORCEMENT—MORTGAGES—FORECLOSURE.

Plaintiff, a wholesale grocer, offered to furnish a retailer, who was indebted to him, goods to a certain amount, if he would execute a demand note and mortgage on his stock covering both bills; nothing being said of prior incumbrances. The note and mortgage were executed, but plaintiff, learning of a prior mortgage on the stock, did not deliver the goods, but four days after foreclosed the mortgage. Held that, as plaintiff had not complied with his part of the contract, he was not entitled to enforce the mortgage.

Appeal from superior court, Marion county; L. M. Harvey, Judge.

Action by the Krag-Reynolds Company against Ulysses G. Oder and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Hord & Perkins, for appellant. W. N. Pickerill and Howard Cale, for appellees.

COMSTOCK, J. The appellant was the plaintiff in the court below, and instituted this action against the appellee Ulysses G. Oder on the 5th day of May, 1896, to obtain possession, under a writ of replevin, of a small stock of groceries belonging to Oder, upon which appellant had a chattel mortgage. To appellant's complaint the appellee Oder filed answer in general denial, and a second paragraph of answer in which he alleged that he was a retail grocer of the city of Indianapolis, and a customer of the appellant, a corporation engaged in the wholesale grocery business in such city; that appellant's mortgage was given to secure the payment to appellant of a promissory note for the sum of \$247.76, of which \$197.76 was

the amount of said appellee's indebtedness to appellant prior to the 1st day of December, 1895, and the remaining \$50 was to cover goods which appellant was to deliver to such appellee; that appellant represented that it desired to aid such appellee by stocking him up, and Oder relied on such representations, and by reason thereof executed such note and mortgage; that appellant, after procuring such note and mortgage upon appellee's stock of groceries, wholly failed and refused to deliver to Oder such \$50 worth of goods, or any part thereof, and never intended to deliver them; and that such representations were made for the fraudulent purpose of procuring the execution of such note and mortgage, and without any intention of delivering such \$50 worth of goods. The appellees John L. Avery and John J. Marshall upon application to the court were made parties defendant, and each filed a separate pleading. Appellee Avery alleged that the property described in appellant's complaint, and covered by the writ of replevin, was covered by a prior mortgage executed to secure him as an indorser for Oder upon a note for \$300 in favor of Fletcher's Bank, that he is still indorser for the full amount of such note, that the same is unpaid, that Oder is insolvent, and that under the terms of such mortgage the action of appellant in taking possession of such property vested the title thereof in appellee Avery. Wherefore he prayed judgment against the appellant for the value of the property, etc. Appellee Marshall in his pleading alleged, in substance, that he held a lien on such property under a chattel mortgage executed to secure the payment of \$250, that such lien was superior to that of appellant, and that, under one of the conditions of such mortgage, the action of appellant in taking possession of such property vested in appellee Marshall the title thereto. Wherefore he prayed the court for judgment against the appellant for the value of such goods, etc. To these pleadings the appellant filed answer in general denial, and the cause was submitted to the court without the intervention of a jury. The court found for appellees, and adjudged that the appellant, to whom the property in controversy was delivered under the writ of replevin, should return to appellee Oder within five days such property, or pay to Oder \$100, the value of the property, and that the appellees, Oder, Marshall, and Avery, recover of the appellant their costs. Appellant filed a motion for a new trial, which was overruled. The error assigned is the overruling of appellant's motion for a new trial. The specifications in the assignment of error discussed are that the decree of the court is not sustained by sufficient evidence, and is contrary to law.

Appellee Oder seeks to avoid the mortgage because appellant failed to deliver the \$50 worth of goods, claiming that appellant's action in that behalf was fraudulent. The

facts, as shown by the evidence, are substantially as follows: Oder, who was running a grocery, in November, 1895, had been found to be indebted to the Krag-Reynolds Company in the sum of \$197, and they declined to give him further credit; and from that time on he paid cash for whatever he got of the Krag-Reynolds Company until May 1st, when a member of the firm called on Oder, and proposed to stock him up and put him in shape for doing a better business than he had been doing; suggested that they let him have \$50 worth of goods on credit, and, in consideration of this, Oder should execute to them his note for the amount of the old bill, \$197, and the \$50 they were about to sell him, and give a chattel mortgage on his stock for the total of \$247,—the goods to be delivered on the following morning. Oder executed the note and mortgage on the 1st day of May, 1896. This suit was brought on the 5th of the same month, and the Krag-Reynolds Company, through the sheriff, took possession. It is not pretended that appellant furnished him any part of the \$50 worth of goods it was to let him have, but, as an excuse for not furnishing them, the Krag-Reynolds Company says that on the next day after it had obtained the note and mortgage of Oder, and had taken his order for the \$50 worth of goods, it learned for the first time of the existence of the prior mortgages of Avery and Marshall. These mortgages had been of record for about two years, but nothing was said about them by any one at the time the Krag-Reynolds Company took the note and mortgage. The appellant contended that Oder's failure to mention these mortgages was such deception on his part as justify it in refusing to furnish the \$50 worth of goods which it had contracted to furnish. It thus appears from the evidence that appellant seeks to enforce a part of a contract in its favor, after having repudiated the promise by which its execution was induced. The execution of the note and mortgage was the result of one contract. Appellant could not affirm that part of the contract in its interest, and rescind the part in the interest of appellee. A contract can only be rescinded in toto. This principle has been recognized in a number of decisions in this state. *Higham v. Harris*, 108 Ind. 253, 8 N. E. 255; *Worley v. Moore*, 97 Ind. 15; *Himes v. Langley*, 85 Ind. 77; *Gregory v. Schoenell*, 55 Ind. 101; *Stedman v. Boone*, 49 Ind. 469; *Joest v. Williams*, 42 Ind. 565; *Railroad Co. v. Horton*, 18 Ind. App. 335, 48 N. E. 22. Appellant's counsel cite authorities to sustain the proposition that one induced by fraud to enter into a contract may rescind the contract in toto, or affirm the contract and sue for damages, and that Oder "did not elect the remedy which was open to him and available, by way of damages, which, in case the note he gave had been paid, would have been \$50 of goods, and the loss of profits he sustained by reason of such nondelivery.

But he chose to rescind." We must bear in mind that the note was executed May 1, 1896, due one day after date. On the 5th day of May, appellant instituted suit, and took possession of appellee's property. It was to that action that appellee set up this defense. Oder, not having received anything, had nothing to return. Ordinarily a past consideration is sufficient to support a mortgage, but the note was not for the old debt of \$197, but for \$247; and the mortgage was given to secure the last-mentioned amount upon the promise of an extended credit, which was refused. The contract was not divisible. Appellant should have furnished the goods, or surrendered the note and mortgage. The court did not err in rendering judgment in favor of Avery and Marshall for costs. We find no error. Judgment affirmed.

(21 Ind. App. 347)

EMSHWILER v. TYNER.

(Appellate Court of Indiana. Jan. 4, 1899.)

CONTRACTS—VALIDITY—LOTTERIES—CONSIDERATION—PLEADING—INSUFFICIENCY OF ANSWER—PARTIAL DEFENSE.

1. Under a contract with plaintiff's intestate, defendant and others each agreed to purchase one of a certain number of town lots, to be platted, and a certain number of shares of stock in a manufacturing corporation, to be organized by him, and to pay therefor each an equal amount, though such lots were of unequal value. The contract provided that the lots should be distributed in a manner to be determined by the purchasers, but they were in fact awarded by lot, by direction of plaintiff's intestate, without the participation and in the absence of defendant. *Held*, that such contract, though valid in its inception, was vitiated by the manner of its execution, and could not, therefore, be enforced.

2. In an action to recover a gross sum as the purchase price of certain real and personal property, an answer purporting to be in bar of plaintiff's entire cause of action, but good as to only a part thereof, was insufficient, on demurrer, where the respective parts were distinguishable.

Appeal from circuit court, Blackford county; E. C. Vaughn, Judge.

Action by Adelbert Emshwiler, administrator, against William H. Tyner. A demurrer to a certain paragraph of defendant's answer was overruled, and plaintiff appeals. Reversed.

A. M. Waltz and Dalley, Simmons & Dalley, for appellant. N. Cale, J. A. Hindman, and Pierce & Bonham, for appellee.

WILEY, J. The only question for review in this appeal is the action of the court in overruling appellant's demurrer to appellee's second paragraph of answer. The decedent in his lifetime commenced the action, but while it was pending he died, and his administrator was substituted as plaintiff below. The complaint was originally in one paragraph, but after decedent's death, and the

substitution of his administrator, an additional paragraph of complaint was filed. The two paragraphs are founded upon a written contract between appellee and the decedent, which contract is made an exhibit. It is not necessary to set out the complaint, even in detail, but, that the pertinency of the facts averred in the third paragraph of answer may clearly appear, it is important that we show the material matters embraced in the contract. The contract sued upon is signed by the decedent, as party of the first part, and appellee and others, parties of the second part, and by its terms the decedent agreed to locate a canning factory upon certain real estate in Blackford county, Ind. That said factory was to have a capacity of 20,000 cans per day, and was to employ 150 persons. That it was to be completed and ready for operation for the canning season of 1895, and appellant was to organize a company for conducting the business, to be known as the Blackford Canning Company. By the terms of the contract the decedent was to plat into 74 lots a certain tract of land, each lot to be 50 feet wide and 120 feet long. That each of the persons signing said contract agreed, by its terms, to take one of said lots, and three shares of paid-up "unassessable" stock of said company of the par value of \$25 each, and to pay for one of said lots and the three shares of stock \$150. The contract further provided that the manner of the distribution of the lots should be determined by the purchasers, and that decedent would convey to such purchasers their respective lots, when distributed, by a deed, with covenants of warranty, and furnish each of said purchasers with an abstract of title, and issue to each of them three shares of said stock. The contract also provided that the said \$150 should be paid in six equal payments of \$25, each subscriber to execute his several notes for the amount, payable in 3, 6, 9, 15, and 18 months, at 6 per cent. interest, said notes to be given when said company was duly organized. The complaint avers in detail all the conditions of the contract, and that decedent complied with all the conditions and stipulations to be performed by him.

The third paragraph of answer avers that in December, 1895, various subscribers to said contract and enterprise, and said decedent, met together for the purpose of determining how and in what manner the said 74 lots were to be awarded and distributed; that the decedent at said meeting directed that said lots be awarded and distributed by placing the numbers of the lots severally upon slips of paper, and placing said slips in a hat, and then by placing the names of the various subscribers severally upon slips of paper, and then placing them in another hat; that thereupon one of the subscribers present was to be blindfolded, and while thus blindfolded he was to draw simultaneously from the two hats a name and a number of a lot, until all

the names and numbers were drawn; that in each instance the lot whose number was drawn when a name was drawn was to be awarded to the subscriber whose name was so drawn, and was to constitute the selection of the lot to be conveyed to him; that said lots were so awarded to each subscriber; that appellee was not notified to meet; that he was not present at such drawing and awarding, either in person or by agent; that he did not in any manner exercise his choice, will, or judgment in the selection of a lot, and did not participate in said drawing, or in awarding said lots; that said 74 lots were of unequal values; that a large portion of the land so platted had been used for a brick yard; that dirt had been excavated therefrom; that huge excavations four or five feet in depth were made therein, so that said lots were mud holes, ravines, and lagoons, and were thereby rendered worthless, and of no value; that some of the said lots were on high ground, and worth \$150, while lot No. 7 so awarded to appellee was of no value. The answer then avers that by reason of the facts therein stated "said lots were of unequal value, and the manner in which said lots were distributed, including the one awarded this defendant, and by reason of the facts aforesaid, the said contract and the manner of its attempted execution was and is a scheme of chance, and a lottery, is fraudulent, and against public policy, and void." It is apparent from this paragraph of answer that the pleader proceeded upon the theory that the contract, in the first instance, is void, because it is tainted with the scheme of a lottery, or chance. This court has recently passed upon this exact question in *Glass Co. v. Mosbaugh*, 19 Ind. App. 105, 49 N. E. 178, where it was held that a contract of similar tenor was not void on the ground urged, and we still adhere to such holding. But the facts in that case and those charged in the third paragraph of appellee's answer in the case now before us are not at all similar. The contract sued upon here does not contain any provision relating to the awarding and distribution of the lots by lottery or chance, but, like the case in 19 Ind. App. and 49 N. E., cited, leaves the manner of such distribution to be determined and agreed upon by the subscribers; and hence, under the authority of that case, the contract, in the first instance, and on its face, is enforceable. If, then, the contract, as originally entered into, was not subject to the objection urged by appellee, the question for us now to determine is, do the averments of the answer, descriptive of the plan and the manner of the distribution of the lots, render the enforcement of the contract against appellee void? The answer avers that various subscribers and decedent met for the purpose of determining how and in what manner the lots were to be awarded, and that the decedent, at said meeting, directed the manner of the distribution. We need not repeat the allega-

tions of the answer, but it is sufficient to say that the plan devised by the decedent, participated in by him and the subscribers present, was a scheme tainted with the vice of a lottery; in other words, it was a scheme of chance, where the will and judgment, both of the decedent and subscribers, were in no sense exercised. Appellee did not participate in the distribution, and was not present. In *Glass Co. v. Mosbaugh*, supra, appellant was not a party to the distribution, and in the complaint in that case it was alleged: "That in making said selection of lots by said drawing, plaintiff neither participated therein, nor counseled or advised the same." In that case, also, appellee was a party to the agreement between the subscribers, was present at and participated in the drawing of lots, and took possession of the lot apportioned to him. So that it is clear that the question to be here decided rests upon very different facts than the case to which we have just referred. The fact that appellant directed and participated in the drawing and distributing of the lots in this case brings it, we think, within the rule announced in *Lynch v. Rosenthal*, 144 Ind. 86, 42 N. E. 1103. There the contract was, in its essential features, similar to the contract here sued on. There was, however, this distinction: there the contract itself provided that the lots should be awarded by "lot" to each respective subscriber, and it was held that it could not be enforced, as being against public policy and good morals. It was there held that contracts tainted with the vice of lottery schemes are not enforceable, and it was said: "That such contracts are against public policy, and that those who have entered into them shall have no relief in the courts to enforce those that are executory, or to recover that which has passed under such as have been executed, is without doubt;" citing many authorities, to which we refer. Continuing, the court said: "We find, therefore, that both the contract and the manner of attempting to comply with its provisions were against public policy, and void."

* * * It is enough to say that one who asks equity must present clean hands in which to receive it. Here the appellant, from the beginning, had unclean hands. He originated, carried forward, and in this suit sought to enforce, a vicious contract. He is in no position to ask that equity estop his ally from exposing the vice of that contract, the enforcement of which public morals forbid." This language conveys no uncertain meaning, and from it it is plain that neither the law nor courts will lend their aid to enforce contracts tainted with the vice of a lottery, and which are against public policy, good morals, and a quickened conscience.

As we have said, the contract before us, in its conception, was not subject to the infirmity of the contract in *Lynch v. Rosenthal*, supra, but in the manner of its execution, which was directed and participated in by appellant, it was inoculated with a like vice;

and under the authorities, appellant, coming into court with unclean hands, and asking the enforcement of a contract which he himself has made obnoxious to public policy and good morals, is in no position to ask the court to enforce its execution. We are unable to distinguish the difference, in principle, between a contract void ab initio, and one made so, after its execution, by the very party under whose provisions he seeks to secure its benefits. It must follow from the authorities and what we have said that the third paragraph of answer, in so far as it seeks to avoid the allegations of the complaint relating to the sale and transfer of the real estate awarded to appellee, constitutes a complete bar; but said paragraph was not good as a complete defense to appellant's cause of action, and it was error to overrule the demurrer thereto.

The third paragraph of answer purports to answer the whole complaint, when at most it is only a partial answer, and, under the unvarying rule in this state, for that reason it is not good. The contract declared on binds appellee to pay appellant \$150 for one lot and three shares of the stock of the Blackford Canning Company of the par value of \$25 each, so that it appears from the contract that \$75 of the consideration running to appellee was three shares of said stock, valued at \$25 per share. The contract binds appellant to issue and deliver to appellee said shares of stock, and the complaint avers that said shares of stock were duly issued in the name and tendered to appellee before the commencement of the action. That part of the contract by which appellee subscribed for and bound himself to pay \$75 for three shares of stock in said canning company was not vitiated by appellant's conduct and acts relating to the distribution and awarding of the lots, and may be enforced. It is the recognized law in this and other states that where valid and illegal considerations in the same contract are susceptible of division—i. e. where the legal can be clearly distinguished from the illegal—that part of the consideration which is legal may be enforced. See *Pierce v. Pierce*, 17 Ind. App. 107, 46 N. E. 480, and authorities there cited. As the third paragraph of answer purports to answer the whole complaint, and is only a partial answer, the demurrer should have been sustained. Each paragraph of an answer must respond to the entire complaint, or to so much of the cause of action as it purports to answer; and if it purports to be in bar of the entire cause of action stated in the complaint, but answers only a part thereof, it is insufficient. *Machine Co. v. Niehouse*, 8 Ind. App. 502, 35 N. E. 1112; *Dunn v. Barton*, 2 Ind. App. 444, 28 N. E. 717; *State v. Parrish*, 1 Ind. App. 441, 27 N. E. 652; *Orb v. Coapstick*, 136 Ind. 313, 36 N. E. 278; *Messick v. Railway Co.*, 128 Ind. 83, 27 N. E. 419. The judgment is reversed, with directions to the court below to sustain appellant's demurrer

to the third paragraph of the answer, and for further proceedings not inconsistent with this opinion.

(21 Ind. App. 345)

WEBER v. HOME BENEV. SOC.

(Appellate Court of Indiana. Jan. 4, 1899.)

INSURANCE—BENEVOLENT SOCIETIES—FUNERAL FUND—SUICIDE.

By the policy of a benevolent society, a member was entitled to participate in the "benefit fund," as follows: (1) A specified amount per week, for a limited period, for total disability by reason of bodily injuries; (2) a specified sum for permanent total disability, not expressly limited as to the cause thereof; (3) a specified amount for the loss of either hand or foot, through such injuries; (4) a specified sum per week, for a limited period, for sickness or disease, causing total disability; and (5) "if death shall result, * * * \$100 as a funeral fund." It was also provided in the policy that "no benefits will be paid for self-inflicted injuries." *Held*, that no funeral benefit could be recovered, in an action on such policy, where deceased had committed suicide.

Appeal from superior court, Allen county; C. M. Dawson, Judge.

Action by Bernhard Weber, administrator of the estate of Henry Vogtlin, deceased, against the Home Benevolent Society. A demurrer to a certain paragraph of defendant's answer was overruled, and plaintiff appeals. Affirmed.

Geo. W. Louttit, for appellant. Robt. B. Dreibelbiss, for appellee.

BLACK, C. J. This was an action brought by the appellant, as administrator of the estate of Henry Vogtlin, deceased, against the appellee, to recover \$100 as a funeral fund under a policy of insurance issued by the appellee to the intestate. The court overruled a demurrer to the fourth paragraph of answer, and this ruling is assigned as error. By the policy upon which the action was founded it was provided that the intestate, as a member of said society, should be entitled to participate in the "benefit fund" of the society as follows: First, a specified amount per week, not exceeding 52 weeks, should he receive bodily injuries by reason of which he should be immediately and wholly disabled, so as to cause a total loss of time, etc.; second, a certain sum specified for permanent total disability, not expressly limited by the policy as to the cause; third, if such injuries alone should sever either hand or foot, he should be entitled to a specified amount; fourth, a designated sum per week, not more than 30 weeks, for sickness or disease causing a total loss of time, etc.; fifth, "if death shall result from any cause at any time while this member is in good standing, then this society shall, upon satisfactory proof of the death of such member, pay to his estate, if living, if not living to his heirs or legal representatives of this member, \$100 as a funeral fund." The policy then proceeded as follows: "No benefits will be paid for self-inflicted in-

juries." The material question raised by the fourth paragraph of answer was whether or not there could be a recovery of this funeral fund in case of the suicide of the member, the defense set up by that paragraph being based upon the provision of the policy that "no benefits will be paid for self-inflicted injuries." The policy designated five instances in which there should be participation in the "benefit fund" of the society. The funeral fund was one of these benefits. Some of the instances designated as occasions for paying benefits included "bodily injuries" having described effects; others included disability, the cause not being expressly designated, and disability from sickness, and death resulting from any cause, including, of course, death caused by bodily injury and death caused by sickness. Immediately following the statement of this last instance was the provision that no benefits—that is, no share in the benefit fund, and, therefore, it would seem, no funeral benefit—should be paid for self-inflicted injuries. The provision for payment if death should result from any cause would seem to have been expressed in the broad and inclusive terms employed for the reason that the specific instances of disability previously designated were separately described as disability from bodily injury, as disability from sickness, and as disability the cause whereof was not stated. The funeral fund would be paid whether the death was caused by violence resulting in bodily injury or from sickness, however caused, or of whatever character. There is some obscurity in the policy, but we think it was the intention that, in case of self-inflicted injury, there should be no payment of benefit, whether the injury resulted in mere disability or in death. The court sustained a demurrer to a paragraph of reply to the fourth paragraph of answer. The discussion of counsel concerning this ruling relates only to the construction of the policy. If what we have already said upon that subject is correct, the court below gave a proper construction to the policy. The judgment is affirmed.

(21 Ind. App. 338)

PERIGO v. INDIANAPOLIS BREWING CO.

(Appellate Court of Indiana. Jan. 3, 1899.)

MASTER AND SERVANT—CO-EMPLOYEES—NEGLIGENCE—EVIDENCE.

1. A carpenter was injured by the falling of a scaffold, which he had helped to build two days before, and which was being altered by two fellow workmen, who were removing supports at the direction of a foreman, and substituting others. The two workmen were experienced carpenters, and the manner of making the alterations was wholly within their discretion. They did not warn plaintiff that they were about to remove the support, but he was working within five feet of them, and he must have known it. *Held*, that this injury resulted from the negligence of co-employees, to which plaintiff contributed.

2. If the case fell within the provisions of the co-employee's liability act (Burns' Rev. St. 1894, § 7083 et seq.), a judgment was not jus-

tified against the employer, since, under the act, the employé must have exercised due care, which the evidence shows he did not.

Appeal from superior court, Marion county; John L. McMaster, Judge.

Action by Smith W. Perigo against the Indianapolis Brewing Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Geo. W. Galvin, for appellant. Miller & Elam, for appellee.

ROBINSON, J. Appellant sued appellee for damages for personal injuries. Upon a special verdict returned by the jury the trial court rendered judgment in appellee's favor. This action of the court presents the only question under the errors assigned. The special verdict as to the manner in which the accident occurred shows: That on the 10th day of April, 1896, appellee, a corporation, was erecting a new building. That W. H. Miller was in charge of the erection of said building as foreman. That on said date, appellant, while in the employ of appellee as a carpenter engaged in putting on ceiling, was injured by the fall of a scaffold upon which he was at work. Said scaffold was inside the building, about 10 feet from the ground, and had been erected about two days before by the direction of said Miller. Appellant assisted in the erection of the scaffold, which was properly constructed, and was safe for the use for which it was intended. On the morning the scaffold fell, one Whitman and Sleuter, who were experienced carpenters, and who were engaged in ceiling the room where the accident occurred, removed a portion of the supports of said scaffold, with the intention of using them in the prosecution of their work. Said supports were 2 by 4 inches in size. As they removed said supports, they substituted other sufficient supports except the last taken. They had removed three or four, and substituted others, before the accident. They removed a support standing within a few feet of where appellant was at work on said scaffold immediately before it fell, and the removal of such support was the cause of the scaffold falling. Whitman and Sleuter had another support at the place, ready to substitute for the one removed, at the time it fell. Whitman was on the scaffold for the purpose of knocking the support loose, and fell with it. They could have placed the support they intended to substitute in place and secured it so that it would have held the scaffold before knocking out the one they intended to take away. If they had done so, the scaffold would not have fallen. They relied upon the scaffold bearing such weight as was upon it without the support they took from it for the time required to put a substitute in its place. The piece of timber from which the support was taken, and upon which the scaffold rested, was of pieces "two by six," placed on edge, and about 20 feet long.

Whitman was about the middle of said piece of timber. Appellant and another man were standing on two planks about 16 feet long, one end of which rested upon the timber that broke near the place where Whitman was; appellant being nearest Whitman, and about 5 feet from him, the other man being about 4 feet from appellant. Said planks were supported at the end furthest from Whitman upon a timber similar to the one that broke. The timber that broke was supported at both ends. When it broke there was no weight on it except part of the weight of the three men and the ends of the scaffolding boards. Whitman and Sleuter removed said supports and substituted others in such manner as they thought best, and the manner in which it was done was wholly within their discretion. They could have placed the substituted supports under the scaffold in such manner as to have prevented the fall of the scaffold, if, in their judgment, it had been necessary to have the substitute support in place before the other was removed. They had been engaged, before the accident, with appellant and others, in ceiling said room, and had worked upon the scaffold that fell. Neither Whitman nor Sleuter warned appellant that they were about to remove a support from the scaffold near where appellant was when it fell. Appellant came upon the planks that fell about the time Whitman and Sleuter removed the support. They could have avoided the accident by warning appellant to remain off the planks. At the time the scaffold fell, appellant was engaged in the work he was employed to do. Said Miller, the foreman, was in charge of the erection of the building and of the men at work thereon. Said supports were removed at his direction. No work was done in or about such scaffolding except such as was pointed out by Miller. There was no other lumber about the building that could have been used for the purpose to which it was intended to place said supports when removed. From the special verdict we can but conclude that the accident resulted from the negligence of co-employés, and also that appellant himself was not free from fault which proximately contributed to his injury. While a foreman may have directed the supports to be removed, yet it is evident that the fellow workmen of appellant acted upon their own judgment as to the manner in which the supports should be removed. The rule is well settled that the master must provide a safe place for his employé to work. But where the employé is a carpenter, and himself provides the working place by erecting a scaffold out of timbers, he certainly has a better opportunity than any one else of knowing whether the place is a safe one or not. It is true, the scaffold was safe when erected, but afterwards became unsafe; not, however, from any act or order from the master, or any one representing him, but by the acts of fellow

workmen, who had up to that moment been standing upon the scaffold, working at the same work, and along with appellant. Thus, in *Robertson v. Railroad Co.*, 146 Ind. 486, 45 N. E. 655, it is said: "The rule in this state, now firmly settled, is that a difference in rank or the power to control and direct or to discharge from service is not the test as to whether one is a fellow servant or a vice principal. The controlling inquiry must be as to whether the act or omission resulting in injury involved a duty owing by the master to the injured servant." And in the case of *Pelce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485, this court said: "It is now well settled that the decisive test whether, in any given case, an employé is to be regarded as a vice principal or a fellow servant is not his title, or rank, or power to employ or discharge, but the nature of the services which he performs." See *Coke Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Lime Co. v. Chastain*, 9 Ind. App. 453, 36 N. E. 910; *Telegraph Co. v. Bower* (Ind. App.) 49 N. E. 182. The doctrine that an employer must respond for failure to provide a safe working place ought to have no application in a case like that at bar. Appellant is a carpenter, and is presumed to be skillful in his calling. He was employed because of his particular skill. Had the master been present, his knowledge of the safety of the scaffold could not have been superior to that of appellant. It is true, the jury find that the two workmen who were removing the supports did not warn appellant that they were about to remove a support from the scaffold near where appellant was. But it is not found that appellant did not know they were removing the supports. He was within five feet of the workman while he was knocking this support loose. It is not shown that he did not see and hear what was going on, nor that anything prevented his seeing or hearing, nor that his senses of sight and hearing were not good. We cannot presume that appellant did not know that the supports were being removed. Three or four supports had already been removed before the removal of the one which caused the scaffold to fall. If he knew this was going on, and continued his work, he assumed any risk caused by such removal. Taking all the facts and circumstances existing at the time as shown by the verdict, it is difficult to escape the conclusion that appellant knew these supports were being removed, and took no steps to protect himself; or, at any rate, the facts and circumstances are such that he should have shown by the evidence that he did not have such knowledge.

No question is made, nor could it be made under the facts, that the scaffold was not safe when first erected, because appellant assisted in its construction, and, if it was unsafe, he knew it. It became unsafe through the acts of two of appellant's fellow work-

men. They chose their own method, and used their own judgment in changing the supports. Not only was the unsafe condition of the scaffold caused by the acts of co-employés, but the burden was upon the appellant to show such facts as would establish his own freedom from contributory fault, and this he has failed to do.

It is briefly argued by appellant's counsel that the special verdict entitles appellant to judgment under the co-employés liability act (*Burns' Rev. St. 1894, § 7083 et seq.*). But under that act the employé so injured must have been in the exercise of due care and diligence. As we have concluded that the verdict fails to show the exercise of such care, there could be no recovery under that act, even if the case at bar is of the class that would fall within the provisions of that act, which question we need not and do not decide. Judgment affirmed.

(21 Ind. App. 343)

STERRETT v. TIMMONS et al.

(Appellate Court of Indiana. Jan. 3, 1899.)

REPLEVIN—WRIT—RETURN—JURISDICTION.

Failure of an officer serving a writ of replevin to make his return on the writ does not affect the court's jurisdiction.

Appeal from circuit court, Carroll county; G. F. Palmer, Judge.

Replevin by Catherine Timmons and others against Wilson Sterrett. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

L. D. Boyd and J. C. Moore, for appellant. M. A. Ryan, for appellees.

HENLEY, J. This was an action in replevin brought by appellees against appellant before a justice of the peace. It involves the ownership of 15 ducks. There was a trial by jury in the justice's court, and a finding in favor of appellees. The cause was appealed to the circuit court of Carroll county, where it was again submitted to a jury, with the same result. The alleged errors of the lower court, for which appellant seeks a reversal of the judgment in this cause, are the rulings of the lower court in overruling his demurrer to the complaint; the refusal of the court to dismiss the same upon appellant's motion therefor; and in permitting the constable to make his return upon the writ of replevin issued to him after said cause had been appealed to the circuit court. The complaint in this cause contains all the material averments necessary to a complaint in replevin, and the demurrer thereto for want of facts was properly overruled.

The other reasons assigned why the cause should be reversed are discussed together. Appellant in the circuit court moved to dismiss the cause for the reason that the court did not have jurisdiction, because the constable who served the writ had failed to make

any return thereon. Upon motion supported by the affidavit of the constable, the lower court permitted the said officer to indorse his return upon the writ. It appears from the record that the writ of replevin for the property described in the complaint, and the summons for the appellant, were properly issued, and placed in the hands of the constable of the township for service; that, at the hour and the day upon which the summons was returnable, the appellant appeared in person and by attorney, and moved for a change of venue, and the cause was sent to another justice of the peace, where the trial was had and judgment rendered as before stated. We do not understand that a return of the doings of the constable upon the writ is necessary to confer jurisdiction in an action of replevin, and counsel have failed to cite us to any authority so holding. The filing of the complaint and bond, the issuing and service of the summons, and the appearance of the appellant, gave the court jurisdiction of both the person and subject-matter. The failure of the writ of replevin to show, by the return of the officer who executed it, that the property was taken under it, or what disposition was made of the property by the officer, might affect the introduction of certain material evidence, but it cannot affect the jurisdiction of the court. The verdict was sufficient in form. See *Busching v. Sunman* (Ind. App.) 49 N. E. 1091. Upon the whole record, we are of the opinion that the cause should be affirmed. See *Horner's Rev. St. § 658*. Judgment affirmed.

(22 Ind. App. 666)

CAYLOR v. CAYLOR'S ESTATE.¹

(Appellate Court of Indiana. Jan. 6, 1899.)

CONTRACTS—CONSIDERATION—HUSBAND AND WIFE—COMPLAINT—GIFT CAUSA MORTIS—DELIVERY.

1. A husband promised his dying wife (they being childless) that he would convey to her nephew all her property, and also pay him a debt he owed his wife. There was to be no diminution of his debt, and no consideration for the promise. *Held*, that it could not be enforced, since, under *Burns' Rev. St. 1894, § 2651* (*Horner's Rev. St. 1897, § 2490*), in the absence of a will, the husband inherited the wife's property.

2. A complaint to enforce a husband's promise to his wife to deliver all her property to her nephew after her death was insufficient, where it failed to allege that the wife's estate was solvent or that it had been settled, since she could not dispose of her property in derogation of her creditors.

3. A wife, on her deathbed, called for her nephew, and, being told he was not present, informed her husband that she gave the nephew all her property, and directed him to deliver the nephew all her property, which he agreed to do. There was no manual delivery of the property, it being already in the husband's possession. *Held* to be a sufficient delivery of a gift causa mortis.

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Claim of William Caylor against the estate of Daniel C. Caylor, by administrator, etc.

52 N.E.—30

There was a judgment for the administrator, and claimant appeals. Reversed.

Roberts & Vestal, for appellant. Robert Graham and Lamb & Hill, for appellee.

WILEY, J. Appellant filed a claim against decedent's estate, which was passed to the issue docket for trial. The claim is in two paragraphs, to each of which a demurrer was sustained; and, appellant refusing and failing to plead over, judgment was rendered against him for costs. Sustaining the demurrer to each of said paragraphs is assigned as error. In the first paragraph it is alleged that appellant, from his early childhood until he became of age, resided in the family of the decedent, Caylor; that the family consisted of Mary Caylor, wife of said Daniel Caylor, and appellant; that said Mary was the second wife of said Daniel, and childless; that during her married life to decedent she loaned him a large sum of money; that she died intestate May 16, 1895, leaving said Daniel as her only heir; that at the time of her death said Daniel was indebted to her in the sum of \$1,500; that at her death she owned divers promissory notes, the makers of which are unknown to appellant; that said notes aggregated at least \$300; that she owned other personal property to the value of \$200; that at the time of her death said notes and personal property were in the possession of the said Daniel; that the said Mary was desirous that appellant should have all her estate at her death, and shortly before her death, for the purpose of bestowing her said estate upon him, entered into an agreement with said Daniel by which said Daniel agreed to, and was to, turn over and deliver to appellant, all and singular, her estate, after her death, and account to appellant for all said money and property; that said agreement also provided that the real estate of which she died seised should go to appellant, the same to be taken in full payment of her account against said Daniel; that said Daniel failed to comply with said agreement, except as to the real estate, and converted all of said personal assets to his own use; that, in pursuance to said agreement, said Daniel conveyed all of said real estate to appellant, and by reason of all of said facts said estate is indebted to him, etc. The second paragraph is like the first as to all material allegations, and differs from it only in this: In the second paragraph it is averred that appellant was the nephew of the said Mary; that on May 16, 1895, she was stricken with disease, which soon developed into an alarming and fatal condition; that within an hour of her death, and believing that she was approaching dissolution, she called for appellant, and, being informed that he was not present, she called for the said Daniel, and informed him that she believed she would not live to see appellant, and that she then gave appellant all her property, both real and personal; that,

¹ Rehearing denied.

in pursuance to her said gift, she directed and enjoined upon said Daniel to deliver over and pay to appellant, all and singular, her property then in his possession; that said Daniel then and there accepted said trust, and agreed to perform the same in all respects; that said Daniel soon after died, without complying with the directions given him by said Mary; that the administrator of the estate of said Daniel took possession of all of said property, mingled it with the assets of the estate of said Daniel, and has failed and refused to account to appellant therefor. In this paragraph it is further alleged that the said Mary died leaving no debts, and that there are no debts against her estate. It is further charged that appellant remained in ignorance of said gift to him until after the death of said Daniel; that he made a demand upon the administrator of his estate to comply with said trust, but that he refused to do so. It is also charged that the said Mary never afterwards made any other or further disposition of her property.

Appellant argues that the first paragraph of the complaint rests upon the alleged agreement of Daniel Caylor with his deceased wife to turn over and deliver all of the property of which she died seised, both real and personal, to him, and that the second paragraph of complaint rests upon a gift causa mortis. We may properly adopt the theory of the complaint contended for by appellant, for the rule prevails in this state that a plaintiff must recover *secundum allegata et probata*, or not at all. Appellee claims that the first paragraph of the complaint is insufficient, because there was no consideration on the part of Daniel Caylor to support the agreement. There seems to be some merit in this claim, and we will consider it. Daniel Caylor was the husband of Mary. Their marriage was fruitless in children. By the averments of the complaint, the said Mary was without heirs, other than her husband. It follows, therefore, that at her death, in the absence of a will or other legal disposition of her property, the said Daniel would inherit her entire estate. Burns' Rev. St. 1894, § 2851 (Horner's Rev. St. 1897, § 2490). It also appears from the complaint that Daniel was indebted to Mary in the sum of \$1,500 for money loaned to him. While this amount, during her life, was a claim against him, which she might have enforced, yet at her death said indebtedness would have become liquidated and canceled; for it was a part of her estate, and he was entitled to the whole estate. Otherwise it would have been a debt against himself, and this could not exist. So we find from the complaint that Daniel not only agreed to turn over and deliver to appellant, upon the death of Mary, all of her estate, but also promised to pay to appellant the \$1,500 which he had borrowed of her, which by her death he would not be otherwise bound to pay. By this agreement he relinquished all of his right, title, and interest in the estate of his

wife, and promised to deliver it all to appellant. In all contracts and agreements there must be some consideration to support them. A contract without any consideration is a *nudum pactum*. From the allegations of the first paragraph of the complaint, we are unable to discover any consideration moving to Daniel for the agreement. Daniel was given nothing by his wife, by the averments of the complaint, which can be construed into a consideration for his promise to pay to appellant the \$1,500, or to turn over to him all of her property. There was to be no diminution of the amount her husband owed her as any consideration for his promise to pay \$1,500 to appellant, but, under the averments of the first paragraph, the entire amount was to be paid. At the death of his wife the debt owing to her by Daniel would have been abrogated or canceled, because he was her sole surviving heir, and the amount would have become his own by inheritance, subject only to debts against her estate. Also, under the first paragraph, Daniel, as the husband of Mary, was given nothing which could be construed into a consideration for his promise to pay appellant \$1,500, or to turn over to him the entire estate of the said Mary. To enforce this alleged agreement would be to hold that the said Daniel abandoned every right he had in the estate of his deceased wife, and that, too, without any consideration moving to him for the performance of the agreement on his part. There is a further objection to this paragraph. It is not charged that the estate of Mary was solvent, that there were no just claims against it, or that it had been settled. Her estate was subject to the payment of all of her debts, and she could not dispose of her property in derogation of the rights of her creditors. A pleading will be construed most strongly against the pleader. The court correctly sustained the demurrer to this paragraph of complaint.

We will next consider the sufficiency of the second paragraph of the complaint. As we have seen, the theory of this paragraph is that the facts constitute a gift causa mortis. We will enter upon the discussion of this question with the fact in view that gifts causa mortis are not favored in law. In 3 Wait, Act. & Def. 502, it is said: "Gifts causa mortis are not favored in law. They are said to be a fruitful source of litigation,—often bitter, protracted, and expensive. They lack all those formalities and safeguards which the law throws around wills, and create a strong temptation to the commission of fraud and perjury. * * * To constitute a valid gift causa mortis, three things are requisite: (1) It must be made with a view of the donor's death from present illness or from external or apprehended peril. (2) The donor must die of that ailment or peril. (3) There must be a delivery." See, also, *Grymes v. Hone*, 49 N. Y. 17; *Emery v. Clough*, 63 N. H. 552, 4 Atl. 796; *Kiff v. Weaver*, 94 N. C. 274; *Smith v. Ferguson*,

90 Ind. 229; *Parcher v. Savings Inst.*, 78 Me. 470, 7 Atl. 266; *Taylor v. Henry*, 48 Md. 550; *Dickeschied v. Bank*, 28 W. Va. 340. In 8 Am. & Eng. Enc. Law (1st Ed.) p. 1342, in note 1, it is said: "Such transfers of property are not, as a rule, favored by the courts, for the reason that they are open to the objection of uncertainty, which the law seeks to avoid, in reference to wills, by its strict provisions and precautions as to their execution and proof. Great strictness and clear proof are, therefore, required to establish such gifts, and they can only be upheld when the intention of the donor is clear and definite, and such intent is fully carried out by execution." See *Pars. Cont.* (6th Ed.) 2237; *Gano v. Fisk*, 43 Ohio St. 462, 3 N. E. 532; *Hatch v. Atkinson*, 56 Me. 324; *Marshall v. Berry*, 13 Allen, 43, note. In 8 Am. & Eng. Enc. Law (1st Ed.), at page 1348, under note 1, it is said: "Gifts causa mortis have the nature of a legacy, and the policy of our law does not favor them while there is provision, by the statute of wills and the law of descent, for the transmission of all property rights." Under the facts pleaded in this paragraph of complaint, it is sufficiently clear that at least two of the prerequisites necessary to constitute a gift causa mortis were present: (1) Impending death from present ailment, and (2) that the donor died of that ailment. The controlling and difficult question, to our minds, is the third prerequisite, and our conclusion must rest upon whether or not the facts constitute or show a valid delivery of the property donated. It is the recognized law, in all cases of this character, that, to complete a gift and make it valid, there must be a delivery of the property given. It sufficiently appears that there was no delivery directly to the donee, for it is shown that he was not present when the gift was made. But the weight of modern authorities holds that delivery to a third person for the benefit of the donee is sufficient, where there is an actual change of possession, and, although the donor dies before the third person delivers the property to the donee, the gift may be enforced. *Michener v. Dale*, 23 Pa. St. 59; *Jones v. Deyer*, 16 Ala. 221; *Dresser v. Dresser*, 46 Me. 48; *Dole v. Lincoln*, 31 Me. 422; *Sessions v. Moseley*, 4 Cush. 87; *Conner v. Root*, 11 Colo. 183, 17 Pac. 773; *Borneman v. Sidlinger*, 15 Me. 429. The most recent and exhaustive discussion of the question we are now considering we find in *Devol v. Dye*, 123 Ind. 321, 24 N. E. 246. From the special findings in that case, it appears that one William J. Devol died intestate, leaving a large estate, and leaving one brother and the descendants of three deceased brothers as his only heirs. He had been in ill health for a long time prior to his death. He was president of a bank, and kept a tin box in the vault, in which he kept money and other valuables. The drawer in which he kept the box, and the box itself, were kept locked, and no one had ac-

cess to them, but himself. He went South for his health, and before going he intrusted his key to this box and private drawer to the cashier of the bank, and these remained in the custody of the cashier until after the testator's death. Soon after his return from the South, he sent for Mr. Lane, the cashier, and declared to him that it had always been his purpose to give to one Pressly G. Dye, his cousin, \$5,000, either in cash or bank stock; that he had put \$2,000 in gold in a sack, and marked the name "Dye" upon it, and left it in the tin box. He then directed the cashier to go to the bank and count out \$3,000 more in gold coin, and put it in a sack and mark it as the other was marked, and that he should also count out \$1,000 in currency, and place it in an envelope for a Mrs. Nickerson, and put her name upon it. He then directed the cashier, in case of his death, that the sacks and package be delivered to the parties indicated by the writing thereon. These directions were carried out by the cashier, who retained the keys to the box and drawer, and the testator died in two or three days after he gave the directions just specified. The supreme court, by Mitchell, C. J., said: "A gift causa mortis is consummated when a person, in peril of death and under an existing disorder, delivers or causes to be delivered to another, or affords the means of obtaining possession of, any personal goods, for his own use, upon the express or implied condition that, in case the donor should be delivered from the peril of death, the gift shall be defeated. * * * The occurrence of three things is essential to the consummation of a gift causa mortis: (1) The thing given must have been of the personal goods of the donor; (2) it must have been given when the latter was in peril of death, or while he was under apprehension of impending dissolution from an existing malady; and (3) the possession of the thing given must have been actually or constructively delivered to the donee, or to some one for his own use, with the intention that the title should then vest conditionally upon the death of the donor, leaving sufficient assets in addition to pay his debts. A mere unexecuted purpose, however clearly or forcibly expressed, so long as it rests merely in intention, is not effectual. The intention must not only have been manifested, but, in addition, in order to consummate the gift, the donor must have transferred the possession of the thing to the donee in person, or to some other for his use, under such circumstances as that the person to whom delivery is made is thenceforth affected with a trust or duty in the donee's behalf;" citing *Smith v. Ferguson*, supra; 21 Am. Law Rev. 732; 19 Cent. Law J. 222; *Walsh's Appeal*, 122 Pa. St. 177, 15 Atl. 470. Continuing, the learned judge said: "It is well settled, however, that the delivery need not be made to the donee personally, but may be made to another as his agent or trustee. A delivery

thus made is as effectual as though it had been made directly to the donee. Thus, in *Milroy v. Lord*, 4 De Gex, F. & J. 264, Lord Chief Justice Turner said: "I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done something which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purpose of the settlement, or declares that he himself holds it in trust for those purposes; and, if the property be personal, the trust may, as I apprehend, be declared either in writing or parol." In the case from which we have just been quoting, it was held that as it appeared from the facts found that it was clearly the intention of the donor to make the gifts indicated, and that he had relinquished the keys to his private drawer and tin box to the cashier of the bank, thereby effectually surrendering, so far as could be, all dominion over the property, and affording to the donees the means of obtaining possession of it, it was a valid gift *causa mortis*, and should be upheld. The learned chief justice, in concluding his discussion, said: "Without pausing to review the authorities, it is sufficient to say that where property is delivered to a third person, for the use of another, as a gift *causa mortis*, and its delivery is accompanied by a written declaration clearly indicating that it is delivered for the use, or upon a trust for an intended donee, or where a deathbed delivery is made in the presence of witnesses who are disinterested, and called for the purpose, the intention of the donor should not be permitted to fail by a narrow and illiberal construction, in case a delivery corresponding with the condition of the donor and the situation of the property was actually made." *Williams v. Gulle*, 117 N. Y. 343, 22 N. E. 1071; 2 Schouler, Pers. Prop. § 179; *Ellis v. Secor*, 31 Mich. 185. In *Wyble v. McPheters*, 52 Ind. 393. Andrew A. McPheters delivered to William M. McPheters some money and bonds, with direction to deliver the same to appellants and one Allie upon the death of the said Andrew. The court, by Worden, J., said: "It is claimed by the appellees that each paragraph of the complaint was bad, because there was no complete delivery of the money and bonds, and, therefore, the gift cannot be sustained as a gift *inter vivos* or *causa mortis*. We, however, are of a different opinion. It appears in the first paragraph that the money and bonds were, in the lifetime of Andrew A. McPheters, by him delivered to the defendant William M. McPheters, with directions to de-

liver the same to the plaintiffs and said Allie, deceased, upon the death of the said Andrew A., and that said William received the same, and agreed to execute the trust reposed in him. There was a sufficient delivery to constitute a valid gift *inter vivos*. The delivery to William M. McPheters was absolute, unconditional. The subject of the gift was to be unconditionally delivered by him to plaintiffs and said Allie upon the death of Andrew A.,—an event which at some time must have taken place. The latter delivery was to depend upon no condition. The time thereof only was uncertain. The second paragraph was equally good. The transaction created the relation of trustee and beneficiaries between William M. McPheters and the plaintiffs. See *Miller v. Billingsly*, 41 Ind. 489. A delivery to a trustee for the use of the party to be benefited is as effectual as a delivery to the party himself," etc.

Under the authorities the second paragraph of the complaint was good as against a demurrer for want of facts. The transaction between Mary and Daniel Caylor relative to the disposition of her property created a trust, with the latter as trustee, and appellant as the cestui que trust. The facts pleaded show a gift *causa mortis*. It is evident from the facts that it was the intention of Mary to bestow her entire estate upon appellant. He was the object of her bounty, and was to be the recipient of her generosity. While it is true the notes and personal property described in the complaint were at the time of the gift in the possession of Daniel, and no change of possession was made, yet we cannot see that this fact vitiates the gift. It would, it seems to us, have been an idle and useless ceremony, at the time of the gift, for Daniel to have delivered to Mary the possession of the property bestowed, and she in turn to have immediately redelivered the same to him for the use and benefit of appellant. The law does not deal in trifles, nor require the doing of unnecessary things. Suppose the gift had been made to Daniel himself; it certainly could not be contended with any show of reason that, to constitute a delivery to him while the property was in his possession, it would have been necessary for him to have turned it over to Mary, and for her to then have made a manual delivery to him. *Tenbrook v. Brown*, 17 Ind. 410, seems to be decisive of the question we are discussing. There appellee claimed certain property as having been given to him by his father, and at and before the time of the gift the property was in the possession of the donee. The court said: "Now, it seems clear enough that if the property in question was in the possession of the defendant, as agent or manager for his father, at the time of the gift, still his father might execute to him a valid gift of the property while in his possession. The law clearly would not require, in such case, that he should first surrender his actual possession to his

father, in order that his father might redeliver the property to him in the execution of the gift. It would seem in such case the gift would be complete, if the father bestowed the property upon the defendant, and relinquished all dominion and control over it, and recognized the defendant's possession thereof as being in his own right," etc. Here Mary Caylor relinquished all dominion and control over the property, and intrusted it to Daniel Caylor, to be by him delivered to appellant. While every case must be brought within the general rule that, to constitute a valid gift *causa mortis*, there must be a delivery of the property or the thing given to the donee, or to a third person for his use and benefit, yet, as the circumstances under which such gifts are made must of necessity be varied and infinite, the courts must determine each case upon its own peculiar facts and circumstances. *Devol v. Dye*, *supra*; *Dickeschled v. Bank*, *supra*; *Kiff v. Weaver*, 94 N. C. 274.

In the case before us every essential element to a valid gift *donatio causa mortis* is present, from the averments of the second paragraph of complaint, and our conclusion is that the facts pleaded show such a gift. In reaching this conclusion, we do not wish to be understood as holding that there was a valid gift of the real estate described; for, as we have seen, gifts of this character apply only to personal property, and title to real estate cannot thus pass. But, as Daniel Caylor has conveyed the real estate to appellant, that question is eliminated from the case, and can have no weight in its decision. The second paragraph of the complaint being sufficient, it was error to sustain the demurrer. The judgment is reversed, and the court below is directed to overrule the demurrer to the second paragraph of complaint.

(21 Ind. App. 373)

ALBERTS et al. v. BAKER.

(Appellate Court of Indiana. Jan. 6, 1890.)

APPEAL AND ERROR — SPECIAL VERDICT — HARMLESS ERROR — GARNISHMENT — JUDGMENT — FRAUD — QUESTION OF FACT.

1. Assignment of errors on rulings as to pleadings need not be considered where the question urged arises on a special verdict.

2. Plaintiffs sought a recovery for certain shingles sold to defendant, who answered, setting up a garnishment. Plaintiff demurred, and assigned as error the overruling of his demurrer to the answer. Overruling the demurrer did not prevent plaintiff from proving material allegations of complaint. The special verdict on the issues presented by plaintiff was for defendant. *Held*, that the ruling on the demurrer, if error, was harmless.

3. Where a garnishee responds to the summons, and makes oral answer, admitting an indebtedness to the debtor, the court acquires such jurisdiction of his person as entitles it to render a valid judgment against him.

4. In the absence of fraud, a judgment rendered against a garnishee will protect him from demands of creditors claiming the same debt.

5. Where a special verdict finds many facts which are badges of fraud, but does not find the ultimate fact of fraud, the court cannot

supply the omission and find fraud, since fraud is a question of fact, and cannot be inferred as a matter of law.

Appeal from circuit court, Huntington county; C. W. Watkins, Judge.

Action by Frank Alberts and others against Ananias Baker. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Whitelock & Cook and I. Conner, for appellants. Holman & Stephenson and Kenner & Lesh, for appellee.

HENLEY, J. This cause is here for the second time. The opinion upon the former appeal is found in 13 Ind. App. 400, 40 N. E. 1119. This action was brought by appellants against the appellee to recover the price of five car loads of shingles. The complaint is in four paragraphs. The first two paragraphs of the complaint proceed upon the theory that the shingles were sold to appellee by one E. B. Newton, who assigned his said account to these appellants. The third paragraph of complaint alleges a sale and delivery to appellee of five car loads of shingles by appellants. The fourth paragraph of complaint alleges that appellee is indebted to appellants for five car loads of shingles furnished to appellee by appellants, which shingles appellee accepted and used. Appellee answered in two paragraphs,—the first a general denial, the second setting up certain attachment and garnishment proceedings in the Fulton circuit court. The averments of this answer present a history of the transaction, and are, in substance, as follows: That in the month of August, one Shrive, claiming to be a representative of E. B. Newton & Co., a firm or partnership composed of Edward B. Newton and Gertrude Newton, solicited an order for shingles from this appellee; that appellee at said time ordered from said firm seven car loads of shingles, which order was filled by a shipment to appellee of the five car loads of shingles which are referred to in each paragraph of the plaintiffs' complaint, and which shingles were billed to appellee by said E. B. Newton & Co.; that appellee's indebtedness for said shingles, after deducting the freight and discounts, amounted to the sum of \$939.34; that on the 21st day of September, 1891, Robert K. and William H. Mann filed in the Fulton circuit court in Indiana a complaint against Gertrude Newton and Edward B. Newton on an account and certain acceptances, on which judgment was demanded in the sum of \$1,300, and at the same time said Robert K. and William H. Mann filed their affidavit and bond in attachment and an affidavit in garnishment against the appellee herein, and summons was duly served upon appellee to answer as garnishee on the 10th day of September, 1891; that on the 21st day of September, 1891, a writ of attachment was duly issued by the clerk of the circuit court of Fulton county to the sheriff of said county, commanding him to seize and take into his

possession the personal property and attach the land of the defendants Gertrude Newton and Edward B. Newton in his county, and not exempt from execution, or so much thereof as would satisfy the claim of the plaintiffs in the action. The answer then fully sets out all of the proceedings in the Fulton circuit court in said cause, including the return of the sheriff upon the writ of attachment, the affidavit of nonresidence of the said Newtons, the publication and proof thereof, the default of the said Newtons, and the following finding and decree: "That it is therefore ordered and adjudged by the court that the plaintiffs, Robert K. Mann and William H. Mann, have their attachment against defendants, Gertrude Newton and Edward B. Newton, in the sum of \$1,294.47, collectible, and subject to appraisalment." It is then further averred in said answer that appellee, pursuant to notice duly served upon him, appeared in open court in person upon the issue raised by the affidavit in garnishment, and testified in said cause concerning his indebtedness for said shingles, whereupon said court rendered judgment against appellee in the sum of \$934.44, which was his entire indebtedness for said shingles, which said judgment was never appealed from, vacated, modified, or in any way set aside, and which, after its said rendition, the appellee herein fully paid. The answer concludes with the further general allegation: "And as to all allegations in the several paragraphs of complaint the defendant denies each and every material allegation therein contained." Appellants' demurrer to the second paragraph of answer was overruled. A reply was filed in two paragraphs. The first paragraph of appellants' reply was a general denial. The second paragraph alleged, in brief, that appellee knew that appellants were furnishing the shingles, and knew that the debt for the same belonged to them, and that he was in collusion with the said Manns, the plaintiffs in the attachment suit against the said Newtons, to aid them in getting the money, and that the payment of the said money into court by appellee as garnishee was voluntary. The cause was submitted to a jury for trial, and a special verdict returned by way of interrogatories and answers thereto. Both parties moved for judgment upon the special verdict. Appellee's motion was sustained; that of appellants overruled. The assignment of errors in this court questions the ruling of the lower court in overruling the demurrer to the second paragraph of answer, the overruling of appellants' motion, and the sustaining of appellee's motion for judgment upon the special verdict. We will dispose of the questions arising upon the alleged errors in the order in which they are assigned.

First as to the sufficiency of the answer. It has been held by the supreme court of this state in the recent case of *Forge v. Harvey*, 51 N. E. 1063, that errors assigned on rulings

as to the pleadings need not be considered where the questions urged arise on a special verdict. See, also, *Smith v. Manufacturing Co.*, 148 Ind. 333, 46 N. E. 1000; *Woodward v. Mitchell*, 140 Ind. 406, 39 N. E. 437; *Willmore v. Stetler*, 137 Ind. 127, 34 N. E. 357, and 36 N. E. 856. The special verdict in this cause fully determines all the questions arising upon this appeal. The overruling of the demurrer to the second paragraph of answer did not prevent appellants from proving the material allegations of their third and fourth paragraphs of complaint, but the special verdict shows that upon the issues presented by such paragraphs there was a finding for appellee; hence appellants were not harmed by such ruling. It is not contended that the answer is bad as to the first and second paragraphs of complaint. It is found by the special verdict that during the month of August, 1891, one David M. Shrieve, representing Edward B. Newton & Co., took appellee's order for seven car loads of shingles, and that five car loads of said order were filled by shipment to appellee; that the debt created by said purchase is the account sued on in this action, and was assigned in writing by said Newton & Co. to these appellants on the 21st day of October, 1891; that on the 21st day of September, 1891, said debt being still unpaid, a complaint was filed in the Fulton circuit court of the state of Indiana against the said Newtons by Robert K. Mann and William H. Mann, and in said action the appellee herein was made a garnishee defendant, and summons was duly served upon him as such defendant on the 21st day of September, 1891; that on said last-named date the said Manns filed with their said complaint an affidavit in attachment and garnishment on the ground that the said Newtons were nonresidents, and at the same time filed an affidavit alleging the nonresidence of said Newtons in the state of Indiana; that publication was ordered, and notice of nonresidence published in the *Rochester Republican*, a paper of general circulation in said Fulton county, and printed in the English language; that the writ of attachment was, on said 21st day of September, 1891, duly issued, and placed in the hands of the sheriff of said county, and the same was returned on the 20th day of November, 1891, indorsed. "No property found in my county;" that the said nonresidence notice was published for four weeks, said publication ending on the 15th day of October, 1891, and proof thereof was duly made by the affidavit of the publisher on the 20th day of November, 1891; that by said notice said Newtons were required to appear in the Fulton circuit court on the first day of the November term, 1891, of said court, which began on the third Monday of November, 1891, and that the 20th day of November, 1891, was the fifth day of said term of court; that said Newtons did not appear, and were defaulted; that appellee appeared in open court on November 20, 1891, and testified as to his indebtedness for said shingles; that the

Fulton circuit court found in favor of said Manns in said attachment proceedings, and rendered judgment accordingly, and also found that said Newtons were indebted to the said Manns in the sum of \$1,394.47, and a finding and judgment against the appellee herein as garnishee defendant in the sum of \$934.94, which judgment appellee has paid; that on the 16th day of November, 1891, the appellee gave appellants notice by letter that he had been "garnished on the shingles bought of E. B. Newton & Co."; that Rochester, Ind., is 160 miles from Muskegon, Mich., and there are direct mail communications between said points, and that Grand Rapids, Mich., is about 140 miles from Rochester, Ind.; that the order for shingles given by said appellee to said Shrieve, the representative of E. B. Newton & Co., was received by appellants, and in pursuance of said order appellants shipped to said appellee during the month of September, 1891, five car loads of shingles, the contract price of which, after deducting freights, amounted to \$939.94, which shingles the appellee received and accepted, said appellants charging the price of the said shingles on their books to appellee; that when the first shipment of shingles arrived they were billed and invoiced from appellants to appellee, whereupon appellee asked appellants to change the shipping bills and invoices from the names of appellants to the name of E. B. Newton & Co., and thereupon appellants recalled their shipping bills and invoices, and changed them all to the name as requested by appellee, and after the change was so made by appellants at appellee's request the said E. B. Newton assigned and transferred to these appellants the account for the shingles shipped to the appellee; that said appellee has never paid appellants for the said shingles; that the said Gertrude Newton, while she was a member of the firm of E. B. Newton & Co., became indebted in the sum of \$1,300 to Robert E. and William H. Mann, who were lumber dealers residing at Muskegon, Mich., and who did, on the 21st day of September, 1891, go to the home of appellee at Rochester, Ind., and commence an action in attachment and garnishment against said Gertrude Newton and Edward B. Newton, and caused said appellee to be summoned as a garnishee defendant; that appellee knew of the commencement of said action, and assisted in obtaining a person to become surety on the attachment bond. It is also found that at the time appellee requested appellants to change the bills for the shingles it was his intention to aid said Mann & Mann in their attachment suit, and that appellants did not know of appellee's intention, and were misled thereby. If the appellee responded to the summons served upon him as garnishee, and made oral answer admitting an indebtedness to the defendant in the attachment proceedings, the court acquired such jurisdiction of his person as enabled it to render a valid judgment against him (*Dooly v. Miles* [Ga.] 29 S. E. 118); and, in the absence of fraud, the

judgment so rendered will protect appellee from the demands of appellants claiming the same debt. The question, then, arises, does the special verdict in this cause find fraud upon the part of appellee? It is true, the special verdict finds many facts which are badges of fraud, but nowhere is the ultimate fact of fraud or collusion found. Fraud is a question of fact, and cannot be presumed or inferred as a matter of law. *Rose v. Colter*, 76 Ind. 590; *Stix v. Sadler*, 109 Ind. 254, 9 N. E. 905; *Bartholomew v. Pierson*, 112 Ind. 430, 14 N. E. 249; *Phelps v. Smith*, 116 Ind. 392, 17 N. E. 602, and 19 N. E. 156. In the case of *Phelps v. Smith*, supra, the supreme court, speaking by Elliott, J., said of this question: "By our statute the question of fraud is made one of fact, and, where fraud is essential to the existence of a cause of action, it must be found as a fact, and not left to be inferred as a matter of law. The court may doubtless give to facts their legal effect; but where, as here, the case is presented upon a special finding, it cannot add a new and substantive fact to those stated by the trial court." This court must take the ultimate facts as found by the jury, and cannot draw conclusions or inferences of fact from them. We think the lower court properly overruled appellants' motion for judgment upon the special verdict. Judgment affirmed.

(21 Ind. App. 361)

INDIANA PIPE-LINE & REFINING CO. v. NEUSBAUM.

(Appellate Court of Indiana. Jan. 5, 1899.)

MASTER AND SERVANT—LIABILITY FOR INJURIES TO SERVANT—SPECIAL VERDICT—CONTRIBUTORY NEGLIGENCE—FELLOW SERVANT—INSTRUCTIONS.

1. Where a servant, on being on a dark night directed by the master to go to a neighboring town over a field out of which there was no road, took a direct route across the field, and fell into an unprotected well in the field, dug thereon by the master, the master was liable, without proof that he had directed the servant to take that route, or that he knew that he had taken it.

2. In an action by a servant to recover for injuries received while crossing a field under the master's direction, a general verdict for the servant is not superseded by a special finding that the servant, by going at an angle, would have avoided the hole into which he fell; that the hole was newly made, and, before going to it, he first had to cross the dirt taken out of the hole; that at the time he was looking at a light in a distant house eight feet higher than the ground; and that there was no public or private way leading to the hole,—since, under *Horner's Rev. St. 1897*, § 546, the servant was not required to submit special interrogatories eliciting all pertinent facts, and under the general issue he could show that he did not know of a safe way of crossing the field, or that he was directed by the master to take the route which he did take, or told that it was safe, and that the night was dark, and the hole, which was unknown to him, could not be seen; thereby avoiding an irreconcilable conflict between the general and special verdicts.

3. A master who lodged 50 people in a tent in a field, and dug a deep hole 91 feet from the tent, which he left unprotected, without warn-

ing the servants thereof, is guilty of negligence.

4. A master, on a dark night, directed a servant, for whom he was obliged to provide lodging, to go to a neighboring town therefor, out of a field, out of which there was no road, and the servant took a route direct towards the town, being guided by a light in the distance, which route was different from the one by which he had come, and in crossing the field he was injured by falling into an unprotected hole, dug there by the master and unknown to the servant. Dirt taken out of the hole was scattered about it for about 12 feet, and to a height of 3 feet, but it was no softer than the surface of the field. *Held*, that the question of contributory negligence was for the jury.

5. The injury was received by the servant in the course of his employment.

6. A servant engaged in putting up a telegraph line is not a fellow servant of one who digs a hole 15 feet wide and 15 feet deep in a field belonging to the master.

7. In an action by a servant to recover for injuries received while crossing a field at his master's direction, an instruction that if he was not given any direction as to the route, and if he did not take the one used by him when coming into it, but chose another, with which he was unfamiliar, he could not recover, is erroneous, as taking from the jury the question of contributory negligence as a fact.

Appeal from circuit court, Wells county; E. C. Vaughn, Judge.

Action by William Neusbaum against the Indiana Pipe-Line & Refining Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Dalley, Simmons & Dalley, for appellant. Mock & Sons, for appellee.

COMSTOCK, J. The issues in this cause on which the trial was had were formed on the second paragraph of complaint and the answer in general denial thereto. The jury returned a general verdict in favor of the appellee, assessing his damages at \$363. and with the general verdict returned answers to interrogatories. The court rendered judgment in favor of appellee for the amount named in the verdict.

The specifications of the assignment of errors discussed are those numbered 1, 2, 3, 4. and 5. The first and second question the sufficiency of the second paragraph of complaint. The third and fourth challenge the action of the court in overruling appellant's motion for judgment on the answers, to interrogatories, notwithstanding the general verdict. The fifth, the action of the court in overruling appellant's motion for a new trial. The second paragraph of complaint avers that the defendant is a corporation engaged in putting up a telegraph line from Domestic, Ind., to a point near Momence, Ill., and for that purpose employed defendant and some 50 other men, and boarded and lodged said employes in a tent; that the tent was pitched at many places along said line, and near many towns; that on said 28th day of October, 1896, the defendant pitched said tent on its own premises, within one-fourth mile of, and east of, the town of Ora, in Stark county, Ind.; that on said day said employes

worked southeast of said place where said tent was pitched, and did not reach said tent until dark; that plaintiff had never been on said premises before said time, and had never been in the said town of Ora; that there was no road, path, or traveled way from said tent to said town of Ora, but said tent was placed in the field of the defendant; that on said day defendant dug a hole in said field 15 feet wide and 15 feet deep, between the said tent and said town of Ora, and negligently, carelessly, and wrongfully left the same uncovered, without light, and wholly unguarded, well knowing that said employes would visit said town of Ora on said night, and pass over said field in going to said town, and were liable to fall into said hole and become injured; that said night was very dark, and said hole could not be seen without light; that on said night there was no lodging room in said tent for plaintiff, and defendant prepared lodging for plaintiff on said night at said town of Ora; that on said night, after the plaintiff had taken supper in said tent, he was directed by defendant to go to said town of Ora for lodging, and, while it was very dark, as aforesaid, plaintiff started across said field on the direct route to said town of Ora, and without any negligence or fault of plaintiff, but owing to the negligence of the defendant in leaving said hole uncovered, without light or guards, the plaintiff fell into said hole on his head and shoulders, thereby wrenching his back, shoulders, and arms, and breaking his fingers, and bruising his face, hands, and body, and permanently injuring his hands and fingers; that plaintiff received said injuries without any fault, carelessness, or negligence on his part, and he had no knowledge whatever of the existence of said hole, or its dangerous condition, before he fell into the same; that, by reason of said wrongs and injuries aforesaid, plaintiff has been, and is, damaged in the sum of \$5,000. Wherefore, etc.

Appellant's counsel point out as defects in the foregoing paragraph that it does not allege that appellant directed appellee to take the route he took when he started for Ora, or that appellant knew he had gone or intended to go in the direction taken; the only averment connecting appellant with the trip to Ora being in this language: "He was directed by defendant to go to said town of Ora for lodging." Appellant's learned counsel insist that this allegation is not sufficient without the further averment that he was directed by appellant "to go to Ora across said field, and without any fault or negligence of plaintiff, but owing to the negligence of the defendant, and fell into said hole." By reference to this paragraph, it will be seen that it avers that the tent was pitched in the field of appellant; that there was no road, path, or traveled way from said tent to the town of Ora; and that appellee started across said field in the direct route to said town of Ora. We think this averment makes the

complaint sufficient to withstand a demurrer.

The third and fourth specifications of errors present the same question,—the action of the court in overruling appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict. It appears from answers to interrogatories that the well or hole into which appellee fell was located at a point about 91 feet north of the northwest corner of the tent mentioned in the complaint, and about 150 feet east of the west line of appellant's real estate; that there was a public highway on the north end of said tract, extending due west from the northwest corner thereof, a distance of 1,150 feet, to the town of Ora; that there was a private roadway belonging to appellant extending due south from the northwest corner of said appellant's land, along the west line thereof and beyond a point opposite said tent; that the northwest corner of the tent was about 475 feet south and 150 feet east of the northwest corner of said real estate. The surface of the ground was comparatively level immediately west of the tent to the driveway, as was the ground from the point where said well was located to a point 75 feet north thereof. The hole into which appellee fell was 10 or 12 feet in depth and in diameter. It was dug on the day of the alleged injury by the servants of appellant, without the knowledge of appellee. The sand and dirt thrown out of said hole were cast upon the ground immediately around it, and extending from its side to 12 or 15 feet. Appellant walked into the hole from the south side. When he came in contact with the dirt thrown out of said hole he did not stop to ascertain if there was any danger. There was no public or private roadway leading from the tent on appellant's premises to said hole at the time of the accident. Appellee could have passed out of the west door of the tent a distance of 150 feet to said private roadway of appellant, then north 475 feet to said public highway, and then west 1,150 feet to the town of Ora. There were no obstructions in the way of his so passing. At the time he fell into the hole appellee was looking at a light in a window of a house on a hill eight feet higher than the ground around the tent, situate on the northwest corner of said real estate, near the public highway. Appellant had 51 men in its employ at that place engaged in the construction of the telegraph line, and 2 women engaged as cooks. On the night in question, 10 men and the 2 women took lodging outside of the tent. There were sleeping accommodations in the tent said night for 48 persons. It is on the foregoing facts, found in answer to interrogatories, that appellant asked for judgment notwithstanding the general verdict.

As has been said by the supreme and this court, special findings in answer to interrogatories cannot override the general verdict unless they irreconcilably conflict with it. Special findings are not aided by any pre-

sumption, but all reasonable presumptions are indulged to sustain the general verdict. As said in *City of Ft. Wayne v. Patterson*, 3 Ind. App. 38, 29 N. E. 167: "In determining whether there is such a conflict, the evidence actually introduced will not be examined; and if, taking all the special findings together and adding to them any other facts that might have been proved under the issues, an irreconcilable conflict with the general verdict can be avoided, the answers to interrogatories will not be allowed to control." See, also, *Cook v. Howe*, 77 Ind. 442; *Davis v. Reamer*, 105 Ind. 318, 4 N. E. 857; *Pennsylvania Co. v. Smith*, 98 Ind. 42; *City of Huntington v. Burke* (Ind. App.) 52 N. E. 415; *Sponhaur v. Malloy*, Id. 245. The general verdict finds negligence on the part of appellant, and freedom from negligence on the part of appellee contributing to his injury. Under the acts of 1897 (*Horner's Rev. St. 1897*, § 546), under which act the verdict in this case was returned, a party is not required to prepare interrogatories to elicit all the facts pertinent to the issue. Under the issues, other facts might have been shown consistent with the general verdict, to wit: That appellee did not know of the safe private way on appellant's ground, or that he was directed by appellant's agent to take the route he selected, or was told that route was free from obstructions; that the night was dark; that the hole could not be seen; that he had no knowledge of its existence. With such additional facts found, an irreconcilable conflict between the facts found and the general verdict might have been avoided. Appellant's motion for judgment was properly overruled.

The fifth and last specification of the assignment of errors is the overruling of appellant's motion for a new trial. Two of the grounds stated and discussed in said motion are that the verdict of the jury is not sustained by sufficient evidence; that the verdict is contrary to the evidence. The evidence is in the record. It appears from the evidence that appellee came from Ora to the tent the evening of the accident, coming east from Ora along the public highway, to the northwest corner of appellant's ground; then south, along its private way, to a point west of the tent; and then directly across appellant's land, to the tent. He reached the tent at 6 or 7 o'clock, and found his supper ready, and ate it. An agent of appellant, having authority to arrange for the lodging of appellant's employés, then told him to go to Ora and find a bed. In a few minutes thereafter he and one Montgomery (who did not testify) started directly north for Ora, and he walked right into the hole, from the south side thereof. He discovered before he got into the hole that there was a bank of dirt on which he was walking, but did not stop when his foot came in contact with it to investigate, but walked right on. If he had gone by the way he came from Ora, he would

not have gone near the hole. The private way over appellant's land along which appellee traveled in coming to the tent was fenced. When he started to return to Ora, the evidence does not show that he attempted or intended to return by the same route by which he had come. The evidence shows that he was not directed to take any particular course. Appellee had no knowledge of the existence of the hole. The tent was pitched in a cornfield, the soil of which was sandy. The sand thrown out of the well was about as soft as that on the surface of the field. It was spread around the well a distance of 12 or 15 feet. Its greatest height was 3 feet. It was hard walking in the sand. The well was right between the tent and a light in a house at the northwest corner of appellant's land, near the public highway leading to Ora. The appellee had seen the house as he was going to the tent. The light in the house, towards which he was walking and by which he was guiding his steps, was 309 feet from the well, and about 8 feet higher than the surface of the ground at the tent. It could be seen from the tent. The grade was gradual. The way by which appellee came to the tent over the 150 feet of the field was that made by teams hauling in the tent and camp equipage. In our opinion, it was negligence for appellant to leave the well unguarded, which it had dug on its premises within 91 feet of a tent within the same inclosure in which it lodged and fed 50 people. Whether appellee, in attempting to go to Ora by the route he took and when he walked into the well, was proceeding with the caution of an ordinarily prudent person under like circumstances (under the rule laid down in numerous approved decisions, viz. where there is room for difference of opinion as to the inferences which may be fairly drawn from the conceded facts, the question of negligence must be submitted to the jury), this was properly submitted to the jury, and answered in the general verdict in favor of appellee. *Railway Co. v. Grames*, 136 Ind. 39, 34 N. E. 714; *Railway Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. 1106; *Board v. Bonebrake*, 146 Ind. 311, 45 N. E. 470; *Railroad Co. v. Williams* (Ind. App.) 51 N. E. 128; *Hopkins v. Boyd*, 18 Ind. App. 63, 47 N. E. 490; *Oooley, Torts* (12th Ed.) p. 805; *Railroad Co. v. Stout*, 17 Wall. 657; *Railroad Co. v. Collarn*, 73 Ind. 261; *Railroad Co. v. Locke*, 112 Ind. 404, 14 N. E. 391; *Railroad Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31.

Appellee was properly in the course of his employment when he received his injury. He had no knowledge of the dangerous place which had been left unguarded by his employer. It was so dark that it was not visible without a light. Ordinary caution required the appellant in some way to put upon their guard its employes, who lodged within a short distance, and were liable to walk into it if not informed of its existence. The same general direction had been followed by

others going to Ora, but who fortunately, either through prior knowledge of the existence of the well or good fortune, kept out of it.

It is the duty of the master to keep his premises in a reasonably safe condition for those who are rightfully there. While the hole was dug by employes of appellee's employer, they were not engaged in the same kind of work and were not co-operating with him in the line in which he was engaged. The doctrine of the negligence of a co-employee does not apply. Appellant's learned counsel lay stress upon what they claim the fact to be, that appellant furnished a safe way to Ora, and that appellee was guilty of contributory negligence when he departed from it; but, as appears from the evidence, there was no way from the tent to the private way, except that made by the teams which had hauled the tent and equipage. In this connection we cite *Railroad Co. v. Adams*, 105 Ind. 152, 5 N. E. 187; *Railroad Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, and 17 N. E. 584; *Lumber Co. v. Ligas* (Ill. Sup.) 50 N. E. 225; *Coal Co. v. Greenwood* (Ind. Sup.) Id. 36; *Lauter v. Duckworth* (Ind. App.) 48 N. E. 864; *Railroad Co. v. Amos* (Ind. App.) 49 N. E. 854; *Binford v. Johnston*, 82 Ind. 426; *Busw. Pers. Inj.* p. 98; *Railroad Co. v. Adair*, 12 Ind. App. 584, 39 N. E. 672, and 40 N. E. 822; *Railroad Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121; *Barnman v. Spencer* (Ind. Sup.) 49 N. E. 9; *Hawkins v. Johnson*, 105 Ind. 29, 4 N. E. 172; *Coal Co. v. Shaw*, 16 Ind. App. 9, 44 N. E. 676.

Appellant's learned counsel complain of the refusal of the court to give instructions numbered 2 and 6, respectively, as requested, and the modification, and giving as modified, of instructions 7, 10, and 11, set out as reasons in the motion for a new trial. Instruction No. 2 is a correct statement of the law, but it is not applicable to the facts in the cause. It was drawn upon the theory that appellee was passing over appellant's land for his convenience and pleasure. The evidence does not warrant the assumption. He was in the employ of appellant, was to be fed and lodged, and was on his way to find lodging by a direct route at the time he received the injury, and was looking for lodging under the direction of appellant. There is some conflict in the evidence upon that point, but it was for the jury to reconcile such conflict. Instruction 6 was to the effect that if on the night in question appellee was not given any direction as to the way to take to Ora, and that if he did not return to the town of Ora over the route traveled by him when he came to said tent, but chose another way, with which he was not familiar, in which he fell into the well, mentioned in the complaint, he could not recover. This instruction would have taken from the jury the consideration of the question of contributory negligence as a fact,—a question which was

properly submitted to the jury. Instructions 7, 10, and 11, requested by appellant, were open to the same objection. Given as modified, they correctly stated the law.

A careful examination of the whole record leads to the conclusion that the cause was fairly tried and a correct result reached. Judgment affirmed.

(177 Ill. 324)

SUGAR CREEK COAL-MIN. CO. v. PETERSON.

(Supreme Court of Illinois. Dec. 21, 1898.)

APPEAL — REVIEW — SUFFICIENCY OF EVIDENCE — INJURY TO EMPLOYE — DANGEROUS PREMISES — KNOWLEDGE OF MASTER — INSTRUCTIONS — EVIDENCE — CONTRIBUTORY NEGLIGENCE.

1. The question of insufficiency of evidence to support a verdict cannot be considered on appeal, where not raised at the trial.

2. In an action for personal injury caused by coal falling from the roof of defendant's mine while plaintiff was working therein, the latter cannot show, for the purpose of showing defendant had notice of the dangerous condition of the roof, that previously, at another place in the roof, and under different conditions, coal had fallen.

3. In an action for personal injury caused by coal falling from the roof of defendant's mine while plaintiff was employed therein, an instruction assuming as a fact that the roof was in dangerous condition was erroneous, where plaintiff's own testimony was that he tested the roof, and, being unable to loosen the coal, regarded it as safe to go to work under.

4. In an action for personal injury caused by coal falling from the roof of defendant's mine while plaintiff was employed therein, plaintiff showed that he had requested defendant to furnish props, and that, when furnished, they were too long, and that during the delay in having them sawed the injury occurred. The height of the roof differed in different parts of the room. *Held*, that the failure to furnish props of exact length was no ground for recovery, in the absence of evidence that plaintiff requested them to be of a particular length.

5. In an action for personal injury caused by coal falling from the roof of defendant's mine wherein plaintiff was working, the evidence was that props were furnished at plaintiff's request, and that they were too long; but it was not shown that plaintiff had specified the length. During the delay in having them sawed, the injury occurred. *Held*, that it was error to submit to the jury the question whether defendant "willfully neglected or failed to furnish such props."

6. Where an employé of a mine is injured by falling roof, his own negligence contributing to the injury, he cannot recover from his employer unless the latter was guilty of willful neglect, or failure to furnish props when requested to do so.

Appeal from appellate court, Third district.

Action by Emanuel Peterson against Sugar Creek Coal-Mining Company. From a judgment for plaintiff, defendant appealed to the appellate court, where the judgment was affirmed. 75 Ill. App. 631. Defendant appeals. Reversed.

Conkling & Gout, for appellant. Patton, Hamilton & Patton, for appellee.

CARTWRIGHT, J. Appellee was injured by coal falling on him from the roof of a

room where he was at work in appellant's mine, and he recovered a judgment for \$2,500 against appellant for his damages, which judgment has been affirmed by the appellate court.

The first branch of the argument for a reversal of the judgment is devoted to the proposition that the verdict is unsupported by the evidence. This question was not raised at the trial by a motion to exclude the evidence, instruction to find the defendant not guilty, or otherwise, and it cannot receive attention here.

The next point made is that the court erred in admitting evidence of a previous fall of clods or roof at another place in the same room of the mine. According to the testimony of plaintiff, which was the most favorable statement of his claim presented to the jury, he was working in room 12 "second south" entry, where he had been for about three weeks. This room was about 30 feet wide, and had been worked back 25 feet from the mouth or entry when he commenced. He worked with a partner, or "buddy," as the partner was called, and changed partners while working there, and during the three weeks worked the room out 25 feet further, so that at the time of the accident it was 30 feet wide and 50 feet in length. For the last 15 feet plaintiff left the top layer, or ply, of coal, as it was called, about 5 or 6 inches thick. He had propped the rest of the roof where the coal was all taken out, but no props had been set under the part where the layer of coal was left overhead for a width of about 15 feet from the face of the coal. He asked for props, and a load was brought the afternoon before the accident. They were too long for the place where they were to be used, and it was necessary to saw them off so as to make them of the right length. He told the mule driver, Fred Wunderlich, who brought the load of props, that he wanted some sawed off, and the driver told him that his brother would be in after a while, and saw some. This brother, who was known as "Peanut" Wunderlich, was employed by defendant for that purpose. Plaintiff testified that the boy did not come, and the next morning he told the "straw boss" that he wanted some props sawed, and the boss said he would send some one right away. Plaintiff then examined the roof by thumping it with his pick under the layer of coal where he was going to work, and, to further satisfy himself whether it was loose, took his iron wedge, used to wedge coal down, and put it in, and struck it a few times with a sledge. He could not get his wedge into it, and had no effect towards parting the coal from the roof. Having made these tests, and thinking the roof safe, he went to work where they had fired a blast in the coal the evening before. He had been at work about 30 minutes when a part of this layer or ply of coal fell, causing the injury. It will be seen that the ground for recovery

presented to the jury by this evidence was that props which had been furnished plaintiff to prop up and secure the roof for his safety were too long for the place where they were to be used, and that there was such delay in sending some one to saw them off as constituted negligence. The evidence objected to was that something more than a week before this accident a place in the roof near the entry where the coal had all been taken out fell from the effect of a water pocket, which swelled and loosened it. Plaintiff was allowed to go into this matter with several witnesses to prove the fall, and that the place was propped afterwards, and made secure. It was not near the place of this accident, and under entirely different conditions, and nothing that was done or omitted at that time with respect to that place had any influence whatever in causing this accident, or producing any injury to the plaintiff, who suffered no harmful consequence whatever from it. The fact so proved was wholly immaterial to this controversy, and the only purpose or effect of the evidence would be to show to the jury that there had been some negligence on the part of the defendant at another time and place. The suggestion that the evidence was admissible to prove notice to defendant that props were needed at this time and place is without force. Conditions were different, and the roof was not the same. There was no question of notice in issue. It was not denied that plaintiff gave notice that props were needed, and the load was hauled in consequence of such notice. The evidence had no legitimate place in the case, and was certainly harmful to defendant.

The first three instructions offered by plaintiff and given by the court are as follows:

"The court instructs the jury that the operators of a coal mine must use all ordinary care to keep their workings in a reasonably good and safe condition; and if you believe, from the evidence, that the defendant had notice that the room in which the plaintiff was working was in an unsafe condition, and that the plaintiff requested of the defendant to deliver props of sufficient length and dimensions with the empty cars of the plaintiff, so that the plaintiff might at all times be able to properly secure the workings for his own safety, and that the defendant promised to so deliver such props and failed to furnish said props, and that by reason thereof, while in the exercise of due care and caution for his own personal safety, the plaintiff was injured, as charged in the first count of the declaration, you will find the defendant guilty, and assess such damages as you believe, from the evidence, that plaintiff is entitled to recover."

"The court instructs the jury that it was the duty of the defendant to deliver to the plaintiff, as required by him, with his empty cars, timber of sufficient length and dimensions to be used as props and cap pieces, so that he might have been able to properly secure the workings for his own safety; and if

the jury believes, from the evidence, that the plaintiff requested the defendant to deliver to him props of sufficient length and dimensions for his use to properly secure said workings for his own safety, and that the defendant willfully neglected or failed to furnish such props to the plaintiff upon such request, and that the plaintiff was injured by reason of such willful neglect of the defendant to furnish such props, as charged in the second count of the declaration, then you will find for the plaintiff, and you will assess his damages at such amount as you believe, from the evidence, he is entitled to recover."

"The court instructs the jury that if you believe, from the evidence, that the defendant willfully failed to deliver props of sufficient length and dimensions with the empty cars of the plaintiff when requested so to do by the plaintiff, so that the plaintiff might at all times be able to properly secure the workings for his own safety; and if you further believe, from the evidence, that the plaintiff was injured, and that such injury was caused by the willful failure to furnish props, as charged in the second count of the declaration, —then the defendant is liable for such injury, although the plaintiff may have been negligent and such negligence may have contributed to such injury."

The first of these instructions assumed as a fact that the room in which plaintiff was working was in an unsafe condition, and the justification for this assumption offered by counsel is that the fact was conceded. Plaintiff testified that he tested the roof with his pick and by the use of a wedge and sledge hammer, and, being unable to loosen the coal, regarded it as safe to go to work under. It could scarcely be assumed as a conceded fact, in view of his testimony, that the roof was actually dangerous before that time when he called for the props. Again, this instruction, and the next one, submitted to the jury, as a ground for recovery, the question whether plaintiff requested of the defendant to deliver to him props of sufficient length and dimensions to properly secure the workings, and the failure to furnish said props. There was no evidence whatever that plaintiff called for props of any particular length or dimensions, and that there was a failure to furnish according to his requirement. Props were furnished, and after they were furnished he simply said that they were too long. The height of the roof differed in different parts of the mine and in different parts of this room. Plaintiff was the one who was to secure himself by putting up these props, and he could adjust them in his own way. He certainly could not complain that the props were not fitted in length without letting defendant know what lengths were required. It would not create a liability that the props were not of the precise length required for the height of the room or the particular place in the room where plaintiff desired to set them, unless the defendant should fail to have them

made of the proper length when notified. The statute required defendant to keep a supply of timber constantly on hand of sufficient length and dimensions to be used as props and cap pieces, and to deliver the same to the plaintiff as required. He made no requirement as to length, and the props were furnished, so that his case must rest solely on the claim that there was unreasonable delay in sawing them off to meet his requirement, as made known to the straw boss. If there had been any delay in furnishing props before that time, no harm had resulted from it to any one, and, if there was any fault, it was in the delay in sawing them off after they were furnished, so that they could be put up.

The second and third of said instructions submitted to the jury the question whether the defendant willfully neglected or failed to furnish props, and upon that hypothesis the second omitted any requirement of care on the part of the plaintiff, while the third expressly stated that the defendant would be liable although the plaintiff might have been negligent, and his neglect might have contributed to his injury. There was no evidence which would justify an instruction on the theory of a willful violation of the statute. Plaintiff was to put up the props where he pleased and as he pleased, and after his request to the foreman to send some one to saw them the length to suit him it was only a short time until the accident. Defendant had a boy employed to do that work about the mine. It does not appear where he was at the time, but there was nothing in the circumstances to indicate a willful and deliberate intention to disregard the statute, or from which such an inference could be drawn. That feature of the instructions is not based on any evidence in the case. We regard these instructions as erroneous, and prejudicial to defendant.

The judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court. Reversed and remanded.

(177 Ill. 357)

WALL et al. v. STAPLETON.

(Supreme Court of Illinois. Dec. 21, 1898.)

MORTGAGES — CONSIDERATION BETWEEN HUSBAND AND WIFE—MENTAL CAPACITY—TRIAL—EVIDENCE—APPEAL—REVIEW.

1. A husband and wife holding a bond for a deed, and desiring to separate, he executed to her an assignment of all his interest, and a deed was made to her. They jointly executed a mortgage to secure payment. She and her husband jointly executed their notes and a mortgage to complainant's assignor, as a consideration for the husband's contemporaneous release to her of all his interest in the lands and personal property which they held, and a release of the right to administer on her estate. *Held*, that the husband's releases were a consideration sufficient to support her execution of the latter notes and mortgage.

2. A number of credible witnesses testified that the maker of notes and a mortgage, on the day they were executed, was apparently men-

tally capable of transacting business. They were present, and assisted in the transaction. There was evidence that said maker became greatly excited when the subject of her domestic troubles with her husband was broached, and some testimony that she was non compos. Other evidence was that her health was not good. *Held* to support a finding that she was *compos mentis*.

3. It was not error for the chancellor to require the production by a party of merely cumulative evidence in open court after the coming in of a master's report, the adverse party not having been deprived of the right to rebut it, and the decree entered being the same as the master recommended.

4. A decree by a chancellor who heard evidence in open court must be clearly and palpably erroneous to be reversed.

Error to appellate court, Third district.

Bill by Mattie E. Stapleton against Alice Wall and others. A decree for complainant was affirmed by the appellate court (72 Ill. App. 614), and defendants brought error. Affirmed.

Peirce & Peirce, for plaintiffs in error. Williams & Capen, for defendant in error.

PHILLIPS, J. This was a bill in chancery filed by Mattie E. Stapleton against Alice Wall and others to foreclose a mortgage on certain lands in McLean county, Ill. The mortgage was dated February 20, 1895, and was given to John O'Connor to secure three notes, one for \$2,000, and two for \$100 each, the mortgage and notes being signed by Alice Wall and Michael Wall, her husband. Subsequently, the notes, by assignment, came to the ownership of complainant herein. An answer was filed, denying that Alice Wall executed the notes and mortgage, or that she owed O'Connor any sum of money whatever, or that there was any consideration for the mortgage and notes, and also alleging that, at the time the notes and mortgage in question were executed, Alice Wall was non compos mentis. By agreement, the cause was referred to a special master to take testimony, and report his conclusions thereon of law and fact, and also to make a computation of the amount due on the notes and mortgage. The master reported, finding that Alice Wall, on February 20, 1895 (the date of the execution of said papers), was competent to contract, and that the consideration for the execution of the said notes and mortgage was a release by Michael Wall, her husband, to Alice Wall, of his entire interest in her property, and finding that the amount due on the notes and mortgage was \$2,795.65. The master recommended the rendition of a decree for that amount. To this report exceptions were filed by plaintiffs in error, and, on hearing of the exceptions, the defendant in error was allowed to file an amended and supplemental bill, to which a demurrer was interposed; which being overruled, answers were filed by all the defendants. The trial court, upon the hearing of the evidence and argument on the exceptions, on his own motion and for his own information, and to better arrive at an equi-

table adjustment of the matters in controversy, called witnesses in open court, and heard their testimony. To this plaintiffs in error objected, and took exception. After such hearing, the circuit court overruled the exceptions to the master's report, and entered an order confirming it, and granting a decree in favor of the complainant in the original bill for the sum found by the master to be due.

It appears from the record in this case that plaintiff in error Alice Wall had contracted to purchase a farm in McLean county in 1891, and a bond for deed had been executed running to her husband, Michael Wall, and herself. Domestic difficulties had arisen to such an extent that the husband and wife had separated, and he desired to return to New York state to live, leaving her and his children on the farm. The weight of the testimony shows she had taken advice of counsel as to the best means and method of protecting her interest, and of securing to herself the land for which she held bond for deed, and on which considerable money had been paid. The evidence further shows that, as a result of negotiations and conferences, the parties interested met at the office of a firm of solicitors in Bloomington on the day of the execution of these papers. At that time all interest in the bond for a deed was assigned to plaintiff in error Alice Wall, and a deed was executed and delivered to her for the land. To make payment of the amount due the owner, a first mortgage of \$7,000 was given to Parker Bros., which mortgage was also signed by the husband. In addition to this, the husband and wife joined in a chattel mortgage to Parker Bros. covering all their personal property. At the same time and place the notes and mortgage in question were executed, there were also executed two releases from the husband, Michael Wall, to plaintiff in error Alice Wall, conveying and releasing to her all his right, title, and interest in the lands and personal property, and also his right to administer upon her estate or any interest therein after her death. These were both intended to be signed by Michael Wall, but, by inadvertence, one of them was signed on the back of the instrument, instead of on the body of the page. This one, irregular in form, was given to the plaintiff in error Alice Wall; but afterwards, when the mistake was discovered, the attorney having the possession of the one properly signed offered to turn it over to her, and it was brought into court in this proceeding, and tendered to her. Before the commencement of these foreclosure proceedings, she had paid one of the \$100 notes.

Under the above evidence, there was a sufficient consideration for the execution of the notes and mortgage. It was an agreement entered into between the parties, and we think, as the evidence shows, fully explained to, if not clearly understood by, plaintiff in error Alice Wall. She had able counsel, and acted under their advice. No imposi-

tion was practiced upon her, and she was apparently in no manner dissatisfied with the adjustment of these affairs until this proceeding was brought.

On the question as to whether or not plaintiff in error Alice Wall was, at the time of the execution of these notes and mortgage, mentally capable of transacting ordinary business, there is but little evidence to show the contrary. A number of witnesses of respectability, and apparently worthy of credit, who were present on the day this transaction was closed and the papers signed, and who assisted in the transaction, have testified to her sanity, and that nothing to the contrary suggested itself at that time. There is evidence showing that when the subject of her domestic matters was suggested, and she was permitted to talk about her troubles with her husband, she became greatly excited, and displayed considerable degree of temper. Other evidence goes to the effect that her health at that time was not good, and some witnesses express the opinion that she was not mentally capable of transacting business. The weight of the testimony, however, is that she was.

It is insisted it was error for the chancellor to hear additional evidence in open court after the coming in of the master's report. It has been frequently held that, where a case is referred to a master to take testimony and state his conclusions, it then becomes necessary that all the evidence shall be heard before the master, as he could not state his conclusions on only a part of the evidence. Where a reference is made to a master to hear evidence and state conclusions, and in the judgment of the chancellor it is necessary that further evidence be considered, it is the proper practice to again refer the cause to the master, with directions to take further testimony on the particular points on which the chancellor desires to have further evidence. The chancellor in this case required the defendant in error to introduce certain testimony as additional evidence in open court, after the coming in of the master's report. This evidence was merely of a cumulative character, and did not in any manner change the conclusion reached as the result of the master's report, for the decree entered by the chancellor was the same as that recommended by the master before the coming in of this evidence. When the court required the defendant in error to introduce this testimony, he did not deprive the plaintiffs in error of any right to introduce evidence to rebut it; and the evidence thus introduced, being merely cumulative, is not cause for a reversal. Inasmuch as the decree was clearly right on the evidence before the master, aside from this additional cumulative evidence.

Defendant in error acquired these notes and mortgage in good faith, by indorsement, and, so far as the record shows, paid full value for them in the purchase. We have found that plaintiff in error Alice Wall executed them for a valuable consideration, and at a time when

she was fully informed and capable of transacting the business in which she was concerned. The chancellor heard at least part of the evidence in open court, and in such case it must appear that there is clear and palpable error before this court will reverse. *Coari v. Olsen*, 91 Ill. 273; *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891; *Rackley v. Rackley*, 151 Ill. 332, 37 N. E. 1014; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530. The appellate court for the Third district, on appeal, has affirmed the decree of the circuit court. A careful examination of the entire case furnishes us no reason to disturb that judgment. The judgment of the appellate court for the Third district is affirmed. Judgment affirmed.

(177 Ill. 334)

PEOPLE ex rel. McCORNACK, County Treasurer, v. McWETHY.

(Supreme Court of Illinois. Dec. 21, 1898.)

MUNICIPAL ASSESSMENTS—SEWERS—ADDITIONS—ACCOUNTING—COLLECTION—COUNCIL—DELEGATION OF AUTHORITY—JUDGMENT.

1. On application for judgment for a delinquent installment on a local assessment, judgment may be rendered for a fractional part of the installment, to meet remaining unpaid expenses, where the work has been completed, and the last payment made on the contract.

2. In a proceeding for judgment on a local assessment, if the court renders judgment according to the justice of the case, it is not error because not based on the exact terms of the written objections filed therein.

3. While a city having authority to let a contract for local improvements, to inspect, accept, and pay for the work, and to audit accounts, is not bound to show that the prices paid are reasonable, or to prove the account, except to show that it was paid for the improvement, yet an owner whose property is assessed may show that the charges are for work not embraced in the ordinance, and are, hence, not payable out of the assessment fund.

4. Where an ordinance for the construction of sewers in certain streets specifies a number of catch-basins, and provides for their location, it is improper for the city to put in a greater number of catch-basins, or construct sewers in streets not designated; and hence the assessment fund is not liable for the additional work.

5. Where an ordinance provided for the construction of sewers in a district, to be paid for by special assessments, including an amount for another district, such amount cannot be allowed as a credit in a subsequent assessment in such latter district, when it is not shown that it was or could be collected.

6. In the construction of a sewer, it was necessary to substitute an iron pipe for brick-work under a railroad track, to enlarge it near its outlet, to protect its outlet by a stone abutment, and to erect a door in the outlet to prevent the backing of water into the sewer. *Held* that, such changes being necessary parts of the sewer, and fairly included within the ordinance providing for its construction, the assessment fund was chargeable therewith.

7. A sewer, as provided for in an ordinance, ended at the bank of a river. After it was finished, the city put in an iron pipe to the middle of the river, and flush tanks at its dead ends. *Held*, that such additions, being outside the ordinance, could not be charged against the assessment fund, though they were beneficial to the better working of the system.

8. A city council, proceeding under an ordi-

nance for the construction of a sewer, cannot delegate its authority by resolution by vesting discretionary power as to such construction in a committee and the city engineer.

Appeal from Kane county court; M. O. Southworth, Judge.

Application by the people, on relation of Robert J. McCornack, county treasurer, and ex officio county collector, against Caroline McWethy, for judgment and order of sale on a delinquent tax and special assessment list. There was a judgment for a fractional part of the installment, and plaintiff appeals. Affirmed.

Frank W. Joslyn, State's Atty., and William J. Tyers, City Atty. (Alschuler & Murphy, of counsel), for appellant. N. J. Aldrich and Theodore Worcester, for appellee.

CARTWRIGHT, J. This case was here on a former appeal, when the judgment of the county court of Kane county was reversed, and the cause was remanded to that court for a trial of the question whether enough had been collected on the special assessment to pay for the improvement for which it was levied. *People v. McWethy*, 165 Ill. 222, 46 N. E. 187. There has been another trial, at which the court found that almost the entire cost of the improvement had been paid by moneys collected from the first three installments of the assessment, and that a comparatively small amount of the fourth installment was necessary to complete the payment, and thereupon gave judgment for one-fifth of the fourth installment to meet the remaining unpaid expense.

It is first claimed that, even if the conclusion of the court was right as to the merits, it was error to order only a fraction of the assessment collected, but that if any amount was necessary, however trifling as compared with the whole installment, there should be judgment for the entire amount. Upon an application for judgment, and an order of sale of lands, the law requires the court, where objections are filed, to hear and determine the matter in a summary manner, without pleadings, and to pronounce judgment as the right of the case may be. The relation out of which the right arises in such a case as this is that the property holders contributed, under the assessment, a fund which must be limited to the actual cost of the improvement, and, after such cost has been paid, if any surplus shall remain, it must be returned to them. It is necessary to the making of local improvements that the assessments should be collected so as to make payments to the contractors as the work goes on, and, consequently, that the assessment should be made and confirmed before the work is actually done and the cost definitely ascertained. The assessment must, therefore, be made upon an estimate of what the cost will be; and, in the nature of things, this estimate cannot be entirely accurate, but will differ from the actual cost.

In order to prevent error as far as possible, the law requires that the ordinance shall specify the nature, character, locality, and description of the improvement; and, even with that safeguard, an estimate is likely to be incorrect, as it proved in this case. This assessment was divided into five installments, and it became so manifest that the fifth installment was not required, that the city abated it of its own motion. The fact that the estimate, and the assessment based upon it, are too large, will not defeat the assessment; nor is that fact available as an objection to its collection, so long as the actual cost remains uncertain or problematical, even in the least degree. A property owner has no right to call upon the city for an accounting upon every application for judgment for a delinquent installment, even if the uncertainty is very slight, or relates only to a very small amount. Although a contract has been let for a fixed price, if the work is not completed there may be accidents or contingencies which will increase the cost; and the city cannot be required to account upon a basis of the probable price of labor and materials, or other problematical or uncertain conditions. *Connecticut Mut. Life Ins. Co. v. People*, 172 Ill. 31, 49 N. E. 989. The property owner, however, has a right that the city shall keep an account showing what moneys have been expended for the improvement, within the power conferred upon it by law for the making of the improvement for which he has been assessed. The city is the instrumentality authorized by the law to collect and receive the money from the property owners, and to disburse it for the purpose specified in the ordinance, and for that only. It occupies such relation towards those who contribute to the improvement that it is bound to keep an account which will intelligibly show the actual cost of the improvement. When the cost has been finally and conclusively determined, so that there is no possibility of a larger amount being required, there can be no reason in natural justice, and we do not discover any in the law, which should prevent the court from staying the further collection by refusing a judgment for any more than is necessary. The payment of assessments is frequently burdensome, and sometimes results in the loss of the property assessed. An enforced collection of more than may be necessary arises out of the nature of things, and the necessity of raising money by an estimate made in advance; but the taking of money that it is definitely known is not required, the payment of which may seriously embarrass the property owner, only to be returned to him in the future, would seem to be a causeless wrong and injustice. Not only would the property owner be deprived of his money without cause, but it is not always easy to obtain a return of it; and it is the common observation and experience in matters of this kind that, like

the fabled cave, the tracks are all going in, and none coming out. When the work is finally completed and paid for, the party assessed is entitled to an accounting for the purpose of a rebate or return of any excess of payment, and we see no good reason why he cannot demand a settlement of that question when judgment against his land is asked for. The written objections were that enough money had already been collected without a portion of the fourth installment, but we think that in a proceeding of this kind, if the court renders a judgment according to the right and justice of the case, it cannot be said to be erroneous because not based upon the exact terms of the written objections as filed.

In this case the ordinance providing for the improvement was passed by the city council of the city of Aurora July 7, 1890. The contract for the making of the improvement was let to the Rockford Construction Company, and its contract was completed and the work accepted in December, 1892. The books of the city show, under date of August 19, 1895, the payment of the last outstanding voucher issued under that contract, amounting to \$3,114.50. The entire work for which the ordinance provided had been completed for several years, and the last payment made long before the hearing in this case. It was, therefore, a proper case in which to call upon the city for a statement of the amount expended for the improvement. Three methods were employed at the hearing to show the amount of moneys received by the city from the first three installments: First, the warrant; next, a lot of small auxiliary cash books; and, third, a large cash book, containing an account of all moneys collected. The amounts as shown by these methods differed, but it was finally shown that the large cash book was correct, and that the total amount collected on those installments was \$59,726.83. The city exhibited an order book showing warrants issued against this assessment amounting to \$68,535.95, and had allowed \$136.59 for interest on the rebate of the fifth installment; making, as it claimed, the total cost \$68,672.54. It is insisted that this statement cannot be questioned, and in some respects that is true. Counsel are correct in their claim that the city is not bound to prove that the prices paid were reasonable, or to prove the account, except to show that it paid the amount in the making of the improvement. It has power, by law, to let the contract, to direct and inspect the work, to audit the accounts, and to accept and pay for the work when complete. These matters are within its exclusive jurisdiction, and, in the absence of fraud, the property owner cannot, in any form of proceeding, call upon the city to justify its action. The city, and not the individual property owner, is the judge whether the contract is complied with; and, unless there is a fraudulent abuse of the power, the property owner is concluded,

and in case of fraud a bill in equity is the proper remedy. *Ricketts v. Village of Hyde Park*, 85 Ill. 110; *Haley v. City of Alton*, 152 Ill. 113, 38 N. E. 750; *Fisher v. People*, 157 Ill. 85, 41 N. E. 415; *People v. Green*, 158 Ill. 594, 42 N. E. 163.

The appellee, however, had a right to show, as against the *prima facie* case made by the treasurer, that a part of these charges were for work not embraced within the ordinance, and not payable out of the assessment fund, but expended elsewhere. As to some of the items, we think she was successful in making such proof. The total amount paid to the Rockford Construction Company for the completion of the improvement, as accepted by the city, and including all extra work done, and interest, was \$57,667.90. Included in the amounts so paid were the following sums: A sewer 249 feet in length in Cross street, costing \$112; a sewer 786 feet long in Middle avenue, amounting to \$276.74; and 23 catch-basins, costing \$828,—none of which were included in the ordinance. It is contended that these additions to the improvement were within the power of the city, and properly chargeable to the assessment fund, because they were desirable and beneficial as additions thereto. It is true that the description of the improvement in an ordinance must be in somewhat general terms, and that it cannot descend to details. Those things which are fairly implied and necessarily included within the general terms used will be regarded as within the description. *Delamater v. City of Chicago*, 158 Ill. 575, 42 N. E. 444; *Gage v. City of Chicago*, 162 Ill. 313, 44 N. E. 729. This applies to small matters which may be regarded as a necessary part of the improvement, because without them it could not be made. Some things of that character, we think, were included, as will be hereafter seen; but in the case of the catch-basins the ordinance particularly specified the number to be included in the improvement as 152, and gave in general terms the location of them. Instead of following the ordinance, the city put in 175. If sewers were to be put in Middle avenue or Cross street, they should have been provided for in the ordinance, and estimated by the commissioners. Neither of these changes comes within the rule as to small matters necessarily implied from the general terms employed. The ordinance is the chart of the city, and it must keep within its requirements, and not make another or different improvement, even if it could be shown to be more beneficial than the one provided for. These items must be deducted from the amount paid the construction company, leaving the correct amount \$56,451.16.

There is a further claim that this district should be credited with \$900, on the ground that on January 6, 1896, the city council passed an ordinance for the construction of sewers in another district, to be paid for by special assessment, including \$900 to be paid

to this sewer district for the use of its main sewer in Garfield avenue and Holbrook street from Chestnut street to Fox river. The record does not show that such assessment was ever spread or confirmed or collected, or that the sewers therein provided for were ever built, but shows that the \$900 was never received or collected by the city. The elements are lacking to even show that it could be collected, and that item cannot be allowed. If the amount can be collected, there is a remedy to require the city to make the collection for the benefit of the district.

Some minor changes were found necessary in the execution of the work, such as the substitution of an iron pipe for brickwork under a railroad track, where the brickwork would be shortly destroyed, and a slight enlargement of the main sewer near Fox river, where it was found insufficient to discharge the sewage. These changes were within the general scope of the original plan, and were necessary to render it at all effective. They do not belong to the same class as the construction of things not provided for in the ordinance, and there were other minor changes which reduced the cost of the work more than enough to offset the expense. So, also, after the work was done, the mouth of the sewer, which discharged at Fox river, had to be protected by a stone abutment to save the sewer. An iron door, opening outward to permit the escape of sewage but closing in case of a flood in the river which would back water into the sewer and force sewer gas back, was found essential. These things were necessary parts of the sewer, as described in the ordinance, and fairly included within its general terms. No deduction can be made on account of them.

The sewer, as provided for by the ordinance, ended at the bank of Fox river; and, after it was finished, the city, apparently for general purposes of sanitation, put in an iron pipe to the middle of Fox river. So, also, the city in the subsequent years of 1893, 1894, and 1895 put in flush tanks at the dead ends of the sewer, and other catch-basins, costing \$4,139.85. These expenses are not chargeable to the assessment fund. It is contended that the flush tanks are within the terms of the ordinance, for the reason that it referred to plans and specifications on file in the office of the city clerk. It was shown, however, that there was no plan or specification for this improvement in the office of the city clerk including or contemplating flush tanks at the dead ends of the sewers. There had been a plan for a general system of sewers for the whole city, differing from this, which did have such a provision; but it was abandoned, and was not the plan referred to in the ordinance. The flush tanks were outside of the ordinance, both in fact, and as it was understood. They were not included within the contract, and the understanding was that there were to be lamp holes at those places. Indeed, it was offered to prove, and counsel

now assert, that these subsequent improvements were made at the instance of mass meetings of citizens. They were made under resolutions of the city council passed May 15, 1893, and May 21, 1894, which vested a discretion in the sewer committee and city engineer. This was a delegation of authority and discretion which would have rendered the original ordinance void, if contained in it; and, of course, it does not strengthen the position that the resolutions were passed subsequent to the ordinance. The attempt at vesting discretionary power in the committee and city engineer was void.

It is also insisted that the flush tanks and catch-basins were properly constructed and charged to the assessment fund because they were necessary and beneficial for the perfect working of the system. That is no justification. If the city contemplated such an improvement, and expected to compel property owners to pay for it by a special assessment, it should have been described in the ordinance. The fact that flush tanks may be desirable does not justify a city in building them, and expending the money of property owners therefor, in place of lamp holes which are provided for in the ordinance. In fact, the evidence shows that in order to make the system complete, and to make it work satisfactorily, a different kind should have been put in. These flush tanks have to be operated by going around and turning water into them, and the evidence was that automatic flush tanks were necessary. If that sort of thing can be done under the original assessment, it would be equally proper to put in automatic ones now, and the lingering existence of an assessment would go on indefinitely.

In addition to the amount paid to the Rockford Construction Company properly chargeable to the assessment, the account shows expenses of engineering and inspection, \$3,378.16; clerk hire, \$573.98; and expense of advertising and court costs, \$130.90. The engineering and inspection account evidently includes, to some extent, at least, engineering and inspection in the building of the flush tanks and catch-basins, and goes beyond the construction of the improvement. This will appear from the dates. But no objection is made on that account, and it would not be easy to separate legitimate charges from those which are unlawful. Allowing these items, they make a total of \$60,534.20, about which there is no doubt; and this shows a small balance, at least, is necessary to be collected from the fourth installment. This is all that can be ascertained with certainty from the statement and evidence, and an examination which has occupied much time. While there has doubtless been an honest effort and intent to conform to the law, it is impossible to tell exactly what the proper state of this account is, and it is certain that it will not get any better with time. The evidence as to the interest on the rebated installment does not show clearly whether it ought to be

allowed or not. A great many of the items of the account do not show what they are for, and perhaps half of the 225 vouchers, or thereabouts, have been lost, not by the fault of any one, but with the effect that there can never be an absolutely accurate accounting, either for the purpose of a return of money to the parties interested or for this purpose. The amount ordered to be collected by the county court is certainly as much as the entire legitimate charges against the district, with all the cost and expense of collection; and, in the condition of the evidence, we are inclined to affirm the judgment. It is the nearest approach to justice that the evidence will admit of. The judgment will accordingly be affirmed. Judgment affirmed.

(177 Ill. 238)

HARDING v. OLSON.

(Supreme Court of Illinois. Dec. 21, 1898.)

EQUITY—REMEDY AT LAW—CANCELLATION OF CONTRACT—TENDER—CONSTRUCTION OF CONTRACT—UNINCUMBERED TITLE—ELECTION TO RESCIND—RECOVERY OF PAYMENTS—PARTIES.

1. Where, in a suit to cancel a land contract, defendant answered to the merits, and went to trial before a master, it was too late to object that plaintiff had an adequate remedy at law, after the master's report was filed; the relief asked being within the jurisdiction of a court of chancery.

2. Where neither the title nor possession of land contracted to be conveyed had been transferred to the purchaser, he is not required to tender a deed to the vendor, nor the contract after the vendor's breach, on filing a bill for its cancellation.

3. A land contract provided that an unincumbered title should be conveyed on the purchaser's final payment on or before January 3, 1896. The purchaser notified the vendor of his readiness to pay on August 2, 1895, and requested a deed; but, the property being incumbered, the purchaser waited until October 21st, and then demanded performance within 5 days, but, the vendor failing to comply, he waited 42 days longer, and then filed a bill to cancel the contract. *Held*, that the purchaser was not required to accept an incumbered title, but one free from reasonable doubt, and was entitled to the relief asked.

4. Where the vendor of land failed to tender the purchaser an unincumbered title, as contracted for, until over a year after the purchaser was entitled thereto, and until after a master's report had been filed in a suit by the purchaser to cancel the contract, he cannot then be compelled to accept performance.

5. The filing of a bill by the purchaser to cancel a land contract for the vendor's breach is an election on his part to rescind the contract.

6. Where the purchaser of land files a bill to cancel the contract for the vendor's breach, the vendor may relieve himself from all obligations under it by refunding payments made.

7. Where a contract for the sale of land provided that, in case the purchaser should not strictly comply with its terms, the vendor might declare it forfeited, and retain all payments as liquidated damages, the purchaser, on the vendor's failure to furnish a deed as provided, is entitled to recover all payments made, with interest.

8. Where a vendor of land failed to convey an unincumbered title until more than a year from the date specified in the contract, it is not error to dismiss his cross bill, filed in a suit by the purchaser for the cancellation of the contract,

asking that he be relieved from its obligations on tendering specific performance.

9. Parties, other than the vendor, holding the title to land contracted to be conveyed, are not necessary parties to a bill by the purchaser to cancel the contract for the vendor's breach, and to recover payments.

Appeal from appellate court, First district.

Bill by Andrew Olson against George F. Harding for the cancellation of a land contract. From a judgment for plaintiff, which was affirmed by the appellate court (76 Ill. App. 475), defendant appeals. Affirmed.

Wm. J. Ammen, for appellant. Jos. D. Hubbard, for appellee.

BOGGS, J. This is an appeal from the judgment of the appellate court for the First district affirming a decree entered in the circuit court of Cook county canceling a contract between the appellant and the appellee, by which appellant obligated himself to convey certain real estate in Cook county to appellee, and decreeing appellant should pay to appellee the amount of certain payments made by appellee on the contract, and interest thereon from the date of such payment. The contract was entered into January 3, 1890, and provided for the payment of \$125 in cash, \$75 in 60 days thereafter, and full payment on or before January 3, 1896, and entitled appellee to title in fee simple, clear of all incumbrance, upon full payment. It appeared that appellee had, before the filing of the bill, performed the obligations of the contract upon his part, and became entitled, under its provisions, to receive a warranty deed from appellant, conveying to him the title to the said premises in fee simple, free and clear from all incumbrances.

The objection that appellee had an adequate remedy at law was presented to the court for the first time after appellant had answered the bill upon its merits, without making such objection or defense in the answer or otherwise, and after both parties had produced their testimony before the master, and each had examined his own witnesses and cross-examined the witnesses of his adversary, and after the master's report and findings upon such testimony had been made up and filed of record in the court. The objection came too late. The relief asked was not so far foreign to equity jurisdiction as that it could not be given in chancery. The appellant had submitted his cause, as made by the pleadings, to the jurisdiction of the court in equity, and could not be permitted to insist, on the hearing of the report of the master, that appellee should be remitted to another forum for his remedy. *Clemmer v. Bank*, 157 Ill. 206, 41 N. E. 728; *Kaufman v. Wiener*, 169 Ill. 506, 48 N. E. 479.

The rule that a party asking the cancellation of a contract must offer to put the other party in statu quo did not impose upon appellee the duty of executing and tendering to appellant a deed of any kind to the prem-

ises, or tendering a return of the contract, prior to the filing of his bill. Appellee had not the title to, or the possession of, the premises; hence there was no occasion that he should tender reconveyance to appellant; nor was he bound to surrender his contract, except in exchange for a deed of conveyance from appellant.

The complaint that appellant was only allowed 5 days after appellee complied with the contract in which to secure conveyance of absolute unincumbered title, and that 5 days was not a reasonable time in which to enable appellant to comply with his obligation, does not arise, under the facts of the case. It appeared that appellee had the option to make final payment on or before January 3, 1896, and that he notified the appellant on the 2d day of August, 1895, that he was ready and desired to pay the balance due on the purchase price of the premises, and requested appellant to execute a deed of conveyance therefor, and that the title to the premises did not then rest in appellant, and was not free and clear of incumbrance. Appellee waited from that time to October 21st of the same year, a period of 80 days, to allow appellant to perfect the title, and then made a formal tender of the amount required by the contract to be paid, and demanded compliance on the part of appellant within 5 days. Appellant did not comply, and appellee waited a further period of 42 days before filing the bill. The time really granted the appellant by the appellee was not the period of 5 days, but the term of 4 months which intervened between August 2d and the filing of the bill on December 3d.

It is urged that the chancellor erred in awarding rescission of the contract, and decreeing that appellant should repay to appellee payments made by the latter thereunder, and interest thereon, and, instead, should have decreed that appellee should accept specific performance of the contract. When the contract was entered into the title to the property did not rest in the appellant, but in one George F. Harding, Jr., his son, who afterwards conveyed the premises to the Fireman's Insurance Company. The insurance company conveyed to the Chicago Real-Estate, Loan & Trust Company; but the deed was not placed of record, nor did the grantee take possession of the property. Judgments at law were entered in the circuit court of Cook county, wherein the land was situated, against the insurance company, and such judgments became liens upon the premises; and two of such judgments remained unsatisfied, and liens upon the premises, at the time appellee tendered payment in full of his obligations under the contract, and became entitled to a conveyance according to the terms of the contract. These judgments were liens, or rendered the title defective, in August, 1895, and also when appellee filed his bill herein. Good

title, free of incumbrance, was bargained for. The appellee was not required to receive a defective title, or one which was so clouded with adverse liens as to materially affect the marketable quality of the property and expose him to the hazard of litigation, but was entitled to demand and receive title free from reasonable doubt. *Brown v. Cannon*, 5 Gilm. 174; *Hoyt v. Tuxbury*, 70 Ill. 331; *Close v. Stuyvesant*, 132 Ill. 607, 24 N. E. 868; *Mead v. Altgeld*, 136 Ill. 298, 26 N. E. 388; *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27.

The master, under the order referring the case for proofs, began the hearing of testimony on the 10th day of February, 1896, and filed his report January 11, 1897. While the case was so pending before the master the appellant procured the release or satisfaction of said judgments, and on the 11th day of December, 1896, tendered a warranty deed (executed by the Chicago Real-Estate, Loan & Trust Company) to the appellee for the premises, and also a warranty deed executed by the appellant and his wife to appellee for the said premises. These deeds were tendered before the master during the course of the presentation of appellant's testimony, and about 11 months after the case had been referred to the master, and 1 year, 1 month, and 20 days after appellee had fulfilled his contract and became entitled to a deed to the premises. Prior to the filing of the bill appellee had granted all time which any rule of law or equity required he should allow, in which to enable appellant to specifically perform his contract. The right of the appellee to recede from the contract, and demand that the appellant should refund the moneys received thereon, was complete, as we read the evidence, when the bill was filed. The contract expressly provided that the failure of the appellee to "make either of the payments, or any part thereof, or to perform any of the covenants on his part made and hereby entered into," should authorize the appellant to declare the contract forfeited, and that all payments made by the appellee on the contract should be forfeited to and retained by the appellant in liquidation of the damages sustained by him by reason of the failure of the appellee to fulfill his undertaking; and the contract further provided that the time fixed for any payment to be made should be deemed as of the essence of the contract. A contract which thus by express terms imposes upon one of the parties to it a forfeiture of all rights under it, as a consequence of a failure to comply literally and strictly with his obligations, in the absence of imperative reasons, ought not to be so construed as that the other party to it would be allowed such an unreasonable length of time after a breach upon his part in which to perform that which the contract required of him. Moreover, the

filing of the bill by the appellee was a complete election upon his part to rescind the contract, and conferred upon the appellant the right to relieve himself of all obligations under it by the payment of money, instead of specifically performing it. Having such right, it was certainly not incumbent upon the chancellor to grant him also the additional right of discharging himself from the payment of money because of the breach of his contract by procuring conveyance to be made of the land at any time before a decree for such payment should be entered. Under the contract the appellee was entitled to a good, unincumbered title to the property at the time he tendered full payment therefor, and, in default of receiving such title within a reasonable time, had the right to declare the contract rescinded, and to institute legal proceedings to recover payments made thereunder. If we are right in the view heretofore expressed, that such reasonable time had expired when the bill was filed, it would seem clear that it would not be logical to say that the chancellor erred in refusing to compel the appellee to accept such a title more than a year after the filing of the bill.

The cross bill which appellant filed while the cause was pending before the master for hearing asked that he be relieved from all obligations because of the said contract upon the delivery of the said deeds executed by himself and wife and the Chicago Real-Estate, Loan & Trust Company; the judgments having been satisfied, as the said cross bill averred. In view of what we have hereinbefore said, the cross bill was obnoxious to a demurrer, and was properly dismissed by the court.

The position of the appellant that the bill filed by the appellee should have made the Chicago Real-Estate, Loan & Trust Company party defendant, for the reason that corporation held title to the premises mentioned in the contract, is not tenable. The appellee had elected to rescind the contract, and the relief prayed for by his bill did not in any way affect the title to the land. He sought only the return of the sums of money he had paid in fulfillment of the contract, and interest thereon, and the only necessary party to the bill was the party against whom a decree of repayment would operate.

The contention that appellee made some of the payments, included in the amount decreed to be repaid, to the Fireman's Insurance Company, and other payments to the Chicago Real-Estate, Loan & Trust Company, is not sustained by the proof. We agree with the chancellor and the appellate court that the evidence on that point charged the appellant with the receipt of such payments. The decree of the circuit court is correct, and the judgment of the appellate court must be, and is, affirmed. Judgment affirmed.

(177 Ill. 331)

ALFORD v. DANNENBERG.

(Supreme Court of Illinois. Dec. 21, 1896.)

APPEAL—OBJECTIONS WAIVED—MOTION FOR NEW TRIAL—FINDINGS OF FACT.

1. Where there is a material variance between a negligent act or omission alleged in the declaration and the evidence offered in support of such allegation, the admission of such evidence, if objected to at the trial, is error, but, if objection is not made at that time, it cannot be afterwards raised.

2. A motion for a new trial does not raise a question of law as to error in regard to variance unless the point was raised at the trial, and a ruling had thereon.

3. The action of the trial court in passing on questions of fact may be reviewed by the appellate court, but its finding thereon is conclusive on the supreme court.

Appeal from appellate court, First district.

Action by Henry Dannenberg against Marvin P. Alford, administrator of the estate of Louis Wilkens. Judgment for plaintiff was affirmed in the appellate court (76 Ill. App. 376), and defendant appeals. Affirmed.

Frank S. Weigley, for appellant. E. C. Maledorm, for appellee.

CARTWRIGHT, J. In May, 1892, appellee fell from a trestle while working as a carpenter on a shed building for the firm of William Wilkens & Co., in Chicago. He brought this suit against appellant, as administrator of the estate of Louis Wilkens, a member of the firm at the time of the accident, and charged that the fall of the trestle was due to the negligence of the firm, through its foreman, in ordering an employé, who had been holding or steadying the trestle, to leave it unsupported. There was judgment for appellee, and the appellate court affirmed the judgment. The points relied upon to secure a reversal are that the cause of action charged in the declaration was wholly unproved; that the appellate court treated the failure to prove the acts of negligence alleged as a mere variance between the proof and declaration; and that the motion for a new trial is sufficient to warrant this court in examining the testimony to determine whether there was such failure of proof.

The claim that the appellate court so treated the question whether the cause of action alleged was proved, rests upon an expression in the opinion of that court. Error cannot be assigned upon the opinion, and we cannot decide the case upon the consideration of the reasons given for the judgment. Unless some error is apparent from the record, we cannot reverse the judgment. It is a just and salutary rule that the evidence must support the charge of negligence contained in the declaration, and that a particular act or omission cannot be charged, and another and different one proved. The defendant is entitled to no-

tice of the particular act or omission of duty with which he is charged, that he may be prepared to meet it, and if there is a material variance, which is insisted upon by the defendant at the trial, it will be error not to sustain his objection. If a plaintiff, having charged particular negligence, attempts at the trial to prove other and different acts or omissions as a ground of liability, it is a valid and meritorious objection that a different cause of action is being proved than that which was alleged. There are many cases where it is impossible to make the objection in advance, as where a witness is detailing some transaction; but the ground upon which a verdict is asked necessarily becomes apparent at some time during the trial, and, if it is not the same as that alleged, it is the duty of the court to act upon objection or proper motion to exclude the evidence. If the difference between the allegations and proof consists in a mere discrepancy between the statement of the cause of action in the declaration and the evidence produced to establish it, the question of variance which thereby arises must be presented during the trial, so that the court may rule upon it, and, if the objection is sustained, there may be an opportunity for amendment. *Railway Co. v. Ward*, 135 Ill. 511, 26 N. E. 520; *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801. The record in this case shows that the evidence introduced at the trial related to the same accident and fall of the trestle, and consequent injury, charged in the declaration. At most, there was nothing more than a discrepancy between the statement of the cause of action and the evidence introduced. The question of variance, not having been raised at the trial, could not be presented and insisted upon afterwards.

A motion for a new trial is designed to bring in review before the trial court the occurrences of the trial which has been had, and to present for consideration alleged errors during the course of the trial. Its purpose and scope are the correction of errors which may be obliterated upon another trial, whether consisting of rulings on the part of the court, or action by the jury in disregarding the evidence, or finding a verdict contrary to its weight. The function of the jury is the determination of questions of fact, and, so far as a motion for a new trial challenges the correctness of the finding, it relates to a question of fact. It does not raise a question of law whether the court erred upon the subject of a variance, unless that question was presented at the trial, and there was a ruling upon it. The appellate court may review the action of the trial court in passing upon the question of fact, but its finding in that respect is conclusive. In this case the judgment has been affirmed, and there is nothing which we are authorized to consider. The judgment will be affirmed. Judgment affirmed.

(177 Ill. 156)

GLANZ v. SMITH.

(Supreme Court of Illinois. Dec. 21, 1898.)

CONFESSION OF JUDGMENT—FRAUDULENT PREFERENCE—SET-OFF.

1. Defendant received \$1,000 from her son's life insurance, which she loaned to K., her son-in-law, taking his judgment note therefor, which was delivered to H., as her agent. Three months later, K. becoming insolvent, H. threatened to enter judgment on the note, but was three times dissuaded by K. and his attorney, until, again becoming alarmed, he entered such judgment, levied on K.'s property, and the next day K. assigned all his property to H. for the benefit of his creditors. *Held* not sufficient to show collusion between defendant and K. to prefer her claim, or defeat the priority of her lien.

2. An insolvent was indebted to defendant's son, and subsequent to his death paid certain sums, exceeding the indebtedness, for him, and also a bill for defendant. *Held* that, in the absence of evidence that the payments were made at defendant's request, they could not be set off against a judgment on a note for money loaned, which was a prior lien on the insolvent's estate.

Appeal from appellate court, First district.

Action by Charles Glanz against Anna M. Smith. From a judgment in favor of defendant, which was affirmed by the appellate court (76 Ill. App. 630), plaintiff appeals. Affirmed.

James A. Peterson, for appellant. John M. Curran, for appellee.

WILKIN, J. This action arose on the petition of appellant, filed in an insolvency proceeding on the estate of John Karlstrand, in the county court of Cook county. The purpose of the petition was to defeat the alleged validity and priority of a certain execution levy on the assets of Karlstrand under a judgment obtained by the appellee, Anna M. Smith, against Karlstrand. The petition shows that Charles Glanz was a merchandise creditor of Karlstrand for \$2,369.04, and had, prior to the commencement of this action, filed his claim for that amount in the insolvency proceedings; that on December 3, 1896, Karlstrand executed a deed of assignment for the benefit of his creditors to J. N. Hennings, as assignee; that on December 2, 1896, Anna M. Smith caused judgment to be entered in the circuit court of Cook county against Karlstrand on a judgment note executed by him for \$1,000, and at 9:40 a. m., December 3, 1896, caused execution to be issued and levied upon the merchandise of Karlstrand. While the records show the execution to have been levied prior to the assignment, it is claimed by appellant that the assignment and levy were a part of the same transaction, and that the judgment was entered and execution issued and levied all in pursuance of a conspiracy to give Anna M. Smith an unlawful preference in the assignment over the other creditors. Anna M. Smith was the mother of Karlstrand's wife,

J. N. Hennings was the bookkeeper of Karlstrand. It is claimed by Anna M. Smith that J. N. Hennings acted as her agent

in all the transactions with Karlstrand leading up to the judgment and execution levy. The petition prayed for an answer by Anna M. Smith, but did not waive her oath. She answered, alleging the execution of the note by Karlstrand to herself, and its delivery by Karlstrand to Hennings, as her agent, and the subsequent entry of judgment and levy of execution on such judgment, etc. She also alleged good faith in all these transactions, and denied the charges of collusion and fraud. On December 5, 1896, J. N. Hennings resigned as assignee, and the court appointed the Chicago Title & Trust Company his successor. On December 9, 1896, an order was made, with the consent of all parties interested, directing the sheriff to turn over to the Chicago Title & Trust Company, assignee, the merchandise levied on under the execution of the appellee, but preserving whatever lien she had on the net proceeds of such property, and leaving the question of the validity and priority of that lien to be determined in the county court. On the trial the court found the issues in favor of defendant, decreeing her judgment a prior lien on the proceeds of the property in the hands of the assignee. From that decree the petitioner appealed to the appellate court for the First district, which court affirmed the decree of the county court, and appellant now appeals to this court.

No disputed propositions of law are involved in the case. Appellant relies almost entirely upon the testimony of Karlstrand and J. N. Hennings to support the controverted allegations of his bill. It is a fact about which there is no substantial conflict in the evidence that appellee, on or about September 4, 1896, received \$1,000 from the Berkshire Life Insurance Company in payment of a policy of insurance on the life of Anton W. Smith, her son, and that this sum was loaned by appellee to Karlstrand on September 8, 1896, and that Karlstrand, in return, executed the judgment note sued on, and delivered it to J. N. Hennings, as appellee's agent, and that this money was used by Karlstrand in his business. It appears that "612 Chicago Title and Trust Building" is a suite of five rooms; that John M. Curran, attorney, has one room there, Harvey Strickler, attorney, another, and L. G. Knight, attorney, also has an office there. On November 20, 1896, Hennings, becoming alarmed by the creditors of Karlstrand, went to the office of Strickler, who was Karlstrand's attorney, and informed him of his fears, and expressed a desire to have judgment entered on the note he held for Mrs. Smith. Strickler requested him not to do it, but to let Karlstrand continue the business, and see if he could not straighten it out. November 27, 1896, Hennings again called upon Strickler, and was again dissuaded from his purpose. The next day he called again, and after a short consultation Strickler sent him for Karlstrand. After further consultation Hennings again

consented to wait. At this consultation Strickler informed Karlstrand, in the presence of Hennings, that if this judgment was entered he would be obliged to make an assignment. Karlstrand replied that if such a thing should happen he would suggest Hennings as a good man for assignee. Hennings made no reply. At this time Strickler refused to have anything to do with the Smith note because he was Karlstrand's attorney, but recommended Attorney John M. Curran, and later, on November 30th or December 1st, introduced Hennings to Curran. On December 1, 1898, Hennings had decided to enter judgment, and without the knowledge of Karlstrand or Strickler placed the note in the hands of Curran for that purpose, who, as stated above, on December 2d entered judgment on the same, and caused execution to issue, and a levy to be made thereunder. In our opinion, the evidence fails to show any fraud or collusion between the parties to the judgment note. It was executed September 8, 1898,—nearly three months before the assignment,—and it was against the wish and protest of Karlstrand that Hennings caused the judgment to be entered. It was doubtless true that Karlstrand foresaw that Hennings might enter judgment on the note, and considered the assignment in such event; but we find nothing in the record on which to base the theory that Hennings acted in collusion with Karlstrand, or that Karlstrand even intentionally delayed making the assignment until Hennings had taken judgment, and made a levy thereunder. On the other hand, Hennings had been dissuaded several times from entering judgment, the last time the matter was discussed being November 28th, from which time until December 2d, between 5 and 6 o'clock p. m., and after a creditor named Parker had given Karlstrand an ultimatum that if he did not pay him \$277 by 12 o'clock (presumably the following day), he would attach his goods, Karlstrand did not know that Hennings had or would enter judgment or that an assignment would be necessary. Even then, at 6 o'clock p. m., December 2d, he called upon his attorney, Strickler, for advice, who told him the best way was for him to go ahead. The evidence further shows that after the death of Anton W. Smith, and before appellee's judgment was entered, Karlstrand paid \$122.06 to release a mortgage on property in the state of Washington owned by Anton W. Smith at the time of his death; also his funeral expenses, \$67; also \$30 dentist bill for appellee. It also appears that Karlstrand owed Anton W. Smith, at the time of his death, from \$100 to \$150, and had promised him to pay off the mortgage on the land in Washington. There is no evidence that any of the foregoing expenditures were made at the request of appellee. Under the facts shown we see no reason for holding the judgment void to the extent of these items, as insisted upon by appellant. They were in no

sense proper credits upon the note for money loaned. The judgment of the appellate court will be affirmed. Judgment affirmed.

(177 Ill. 128)

ALLEGRETTI et al. v. ALLEGRETTI CHOCOLATE-CREAM CO.

(Supreme Court of Illinois. Dec. 21, 1898.)

TRADE-NAMES—SALE OF BUSINESS—INTENT—IN-JUNCTION.

1. Though there is no formal transfer of a business and the right to its name, where a business is actually transferred, the transferee has the right to use the trade-name.

2. Where one has established a business in his name, equity will restrain another of the same name from using it in the same line of business with the fraudulent intent of attracting custom intended for the first user.

3. Where defendants fraudulently used the name of one of them in their business for the purpose of attracting custom intended for complainant, another old, established firm of the same name, a decree that enjoined defendants' use of the name, unless coupled with words that clearly indicate that the firm is composed of all the defendants, and is not the complainant, is not too broad.

Appeal from appellate court, First district.

Bill by the Allegretti Chocolate-Cream Company against Giacomo Allegretti and others. A decree for the complainant was affirmed by the appellate court (76 Ill. App. 581), and the defendants appeal. Affirmed.

Appellee, the Allegretti Chocolate-Cream Company, is a corporation engaged in the manufacture of chocolate creams and confections in the city of Chicago, the stock of which is owned by Ignazio Allegretti, the father, and Joseph and Nicholas Allegretti, his sons. This proceeding is a bill in chancery by the corporation, begun in the superior court of Cook county, against I. A. Rubel, B. F. Rubel, and Giacomo Allegretti, partners as Allegretti & Co., to enjoin and restrain the latter from manufacturing and selling chocolate creams under processes, recipes, and methods belonging to complainant, and from using the trade-mark or trade-name "Allegretti," claimed by the complainant as its exclusive trade-name, and used by it in its business. The bill alleges that complainant is the owner of the sole right, processes, recipes, and methods of manufacturing certain chocolate creams, and the trade-mark or trade-name "Allegretti"; that the said business was very extensive, being operated in several cities, and had become known throughout the United States; that Giacomo Allegretti was employed by Ignazio Allegretti and Allegretti Bros., to whose business and rights complainant succeeded, and that while so employed he acquired some knowledge of the processes; that on August 26, 1898, he advertised in the Chicago Daily News for a partner to inaugurate a new business, claiming to be the "originator and sole possessor of the genuine processes of manufacturing Allegretti chocolate creams"; that

the intention was to use the name "Allegretti," and cause the public and the trade to believe chocolate creams manufactured by Giacomo Allegretti are manufactured by complainant; that he then became associated with the Rubels under the firm name of Allegretti & Co., and instituted a business at 101 State street, in Chicago, for the purpose of manufacturing and selling creams similar to complainant's; that the creams made by defendants are shaped and packed like those made by complainant, to deceive the public; that defendants are claiming to be the originators of "Allegretti's" chocolate creams, and that complainant's customers have been misled by such representations; that the Rubels and Giacomo Allegretti have entered into a conspiracy for the purpose of diverting to their use and profit complainant's business; that Giacomo Allegretti never achieved any reputation in the manufacture of chocolate creams, but that defendants are selling chocolate creams upon the reputation of complainant. The Rubels and Giacomo Allegretti filed separate answers, each denying all intent to deceive the public or do business on the trade-name of complainant, and denying the processes and methods used by defendants were those of complainant, etc. Upon the hearing, a decree was rendered restraining the defendants "from using the name 'Allegretti' or 'Allegretti & Co.' in the sale of chocolate creams and confections," "except when such use is coupled with words clearly indicating that such goods were manufactured and are sold by B. F. Rubel, I. A. Rubel, and Giacomo Allegretti, and not by Ignazio Allegretti or the Allegretti Chocolate-Cream Company," etc. From this decree defendants appealed to the appellate court, where it was affirmed. Appellants bring the cause here upon further appeal.

Moran, Kraus & Mayer and Clyde E. Marsh, for appellants. Douglas C. Gregg (Darrow, Thomas & Thompson, of counsel), for appellee.

WILKIN, J. (after stating the facts). From the record before us it clearly appears that Ignazio Allegretti, after years of business experience in that line, established for himself a reputation and trade-name as the manufacturer of a superior grade of confections known as "Allegretti chocolate creams." He subsequently became engaged with his sons in the same business, and later incorporated the complainant company, composed of himself and his sons, Nicholas and Joseph Allegretti. The questions raised upon this record for our decision are chiefly two: First, was the complainant company, at the time of filing the bill, the owner of the exclusive right to use the trade-name or trade-mark "Allegretti," when applied to manufactured chocolate creams and confections? And, second, were appellants so using the firm name "Allegretti & Co." as to justify the intervention of a court

of equity by injunction, as set forth in the decree in this cause?

Upon the first inquiry, it is contended that appellee has not proven the allegations of the bill in this cause, alleging that the sole right to the use of the trade-name "Allegretti," and the processes and recipes, passed to complainant, and was in complainant at the bringing of this suit. We think the facts proven sufficiently support the allegations of the bill in this respect. Ignazio Allegretti and his two sons, who own all the stock in the present company, composed the firm of Allegretti Bros., to whose business and rights the corporation succeeded. True, there is no testimony showing that Allegretti Bros. executed and delivered to the corporation any formal assignment or transfer of the right claimed; but the business was transferred to the corporation, and the same persons continued it in the same manner, but under a new and corporate name, and no formal transfer was necessary to vest the rights in appellee. The transfer of the property and effects of a business carries with it the exclusive right to use such trade-marks or trade-names as have been used in such business. *Manufacturing Co. v. Snyder*, 54 Ohio St. 86, 43 N. E. 325; *Williams v. Farrand*, 88 Mich. 473, 50 N. W. 446; *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, 52 N. W. 595; *Merry v. Hoopes*, 111 N. Y. 415, 18 N. E. 714; *Feder v. Benkert*, 18 C. C. A. 549, 70 Fed. 613.

The second question, whether appellants are so using the firm name "Allegretti & Co." as to justify the intervention of a court of equity, is one of fact, and is the chief consideration in the decision of this cause. It is hardly disputed that for a number of years "Allegretti's" chocolate creams and confections, in the city of Chicago, were known to be the manufacture of the firm of Allegretti Bros., which was afterwards incorporated and became the appellee company. That firm, and later the appellee, had thus acquired a reputation in that particular business, and the manufactured product had acquired a trade-name, when associated with the business, which was of great value. The defendants had a right to open up their business under the firm name of "Allegretti & Co." provided they did so without "any intent, act, or artifice to mislead dealers in the market, or the public at large, as to the identity" of the firm. *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127, 40 N. E. 616. If they established their new business and sought to conduct it with the fraudulent and wrongful intention of attracting to themselves the custom intended for appellee, this is clearly a fraud upon the rights of the latter. Whether the business was carried on with such wrongful intent to deceive is the question of fact which was found adversely to appellants upon the hearing, and is the one we must determine from an examination of the evidence. From a careful examination of the whole record we think the chancellor below, and the appellate court, were

amply justified in their finding. The most that can be said is that the evidence is somewhat conflicting, although we are satisfied that it preponderates in favor of complainant.

It is also contended by appellants that the scope of the injunction in this cause is too broad; that even if it be found the appellants have been guilty of fraudulent practices to divert to themselves the trade intended for appellee, yet the injunction can only restrain such fraudulent practices, and not the use of the name, it being contended that every natural person has the right to the free use of his own name in his own business. That every natural person has such right is undoubtedly the rule established by an unbroken line of decisions; yet that right, as is said in the case of *Elgin Butter Co. v. Elgin Creamery Co.*, supra, can only be exercised "in the absence of any fraudulent or wrongful intention or act." In harmony with this view is the case of *Hazelton Boller Co. v. Hazelton Tripod Boller Co.*, 142 Ill. 494, 30 N. E. 339. Appellants are not restricted from the use of the name "Allegretti" in every manner, as is contended by counsel. They may use it, provided they do so in a manner indicating that their goods are "manufactured and sold by B. F. Rubel, I. A. Rubel, and Giacomo Allegretti, and not by Ignazio Allegretti or the Allegretti Chocolate-Cream Company." Fraud and deception having been practiced by appellants, as shown by the facts and the finding herein, we are satisfied the language of the decree is not too far-reaching. The judgment of the appellate court affirming the decree of the superior court of Cook county will accordingly be affirmed. Judgment affirmed.

(177 Ill. 115)

LAUER v. WEBER.

(Supreme Court of Illinois. Dec. 21, 1896.)

TAXATION—VALIDITY OF AFFIDAVITS—TAX DEEDS—CURING ERROR—REDEMPTION—APPEAL.

1. An affidavit filed by a purchaser at a tax sale to procure the issuance of a tax deed to himself, stating that he served a notice some six months before on one who "is" the owner of the land described in said notice, is defective for failure to state said person "was" the owner at the time the notice was served, within 3 Starr & C. Ann. St. (2d Ed.) p. 3487, providing that the notice shall be served on the owners, or the parties interested in said lot.

2. A tax deed, void because based on a defective affidavit by the purchaser at the tax sale, cannot be cured by the subsequent filing of an additional affidavit, and the issuance of a new tax deed based thereon, where the latter affidavit is contradictory of the original affidavit as to who was in the actual possession of the premises in controversy.

3. An objection to evidence cannot be first urged on appeal.

4. A ruling excluding evidence cannot be assigned as error, where no exception was taken.

5. On the setting aside of a tax deed, complainant need not pay the taxes prior to the taxes for which the property was sold, though the purchaser may have paid such prior taxes.

Error to superior court, Cook county; H. M. Shephard, Judge.

Bill by Caroline Weber against Mary Lauer. From a decree for complainant, defendant brings error. Affirmed.

This is a bill originally filed on February 27, 1896, by the defendant in error, Caroline Weber, against the plaintiff in error, Mary Lauer, to set aside a tax deed and a quitclaim deed based thereon, as clouds upon the title of the defendant in error. The original bill alleges that the defendant in error is the owner of a certain lot in Sheffield's addition to Chicago; that the same was sold by the county clerk of Cook county on October 5, 1893, for the general taxes of 1892, and purchased at such tax sale by Daniel J. Hubbard; that a tax deed, dated January 30, 1896, and recorded on February 9, 1896, was executed to said Hubbard; that by quitclaim deed dated February 13, 1896, and recorded February 16, 1896, said premises were conveyed by said Hubbard to the plaintiff in error, Mary Lauer. The bill further alleges that said tax sale and tax deed were void by reason of certain defects in the affidavits upon which the tax deed was issued, and which were filed with the county clerk. The bill still further alleges that on February 27, 1896, defendant in error tendered to the plaintiff in error a sum of money, sufficient to cover all reasonable costs for the payment of said taxes, and demanded of her that she execute a quitclaim deed to defendant in error; that plaintiff in error refused to comply with such request; and in the bill defendant in error offers to pay to plaintiff in error the amount of the taxes for which the premises were sold, and the amounts of all the payments of taxes subsequently made under said tax sale, or tax deed, or quitclaim, with interest at 6 per cent. from the date of the sale. The bill prays that the tax deed to Hubbard, and the deed of Hubbard to plaintiff in error, may be set aside, and declared void, as clouds upon the title of defendant in error, and that the same may be decreed to be delivered up and canceled. Demurrer was filed to the bill, and overruled, and leave was given to the plaintiff in error, Mary Lauer, to answer. Plaintiff in error filed an answer, denying the material allegations of the bill as herein set forth. The answer further states that Hubbard, on May 7, 1896, more than two, and less than three, years after the said sale, filed with the county clerk of Cook county certain new and additional affidavits, with the tax notice thereto attached, which are appended to the answer; that upon delivery to the county clerk of said new affidavits and notice the county clerk executed and delivered to Hubbard, on May 7, 1896, a tax deed, conveying said premises to him, for the nonpayment of the taxes of the year 1892, which deed was recorded on May 13, 1896; that on May 7, 1896, Hubbard, by quitclaim deed of that date, recorded on May 13, 1896, conveyed said premises to Mary Lauer, the plaintiff in error. Subsequently, on June 13, 1896, the defendant in error filed a supplemental bill, making Hubbard a party

defendant. Default was entered against Hubbard. Mary Lauer filed an answer to the supplemental bill. Thereafter defendant in error filed an amended supplemental bill, reciting the matter of the original bill and answer thereto, and also, by way of supplement, alleging that, after the filing of the original bill, Hubbard filed with the county clerk certain affidavits, and that upon the filing of said affidavits with said clerk the original tax deed issued to Hubbard was surrendered to said clerk, and the latter made to said Hubbard a new tax deed; that thereupon, on May 7, 1896, Hubbard executed a new quitclaim deed to said Mary Lauer. It is alleged that such filing of additional affidavits and execution of a new tax deed and a new quitclaim deed were illegal acts, and that the second tax deed is void. The amended supplemental bill prays that the judgment for taxes against said lot and the proceedings thereon and the tax deeds to Hubbard and the quitclaim deeds to Mary Lauer may be set aside, and delivered up, and canceled, as clouds upon the title of the defendant in error. The plaintiff in error, Mary Lauer, filed an answer to the amended supplemental bill, admitting the filing of the additional affidavits with the county clerk as above set forth, and the surrender of the first tax deed to the clerk, and the execution of a new tax deed to Hubbard, and of a quitclaim deed by Hubbard to plaintiff in error, on May 7, 1896. The plaintiff in error claims title under such additional proceedings. On September 27, 1897, the court below entered a decree finding defendant in error to be the owner of the premises in question; that said tax deeds and affidavits and quitclaim deed were void, and clouds upon the title of the defendant in error, and that the same should be removed. The decree adjudged in accordance with the findings, and ordered that such deeds be canceled and set aside upon the defendant in error paying to the plaintiff in error the amount of the tax sale, and all payments of taxes made under the tax sale and judgment, respectively, from their dates to the date of the decree. The present appeal is prosecuted from such decree of the superior court of Cook county.

Ernst F. Herrmann and J. Kent Green, for plaintiff in error. J. H. Freudenthal, for defendant in error.

MAGRUDER, J. (after stating the facts). Section 216 of the revenue act provides that the purchaser at a tax sale, or his assignee, shall comply with certain conditions therein specified, before he shall be entitled to a deed of the land purchased at such tax sale. Section 217 of the act provides that every such purchaser or assignee, by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied with the conditions of section 216, stating particularly the facts relied on as such compliance, and shall deliver such affidavit to

the person authorized by law to execute the tax deed. 3 Starr & C. Ann. St. (2d Ed.) pp. 3487, 3490. In this case the original affidavits were filed, and the original tax deed was issued, in January, 1896. Hubbard, to whom the tax deed was issued, executed a quitclaim deed of the premises to the plaintiff in error on February 13, 1896. The original bill herein was filed on February 27, 1896. After the original bill was filed, the original tax deed issued to Hubbard, and dated January 30, 1896, was surrendered to the county clerk, and additional affidavits were filed, and a subsequent tax deed was issued to Hubbard, on May 7, 1896. The main question presented by the record is whether a purchaser at a tax sale, having filed affidavits under section 217 with the county clerk, and having procured the issuance of a tax deed to himself, can thereafter surrender such tax deed, and file additional affidavits, as additional evidence of his compliance with the law, and thereafter have a subsequent tax deed issued to him. The bill alleges that the original affidavits filed with the county clerk on January 30, 1896, were defective in certain particulars. It is unnecessary to consider all the objections made to such affidavits. It is sufficient to notice one, which we regard as well founded. That objection has reference to an affidavit made by C. J. Marhoeffer, which was sworn to on January 27, 1896. In such affidavit Marhoeffer swears that he is the agent of Daniel J. Hubbard; that, as such agent, he, on the 1st day of July, 1895, being at least three months before the expiration of the time of redemption on the sale mentioned in the notice thereto annexed, served a notice, of which the annexed notice is alleged to be a true copy, on Caroline Weber, "who, this deponent is informed and believes, is the owner of the lot described in said notice, by handing the same to and leaving same with her, at Chicago in said county." The affidavit from which the above quotation is made was clearly defective. It alleges that Caroline Weber is the owner of the lot described in the notice; that is to say, that she is such owner at the time the affidavit was made, which was on January 27, 1896. This is not sufficient. The affidavit should have stated that Caroline Weber was the owner of the lot at the time when the notice was served upon her. In *Gonzalia v. Bartelsman*, 143 Ill. 634, 32 N. E. 532, we said (page 639, 143 Ill., and page 534, 32 N. E.): "The legislature has provided in section 216 of the revenue act that the notice therein described shall be served on 'the owners of, or parties interested in, said land or lot, if they can, upon diligent inquiry, be found in the county,' etc. The owners, or parties interested, here referred to, are those who are such at the time the notice is served or published." In view of the defect thus indicated in the affidavit, the original tax deed issued by the county clerk to Hubbard on January 30, 1896, was invalid. To remedy

this defect, Hubbard, on May 7, 1896, filed another affidavit, made by Marhoeffer, and sworn to by him on April 24, 1896, in which latter affidavit it was stated that Marhoeffer, as agent of Hubbard, on the 1st day of July, 1896, "being at least three months before the expiration of the time of redemption on the sale mentioned in the annexed notice, served the notice of which the annexed notice is a true copy on Caroline Weber, who was at the time of the serving of said notice the sole owner of, the only person in the actual possession or occupancy of, and the only person having any interest in, the land or lot described in said notice, by handing the same to and leaving the same with her at Chicago, in said county."

We are of the opinion that the defect in the original affidavit and the void character of the tax deed based thereon were not, and could not be, cured by the subsequent filing of such additional affidavit, and the issuance of a new tax deed based thereon. This question was expressly decided in *Klokke v. Stanley*, 109 Ill. 192. In the latter case we held that a county clerk, who has once executed a tax deed at the instance of the holder of the certificate of purchase at a tax sale upon evidence then furnished by such holder, cannot be subsequently compelled by mandamus to execute to the same party another tax deed under the same certificate of purchase, the holder thereof having filed with the clerk additional and more perfect evidence of his having complied with the law in respect to giving notice, etc., after the execution of the first deed. The reasons for such holding are fully set forth in that case, and need not here be repeated. If the county clerk could not be compelled by mandamus to receive such additional affidavits, and to execute a new tax deed based thereon, then he may not be permitted to do so voluntarily. *Maxcy v. Clabaugh*, 1 Gilman, 26. It is true that here the original tax deed issued by the county clerk was defective, because there was no statement in it of the year for which the delinquent tax was levied. In *Maxcy v. Clabaugh*, supra, a deed to the purchaser of land sold for taxes was held to be invalid on account of such omission. The mistake in the tax deed there and in the first tax deed issued here was the mistake of the county clerk himself. The county clerk may be compelled by mandamus to correct a mistake of this kind, where it is his own fault that such mistake was made. Here, however, the mistake in the statement of the affidavit was that of the party applying for the deed, "and relates to proof which it was his duty to furnish the clerk, and which he assumed to furnish to the clerk before he applied for his deed." In case of a mistake so made by the party applying for a deed, mandamus will not lie. *Klokke v. Stanley*, supra. In *Klokke v. Stanley*, supra, a new affidavit was filed with the county clerk to procure another tax deed, upon the ground that the first affidavit had

omitted to state that a notice had been served upon the party in possession of the premises. In the case at bar one of the affidavits originally filed by Marhoeffer states that Mary Lauer was the only person in actual possession of the premises here involved, while the additional affidavit of Marhoeffer alleged that Caroline Weber was the only person in the actual possession of the premises in controversy. As these affidavits contain contradictory statements upon the subject, the reader of the same would be at a loss to know who was the actual occupant of the premises in question. Our conclusion upon this branch of the case is that the court below decided correctly in holding that both the original tax deed and the tax deed subsequently issued were void, and were clouds upon the title of the defendant in error.

Plaintiff in error complains that the court below erred in admitting evidence of the tender made by the defendant in error to the plaintiff in error of the amount to which the latter was entitled for her reasonable costs for the payment of the taxes. Whether the evidence upon this subject was or was not improperly admitted by the court is a question which cannot be raised upon this record, because no objection was made by counsel for plaintiff in error to the introduction of such evidence on the trial in the court below. A party must object to evidence offered, so as to afford the trial court an opportunity of passing upon the objection, before he can assign for error the admission of such evidence. *Powell v. McCord*, 121 Ill. 330, 12 N. E. 262.

Plaintiff in error further assigns as error that the court below refused to allow a witness to testify as to the payment of the taxes on the premises in question prior to the year 1892, the taxes for that year being the taxes for the nonpayment of which the premises were sold. The question addressed to the witness, which was intended to call out the proof as to the payment of such taxes, was objected to by counsel for the defendant in error, and the objection was sustained by the court; but no exception was taken by counsel for the plaintiff in error to the ruling of the court sustaining the objection. Hence such ruling cannot be here assigned as error. A party cannot complain in this court of a ruling of the trial court which excludes evidence, where the record fails to show that any exception was taken to such ruling at the time it was made, or that any motion was made to exclude the evidence. *Lithographing Co. v. Kerting*, 107 Ill. 344. But the proper condition to be imposed upon the setting aside of a tax deed is to require the complainant to pay the amount paid at the sale with all subsequently paid taxes and assessments, together with interest thereon, etc. *Gage v. Waterman*, 121 Ill. 115, 13 N. E. 543; *Barnett v. Cline*, 60 Ill. 205; *Phelps v. Harding*, 87 Ill. 442; *Farwell v. Harding*, 96 Ill. 32; *Moore v. Wayman*, 107 Ill. 192. It was, therefore, immaterial who paid the taxes prior to the sale.

This being so, there was no error in excluding proof as to the payment of such prior taxes. The decree of the superior court of Cook county is affirmed. Decree affirmed.

(177 Ill. 390)

HORNER et al. v. KEENE et al.

(Supreme Court of Illinois. Dec. 21, 1898.)

EASEMENT—PRIVATE WAY—BILL—DISMISSAL—INJUNCTION.

1. The owner of two lots and an adjoining private alley conveyed one, telling the grantee he could get his coal in through the alley. *Held*, that the latter had a right of way over the alley with teams.

2. The owner of three lots and a private alley adjoining two of them conveyed the two and the "joint use" of a certain strip and a right of way over the alley, and afterwards conveyed the third lot with a right of way over the strip and the alley. *Held*, that the grantee of the third lot was entitled to use the alley with teams; and this, though the lot did not adjoin the alley.

3. A bill to enjoin the obstruction of a private alley and using it with teams was properly dismissed for want of equity, where the obstructions were removed before suit, and an unauthorized use of the alley was not shown.

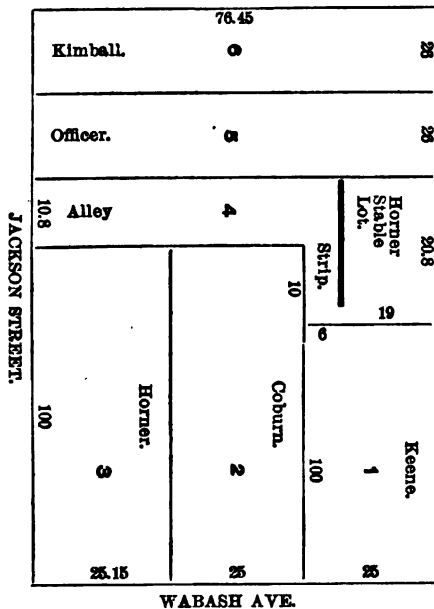
Error to circuit court, Cook county; O. H. Horton, Judge.

Bill by Hannah Horner and others against Francis B. Keene and others. There was a decree for defendants, and complainants bring error. Affirmed.

This was a bill in equity and for an injunction, filed in the circuit court of Cook county December 19, 1893, by Hannah Horner and Fannie Abson, against David Keene, Charles E. Cook, F. H. Brammer (the agent of Francis B. Keene), Thomas B. Bryan, Lewis B. Coburn, Julius Jonas, and Alexander Officer. The bill alleged that Hannah Horner and Fannie Abson claimed an interest in a private alley, being the south $57\frac{1}{12}$ feet of lot 4, assessor's division of lot 9, block 6, fractional section 15, addition to Chicago; that on December 28, 1853, Thomas B. Bryan owned the east 120.8 feet of lot 9, in said block 6, situate at the northwest corner of Wabash avenue and Jackson street, otherwise known as lots 1, 2, 3, and 4 of said assessor's division of lot 9, block 6; that lot 1 was 25 by 100 feet, lot 2 was 26 by 110 feet, and lot 3 was 25 feet 9 inches by 110; that lot 4 is 10.8 feet wide, and extends from the north line of Jackson street north 51.75 feet to the north line of lot 2, thence north 25 feet between parallel lines 20.8 feet apart to the north line of lot 9; that on February 10, 1855, Thomas B. Bryan conveyed lot 3 to William Bross, also the stable lot, being the north 19 feet of lot 4, also the "joint use" with Bryan and perpetual right of way 6 feet in width adjoining the east 10 feet of said stable lot, running from lot 1 to the private alley, also perpetual right of way 10.80 feet from the south line of said lot to Jackson street; that Bryan built a brick residence on lot 3, and a stable on the stable lot,

and inclosed the rest of lot 4 with fences, and lived on lot 3 until said deed to Bross, using said alley as an access for his teams and vehicles to the stable. The bill sets out the title of complainant Hannah Horner. It alleges a deed from Bross and wife, February 13, 1856, to lot 3 and a stable lot, and the same easements and right of way as in the deed from Bryan to Bross; that Ebenezer Higgins and wife, on June 10, 1856, deeded to Van H. Higgins the same premises, easements, and right of way, and on January 1, 1862, Van H. Higgins and wife conveyed, by deed, lot 3 and the stable lot, and the same easements and right of way over said alley, to Henry Horner, the husband of complainant; that said Henry Horner died, testate, February 11, 1878, devising the same easements and rights of way to his wife, Hannah Horner, one of the complainants. The bill further alleges that Henry Horner was in the exclusive possession of said premises until the great Chicago fire of October, 1871, and complainant claims possession since that time; that since the fire, and over 20 years ago, the present brick building was built on the stable lot, with a window facing on the 6 by 10 strip, on the south side; that never until a few years ago has any part of lot 4 been used by teams other than those belonging to the owners of lot 3 and said stable, or for loading or unloading goods for stores on lot 1; that the store on lot 1 was erected in 1874 and the store on lot 2 in 1888; that on March 1, 1892, complainant Fannie Abson leased said stable building from Hannah Horner for a term of five years, to be occupied as a restaurant, and has fitted it up at great expense, and built up a large and profitable business, and has paved the alley; that in the spring of 1892 she erected a post at the Jackson street entrance of said alley, where a gate stood before the fire, to prevent teams from trespassing, and sets up the destruction of the post, the excavation of the 6 by 10 strip, the construction and maintenance of a trapdoor over the same, the closing up of said window, and that it is a permanent injury; that, since the Bryan conveyance, said 6 by 10 strip has been used and treated as appurtenant to the north 19 feet of lot 4; that Brammer, as agent for Keene, has recently, with one Cook, deposited large quantities of rotten wood, dirt, and other débris in front of oratrix's door, and obstructed the approach to said restaurant, and excludes light and air from a window in the basement of the restaurant facing the 6 by 10 strip. The bill prays for an injunction restraining defendants from maintaining any obstruction on lot 4, or maintaining any stairway in the strip, or from leaving open any trapdoor, or from placing any dirt on the strip, or from interfering with any post or gate to be placed at the Jackson street entrance of the alley, or from placing any team on any part of lot 4, or from using any part of the 6 by 10

strip except as a footway. The following plat of assessor's subdivision of lot 9, block 6, was made an exhibit to the bill:



Francis B. Keene, the owner of lot 1 in subdivision of lot 9 in block 6, filed his answer under oath, claiming that all of lot 4, except the stable lot and the 6 by 10 strip, has always been used as a private alley for the benefit of lots 1, 2, 3, and 5, and has been used as such by said owners as occasion required; that the 6 by 10 strip had been in the possession and control of the owners of lot 1, and used by them since 1855, and used by them as a passageway between lot 1 and the private alley; that the right of way over said strip, and over the private alley, was granted by Thomas B. Bryan to Luther Rossiter by deed of April 24, 1855; denies that any part or all of said 6 by 10 strip has ever been in the exclusive possession of any owner of lot 3 and of the stable lot; denies that Henry Horner, and Hannah Horner, since his death, have had exclusive possession of all the alley and 6 by 10 strip, and paid taxes thereon; and alleges that the private alley has always been used, since 1858, by the owners of all the abutting lots, with teams, etc., as occasion required; that defendant Keene removed the post because it interfered with the common use of the alley; that, prior to the removal of the post, the sidewalk had been of plank for more than 20 years; that after the removal of the post, and without consent of defendant Keene or any other owner, complainants placed a stone pavement over the sidewalk space, with the outer edge so raised as to prevent access by teams to the alley from the street; claims a right to alter the sidewalk to admit teams to the alley; denies the trapdoors are dangerous or a nuisance, and denies that, because the alley is only 10

feet wide, therefore the use is impracticable, but avers that it is practicable to back teams in from Jackson street to reach any of the lots; avers that for over 20 years the 6 by 10 strip has been excavated, but that the excavation had been gradually filled with debris, and that defendant Keene directed this debris to be cleaned out, and a stairway built into the basement of the building on lot 1, and covered with trapdoors; that persons can easily walk over the trapdoors without danger; claims that the rights of Keene are matters of public record, and were never disputed until 1892.

Francis B. Keene also filed his cross bill, March 28, 1894, setting up the original bill and answer, and that on April 24, 1855, Thomas B. Bryan owned and possessed at least 120.8 feet of lot 9, being lots 1, 2, 3, and 4 of lot 9; that Bryan, by deed, conveyed to Luther Rossiter, as trustee for Harriet V. Rossiter and Gilbert Rossiter, lot 1 of lot 9, also a perpetual right of way over the 6 by 10 strip to the private alley 10.8 feet wide, and over the private alley to Jackson street; that at that time the north 19 feet of lot 4 was used as a stable lot by Bryan; that from the date of that deed to February 2, 1863, Harriet V. and Gilbert Rossiter occupied said strip and alley for general alley purposes; that on February 2, 1863, the said Rossiters conveyed, by deed, to James M. Cutler, said lot 1 and rights of way; that Cutler and his tenants occupied said premises under his deed up to August 28, 1868, when, on that date, Cutler and wife conveyed lot 1 and rights of way to James H. Stead and Silas M. Moore; that Moore occupied said lot and used said rights of way up to June 6, 1870, when Moore and wife and Stead and wife conveyed lot 1 and rights of way to Potter Palmer; that on April 27, 1871, Potter Palmer and wife conveyed lot 1 and the same rights of way to Joseph P. Clarkson; that in October, 1871, the improvements on lot 1 were destroyed by fire, and lot 1 remained vacant for about a year; that Clarkson erected a four-story brick building, covering all of lot 1; that at that time the 6 by 10 strip was excavated, and the sides walled up with brick, and the excavation used for an entrance to the cellar of lot 1, the excavation being covered by trapdoors when not used; that the said building and excavation remained afterwards as first constructed in 1872, and on March 23, 1877, Clarkson and wife conveyed lot 1 and the same rights of way to David Keene, who occupied the same until his death, in February, 1893, when he devised said lot 1 to Francis B. Keene, the complainant in the cross bill. The cross bill avers that at no time since the conveyance by Bryan, in 1855, has any one objected to such use by the owners of lot 1 of said strip and private alley until 1892, and that during all that time said owners of lot 1 have used said private alley and strip for all purposes of an alley, including use of teams. The cross bill further sets out that

Fannie Abson, by the direction of Hannah Horner, in the latter part of 1892, paved the private alley with cement from the stable to Jackson street, erected a post at the Jackson street entrance, and built a storm door directly in front of the 6 by 10 strip, to the injury of Keene, and that she also caused the pavement to be extended at a height to cut off teams, and now for the first time claims a right to limit the use of the alley to foot passage only; that the right to use the alley and the connection with Jackson street for general alley purposes is of great value to Keene; that no person except Keene can have any possible use for the 6 by 10 strip except the occupants of the stable lot, who use the same for light and air; that lot 2 is owned by Lewis L. Coburn, and occupied by his tenant, and lot 5 is owned by Alexander Officer. The answer under oath is waived, and asks that Abson and Horner be enjoined from interfering with the use by Keene of the 6 by 10 strip and private alley for general private alley purposes. The cross bill was amended, to the effect that Keene does not claim any rights by prescription in the 6 by 10 strip which he did not have by the original grant.

Answer was filed to the amended cross bill. It admits that Bryan owned the east 120.8 feet of lot 9, being lots 1, 2, 3, and 4; that said 6 by 10 strip was many years ago partly excavated to afford light and air to a window of the stable building below the surface; that the owners of lot 1 used said excavation as a coal chute; denies that the owners of lot 1 have used the private alley since 1855 for all purposes, including teams; and claims a right to construct the storm door, but admits that complainants have not an exclusive use of the 6 by 10 strip.

Replication was filed by Keene to the answer to his cross bill. Defaults pro confesso were entered as to Bryan, Coburn, Officer, and Jonas, and the case was referred to a special commissioner. Objections were filed to the report of the special commissioner, and it was ordered that the objections filed before the special commissioner stand as exceptions. Upon final hearing, the circuit court decreed as follows: "It is therefore ordered, adjudged, and decreed that the cross complainant, Francis B. Keene, who is the owner of lot 1 in assessor's division of original lot 9, in block 6, in fractional section 15, addition to Chicago, in Cook county, Ill., is possessed of, and he and his heirs and assigns are entitled to, a perpetual right of way appurtenant to said lot 1 over a private alley in the rear thereof, leading from said lot 1 to Jackson street, a public highway in the city of Chicago, Cook county, aforesaid; that said private alley consists of a strip of ground 6 feet in width by 10 feet in length, immediately west of and adjoining the south 6 feet of said lot 1, together with a strip of ground west thereof, and connecting therewith 10.80 feet in width, beginning 19 feet south of the north line of lot 4, in the assessor's division, and running

thence south an even width of 10.80 feet to Jackson street aforesaid, which strips of land are together otherwise known and described as all of lot 4 in said assessor's division, except the north 19 feet thereof; that the complainant Hannah Horner, who is the owner of lot 3 and the north 19 feet of lot 4, in said assessor's division, is also possessed of, and she and her heirs and assigns are entitled to, a like right of way appurtenant to her said lots over the same private alley connecting said lots with Jackson street; that neither of the rights of way aforesaid is exclusive of the other, but the owner of each, and his or her tenants, are entitled to use the same for any and all purposes reasonably necessary or convenient in connection with his or her said premises, including the reasonable use of said private alley with teams and wagons, and for the shipping and receipt of merchandise through and over said alley to and from Jackson street aforesaid. It is further ordered, adjudged, and decreed that complainants, Hannah Horner and Fannie Abson, within thirty days from the entry of this decree, remove, or cause to be removed, the storm door erected by them upon the private alley aforesaid, in front of the building located upon the north 19 feet of lot 4 aforesaid; and that within the same time they remove, or cause to be removed, the cement sidewalk in front of the alley aforesaid, which, as hereinabove found by the court, constitutes an obstruction to the use of said alley, or that they cause the same to be reconstructed in such a manner as to afford safe and convenient access to and from the alley from Jackson street aforesaid. It is further ordered, adjudged, and decreed that said complainants, Hannah Horner and Fannie Abson, their agents and servants, be, and they are hereby, perpetually enjoined and restrained from placing, or causing to be placed, any permanent obstruction whatsoever in or upon any part of said alley or the entrance thereto, and from in any manner interfering with any reasonable use of said alley by the owner or occupants of lot 1 aforesaid, with teams or otherwise. It is further ordered, adjudged, and decreed that the cross complainant, Francis B. Keene, within thirty days from the entry of this decree, remove the trapdoors upon the 6 feet by 10 feet space in the northeast corner of said alley, and cover the excavation therein in a safe, substantial manner, so as to afford light and air to any window there may be in any of the buildings surrounding the same, and to afford safe and convenient passage over the same for all purposes that may be reasonably necessary or convenient. It is further ordered, adjudged, and decreed that the original bill filed herein be, and the same is hereby, dismissed for want of equity, at complainants' costs, and that the cross complainant, Francis B. Keene, have and recover of and from the complainants, Hannah Horner and Fannie Abson, his costs in this behalf expended, to be taxed,

and that execution issue therefor." From this decree the complainants in the original bill have appealed to this court, and ask a reversal of the same.

Story, Russell & Story, for plaintiffs in error.
Joseph H. Fitch, for defendants in error.

CRAIG, J. (after stating the facts). 1. The principal question for determination in this case is: Is the defendant Francis B. Keene, the owner of lot 1 in the subdivision of lot 9, block 6, of fractional section 15, addition to Chicago, entitled to a perpetual right of way, with teams and wagons, equally with complainant Hannah Horner, the owner of lot 3, over the private alley appurtenant to lot 1, and in the rear thereof, leading to Jackson street, by virtue of the grant in the deed from Thomas B. Bryan to Rossiter, and the successive deeds from Rossiter to David Keene? The evidence shows that John W. Waughop, the then owner of the whole of original lot 9, conveyed the north 26 feet of the east 141 feet of the lot to Robert W. Patterson; and on August 1, 1853, Waughop conveyed the south 50 feet of the east 141 feet to Thomas B. Bryan. These premises include lot 3, all of lot 2 except the north foot of it, and all of lots 4 and 5. Bryan and Patterson then owned the whole of the east 141 feet of lot 9, with a frontage of 76 feet on Wabash avenue. Bryan built a brick house on the corner 25 feet, on what is sublot 3. Bryan and Patterson effected an exchange of lots. December 23, 1853, Patterson conveyed to Bryan the east 120.80 feet of the north 26 feet, being lot 1; also the north one foot of lot 2, and the north 26 feet of lot 4. Bryan testifies: "I do recall that in the transactions with Dr. Patterson I mentioned to him that he could get his coal in through the alley. I recall that fact, and I never shall forget a certain remark he made in respect to it; but it was a religious remark, about 'Narrow is the way,' etc." This evidence shows Patterson, to whom lot 2 was conveyed, expected to have, and had, the right of way with teams in the alley as an incident to his ownership of his lot. In *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111, this court held that where the owner of two tenements, or of an entire estate, has so arranged and adapted them that one tenement or one portion of the estate derives a benefit and advantage from the other, of a permanent, open, and visible character, and he sells a portion of the property, the purchaser will take the tenement or portion sold, with all the benefits and burdens which so appear at the time of the sale to belong to it; that it is not necessary, in such case, that the easement claimed by the grantee must be really necessary for the enjoyment of the estate granted, but it is sufficient if it is highly convenient and beneficial therefor. See, also, *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176.

It appears from the evidence that wood-

sheds were built about this time in the rear of the Patterson lot (lot 2), and in the rear of lot 3, with the rear wall of the sheds on the east line of the alley in controversy, with an opening or slide door in the sheds for the purpose of getting in wood or coal from the alley. Bryan, by the deed from Waughop, dated August 1, 1853, and the deed from Patterson, dated December, 1853, for lot 1, owned lot 1, and also lots 3 and 4 and the stable lot, together with the 6 by 10 strip, and, owning the same, had the right of passage over the 6 by 10 strip, and the right to use lot 4 as an alley for teaming purposes. Bryan, in his deed to William Bross, dated February 10, 1855, conveyed lot 3, the north 19 feet of lot 4 (the stable lot), and also the joint use of the 6 by 10 strip and right of way over the alley to Jackson street. The several conveyances from Bross to Ebenezer Higgins, and from Ebenezer Higgins to Van H. Higgins, describe the property and rights of way substantially the same as in the deed from Van H. Higgins to Henry Horner. The deed conveys lot 3, also the stable lot, also the use of right of way over the 6-foot strip, and "also the perpetual right of way over the said private alley, it being a strip of ground about 10.8 feet wide, running from the south line of said stable lot to Jackson street." After these conveyances, Bryan still owned lot 1, 25 by 100 feet, east of the stable lot, and a lot 20 feet wide west of the private alley. In April, 1855, Bryan sold lot 1, 25 by 100 feet, east of the stable, to Luther Rossiter, which was described as follows: "The north 25 feet of the east 100 feet of said lot 9, together with the perpetual right of way over a strip of ground adjoining said part of lot on the southwest corner thereof, being 6 feet in width, and extending westwardly of an even width of 6 feet to a private alley of 10.80 feet in width running to Jackson street, together, also, with the perpetual right of way over said last-named alley, running north and south to Jackson street." In the successive deeds of Bryan to Rossiter, Rossiter to Cutler, Cutler to Stead and Moore, Stead and Moore to Potter Palmer, Palmer to Joseph P. Clarkson, and Clarkson to David Keene, there was in the grant substantially the same language of right of way over the alley to Jackson street.

Where an easement is granted or reserved in express terms by deed, the question then ordinarily is, what is the proper construction of the language of the deed? *Shep. Touch.* 88. From the language used in the deed from Bryan to Rossiter, it was evidently the intention of the grantor to grant a perpetual right of way from said lot 1 to Jackson street for all the ordinary and usual purposes and uses of an alley. The grant did not limit the right of way to foot passage. This right of way was to be enjoyed with others having a similar right in the same alley, and in the same strip of land. The deed from Bryan to Bross of lot 3 and the stable lot granted the

joint use of the 6 by 10 strip and right of way over the alley, and not the exclusive use. This deed was not in conflict with the joint use of the strip and alley to the respective grantees of lot 1. A reasonable right of way was to be enjoyed by the owners of lots abutting on this alley. Neither of the rights of way was exclusive of the other, but the complainant Hannah Horner, and the owner of lot 1, and the owners of the other lots abutting on the alley, and their tenants, are entitled to use the said alley for all reasonable and necessary purposes, including the reasonable use of said alley with teams.

If the deed from Bryan to Bross was intended to grant the exclusive use of the alley to Bross and his grantees when Bryan sold lot 1 to Rossiter, it is not reasonable to presume he would have granted a perpetual right of way over the same alley; but, if the intention was to establish a right of way over lot 4 for the benefit of all subsequent owners, a reason can be found for each deed containing substantially the same grant of right of way. We are of the opinion, therefore, that the owners of lot 1 and the stable lot have a joint use of light and air and right of way over the 6 by 10 strip, and also a joint use of light and air in the excavation of the said 6 by 10 strip, and that the owner of lot 1 is entitled to a perpetual right of way appurtenant to said lot 1 over the private alley in the rear of said lot 1, leading from the 6 by 10 strip to Jackson street, for any and all purposes reasonably necessary or convenient to his premises, including the reasonable use of said private alley with teams, and that complainant, the owner of lot 3, is also possessed of and entitled to a like right of way appurtenant to her said lots over the said alley to Jackson street.

It is contended by plaintiffs in error, there being no terminus of the alley upon lot 1, that, therefore, the easement was in gross. A right of way will never be presumed to be in gross where it can fairly be construed as appurtenant. *Railroad Co. v. Koelle*, 104 Ill. 455. In *Whitney v. Railway Co.*, 11 Gray, 365, the court defined a grant which may be regarded as appurtenant, as follows: "When it appears, by fair interpretation of the words of a grant, that it was the intention of the parties to create or reserve a right, in the nature of a servitude or easement, in the property granted, for the benefit of other land owned by the grantor, and originally forming, with the land conveyed, one parcel, such right will be deemed appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created will pass, respectively, to, and be binding on, all subsequent grantees of the respective lots of land." The deeds from Bryan down to Keene contained the same grant as in the deed from Bryan to Rossiter. The language used shows it was the intention to create a right of way over this alley to Jackson street, and this right will be deemed ap-

purtenant to and binding on that conveyed to the grantee, and all subsequent grantees of the respective lots of land. In *Washb. Easem.* p. 35, § 13, it is said: "Where, therefore, one grants or reserves a right of easement over one parcel of land in favor of another, such easement, by such act of creation or annexation, would become incident and appurtenant to such estates respectively, and pass as appurtenant in after conveyances, by, or even without, the word 'appurtenances,' so long as such estates should subsist as distinct estates in different proprietors. Nor could the easement be separated from the principal estate, except by him who has a disposing power over the estate,"—citing *Ritger v. Parker*, 8 Cush. 145.

2. Was the alley used for teaming purposes by the owners of the various lots abutting on this private alley on lot 4, from about December, 1853, until the complainant Fannie Abson put up the post at the entrance of the alley into Jackson street, in May, 1892? Complainants introduced testimony for the purpose of proving that the owners of lot 3 had the exclusive use of the alley on lot 4 with teams, while defendants introduced evidence to show that the alley was used by the owners of other lots with teams. The master in chancery, on the question of the user or nonuser of lot 4 as an alley with teams, divided the evidence on that subject into three periods: First period, from the date of the deed by Dr. Patterson to Bryan of lot 1, in December, 1853, down to the date of the deed of lot 3 and the stable lot to Henry Horner, in January, 1862; second period, from January 1, 1862, to the time of the Chicago fire, October 9, 1871; third period, from October 9, 1871, to May 1, 1892.

The sworn answer of Francis B. Keene, the oath not having been waived, states this private alley had been used since 1855 by all the owners of all abutting lots, with teams, as occasion required. Gilbert Rossiter testified, for defendants, that he lived on lot 1 from 1855 to 1860, and had a rear entrance to lot 4, and used the alley to get wood into his lot, and that the teams usually backed in from Jackson street. William Higgins, a son of Ebenezer Higgins, testified by deposition, for the complainants, that only his father's teams used the alley. In 1856, when his father lived on lot 3, this son was only two years of age. He says that he was familiar with the property after he moved away, for he used to visit his uncle, Van H. Higgins, who then occupied the property. The evidence shows Van H. Higgins bought the property in 1856, and sold it to Horner in 1862, which would make the witness only eight years of age when his uncle moved from the property. This testimony, after the lapse of 40 years, is entitled to little weight. Ebenezer Higgins, the father, who lived in Yazoo, Miss., testified, in his deposition, that he owned the Horner property and stable, having bought it in February, 1856, and sold it

June 11, 1856, and his testimony related to only four months between these deeds, and he testified that the other owners did not use the alley, to his knowledge. This testimony is not sufficient to overcome the sworn answer of Francis B. Keene, and the positive testimony of Rossiter, that all the owners of abutting lots used the alley with teams, from 1853 to the date of the deed to Henry Horner, January 1, 1862, and sustains the finding of the master in chancery that there is no evidence during this period that the respective owners of lot 3 had the exclusive use for teams of lot 4, but that there was a preponderance of evidence that during part of that period lot 4 was used as an alley for teams by the owners of some of the other lots than that of lot 3 and the stable lot, and without objection.

The second period is from January 1, 1862, to the time of the Chicago fire, October 9, 1871. As to the use of lot 4 as an alley, with teams, we have examined the testimony of the witnesses, upon which the master in chancery based his report for this period of about nine years. The master reports that, during this period there is no preponderance of evidence that the alley on lot 4 was used for teaming purposes exclusively by the Horners. While there is some evidence that, after Henry Horner acquired lot 3 and the stable lot, the gate at the Jackson street entrance to the alley (a gate erected by Bross) was kept padlocked, and the key kept by the Horners, there was no preponderance of evidence that the Horners refused to allow the gate to be opened for the occupants of other lots. Addison Ballard, a witness for the cross complainant, testified that he knew lot 1 from 1865 to 1871; that he owned 54 feet just north of it; that it was used as an alley for horses and wagons before the great fire of October, 1871, to get to the stables in the rear; that Officer and Kimball lived on lots 4 and 5, and there was a barn in the rear, and teams reached it from Jackson street through this alley; and that he himself had driven in the alley during this period, when he was in the lumber business. The sworn answer also covered this period, and states that all of lot 4, except the stable lot and the 6 by 10 strip, has always been used as a private alley with teams, for the benefit of the owners of lots 1, 2, 3, and 5, and has been used as occasion required. One witness for complainants testified he was in Europe for three years during this period, and that lot 4 was never used, to his recollection, by the occupants of lots 1 and 2. Some of the complainants' witnesses never saw any of the abutting owners use the alley during this time. The master finds there is some difference in the weight to be given to testimony,—between positive testimony that a man did use or saw others use the alley for teaming purposes, and the testimony of witnesses that they did not see or know of such use,—and finds there is a slight preponderance of evidence that Alexander Officer, occupying lot 5, and Addison

Ballard, during this period, used the alley on lot 4 for teaming purposes.

During the third period, from October 9, 1871, to May 1, 1892, the master found that the gate to the alley, together with all the buildings and improvements, was burned in the great fire, and that there is no evidence that there was any obstruction to the use of the alley with teams until about May 1, 1892,—nearly 21 years afterwards,—when Fannie Abson erected the post at the Jackson street entrance to the alley. We find that during this period there is evidence of the occupants of the various lots using the alley on lot 4 for teaming purposes. William H. Ditmer occupied the store on lot 1 in 1882 and 1883 for a restaurant, and he used the alley with express wagons to get in his provisions, and for hauling out ashes, garbage, etc., and nobody ever objected. Kimball & Co., wholesale glass men, occupied lot 5, and they used to back a wagon in to a door which opened into the alley, and loaded the wagon with glass. And Edwards & Son, who occupied lot 2 as a carriage house, used the alley to bring in their conveyances. Morris H. Ellinger occupied lot 1 for 13 years,—from 1878 to 1891,—as a picture frame manufacturer. He testifies he used the alley for shipping and receiving goods; that teams used to back in there; that he used it right along, getting in coal and lumber; that he used to carry stuff through the 6 by 10 strip into the rear door; that no one ever objected to the use of the alley (with teams) until the barn was rented for a restaurant. Coburn and Bramner also testified to the use of the alley by teams. Coburn owned lot 2 since 1878, and he saw teams in the alley unloading into the building on lot 5; while Frederick H. Bramner, who took charge of the Keene property in 1889, testifies that he took out all the partitions on the three upper floors, and took out all the plaster, laths, etc., by teams through the alley, and no one objected. He also testifies that Ellinger shipped most of his goods through the alley by teams at that time, and for years afterwards. In 1889 Ellinger leased the property occupied by Abson, which was then a barn, and used the alley with express wagons, and nobody objected to such use. The master found that during this period of 21 years there was no evidence that there was any obstruction to the use of the alley with teams. The master's report was approved by the circuit court, and we think the evidence fully warranted the finding.

It was also alleged in the bill that Horner had paid all taxes upon the alley for more than 30 years. The stipulation in the record as to the tax receipts offered in evidence by Horner does not sustain this allegation. The receipts show that since 1868 Horner paid taxes only on the east $4\frac{1}{2}$ feet of the south 25 feet (i. e. the half immediately abutting upon lot 3) and the south 6 feet of the north 25 feet of the west half of lot 4, being a

space 6 by 10 feet on the west side of the alley, immediately fronting the doorway of the barn, now the Abson restaurant. The evidence shows Horner did not pay the taxes on the portions of the alley abutting upon either of lots 1, 2, or 5. It also appears in evidence that on March 26, 1868, Silas M. Moore, then the owner of lot 1, paid a special assessment for filling and grading Jackson street, assessed by the city of Chicago against subplot 4 (the alley); and on March 26, 1868, Henry Horner, the owner of lot 3, and complainant's husband, paid to said Moore \$5.10 "in full for his (said Horner's) portion of said special assessment." Keene has paid the taxes upon the east half of the alley abutting upon lot 1. and the 6 by 10 strip. This evidence does not show that Henry Horner claimed to hold the whole of the alley adversely, but rather shows that he considered the owners of the other lots abutting on the alley had a joint right of way with himself, and should pay their proportion of the taxes on that portion of the alley opposite the respective lots by reason of the grant in their deeds.

3. Plaintiffs in error insist the circuit court erred in dismissing the original bill for want of equity. It was alleged in the original bill that defendants had deposited large quantities of rotten wood, debris, and rubbish in front of Abson's door. The evidence shows it had all been removed before the bill was filed; that it was only placed in the alley temporarily, while repairs were being made to the 6 by 10 strip. The real question at issue in the original bill and answer was the right of the parties to the use of the alley with teams. No injury, irreparable or otherwise, was shown by the evidence to have occurred, and no use of the alley other than was authorized by the grant in the deed was shown. Consequently, the relief sought to prevent defendants from using the alley with teams was not warranted, and the bill was properly dismissed for want of equity. Finding no serious error in the record, the decree of the circuit court is affirmed. Decree affirmed.

(177 Ill. 178)

CITY OF JOLIET v. JOHNSON.

(Supreme Court of Illinois. Dec. 21, 1898.)

PLEADING—VARIANCE—ERROR—WAIVER—EVIDENCE—INSTRUCTIONS.

1. In an action for injury resulting from falling on a sidewalk, there was an allegation that the planks were broken and unfastened. The proof showed that some of the planks were unfastened, and that the fall resulted from this. Held not a variance, though there was no proof of any planks being broken.

2. In an action for injury caused by falling on a sidewalk, the declaration alleged that the "right knee of plaintiff was then and there dislocated," and she "became sick, lame, disordered, and permanently injured." The proof was that plaintiff's knee impinged against a protruding nail, causing a jagged wound above

the cap, and a swelling of the limb, and varicose veins. Held not a variance.

3. Objection of variance between pleading and proof must be made in the trial court, so that an amendment may be permitted, and, if not so made, will be deemed waived.

4. Where the allegation in an action for injury from falling on a sidewalk was that plaintiff dislocated her right knee, and became lame and permanently injured, it was not error to admit proof of varicose veins, though there was no complaint of enlargement of the limb; it referring merely to the results produced by the injury.

5. Error of a witness in stating a conclusion that a sidewalk was in "poor condition" was harmless, he stating fully the reasons why it was in poor condition.

6. A requested charge that there was no evidence that a defendant city had actual notice of a defect in a sidewalk was properly modified so as to read, "Unless the jury believe * * * that the city had actual notice" of the defect, "or that the sidewalk * * * was out of repair for such a length of time that the city" by reasonable care might have discovered it, etc., though there was no evidence of actual notice.

7. Error in charging that the action claims damages for an "injury sustained," as assuming as a fact that injury was sustained, is cured, where a subsequent charge leaves the jury to determine whether or not plaintiff was injured.

8. Where the doctrine announced in a refused charge was substantially embodied in given charges, error in refusing the charge was harmless.

9. In an action for injury from falling on a sidewalk, a charge that plaintiff could not recover, if the injury resulted from a defective construction of the walk, was properly refused; the evidence showing the injury resulted, not from defective construction, but from defective repairs, and the declaration alleging that defendant suffered the walk to be and remain in a bad and unsafe condition.

Appeal from appellate court, Second district.

Action by Margareth Johnson against the city of Joliet. From a judgment of the appellate court (71 Ill. App. 423) affirming a judgment for complainant, defendant appeals. Affirmed.

This is an action on the case for the recovery of damages for injuries claimed to have been sustained by the appellee in consequence of a fall on a defective sidewalk in the city of Joliet on September 29, 1894. In the trial court the appellee recovered a verdict for \$1,500, upon which, after overruling a motion for new trial, the court rendered judgment. An appeal was taken from the judgment so rendered to the appellate court, where the judgment was affirmed. The present appeal is prosecuted from such judgment of affirmance.

Coll McNaughton, for appellant. E. Meers and J. W. Downey, for appellee.

MAGRUDER, J. The reversal of the judgment in this case is asked upon the ground that there is a variance between the allegations in the declaration and the proof introduced by the appellee thereunder. The variance complained of is alleged to exist both as to the allegations setting up the

cause of the injury and as to those setting up the character of the injury. The alleged variance between the statement of the cause of the injury and the proof in relation to the same is based upon the following allegation in the declaration: "The said defendant * * * wrongfully and negligently suffered the same [sidewalk] to be and remain in bad and unsafe repair and condition, and divers of the planks wherewith the sidewalk was laid to be and remain broken and unfastened, and divers of the sills or stringers upon which the planks of said sidewalk were laid to become rotten and decayed," etc. It is said that no proof was introduced to show that the planks of the sidewalk, or any of them, were broken. The allegation is not only that the planks were broken, but that they were unfastened, and also that the sills upon which they were laid had been rotten and decayed. There is proof tending to show that some of the boards were unfastened and were rotten, and that the tripping which resulted in the fall of appellee was due to the fact that one or more of the boards of the sidewalk were unfastened. This was sufficient to justify a submission of the case to the jury, even though there was no proof that any of the boards were broken. It is not necessary, in actions for torts, that every allegation of matters of substance should be strictly proved. The statement of the tort is divisible in its nature, and proof of part of the tort or injury is, in general, sufficient to support the declaration. "In torts, the plaintiff may prove a part of his charge, if the averment is divisible, and there be enough proof to support his case." *City of Rock Island v. Guinely*, 126 Ill. 408, 18 N. E. 753. The alleged variance, so far as it has reference to the character of the injury, is based upon the allegation of the declaration, that "the right knee of the plaintiff was then and there dislocated," etc. It is said that there is no proof that the appellee's knee was dislocated by the accident. The proof does show that, in her fall, plaintiff's right knee impinged against a nail or spike protruding from one of the planks of the sidewalk; that the result was a jagged wound a little above the cap of the right knee, which caused a swelling around the mouth of the wound, and caused the limb to be swollen. The doctor, who dressed the wound and sewed it up, states that it was about an inch and a half long, and quite deep, and also says that: "There was crepitation of the bone covering of the knee, like if there would be sand under it, or ice under it. It would give with the finger, so that it was very susceptible and painful. I made examination as to the condition of the veins in that place. The varicose vein in that limb was very much enlarged. It would be an injury to her limb and to her health, because liable at any time to result in hemorrhage." We are unable to say that, under proof of the character thus indicated,

there was not, in a certain sense, a dislocation of the knee. But, whether this was so or not, the declaration alleges that, as a result of her fall, the appellee "became sick, lame, disordered, and permanently injured." This allegation was broad enough to let in the proof, and was sustained by the proof. We concur with the appellate court when they say in their opinion, "The charges were broad enough to warrant, we think, the proof admitted."

Independently, however, of any of the considerations already advanced, it is well settled that an objection alleging variance between the allegations and proofs must be made in the trial court, in order to afford an opportunity to the plaintiff to amend the declaration. Such objection should properly be made at the time the evidence is offered; otherwise it will be waived. *Construction Co. v. Foley*, 166 Ill. 81, 46 N. E. 750; *Village of Chatsworth v. Rowe*, 166 Ill. 114, 46 N. E. 763. We do not find in the record that any specific objection was made to any of the offered evidence of the plaintiff as being variant from the allegations of the declaration. Such an objection on the ground of variance must not be general in its character, but must be sufficiently specific to show wherein the variance consists. *Construction Co. v. Foley*, *supra*.

Objection is also made as to the admission of certain evidence which the court permitted the appellee to introduce over the objection of the appellant. It is said that the proof as to the enlargement of the varicose veins should not have been admitted, because there was no complaint in the declaration of any enlargement of the limb. There was no error in the admission of this testimony, because it had reference merely to the results produced by the injury to the knee of the appellee. In describing the character of the injury, the physicians referred to such enlargement as a necessary consequence of it. It is not necessary that the declaration should describe in detail all the characteristics and consequences of a wound inflicted by an injury.

It is also objected that one of the witnesses was permitted to state his conclusions from the evidence, instead of stating facts. One James Hart was called as a witness for the appellee, and stated that the sidewalk was in "poor condition." It is claimed that this was a statement of his conclusion or opinion in regard to the matter. But, whether this be so or not, no particular harm resulted to the appellant, because the witness states the reasons why the sidewalk was in poor condition. Those reasons were that some of the planks were not sound, and that at least one of them had been unfastened and was thrown out upon the ground at the point where the injury occurred.

Complaint is also made that error was committed by the trial court in the giving and modification and refusal of instructions. Appellant asked the court to give an instruction

containing the following words: "There is no evidence that the defendant, the city of Joliet, had actual notice thereof;" that is, of the defect. Appellant contends that the instruction containing this statement should have been given as asked, because there was no evidence that the city had actual notice of any defect in the sidewalk. The court gave the instruction after modifying it. It was so modified as to read as follows: "Unless the jury believe from the evidence that the city had actual notice of such defective walk, or that the sidewalk in question, at the point where the plaintiff is alleged to have been injured, was out of repair for such a length of time that the city, by its proper officers, in the exercise of reasonable diligence, might have discovered the defects existing," etc. The modification was proper. It states the law correctly. *Village of Mansfield v. Moore*, 124 Ill. 133, 18 N. E. 246; *City of Sterling v. Merrill*, 124 Ill. 522, 17 N. E. 6.

In the second instruction given for the appellee the following words are used: "The court instructs the jury that this is an action brought by Margareth Johnson against the city of Joliet; claiming damages for an injury sustained by her by falling on a sidewalk," etc. It is said that, by the use of the words "an injury sustained," the instruction assumes as a fact that the appellee did sustain injury. The next paragraph of the instruction cured the defect thus indicated, if it was a defect, by leaving it to the jury to find from the evidence whether or not plaintiff was injured. The second paragraph begins with the following words: "If you believe from the evidence that the plaintiff was injured by falling on said walk by reason of a defect therein, as alleged in her declaration," etc.

Complaint is also made, that the trial court refused to give an instruction asked by the appellant which stated that, if the jury believed that the injury complained of was the result of an accident, and not the result of negligence of the city, the plaintiff could not recover, and that the city was bound only to the exercise of reasonable prudence and diligence in the repair of its sidewalks, and was not required to foresee and provide against every danger or accident that might occur, and was not an insurer against accident. We find upon examination that the doctrine announced by this instruction was embodied substantially in other instructions which were given, and therefore appellant suffered no injury on account of its refusal.

It is also said that the court erred in refusing to give two instructions asked by the appellant which stated, in substance, that if the injury to the appellee was the result of a defective construction of the sidewalk, and not the result of a failure on the part of the city to keep the same in repair, then the plaintiff could not recover. Instructions should be based upon the evidence. We find no evidence in the record tending to show

that the accident resulted in any way from any defect in the original construction of the sidewalk. Some of the witnesses, in describing the condition of the sidewalk, made some reference to the manner in which it was constructed, but these references were only incidental to their statements as to the condition of the repairs upon the sidewalk. The testimony shows that the original sidewalk, as first laid, had been constructed some nine or ten years before the accident. The city itself introduced two witnesses for the purpose of showing that the sidewalk had been repaired in the spring of 1894 by taking out some of the sills or stringers, which had become rotten or decayed, and putting in new sills or stringers. This testimony, however, did not have reference to the construction of a new sidewalk, but merely to the repairing of the existing sidewalk. The witnesses speak of their work as being in the nature of repairs, and state expressly that all of the old stringers were not taken out. The statement of the declaration that the appellant suffered the sidewalk to be and remain in bad and unsafe condition was broad enough to justify the introduction of all the testimony that was introduced in regard to the condition of the sidewalk, or in regard to the nature of the repairs made upon it.

Some other objections of a minor character are urged in reference to the instructions given and the instructions refused, but we do not deem them of sufficient importance to require further notice. The judgment of the appellate court is affirmed. Judgment affirmed.

(172 Mass. 286)

WATERS et al. v. BONVOULOIR.

(Supreme Judicial Court of Massachusetts.
Hampden. Jan. 5, 1896.)

MUNICIPAL CORPORATIONS — APPROPRIATION OF MONEY—PUBLIC PURPOSES.

1. Under Pub. St. c. 27, § 10, authorizing towns to appropriate money for certain purposes, "and for all other necessary charges arising in such town," a town cannot appropriate money to pay expenses of a committee to attend a convention of American Municipalities, since such expenses are not "necessary charges."

2. Pub. St. c. 28, § 13, providing that city councils may appropriate money for armories, holiday celebrations, and "other public purposes," does not authorize a city to appropriate money to defray the expenses of a committee to represent it at a convention of American Municipalities.

Report from supreme judicial court, Hampden county; Marcus P. Knowlton, Judge.

Bill by Edward S. Waters and others against Pierre Bonvouloir, city treasurer, to restrain the latter from paying certain money appropriated by the board of aldermen. Case reported, and injunction granted.

Arthur B. Chapin, for petitioners. J. B. Carroll, W. H. McClintock, and J. F. Stapleton, Jr., for respondent.

FIELD, C. J. This is a petition brought under Pub. St. c. 27, § 129, by 10 taxable inhabitants of the city of Holyoke, to restrain the respondent, as city treasurer, from paying money out of the treasury of the city in accordance with an appropriation of \$500, made on the recommendation of the mayor, by the board of aldermen, by a vote of 16 yeas to 5 nays. The appropriation was from the contingent fund, to defray the expenses of a committee to attend a convention of American Municipalities at Detroit, Mich., where subjects pertaining to the administration of cities were to be discussed, and which the city of Holyoke had received an invitation to attend. This convention was under the charge of the League of American Municipalities, whose constitution provided that its objects were: "First, the perpetuation of the organization as an agency for the co-operation of American cities in the practical study of all questions pertaining to municipal administration; second, the holding of annual conventions for the discussion of contemporaneous municipal affairs; third, the establishment and maintenance of a central bureau of information for the collection, compilation, and dissemination of statistics, reports, and all kinds of information relative to municipal government." The charter of the city of Holyoke is St. 1896, c. 438. The last part of section 13, Id., is as follows: "The board [of aldermen] shall, so far as is not inconsistent with this act, have and exercise all the legislative powers of towns and of the inhabitants thereof, and shall have and exercise all the powers now vested by law in the city of Holyoke and in the inhabitants thereof, as a municipal corporation, and be subject to all the liabilities of city councils and of either branch thereof, under the general laws of the commonwealth, and it may by ordinance prescribe the manner in which such powers shall be exercised. Its members shall receive no compensation for their services as members of the board of aldermen or of any committee thereof." Section 14, Id., is as follows: "Neither the board of aldermen nor any member or committee thereof shall directly or indirectly take part in the employment of labor, the making of contracts, the purchasing of materials or supplies, the construction, alteration or repairs of any public works, buildings or other property, or the care, custody or management of the same; or in the conduct of any of the executive or administrative business of the city, or in the expenditure of public money, except as herein otherwise provided and except such as may be necessary for the contingent and incidental expenses of the board of aldermen; nor in the appointment or removal of any officers except as is herein otherwise provided. But nothing in this section contained shall affect the powers or duties of the board in relation to city aid to disabled soldiers and sailors and to the families of those killed in the Civil

War." Section 23, Id., is as follows: "No member of the board of aldermen shall, during the term for which he is elected, hold any other office in or under the city government, have the expenditure of any money appropriated by the board of aldermen, or act as counsel in any matter before the board of aldermen or any committee thereof; and no person shall be eligible for appointment to any municipal office established by the board of aldermen during any municipal year within which he was an alderman, until the expiration of the succeeding municipal year." The question is whether the appropriation of \$500 from the contingent fund to pay the expenses of the committee to the convention of the American Municipalities at Detroit is authorized by the general laws with reference to towns and cities or by the charter of the city of Holyoke. Pub. St. cc. 27, 28, and the amendments thereof, define the powers of towns and cities and city councils. The appropriation shown in the present case is not for the payment of "necessary charges," within the meaning of Pub. St. c. 27, § 10. Necessary charges are confined to matters in which a town or city has a duty to perform, an interest to protect, or a right to defend. *Minot v. Inhabitants of West Roxbury*, 112 Mass. 1; *Coolidge v. Inhabitants of Brookline*, 114 Mass. 592; *Spaulding v. Inhabitants of Peabody*, 153 Mass. 129, 26 N. E. 421; *Swift v. Inhabitants of Falmouth*, 107 Mass. 115, 45 N. E. 184. Pub. St. c. 28, § 13, is as follows: "The city council of a city may, by yeas and nays vote of two-thirds of the members of each branch thereof present and voting, appropriate money, not exceeding in any one year one-fiftieth of one per cent. of its valuation for the current year, for armories for the use of military companies, for the celebration of holidays, and for other public purposes." It is contended that the appropriation shown in the present case is for "other public purposes," within the meaning of this section of the statutes. The appointment of a committee "to represent the city of Holyoke at the convention of American Municipalities to be held at Detroit, Mich., from August 1st to 4th, inclusive," does not seem to be for any distinct public purpose, within the meaning of the charter of the city or of the general laws. The purpose apparently is to educate the committee generally with reference to all questions pertaining to municipal administration anywhere. It is not confined to the ascertainment of facts for the information of the board of aldermen of the city of Holyoke, concerning questions actually pending before the board. There is nothing in the statutes of the commonwealth which authorizes the city of Holyoke to become a member of the League of American Municipalities, and the attendance of a committee made up of the mayor and certain members of the board of aldermen upon any meeting of that league is for the purpose of listening to, or

taking part in, general discussions concerning municipal administration. The general education of the mayor and aldermen upon all matters relating to municipalities in the United States and Canada is not, we think, a public purpose, and cannot be paid for out of the funds of the city. An injunction should be issued as prayed for. So ordered.

(173 Mass. 319)

PAIN v. SOCIÉTÉ ST. JEAN BAPTISTE.
(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 5, 1899.)

BENEFICIAL ASSOCIATIONS — BY-LAWS — AMENDMENTS—SICK BENEFITS—VESTED RIGHTS.

1. While a member of a beneficial association was receiving sick benefits under an existing by-law, an amendment was adopted whereby such benefits were reduced. The by-laws in existence when such member joined the association, and under which he contracted, provided for their amendment. *Held* that, as the right of such member to receive benefits was subject to change, it was not violative of vested rights to make the change at any time.

2. A beneficial association amended its by-laws by providing that, when a member has received 39 weeks of sick benefits, he shall not hereafter receive more than \$1 a week. *Held* applicable to a member who had received 39 weeks of sick benefits previous to the adoption of the amendment.

Appeal from superior court, Bristol county.

Action by Damase Pain against the Société St. Jean Baptiste to recover certain sick benefits. There was a judgment for defendant, and plaintiff appeals. Affirmed.

L. E. Wood and A. G. Weeks, for appellant.
Hugo A. Dubuque, for appellee.

HAMMOND, J. The defendant society is a beneficiary organization chartered in 1884, under Pub. St. c. 115, and ever since its incorporation the plaintiff has been a member in good standing. In June, 1890, the plaintiff, by reason of sickness, became unable to work, and has so continued to the present time; and during that time he has received benefits at the rate of \$5 per week for 13 weeks of each year, down to July 7, 1896; and since the latter date he has received benefits at the rate of \$1 only per week for 13 weeks of each year. This suit is brought to recover the additional \$4 per week for a period of 9 weeks. Whether the plaintiff can recover depends upon the construction and effect of the amendment of the by-laws which was passed July 7, 1896. If it is applicable to him, he cannot recover; if not, he can. The by-law of 1893 (which, so far as the plaintiff is concerned, was not materially different from that of 1889), under which the plaintiff was receiving aid at the time of the amendment in question, was as follows: "Every member who shall belong to the society for twelve consecutive months, who has paid his dues, contributions, fines or other sums assessed by vote or by-law of the society, shall have a right to five dollars per week if he becomes unable to work, in con-

sequence of sickness or accident, during a period not exceeding thirteen weeks in each year, beginning from the date of the first application for benefits." And the amendment of July 7, 1896, was as follows: "Provided, that when a member has received thirty-nine weeks of sick benefits, or one hundred ninety-five dollars, for the same or a different period of disability, then he shall not hereafter receive more than one dollar per week, instead of five dollars, for thirteen weeks of each year, if his sickness shall so long continue; and that during a period of five years, aggregating sixty-five dollars of benefits. Each year reckons from the date of the first application for benefits. If, after that period of five years, he is still unable to work, he is then entitled to five dollars a week for thirteen weeks of each year for three years, as at first. This partial suspension of benefits is established so as to allow, as much as possible, all the members to share more equitably in the disability funds."

The plaintiff concedes that the amendment was duly passed, but in his brief contends, in the first place, that "the defendant society cannot by such amendment, under the circumstances of this case, so change its obligation to the plaintiff," because his "originally contingent right to receive benefits as stated became vested upon the happening of the contingency, i. e. his disability to work, June 7, 1890, and from that time no act of the society, by amendment to its by-laws, could divest him of that right"; and, in the second place, that even if his rights "were not vested, and could be taken away by amendment of the by-laws, such amendment could have no retroactive force," and that "to hold that payments of benefits made before the adoption of the amendment can be applied to benefits accruing under the amendment will make such amendment retroactive in force, and will place the plaintiff in a worse position than the other members of the society at the time of the adoption of the amendment." The plaintiff's contention, more briefly expressed, is that the defendant had no power to amend its by-laws so as to affect his rights to future benefits under a disability then existing; and, even if it had such power, this amendment, fairly construed, does not affect such rights.

The rights of the plaintiff are determined by the nature of the contract between him and the society, as interpreted by the by-laws under which it was made, and in the light of the surrounding circumstances. The general purpose of the society was to give pecuniary aid to its sick or disabled, and, in case of the death of a member, to provide for the relief of his family. The fund for this purpose was to be raised by monthly dues, and in case of death by an assessment upon the survivors. Of course, the amount of benefits which the society, with due regard to the interest of the sick as well as that of the other members, could properly pay, depended upon many circumstances, such

as the number of its members, the actual or relative number of the sick, the promptness with which dues were paid, and others of similar nature; and as these various circumstances might, and probably would, change from time to time, it might be regarded not only as prudent, but as necessary for the successful management of the society, that there should exist the power to make such corresponding changes in the by-laws as the circumstances for the time being seemed to require. The power to amend the by-laws was reserved, and there is no limit to the reservation. After certain preliminary proceedings, its by-laws could be amended at any time, and in any reasonable way. All this the plaintiff well knew from the first, and he was present at the meeting of July 7, 1898, and spoke against the adoption of the amendment. There being a power of amendment reserved, the contract between the plaintiff and the society was liable to changes with regard to future benefits to which a disabled member might be entitled, as well as in other matters; and the plaintiff had agreed that these changes, duly made in compliance with the rules of the society, should be binding upon him, not as a new contract, but as a part of the old contract, and under its provisions. But the plaintiff contends that there is an implied limitation to this power of amendment, that it cannot be made so as to deprive him of a vested right, and that his right to the benefit became fixed by his disability, and can never be changed during that disability. But now does the right become fixed? There is no such restriction contained in the words expressing the power of amendment. To thus restrict the power would be to divide the society into two classes, one comprising those like the plaintiff, who could not be affected by any reduction or future benefits, and the second comprising the well members, who would be affected by such reduction. And, no matter how many of these preferred pensioners there might be, this society, whose right to graduate payment according to varying circumstances has been reserved so carefully, and in language so general and comprehensive, and which is so plainly necessary to the purposes for which it was incorporated, is powerless to do what might be necessary even to its own existence. There can be no right to future benefits vested in one member more than in another. The right of a sick member to future benefits, which became vested in the plaintiff at the time of the disability, is not a right to receive, so long as such disability continues, the future benefits provided by the by-law existing at the time the disability begins, but simply a right to receive them subject to such changes as may be made by the society; and it is no violation of such a vested right to make the changes at any time. Such a change is not a repudiation of, but, on the contrary, is in accordance with the terms of, the contract. As was said in *Smith v. Gallo-*

way [1898] 1 Q. B. 71, 77, "Where the original contract provides for alteration of the rules, he is bound by any subsequent alteration that is made, within the power conferred, whatever the extent of that alteration may be." Such an interpretation of the contract seems to be in accordance with the provision for amendments, and to be the only one reasonably calculated to subserve the interests of all, and to enable the society to accomplish the objects for which it was incorporated. We are aware that the doctrine herein enunciated is inconsistent with some decisions in other states, but we are satisfied that it is sustained by the better reasoning and the weight of authority. *Smith v. Galloway* [1898] 1 Q. B. 71; *Stohr v. Society*, 82 Cal. 557, 22 Pac. 1125; *Poultney v. Bachman*, 31 Hun, 49; *Bowie v. Grand Lodge*, 99 Cal. 392, 34 Pac. 103; *Fugure v. Society*, 46 Vt. 362; *Supreme Lodge v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 Lawy. Rep. Ann. 409, and note; *Supreme Commandery v. Ainsworth*, 71 Ala. 449; *Loeffler v. Modern Woodmen of America* (Wis. 1898) 75 N. W. 1012; *Borgards v. Insurance Co.*, 79 Mich. 440, 44 N. W. 856; *Moore v. Association*, 103 Iowa, 424, 72 N. W. 645; *Carpenter v. Knapp* (Iowa, 1898) 70 N. W. 765; *Hughes v. Insurance Co.* (Wis. 1898) 73 N. W. 1015; *Supreme Council v. Morrison*, 16 R. I. 468, 17 Atl. 57. Of course no amendment could change the amount of any benefit which under any by-law has passed from a possible to that of a future benefit. The right becomes vested absolutely as the time expires for which the benefit is granted.

As to the second contention of the plaintiff, it is sufficient to say that we think the by-law applies to the case of the plaintiff. The language is broad enough to cover his case. The plaintiff had received more than "thirty-nine weeks of sick benefits," and it was provided that such person shall "not hereafter receive more than one dollar per week." We have no doubt the construction put upon the amendment by the officers of the society was the one intended and justified by the language. Judgment affirmed.

(173 Mass. 324)

MURPHY v. CITY COAL CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 5, 1899.)

MASTER AND SERVANT — OBVIOUS RISKS — INSTRUCTIONS.

1. In an action for injuries caused by an apparatus known as a "pick-up" jamming an employé of a coal company against a car he was pushing, a request that, if plaintiff undertook to run the car and if the liability of the "pick-up" to injure one in plaintiff's situation were proven, the danger was an obvious risk assumed by plaintiff, was properly refused, there being evidence to justify a finding that the accident was caused by the negligence of the superintendent.

2. An employé of a coal company had been at work but a few hours, and was not familiar

with the running of a car which carried coal down a slight incline, and was pushed back by an automatic contrivance. The car caught, and he saw another employé push it back, and later, when it caught again, he stepped onto the track, and started to push it back, and was injured by the contrivance. In an action for the injury, the company requested a charge that if, when plaintiff asked the cause of the trouble, he was in a safe place, and, without waiting to ascertain why the contrivance did not work, voluntarily placed himself in danger, and was hurt, he could not recover. *Held* properly modified by adding, "if he appreciated the danger, or in the exercise of reasonable diligence ought to have been aware of it."

Exceptions from superior court, Bristol county; Charles S. Lilley, Judge.

Action by Edward H. Murphy against the City Coal Company. There was a judgment for plaintiff, and defendant excepts. Exceptions overruled.

This was an action of tort. There was testimony tending to show that the plaintiff was injured while in the employ of the defendant, by reason of being caught and jammed between a car used for the transportation of coal from a hopper to bins, in which it was to be deposited for delivery when sold, and a certain apparatus called a "pick-up"; that this car was operated upon a track elevated upon a trestlework above the succession of bins in which the coal was dumped; that the car was propelled by this pick-up when power was communicated to it by the action of a certain apparatus called a "triangle," and located beneath the hopper; that this triangle was connected with the pick-up by means of a rope or cable running over pulleys; that, when loaded at the hopper, the car moved upon this slightly inclined track by force of gravity, until it came in contact with the pick-up, which it pushed to the spot where it was intended to dump the load; that at this spot was stationed on the side of the rail a certain other apparatus, so constructed as to automatically open the sides of the car and empty it of its load; that thereupon the car, being thus lightened, was pushed by the pick-up, by reason of the weight of the triangle communicating power to it, for a distance of about 14 feet, and received an impulse that gave it requisite momentum to return to the hopper for reloading; that, on the occasion of this accident to the plaintiff, the triangle, a loose plank having been temporarily caught beneath it, failed to work, so that the pick-up did not start the car, and it remained motionless upon the track at the spot where it was unloaded; that thereupon the plaintiff, who was standing at the time on the south side of the track, watching the operation of the mechanism, and in a place of safety, inquired of one Rowe, who was standing at the hopper, what the reason was that it did not work, and was told that the trouble must be at his (plaintiff's) end; that, without waiting to ascertain the difficulty, the plaintiff stepped upon the track in the rear of the pick-up, and at once commenced to push the car away from

the pick-up; that when the car had moved sufficiently he stepped over the pick-up, between that and the car, and continued to push it along by hand; that at this moment, while the plaintiff was between the pick-up and the car, pushing the latter forward, and some little distance from the pick-up, the defendant's foreman observed the plank under the triangle, and directed one Tabeley to remove the same, so that the triangle would work; that, upon his so doing, the triangle instantly fell, communicated power to the pick-up, through this rope or cable, and caused the pick-up to advance upon the plaintiff, jamming him between it and the car, thus producing the injuries for which he complains.

Before proceeding to his argument, the defendant's counsel submitted certain requests for ruling, in writing, among others the following: "If the jury find that the plaintiff engaged to run the car in question and undertook that employment, and if the jury find the liability of the pick-up to injure a person in the situation in which the plaintiff was hurt, to be proven, then that danger was an obvious risk assumed by the plaintiff, for which he cannot recover." The court declined to give this instruction. The defendant also requested the court to instruct the jury that "if they found that the plaintiff, when he asked the cause of the trouble, was standing in a place of safety, and, without waiting to ascertain why the pick-up did not work voluntarily, placed himself in a position of danger, and was injured in consequence, he cannot recover."

L. Le B. Holmes and A. B. Collins, for plaintiff. H. M. Knowlton and A. E. Perry, for defendant.

HAMMOND, J. 1. The first request was rightly refused. The evidence, so far as disclosed in the report, tended to show that the defendant's superintendent ordered the removal of the board obstructing the triangle before the car had passed over the 14 feet of track in which the pick-up operated, and while the plaintiff was in this dangerous space of the track; and "that, upon so doing, the triangle instantly fell, communicated power to the pick-up through the rope or cable, and caused the pick-up to advance upon the plaintiff, jamming him between it and the car, thus producing the injuries for which he complains;" and the jury would have been warranted in finding that this order was negligent. Even if the liability of the pick-up to injure a person in the situation in which the plaintiff was when hurt was an obvious risk of the business assumed by the plaintiff, that rule was not applicable to the case, if the jury found that the accident was caused by the negligent act of the superintendent. The risk which the workman assumes by virtue of his contract of employment does not include the risk arising from the negligent act of a superintendent. If it did, the purpose of

the statute under which the case was submitted to the jury would be defeated. *Malcolm v. Fuller*, 152 Mass. 160, 167, 25 N. E. 87; *Davis v. Railroad Co.*, 159 Mass. 532, 536, 34 N. E. 1070; *McPhee v. Scully*, 163 Mass. 216, 39 N. E. 1007; *Smith v. Baker* [1891] App. Cas. 325. There being a possible phase of the case where the risk was not assumed by the plaintiff, the judge could not properly have given the ruling in the broad and unqualified form in which it was requested, and as it is stated in the bill of exceptions that "full general instructions appropriate to the case were given by the court to the jury, which were not excepted to otherwise than as herein appears," we must presume that the jury were rightly instructed upon the subject.

2. In dealing with the second request, some embarrassment arises from the difficulty in ascertaining what it means. The counsel for the defendant in his brief seems to think that it should be interpreted as meaning, in substance, that if the plaintiff, of his own motion, went outside the scope of his employment when he placed himself between the pick-up and the car, or, in other words, if the plaintiff in moving the car was a mere volunteer, he cannot recover. But we do not think that is the fair and natural import of the language. The judge was justified in interpreting it, as he evidently did, as meaning that if, without waiting to ascertain why the pick-up did not work, the plaintiff, of his own motion and without any direct command, went from a place of safety to a position of danger, in which he was hurt, he cannot recover; and hence he gave the instruction with the modification, "if he [the plaintiff] appreciated the danger; or in the exercise of reasonable care ought to have been aware of it." And this we think was correct. While the plaintiff had worked elsewhere in a similar employment for some years, he had begun to work on this job only a few hours before he was hurt. He testified that when, upon his application for employment, Witherell asked him if he "would run the car for him," he replied in the negative, saying he "did not understand running it." The car which passed from the bins to the hopper end of the trestle, just before this car, was pushed to the hopper in the same way this was, and the plaintiff saw it done. It does not appear that anything was said by anybody against that act. This request bears only upon the question of the plaintiff's due care. The jury may have found upon all the evidence on this branch of the case, only a part of which is before us, that the plaintiff was warranted in thinking that whenever the pick-up did not move he was expected to push the car back, and that, so thinking, he went upon the trestle for that purpose. If that was his idea, then, so far as the question of his due care was concerned, he was not necessarily precluded from recovering, unless he appreciated the danger, or, in the exercise of reasonable diligence, ought to have been aware of it; and this would be so,

although he was not directly commanded to do it, but did it of his own motion, or "voluntarily." Exceptions overruled.

(172 Mass. 264)

MURPHY v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 3, 1899.)

CRIMINAL LAW—PRISON DISCIPLINE—RIGHTS OF CONVICTS—INDETERMINATE SENTENCES—EX POST FACTO LAWS—STATUTES—OPERATION—IMPLIED REPEAL.

1. Pub. St. c. 222, § 20, authorizing certain deductions to be made for good conduct from the sentences of convicts, and their release during the time so deducted, on certificate of the prison commissioners, is not a mere measure of prison discipline, but entitles convicts to such deduction and release as of right, which, subsequent to the commission of the offense, cannot be interfered with to their disadvantage by legislation.

2. St. 1895, c. 504, providing that in sentencing convicts the court shall fix a minimum and a maximum term for the offense, and at any time after expiration of the minimum period the convict may be released on permit from the commissioners of prisons, approved by the governor and council, which permit may at any time be revoked, is not void as rendering the duration of the sentence uncertain.

3. Said act is not void as an ex post facto law, as empowering the prison commissioners and the governor and council to fix the sentence, since a sentence thereunder is, in effect, one for the maximum period.

4. Pub. St. c. 222, § 20, provides for the release of a convict during a period deducted from his sentence for good behavior on certificate of the prison commissioners. St. 1895, c. 504, provides for an indeterminate sentence and a release after expiration of the minimum period, on certificate of the prison commissioners, approved by the governor and council. *Held*, that the latter act is not, by requiring additional authorities to concur in the issuance of the certificate of release, void as an ex post facto law, as applied to offenses committed before it went into effect.

5. Pub. St. c. 222, § 20, provides for deductions for good behavior from the sentences of convicts, and for their release for the time so deducted. St. 1895, c. 504, without repealing the former act, provides for indeterminate sentences, and a release of the convict after expiration of the minimum period. *Held*, that the latter act does not, by implication, repeal the former, and hence it applies only to sentences for offenses committed after it took effect.

Error from supreme judicial court, Essex county.

Clarence Murphy was convicted of embezzlement, and he petitions for writ of error. Judgment reversed.

Brandels, Dunbar & Nutter, for plaintiff in error. J. M. Hallowell, Asst. Atty. Gen., for the Commonwealth.

MORTON, J. This is a petition for a writ of error to reverse a sentence of the superior court for the county of Essex, by which the petitioner is confined in the state prison. The plea is "in nullo est erratum," and therefore admits the facts well assigned in the petition. *Bodurtha v. Goodrich*, 3 Gray, 508, 512; *Conto v. Silvia*, 170 Mass. 152, 49 N. E. 86. From those, and from the record of the

superior court, it appears that the offenses of which the petitioner was convicted were committed between July 19, 1892, and November 17, 1893, but that he was sentenced under St. 1895, c. 504, which took effect on the 1st day of January, 1896, and which provides in section 1 that "when a convict is sentenced to the state prison otherwise than for life or as an habitual criminal the court imposing sentence shall not fix the term of imprisonment but shall establish a maximum and minimum term for which said convict shall be held in said prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offense of which he is convicted and the minimum term shall not be less than two and one half years." The petitioner was indicted under Pub. St. c. 203, § 40, and was found guilty on 63 counts, each of which, except in a few instances, alleged the value of the property stolen to be more than \$100. The penalty is prescribed in section 20 of the same chapter, and is imprisonment in the state prison not exceeding five years, or fine not exceeding \$600 and imprisonment in the jail not exceeding two years, if the value of the property stolen exceeds \$100. The maximum sentence imposed in the present case was not more than 15 years, and the minimum not less than 10. The maximum term was therefore only a small fraction of that authorized by law, and it is agreed that it probably does not exceed the sentence which would have been imposed before the passage of St. 1895, c. 504. The error assigned is that the sentence and the commitment pursuant to it were wholly unauthorized and void, because the statute under which the sentence was imposed was *ex post facto*, and contrary to section 10, art. 1, of the constitution of the United States, and to article 24 of the declaration of rights of the constitution of Massachusetts.

The statute was considered by this court in *Com. v. Brown*, 167 Mass. 144, 146, 45 N. E. 1, and again in *Oliver v. Oliver*, 169 Mass. 592, 48 N. E. 843. It was also before the court in *Com. v. Crowley*, 168 Mass. 121, 46 N. E. 415. In *Com. v. Brown*, the court says that it sees no reason why the statute should not be construed to apply to all sentences in the cases referred to in it, passed after it went into effect. But it is evident that the attention of the court was directed more to the effect upon the constitutionality of the statute of the feature of indeterminate sentences than to other matters. The fact that the statute might interfere with his rights or privileges in regard to a permit to be at liberty, and was therefore objectionable as *ex post facto*, was not suggested in the defendant's brief. In *Oliver v. Oliver*, the point decided was that a sentence imposed under the statute in question must be regarded as a sentence for the maximum term, and not for the minimum or any intermediate term. The point now raised was not involved

nor considered in that case. *Com. v. Crowley* followed *Com. v. Brown*. There was in the opinion no discussion of the statute, and the motion in arrest of judgment did not aver that the statute was unconstitutional because of its interference with defendant's right to a permit to be at liberty for good conduct, under Pub. St. c. 222, § 20, or otherwise; and an examination of defendant's brief shows that the ground on which it was contended that the statute was unconstitutional was the indeterminate feature of the sentences. This had been fully considered and disposed of in *Com. v. Brown*, and hence a reference to that case was all that was necessary. We discover nothing in either of these cases which precludes us from examining the question now presented. The statute was also considered by the United States circuit court of the first circuit when this plaintiff was before it recently on a petition for a writ of habeas corpus, which it was led to deny, and to leave the petitioner to his writ of error, largely, as we infer, on account of the views concerning the statute which this court was supposed to have expressed in the two cases of *Com. v. Brown* and *Oliver v. Oliver*, referred to above. In *re Murphy*, 87 Fed. 549.

We have already quoted section 1 of the act. By section 2 it is provided that, at any time after the expiration of the minimum term, the commissioners of prisons may issue a permit to the convict to be at liberty on such terms and conditions as they may deem best, and may revoke the permit at any time previous to the expiration of the maximum term. The permit shall not be issued without the approval of the governor and council, or unless the commissioners shall be of the opinion that the convict will lead an orderly life if set at liberty. Other provisions contained in the act were taken from St. 1884, c. 152, §§ 1, 2, which will be referred to later. The statutes applying to the petitioner's case which were in force when he committed the offenses of which he was convicted are Pub. St. c. 222, §§ 20-22, and St. 1884, c. 152. There were and are statutes relating to the issue of permits to persons confined for drunkenness in jails, houses of correction, or other places under the jurisdiction of the county commissioners, or in the county of Suffolk under that of the board of directors of public institutions, and who have reformed, and also to persons imprisoned in the reformatory prison for women, who have reformed. But those are not applicable to this case. Pub. St. c. 222, § 20, provides that every officer in charge of a prison or other place of confinement shall keep a record of each person whose term is not less than four months, and "every such prisoner whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment shall be entitled to a deduction from the term of his imprisonment to be estimated as follows" (stating it). Later in the section it is provided that "each

person who is entitled to a deduction shall receive a written permit to be at liberty during the time thus deducted upon such terms as the board granting the same shall fix." The permits are to be issued to prisoners in the state prison by the commissioners of prisons, and they "may at any time revoke the same, and shall revoke it when it comes to their knowledge that the person to whom it was granted has been convicted of an offense punishable by imprisonment." St. 1884, c. 152, § 1, provides that if the holder of a permit shall violate any of its terms or conditions, or any law of this commonwealth, "such violation shall of itself make void such permit." Section 2 provides that, when any permit has been revoked or has become void, the board granting it may cause the holder of it to be arrested and returned to the place in which he was confined, and when so returned he "shall be detained therein according to the terms of his original sentence," and "the time between his release upon said permit and his return to said place of confinement shall not be taken to be any part of the term of sentence." These provisions are embodied in St. 1895, c. 504, and are the ones previously referred to. The other provisions of St. 1884, c. 152, are not now material.

From this examination it appears that St. 1895, c. 504, differs from the statutes which were in force at the time when the offenses were committed, and that the differences consist—First, in the matter of indeterminate sentences; secondly, in providing that the permit shall not be issued till after the expiration of the minimum sentence, and in omitting any provision for deductions for good behavior; and, thirdly, in leaving the issue of the permit to the discretion of the commissioners, and in providing that it shall receive the approval of the governor and council. The petitioner contends that the effect of these differences may be to make the term of imprisonment longer than it would have been under the laws in force at the time the offenses were committed, and to change his position in other respects to his disadvantage, and that therefore the statute is unconstitutional and void. The commonwealth contends that the provisions are in the nature of prison discipline or of penal administration or criminal procedure, and are not therefore open to the objection of being *ex post facto*. As the term "*ex post facto*" has been construed, it applies only to penal or criminal matters. The objection to *ex post facto* legislation consists in the uncertainty which would be introduced thereby into legislation of a penal or criminal character, and the injustice of punishing an act which was not punishable when done, or of punishing it in a different manner from that in which it was punishable when done. But not all retrospective legislation is unconstitutional as being *ex post facto*. The question in each case is whether it will increase the penalty, or operate to deprive a party of substantial rights or privileges to which he

was entitled as the law stood when the offense was committed, or, "in short, in relation to the offense and its consequences, will alter the situation of a party to his disadvantage." *Calder v. Bull*, 3 Dall. 386; *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, Id. 333; *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. 443; *Medley*, Petitioner, 134 U. S. 160, 10' Sup. Ct. 384; *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570; *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620; *Hartung v. People*, 22 N. Y. 95; *Shepherd v. People*, 25 N. Y. 406; *Ratzky v. People*, 29 N. Y. 124. A statute which mitigates the penalty is not objectionable, though passed after the offense. *Com. v. Wyman*, 12 Cush. 237; *Com. v. Gardner*, 11 Gray, 438; *Dolan v. Thomas*, 12 Allen, 421, 424. Nor, speaking generally, are statutes which relate to procedure or penal administration or prison discipline, even though the effect may be, in the last two instances, to enhance the severity of the confinement. *Duncan v. Missouri*, supra; *Cook v. U. S.*, 138 U. S. 157, 11 Sup. Ct. 268; *Hop v. People*, 110 U. S. 574, 4 Sup. Ct. 202; *Gut v. State*, 9 Wall. 35; *Com. v. Hall*, 97 Mass. 570; *Carter v. Burt*, 12 Allen, 424; *Hartung v. People*, supra; *Marion v. State*, 20 Neb. 233, 29 N. W. 911; *Ex parte Bethurum*, 66 Mo. 545; *People v. Mortimer*, 46 Cal. 114; *Cooley*, Const. Lim. (3d Ed.) 272; *Black*, Const. Law, p. 513, § 184. No one has a right to insist that particular remedies shall remain unchanged, or that courts and their jurisdiction and the proceedings in them shall continue unaltered, or that there shall be no departure from established methods in prison discipline or penal administration. But the legislature, under the guise of laws relating to procedure or prison discipline or penal administration, cannot take away or interfere with any substantial right or privilege which was secured to a party by the law as it was when the offense was committed. *Kring v. Missouri*, 107 U. S. 232, 2 Sup. Ct. 443; *Thompson v. Utah*, supra; *Medley*, Petitioner, supra. To deprive him in any manner of such right or privilege would be to increase the penalty. In determining in any case whether this is or is not the effect of a statute, it is to be borne in mind that the constitutional provision was intended as a security to life and liberty, and as a safeguard against the infliction of any punishment except such as was duly authorized by law, and it is to be construed so as to promote these ends. As the law formerly stood in this state, the effect of good conduct on the part of the prisoner was to shorten his term of imprisonment, and to give him a right to his discharge at the expiration of the shortened term. St. 1857, c. 284; St. 1858, c. 77; St. 1859, c. 108; Gen. St. c. 178, § 47. This was so said in Opinion of the Justices, 13 Gray, 618. And although the act of 1857, c. 284, was entitled "An act concerning the discipline of the state prison," and the acts of 1858 and 1859 were respectively entitled "An act concerning the disci-

pline of jails and houses of correction," and "An act to amend 'An act concerning the discipline of jails and houses of correction,'" it does not seem to have occurred to the justices that the right of the convict was affected thereby. They declared, on the contrary, that the act of 1857, upon the construction of which the answer to the question proposed mainly depended, gave the convict a right to have his term reduced and shortened by the scale provided in it for good behavior, and bore upon the sentence, and shortened the term of imprisonment, and afforded "an assurance of the highest character that upon condition of good behavior the convict shall have the promised benefit of an earlier release." And, again, they said that "the benefit promised in consideration of good behavior was intended to be an actual reduction of sentence as a right, and not as a favor," and "therefore operated upon the sentence itself." It would seem plain, therefore, that a subsequent statute, which interfered to his disadvantage with the right of deduction for good behavior to which a convict was entitled, at the time of the commission of the offense, under the acts of 1857, 1858, and 1859, would have been unconstitutional and void, notwithstanding the fact that those acts related, according to their titles, to the discipline of the state prison and to that of jails and houses of correction, and therefore appeared to pertain to prison regulation. To have taken away the right of deduction for good behavior, or to have interfered with it to the disadvantage of the convict, would have been, in effect, to lengthen the sentence which was provided by law for the offense at the time when it was committed; and a statute which did that clearly would have been *ex post facto*. See *Opinion of the Justices, supra; Kring v. Missouri, supra; Medley, Petitioner, supra; Thompson v. Utah, supra; Com. v. McDonough, 13 Allen, 581; In re Canfield, 98 Mich. 644, 57 N. W. 807; Ex parte Hunt, 28 Tex. App. 361, 13 S. W. 145.*

The question, then, is whether the changes made in regard to deductions for good behavior by St. 1880, c. 218, which were subsequently incorporated into and are now found in Pub. St. c. 222, § 20, have so modified the rights which convicts had under statutes previously in force that those committing offenses after the passage of St. 1880, c. 218, cannot be said to have anything in the nature of a right to deductions for good conduct, and to a permit to be at liberty, which could not be interfered with to their disadvantage by subsequent legislation; in other words, whether the effect of St. 1880, c. 218, and of the Public Statutes, has been and is to make deductions for good behavior and the issuing of a permit a matter of favor, and not in any sense a matter of right. It should be noted in passing that the words, "with the consent of the governor and council," were inserted in Gen. St. c. 179, § 51, which, with one other amendment that is not now ma-

terial, is a re-enactment of St. 1857, c. 284, § 1. These words were not in the commissioners' report (chapter 180, § 50), and it does not appear how they came to be inserted. They were not in Gen. St. c. 178, § 47, and were omitted from St. 1880, c. 218, and are not found in any subsequent statute. It seems to us that under St. 1880, c. 218, and Pub. St. c. 222, § 20, the convict was and is entitled to deductions for good conduct, and to a permit to be at liberty for the time thus deducted, rather as a matter of right than of favor. The object was to furnish an incentive to good conduct while the convict was in confinement, by offering him a reward therefor. Applying the language of *Opinion of the Justices, supra*, the provisions of St. 1880, c. 218, and of the Public Statutes, "afford an assurance of the highest character that, upon condition of good behavior, the convict shall have the promised benefit" of certain deductions, and a permit to be at liberty for the time thus deducted from the term of his sentence. Though the provisions of the Statutes of 1880 and of the Public Statutes may not bear as directly upon the sentence as those of the Statutes of 1857 did, we cannot doubt that the purpose was to secure to the convict a substantial advantage as a reward for his good conduct, which practically would have the effect of shortening his sentence. It is true that the prison commissioners could revoke the permit without cause shown, or for a violation of its terms, and that they are bound to revoke it when they have knowledge that the convict has been convicted of an offense punishable by imprisonment. But this does not affect the right of the convict to deductions and to a permit in the first instance. Besides, it is not to be assumed that the power of revocation will be exercised capriciously. Unless the provisions of the statute were intended to secure a substantial advantage to the convict as a reward for his good conduct, to the enjoyment of which he could look forward with reasonable certainty if he did not violate the terms of the permit, nor commit an offense punishable by imprisonment, it is difficult to understand what object the legislature had in view. *Conlon's Case, 148 Mass. 168, 19 N. E. 164*, is relied on as tending to show that the convict had no right to a permit. One of the contentions of the petitioner in that case was that his confinement in the reformatory was unlawful because his removal to it from the state prison to which he had been sentenced interfered with or took away his right to deductions for good conduct under Pub. St. c. 222, § 20. But neither that statute nor St. 1880, c. 218, of which it was a re-enactment, was in force at the time when the petitioner committed the offense of which he was convicted, and no question under either was properly before the court. Further, deductions for good conduct under Pub. St. c. 222, § 20, are not limited to persons confined in the state prison, but extend to those confined in

"a prison or other place of confinement," and the legislature had the right to change the place of confinement of any prisoner, so long as the penalty was not thereby aggravated. *Carter v. Burt*, 12 Allen, 424. Lastly, the permit in that case was issued under St. 1884, c. 258, and was revoked by the commissioners for a violation of its conditions, as they had the right to do. The decision would have been the same if the permit had issued under Pub. St. c. 222, § 20, and had been revoked for a like cause. The nature of the right to a permit under Pub. St. c. 222, § 20, was therefore not material to the decision. For these reasons, the case, though rightly decided, cannot be regarded as authoritative on the question now before us. And we think, as has been already observed, that St. 1880, c. 218, and Pub. St. c. 222, § 20, secured to prisoners who were convicted of offenses committed when they were in force, and who came within their scope, deductions for good conduct and permits to be at liberty, as something to which they were entitled as of right, rather than by favor, for faithful observance of the rules, and for not having been subjected to punishment, and that their rights in these respects could not be taken away or interfered with to their disadvantage by subsequent legislation.

The next question is whether St. 1895, c. 504, alters or may alter to their disadvantage, in a substantial manner, the position of those committing offenses prior to its passage, and while Pub. St. c. 222, § 20, was in force. We think that it is clear that such might be its effect. In case the maximum sentence was for 15 years, the convict would be entitled, for good conduct, to deductions under Pub. St. c. 222, § 20, which would shorten the term to 12. Under St. 1895, c. 504, however, he could be sentenced for a maximum term of 15 years and a minimum of 13, or of any number less than 15 and more than 12. In the present case the minimum was 10, and it is possible that the statute might operate more beneficially in the case of the petitioner than Pub. St. c. 222, § 20, and St. 1884, c. 152, would have operated. But that cannot avail. A law cannot be constitutional as to some cases, and unconstitutional as to others falling within the same class. If it is unconstitutional as to any, it is unconstitutional as to all. It is suggested in *Re Murphy*, supra, that the supposed leniency of St. 1895, c. 504, might have led the court to make the maximum sentence longer than it otherwise would, and the implication is that this also would render the statute objectionable as to past offenses. But it is obvious that this argument might prevent the application of any mitigative statute to past offenses, and we should hesitate to pronounce the act unconstitutional on that ground. It is also said in *Re Murphy*, supra, that under St. 1895, c. 504, "important conditions were added which would permit the recall of a permit, and still others which would revoke it absolutely.

The most serious new provision is that the act of 1895 directs that "if a permit is revoked no portion of the time the prisoner may have been at liberty under it shall be taken to be any part of the term of his sentence." But this last provision, which is called "the most serious new provision" of the act of 1895, is found in Pub. St. c. 222, § 21, and in St. 1884, § 2, and was not, therefore, new, and was in force when the offenses were committed of which the petitioner was convicted, and applied to persons confined in the state prison. So far as the revocation of permits is concerned, it is doubtful if St. 1895, c. 504, adds anything new. Under Pub. St. c. 222, § 20, the commissioners have power, as already observed, to revoke permits without cause shown. They have the same power under St. 1895, c. 504. Under St. 1884, c. 152, a violation by the holder of a permit of any of its terms or conditions, or of any law of this commonwealth, rendered the permit void. The same is true under St. 1895, c. 504. And the provisions as to the return of the holder of a permit which has been revoked or has become void are the same in St. 1895, c. 504, as in St. 1884, c. 152, except that the latter contains a provision that the order for the arrest and return of the convict may be served by any officer authorized to serve civil or criminal process in any county in the commonwealth, which is omitted from St. 1895, c. 504. So far, therefore, as revocation and the results which follow it, and violation of the terms and conditions of the permit, or of any law of the commonwealth, and the results which follow that, are concerned, there would seem to be nothing in the act of 1895 which, as compared with the laws in force when the offense was committed, changed the situation of the petitioner for the worse.

The petitioner further contends that, independent of the effect of the statute upon his right to deductions for good behavior and to a permit to be at liberty, the statute is inoperative as an *ex post facto* act, because it renders the duration of his sentence uncertain, and gives to the prison commissioners the power to fix the term of his imprisonment. But there is no uncertainty in the sentence itself. That, it has been held, is in effect for the maximum term. *Oliver v. Oliver*, supra; *Com. v. Brown*, supra; *People v. Illinois State Reformatory*, 148 Ill. 413, 36 N. E. 76; *State v. Peters*, 43 Ohio St. 629, 4 N. E. 81. The convict may be released before its expiration, either by an absolute or conditional pardon from the governor (Pub. St. c. 218, § 12 et seq.), or after the expiration of the minimum term by a permit from the commissioners approved by the governor and council. In the latter case he is under sentence till the expiration of the maximum term. *Oliver v. Oliver*, supra. It is as correct, it seems to us, to say that the duration of his sentence is uncertain because the governor may pardon him absolutely or conditionally at any time, as it is to say that it

is uncertain because, after the expiration of the minimum term, the commissioners may release him before the expiration of the maximum term on a permit approved by the governor and council, and as correct to say that, in case of a pardon, the governor fixes the term of imprisonment, as to say that, in case of release upon a permit, the commissioners fix it. Moreover, "the form of sentence," as was said in *Com. v. Brown*, supra, "is made to recognize and carry out a policy familiar to our legislation, and acted on heretofore without question." In no just sense can it be said, we think, that the duration of his sentence is uncertain, or that the determination of the term of the imprisonment is taken from the courts, where it belongs, and left to the prison commissioners. See *People v. Illinois State Reformatory*, supra; *George v. People*, 167 Ill. 447, 47 N. E. 741; *State v. Peters*, supra; *Miller v. State* (Ind. Sup.) 49 N. E. 894. Contra, *People v. Cummings*, 88 Mich. 249, 50 N. W. 310.

The petitioner also insists that requiring the approval of the governor and council to a permit is a serious interference with his rights, and, without anything more, would render the statute void as an *ex post facto* law. But we think that the provision does not affect any substantial right to which the petitioner was entitled when the offenses were committed, but relates rather to a matter of procedure. There can be no doubt, we think, that in the matter of permits the legislature could have substituted some other tribunal for the prison commissioners, or could have added to the number of commissioners, on the same principle that it could have abolished the court which existed when the offenses were committed, and have created another court for the trial of such offenses, or have added to the number of the judges of the existing court. If this had been the only change, the effect of it would have been merely to require that so many more persons should act in regard to the matter of permits. The petitioner would have still been entitled to deductions for good behavior, and to a permit to be at liberty during the time of such deductions, and there would have been no increase in the penalty for the offense, or other change to his disadvantage. It is not contended that the terms and conditions of permits issued when the offense was committed, or the rules of government of the prison then in force, must remain the same. By St. 1898, c. 371, which is in amendment of and in substitution for section 2, c. 504, Acts 1895, and which went into effect since the indictment was found in this case, it is now provided that a convict who has faithfully observed all the rules, and has not been subjected to punishment, shall be entitled to release at the expiration of the minimum term, and shall be given a permit to be at liberty during the unexpired portion of the maximum term, which permit shall be issued by the commissioners of prisons. The

approval of the governor and council is no longer required, and the permit is no longer to be issued at the will and pleasure of the commissioners. We think, therefore, that the statute of 1895 could not be declared unconstitutional as an *ex post facto* act because it requires the approval of the governor and council to permits to be at liberty, or because it renders the duration of the sentence uncertain, or gives the prison commissioners power to fix the term of imprisonment; but we think that, as the law stood when the offense was committed, the petitioner was entitled to a deduction for good behavior, and to a permit to be at liberty for the time thus deducted, on such terms as the prison commissioners should fix, and subject to revocation by them, and, if sentenced under the statute of 1895, this right might be interfered with to his disadvantage, and that the statute is therefore inoperative and void as an *ex post facto* law. We do not see how the statute can be construed as merely a measure of prison discipline or regulation, and therefore liable to change from time to time, as the legislature may see fit, without interfering with any rights on the part of the convict.

We have assumed thus far that the act of 1895 applied to all cases of convicts sentenced to the state prison after it took effect, except such as are sentenced for life or as habitual criminals. But we think that it is doubtful, notwithstanding the generality of the language, whether it should be so construed. It is manifest that convicts sentenced under the statute of 1895 are not entitled to the benefits of Pub. St. c. 222, § 20. The sentence is intended to be different in character from that referred to in section 20, and the provisions of that section in regard to deduction for good behavior could not be applied to a sentence under the act of 1895. Pub. St. c. 222, § 20, so far as it relates to convicts sentenced to the state prison, is not repealed in terms by the statute of 1895. To hold that that statute operates, by necessary implication, as a repeal of it to that extent, as it would seem that we should be obliged to do if the statute of 1895 is construed to apply to all sentences to state prison after it took effect, whether the offenses occurred before or after it went into operation (*Flaherty v. Thomas*, 12 Allen, 428; *Com. v. McDonough*, supra), would result in the discharge of all persons who might have been sentenced under it to the state prison for offenses committed before it took effect. On the other hand, by construing it,—as we think properly may be done, pursuant to the general rule that statutes are to be construed prospectively,—to apply to sentences for offenses committed after it took effect, this difficulty will be avoided. See Pub. St. c. 3, § 3, cls. 1, 2; *Com. v. Sullivan*, 150 Mass. 315, 23 N. E. 47; *Com. v. Desmond*, 123 Mass. 407; *King v. Tirrell*, 2 Gray, 331; *Bank v. Copeland*, 7 Allen, 139; *Gardner v. Lucas*, 3 App. Cas. 582,

590; Appeal of Lambard, 88 Me. 587, 34 Atl. 530.

The result is that, the only error being an error in the sentence, and the superior court having jurisdiction to impose such sentence as should be imposed, the sentence in question, in the opinion of a majority of the court, must be reversed, and the case remanded to that court for sentence according to the law as it was before the passage of St. 1895, c. 504. *Jacquins v. Com.*, 9 Cush. 279; *Pub. St. c. 187, § 13*. So ordered.

(172 Mass. 289)

FORBES v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 4, 1899.)

EASEMENTS — MILL PRIVILEGE — RIGHT TO FLOW LAND — EXTENT — MERGER.

1. An easement consisting in the right to flow land by a milldam is not destroyed by taking down the dam for the purpose of replacing it with a new one, or by erecting a new dam above the old on land which was a part of the mill privilege, if the water is not raised beyond the height limited by the easement.

2. An easement, appurtenant to a mill privilege, acquired by reservation or grant, to raise the water of the stream to a certain height, is appurtenant to every part of it.

3. Where a part of a mill privilege owned in fee, with an easement appurtenant thereto, allowing it to flow certain lands, was purchased by the commonwealth, and the servient estate was subsequently taken by right of eminent domain, there was no merger of the title to the land belonging to the servient estate with the title to the easement, so as to entitle the owner of such estate to the value of both until the servient estate was taken.

Report from superior court, Worcester county; Francis A. Gaskill, Judge.

Petition by Martha A. S. Forbes against the commonwealth for the assessment of damages for lands taken by the Metropolitan Water Board. There was a judgment for petitioner, and the case is reported. Affirmed.

Herbert Parker and Chandler Bullock, for petitioner. J. M. Hollowell, Asst. Atty. Gen., for the Commonwealth.

FIELD, C. J. The petitioner's title to the land taken by the Metropolitan Water Board in pursuance of St. 1895, c. 488, was derived through mesne conveyances from the Lancaster Mills, a corporation engaged in the business of manufacturing cotton cloth by means of mills and a dam on the South Branch of the Nashua river. The deed of the Lancaster Mills to Franklin Forbes, the petitioner's predecessor in title, contained this reservation: "Reserving to the said Lancaster Mills, their successors and assigns, the right to raise and maintain forever their dam, by flashboards or otherwise, three feet above its present height, without being subject to any claim or demand from said grantee, his heirs or assigns, for damages to said Barnard farm or to said Upper Intervale by reason thereof." Afterwards, and while he held the title,

Franklin Forbes, by deed dated March 31, 1868, conveyed to said Lancaster Mills, its successors and assigns, the right to flow said land, "by backwater from the dam of said corporation, raised and maintained forever by permanent structure or otherwise, one foot above the present permanent height thereof." The report of the case by the justice of the superior court then proceeds as follows: "It was agreed that the said dam of the Lancaster Mills, maintained at the height referred to in these deeds, would and did flow the said petitioner's land, taken as aforesaid, up to the flowage line designated upon the accompanying plan referred to, annexed hereto, marked 'Exhibit B.' On the 15th day of May, 1897, the Metropolitan Water Board, acting for the commonwealth of Massachusetts, under authority of chapter 488 of the Acts of 1895, and in pursuance of the construction of the system of Metropolitan Water Works provided for by said act, entered into an agreement with said Lancaster Mills whereby said board was authorized on and after June 1, 1897, to take down the upper portion of said Lancaster Mills dam, not exceeding six feet below the top of flashboards; to lower the water in the millpond, by means of taking down the upper portion of the dam as aforesaid; to erect a temporary dam at a point further up the stream, and, during the time the water was drawn off the millpond, to supply the mills of said corporation with water through a pipe running from the temporary dam to the mills; and when the purposes for which said millpond was so emptied, namely, the construction of the dam for the reservoir of the Metropolitan Water Works, were accomplished, to rebuild said milldam, in accordance with section 9 of said chapter 488 of the Acts of 1895. About the 1st day of July, 1897, the servants of the commonwealth, under the terms of said agreement with the Lancaster Mills, entered upon land of said Lancaster Mills, and began taking down the dam, as by said agreement authorized. On the 21st day of July, 1897, said dam had been taken down to a depth of five feet. On the 28th day of August said dam had been so far destroyed and obliterated as to draw off the water of the former millpond or reservoir of said Lancaster Mills, and the waters have since flowed within the original channel of the river, no part of petitioner's land being flowed. The further prosecution of the works of said Metropolitan Water Board, under the provisions of said act, requires the construction of a permanent dam for a reservoir of the Metropolitan Water Works at a point above the original dam of said Lancaster Mills, referred to in said Forbes deed, and within the limits of the former millpond. Said dam so to be constructed will be situate above said Lancaster Mills dam, and below said lands of the petitioner. When said dam is so constructed, the lands of the petitioner will be wholly within the basin and reservoir for water

caused by said dam so to be constructed for the Metropolitan Water Works; so that the entire flowage of petitioner's lands will be from the said dam so to be constructed, and not at all from said original dam, when or if reconstructed. On the 21st day of July, 1897, the Lancaster Mills conveyed to the commonwealth a parcel of land covered in part by the former millpond of said Lancaster Mills, which tract of land is situate within the former limits of said Lancaster Mills pond, and between the dam of said Lancaster Mills and the petitioner's land. The Lancaster Mills also conveyed to the commonwealth all the mill privileges in said Clinton owned by said grantor corporation, and situate on said southerly branch of the Nashua river, south of the northerly boundary line of the above-described parcel, and its tributaries entering said river, south of said northerly boundary line, and all right, title, and interest in the fee of land in Clinton under said Nashua river, and situate southerly of said northerly boundary line, and under its tributaries entering said river south of said northerly boundary line, and all flowage rights south of said northerly boundary line; the right of flowage on petitioner's lands, formerly held by Lancaster Mills, being included in the terms and description of said conveyance. On the 23d day of September, 1897, the commonwealth, under the provisions of said chapter 488, made a taking of the said petitioner's lands, the title to which, it was agreed, was then in the petitioner, Martha A. S. Forbes, subject only to flowage rights hereinabove referred to, if any; the petitioner contending that no such flowage rights existed when lands were taken as aforesaid. Upon the foregoing facts, the petitioner asked the court to rule that her land, when taken by the commonwealth, was subject to no flowage rights, and asked the court to rule that the rights of flowage formerly held by the Lancaster Mills had been and were extinguished and abandoned before the said taking of the petitioner's lands, and further asked the court to rule that by the said taking by the said commonwealth the said easements were, eo instanti, extinguished. It was agreed between the parties that, if said contention of petitioner were sustained, damages were to be assessed for the petitioner in the sum of \$3,500; if not sustained, then for \$2,200." The justice found for the petitioner, and assessed damages in the sum of \$2,200, and then reported the case to this court.

It thus appears that the right to flow the lands of the petitioner was created by reservation and by grant, and that the reservation and the grant were to the Lancaster Mills, its successors and assigns, forever. There is no limitation in the reservation or the grant that the right to raise the water to the height mentioned should be confined to any particular use of the water. The charter and the ti-

tle of the Lancaster Mills to the mill privilege are not set out, but it is, we think, to be assumed that it held its mill privilege in fee simple, and had the power to convey it in fee simple to any grantee. This reservation and this grant of the right to flow the petitioner's land, we think, created an easement appurtenant to the mill privilege of the Lancaster Mills. The height to which the right to flow extended was measured by reference to the permanent height of the existing dam of the Lancaster Mills. But the easement would not be destroyed by taking down the dam and erecting a new one in its place, or by erecting a new dam across the stream above the old dam, on land which was a part of the mill privilege of the Lancaster Mills, to which the easement of the right to flow was appurtenant, if the water was not raised beyond the height mentioned in the reservation and the grant. A right of way appurtenant to land is appurtenant to every part of it when divided into parcels, and, in general, an easement acquired by reservation or grant of a right to raise the water of a stream to a certain height, appurtenant to a mill privilege, is appurtenant to every part of the mill privilege. The erection of a new dam on the mill privilege of the Lancaster Mills, whether above or below the old dam, if it raised the water of the stream no higher than the right granted, would work no injury to the petitioner. *Oary v. Daniels*, 8 Metc. (Mass.) 466, 483; *Gaslight Co. v. Fuller*, 170 Mass. 82, 48 N. E. 1024. See *Chase v. Manufacturing Co.*, 4 Cush. 152, 171; *Stackpole v. Curtis*, 32 Me. 383; *Gould, Waters* (2d Ed.) § 344. If the Metropolitan Water Board had taken by the same taking the whole mill privilege of the Lancaster Mills and the land of the petitioner, the value of the mill privilege would have been enhanced by the value of the easement appurtenant to it, and the value of the petitioner's land would have been diminished by the value of the easement to which the land was subject. But the rights of the petitioner are not affected by the fact that the board acquired a part of the mill privilege, with its appurtenances, by purchase pursuant to St. 1895, c. 488, § 4. We understand that the petitioner's land was taken in fee. There was no merger of the title to the land, with its appurtenances, which had been purchased of the Lancaster Mills by the board in the name of the commonwealth, and the title to the land of the petitioner, which was taken by the board in the name of the commonwealth, until after the taking of the petitioner's land. The merger of title, if there was a merger, was a consequence of the taking. Up to and at the time of the taking, the petitioner's land was subject to the easement appurtenant to the mill privilege of the Lancaster Mills, a part of which had been conveyed to the commonwealth. According to the terms of the report, judgment is to be entered on the finding. So ordered.

(172 Mass. 395)

HARRISON v. DOLAN.(Supreme Judicial Court of Massachusetts.
Essex. Jan. 6, 1899.)**ADVERSE POSSESSION—INTERRUPTION—TAX SALE
—CONVEYANCE BY PURCHASER—EFFECT.**

1. Where a tenant has continued in adverse possession of land for over 20 years, the fact that during his occupancy there was a sale and conveyance of the premises for taxes does not constitute an interruption of his possession.

2. A tenant continued in adverse possession of land for over 20 years, during which time there was a sale of the land for taxes, and the purchaser conveyed to demandant. *Held* that, as the purchaser was disseised, his deed, being made before St. 1891, c. 354, providing that notwithstanding adverse possession the conveyance of real estate, otherwise valid, shall be effectual to pass title, conveyed no title as against the tenant.

Exceptions from superior court, Essex county; Henry N. Sheldon, Judge.

Writ of entry by John H. Harrison against Alice Dolan. There was a judgment for defendant, and plaintiff excepts. Exceptions overruled.

Hesseltine & Hesseltine, for plaintiff. J. F. Quinn and H. T. Lummus, for defendant.

HOLMES, J. This is a writ of entry. The defense is the statute of limitations. It was found by the judge who tried the case that the tenant had been in open, adverse possession of the land in question, under a claim of right, for over 20 years, and had gained a title, unless the possession was interrupted by a sale and conveyance of the premises for taxes in 1883, followed by a quitclaim of the tax title to the demandant in 1884. The judge ruled that the possession was not interrupted, and ordered a judgment for the tenant. The foregoing facts present the only question; for although the bill of exceptions states that it was in evidence that the demandant, "on one or two occasions, had come to the tenant, and claimed that she was occupying his lot, but was informed by him that she was on lot No. 12, and that lot 13 (his lot) was next adjacent to hers," the finding of the court must be taken to mean that the tenant's possession was not disturbed, and that there was no fraud, mistake, or disclaimer affecting the rights of the parties, if, indeed, any inference of disclaimer, fraud, interruption, or material mistake would have been warranted by the evidence, supposing it to have been accepted in the fullest sense. See, also, Pub. St. c. 196, § 8. The tenant manifested her intent to maintain possession of the locus, even if she did it under a mistaken description. "*Præsentia corporis tollit errorem nominis*,"—identification by the senses overrides description,—as in many other cases in the law. *Melvin v. Proprietors*, 5 Metc. (Mass.) 15, 33; 2 Wood, Lim. Act. (2d Ed.) p. 660, § 263.

We interpret the finding and ruling as meaning that the tenant in actual fact occupied the premises adversely during the whole 20 years,

and that the question saved is whether what otherwise would have been the effect of the adverse possession was prevented by the tax deed. Adverse possession is pure matter of fact, to be interrupted only by interrupting the possessor's exclusion of adverse claimants, abandonment of his claim, or a change in his intent. Whether the last two would have any effect unless they were manifested we need not consider. In general, also, the effect of the adverse possession will not be abridged by a change of title. The adverse possessor *ex hypothesi* is a wrongdoer until the 20 years has elapsed. Commonly, at least, if not necessarily, his claim is adverse to all the world; and probably any dealings among the excluded parties, even when a deed by a disseisee is valid, would not affect him. Probably the purchaser would only stand in his seller's shoes. See *Chapin v. Freeland*, 142 Mass. 383, 387, 8 N. E. 128. At all events, the action of the original disseisee would be barred.

When it is held that the disselector's possession must be continuous in him and his predecessors in title during the whole time of limitation, and when the statute does not run against the state, it may be held that the statute has not run if the state has had the title during a part of the time relied upon. *Armstrong v. Morrill*, 14 Wall. 120, 145; *Braxton v. Rich*, 47 Fed. 178, 188; *Hall v. Gittings*, 2 Har. & J. 112. But such decisions have no application to this case, if for no other reason, because the statute runs against the commonwealth as well as against private persons (Pub. St. c. 196, § 11); and because, further, the commonwealth never had even a momentary title to the land.

Again, the intimation in *Abbott v. Railroad Co.*, 145 Mass. 450, 460, 15 N. E. 91, has no bearing. That intimation concerned the acquisition of a right of way across a railroad, and was to the effect that a user begun across an earlier three-rod location would be interrupted in its operation by a later five-rod location. In such a case, the wrongdoer has no possession. He merely commits a series of trespasses. Whether the acquisition and implied assertion of right on the part of a railroad company by a location be or be not sufficient to interrupt the running of prescription (see *Powell v. Bagg*, 8 Gray, 441; *Brayden v. Railroad Co.*, 172 Mass. —, 51 N. E. 1081), the determination cannot help us in dealing with the effect attributed by statute to allowing oneself to remain disseised for 20 years.

As there was not even a momentary possession under the tax deed, it is not necessary to consider whether the words and meaning of the statute would not bar a disseisee at the end of 20 years if he had been continuously kept out by a succession of disseisins, one upon another, beyond remarking that there is no analogy between this case and the attempted acquisition of an easement by prescription, where successive users of a way,

without right, are merely successive trespassers, except in those cases where, by the doctrine of privity, the later wrongdoer can add the time of his predecessor's adverse use to his own.

A more subtle argument than those which we have dealt with may be suggested. It may be said that as a tax sale, if valid, gives a good title as against all the world, it is like prescription, and really begins a new title, which can be barred only by 20 years of adverse holding after the new title begins. But we are not driven to consider this argument, because, if it prevailed, it could do the demandant no good. The tax purchaser was disseised by the tenant's continued adverse possession, and his deed to the demandant before St. 1891, c. 354, conveyed no title as against the tenant. *Faxon v. Wallace*, 98 Mass. 44, 45; *McMahan v. Bowe*, 114 Mass. 140. In *Davels v. Collins*, 43 Fed. 31, 33, where the jury were instructed that a sale for taxes would break the running of time in favor of the disseisor, it seems to have been assumed that the conveyance of the tax title to the demandant was good. It is stated that the plaintiff was "clothed with whatever title passed by these tax deeds." *Id.* 34. If the conveyance of the tax title to the plaintiff was bad, then, since the very meaning of the statute of limitations is to bar liability for a wrong, and as the disseisin was a wrong to the demandant before the sale for taxes as much as, if not more than, afterwards, and was the same wrong, we do not perceive any ground in the tax sale, taken by itself, to prolong the demandant's right of action.

If the conveyance of the tax title to the demandant were good as against the tenant, it might be necessary to consider whether a tax sale is adverse, and, as in the case of a title by disseisin or prescription, creates no privity with former owners, or whether, although it takes all titles, it conveys them in privity like a sale on execution. Pub. St. c. 12, § 38. The question is not decided by *Langley v. Chapin*, 134 Mass. 82. Even if the former view were taken, it still possibly might be held that no mere change of title, except one which puts it where it is above the statute, as in the sovereign apart from statute, can prevent the gaining of a later title, which also is adverse to all the world, and is the result of an adverse holding, uninterrupted in fact for 20 years. Upon these points we express no opinion.

Exceptions overruled.

(172 Mass. 407)

TILTON et al. v. INHABITANTS OF WENHAM.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 6, 1899.)

HIGHWAYS—DEFECT—QUESTION FOR JURY.

1. Plaintiffs, while driving along a road, struck a stump 10 inches high and 6¼ inches in diameter, which was hidden by the grass, and

were thrown out and injured. The road was a highway by prescription, and its width did not appear, but it did not extend to the fences on the sides. Travel had turned to the side of the road, and worn bare a strip several feet wide, which looked like the rest of the road, and came to within an inch of the stump. *Held*, in an action against the town, that the question whether the stump was within the limits of the highway was for the jury.

2. Where plaintiffs, when driving, were thrown out by an old stump in the highway, the fact that from its appearance it seemed to have been there a long time was sufficient to cause an inference that defendant had notice thereof.

3. Where there had been no laying out of a road or taking of land, and no fences fixed the limits, it can fairly be inferred that the assertion of right by public user was not confined to the space between the wheel ruts.

Exceptions from superior court, Essex county; Robert R. Bishop, Judge.

Actions by Florence B. Tilton, Marion T. North, and Charles H. Tilton against the inhabitants of Wenham. The actions were tried together, and there was a judgment for defendant, and plaintiffs except. Exceptions sustained.

Frank Paul, for plaintiffs. F. L. Evans and H. P. Moulton, for defendant.

HOLMES, J. These are actions to recover for injuries to person and property caused by an alleged defect in the highway. The way in question was Main street, in Wenham. There was evidence that it was a highway by prescription, but its width did not appear, unless by presumption; and it was admitted by the plaintiffs that the road did not extend to the fences on the sides. Beside the point where the accident happened there was a muddy place, with standing water; and travel had turned to the easterly side of the road, over the grass, to such an extent that a strip 3 or 4 feet wide was worn bare, and looked like the rest of the road. At the time of the accident this strip came up to within an inch of the stump of a pole about 10 inches high and 6¼ inches in diameter, which was hidden by the grass that remained. The plaintiffs Mrs. North and Mrs. Tilton were driving along the road in a southerly direction, and, upon coming to the muddy place, turned to the left, over the above-mentioned strip, from which the grass had disappeared. In some way or other the left wheel of their vehicle struck the concealed stump. Mrs. North, who was driving, was thrown out, the horse ran away and brought the wagon against a trolley pole, and Mrs. Tilton was thrown out in her turn. We believe that this is a sufficient statement of the plaintiffs' case. The judge directed a verdict for the defendant, and the plaintiffs excepted.

The ruling is supported by an argument that it does not appear that the driver was using due care. But the evidence warranted a finding that Mrs. North was driving quietly along, and that the first trouble was caused by striking the concealed stump. We see no ground whatever for the suggestion that this

is only conjecture, and that the horse may have been running away before the stump was reached.

The real question is whether there was evidence that the town was responsible for the defect. If the stump was outside the limits of the highway, and of the way that was traveled, *Marshall v. Ipswich*, 110 Mass. 522, points to the conclusion that the town was not bound to build a fence for the protection of the public against it, any more than in the case of a stone of the same height. It is one of those usual things which travelers must look out for. The last part of the decision in this case suggests that the law is the same as to such small obstacles, even if within the limits of the highway, if they are not within the traveled part. But the language is ambiguous, and in other doubtful cases of a like character the question has been left to the jury. *Davis v. Charlton*, 140 Mass. 422, 5 N. E. 473; *Cogswell v. Inhabitants of Lexington*, 4 Cush. 307. See *Warner v. Inhabitants of Holyoke*, 112 Mass. 362, 367; *Harris v. Inhabitants of Great Barrington*, 169 Mass. 271, 275, 47 N. E. 881. When we consider that the jury might have found that the responsibility of the town for the traveled part of the way extended over the strip from which the grass had been worn away,—*Moran v. Inhabitants of Palmer*, 162 Mass. 196, 38 N. E. 442; *Aston v. City of Newton*, 134 Mass. 507; *Weare v. Inhabitants of Fitchburg*, 110 Mass. 334, 337 (even according to *Cogswell v. Inhabitants of Lexington*, 4 Cush. 307, if that strip was outside the limits of the highway),—and that the stump was hidden and within an inch of the strip, we are of opinion that, under the decision last cited, if the stump was within the highway, the jury would have been warranted in finding it a defect. If it was a defect, they could have inferred from its position, and the time during which it seemed, from its appearance, condition, and surroundings, to have stood where it was, that the defendant had notice of it. *Noyes v. Gardner*, 147 Mass. 505, 18 N. E. 423; *Bourget v. City of Cambridge*, 159 Mass. 388, 34 N. E. 455; *Welsh v. Inhabitants of Amesbury*, 170 Mass. 437, 49 N. E. 735. It is not argued that any part of the damage is too remote. *Marble v. City of Worcester*, 4 Gray, 395, 403.

If, then, the jury might have found that the stump was within the limits of the highway, the case should not have been taken from them. The only evidence was that the highway was ancient, and it was admitted, as we have said, that it did not extend to the fence. But the case of an ancient highway is somewhat different from that of a private way, or other private easement by prescription, where the suggestion of a lost grant is a pure fiction, having a well-known historical explanation. In the case of an important public way there is a real working probability that it has been sanctioned by some public action, even though no record of such action is produced. The offer of evidence of which

we shall have to speak indicates that there was a location in this case. If there was any such, it is very improbable that the width was not greater than that of the traveled part of an ordinary country road. And even if there never has been any laying out of the road or taking of land, where no fence fixes the limits, it fairly may be inferred that the assertion of right by public user is not confined to the space between the wheel ruts. We are of opinion that the jury would have been warranted in finding that the stump was within the highway. See *Hannum v. Inhabitants of Belchertown*, 19 Pick. 311, 312; *State v. Morse*, 50 N. H. 9, 20; *Bumpus v. Miller*, 4 Mich. 159, 164; *Bartlett v. Beardmore*, 77 Wis. 356, 363, 46 N. W. 494; *Davis v. City of Clinton*, 58 Iowa, 389, 392, 10 N. W. 768.

In view of our decision upon the main question, the two exceptions to the exclusion of evidence become unimportant. The plaintiffs offered to prove that the stump was cut off, after the accident, by order of the board of selectmen. The offer now is justified as evidence that the town exercised authority over the place as part of the highway, but, when the evidence was offered and rejected, it probably was understood by everybody, unless the plaintiffs' counsel is to be excepted, to be offered as evidence of an admission by subsequent conduct. The plaintiffs also offered to prove that the highway did not run where the actual legal location would take it, by an engineer who had tried to fix the east line of Main street from what was said to be a copy of the location. But the copy was not proved to be a correct copy. We hardly should have sustained these exceptions, but at another trial the questions raised are not likely to be important.

Exceptions sustained.

(172 Mass. 401)

FROST v. COURTIS et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 6, 1899.)

PLEADING—AMENDMENTS—ESTOPPEL—ADVERSE POSSESSION—DEED—TENANT IN COMMON.

1. Under Pub. St. c. 167, § 42, allowing amendments, the court may permit an amendment setting up an estoppel, notwithstanding that, after verdict on the first trial, the case was reported to the supreme judicial court on the terms that, if the verdict was wrong, a new trial should be had on the issue of title by prescription, the amendment raising no matter inconsistent with the question decided on the report.

2. On the issue of adverse possession the various adverse holdings of the different claimants in the chain of title may be added together to make up the required period of prescription.

3. Though a deed by a tenant in common of a portion of the estate in severalty is invalid as against his co-tenants, yet it is good by way of estoppel against the grantor and his heirs.

4. A deed by a tenant in common by metes and bounds is valid against all persons unless avoided by the co-tenants.

Exceptions from superior court, Essex county; John Hopkins, Judge.

Petition by Rebecca C. Frost against Jane Courtis and others for partition. There was a judgment for respondents, and petitioner excepts. Exceptions overruled.

S. H. Tyng and G. C. Abbott, for petitioner.
H. P. Moulton, for respondents.

HAMMOND, J. Francis Courtis, being seised of the two parcels of real estate named in the petition, namely, a house and land on Back street, in Marblehead, and Baker's Island, in Salem Harbor, died testate, June 15, 1870, leaving a widow, Jane Courtis, the respondent; a son, Francis Mason Courtis; and two grandchildren, who were children of a deceased son; the petitioner, Rebecca C. Frost, being one of the grandchildren. When the case was originally tried in the superior court, the respondent claimed as a part of her defense that by the death of the testator's son, Robert Harris Courtis, who died before the testator, the interest devised to Robert did not lapse, but went to the survivors named in the second clause of the will, namely, to the respondent and her son, Francis Mason Courtis; and upon this issue a verdict in the superior court was directed for the respondent, and the case was reported to this court under the following terms, namely: "If the ruling was right, judgment is to be entered on the verdict; if the ruling was wrong, the verdict is to be set aside, and by agreement of parties a new trial granted to try the issue of title by prescription of the respondent, Jane Courtis." This court decided that the devise to Robert Harris Courtis lapsed (see *Frost v. Courtis*, 167 Mass. 251, 45 N. E. 687), and by a rescript directed that, in accordance with the report, the verdict should be set aside, and the case should stand for trial on the issue whether the respondent Jane Courtis has acquired title by prescription. The case came on again for trial in the superior court, and in the course thereof the court allowed the defendants to amend the answer, setting up as a defense that the petitioner was estopped from claiming any interest in Baker's Island adverse to the respondent Morse, or any person claiming under him. To this the petitioner excepted. Her contention is that, it having been agreed by the parties in open court, at the time when the case was reported to this court as aforesaid, that a new trial, if granted, should be merely to try the issue of title by prescription of the respondent Jane Courtis, the court, as a matter of law, had no right to allow the amendment. The court ruled that it had the right, and, in the exercise of its discretion, allowed the amendment. On this part of the case the only question before us is whether the court had the power to allow the amendment. It is the policy of existing legislation and practice to allow amendments and pleadings to be made at any time before final judgment. Pub. St. c. 167, § 42, allowing amendments, has always been liberally construed, and there

can be no doubt that the superior court had the power to allow the amendment, notwithstanding the terms of the report of the first trial and this court, and of the rescript thereon. *Hutchinson v. Tucker*, 124 Mass. 240; *Gray v. Inhabitants of Everett*, 163 Mass. 77, 39 N. E. 774; *Terry v. Brightman*, 133 Mass. 536; *West v. Platt*, 124 Mass. 353, and cases therein cited. The amendment raised no defense inconsistent with the question of law decided by this court. The trial of the case proceeded upon the defenses set up by the respondents, namely, prescription and estoppel, the latter defense applying only to Baker's Island. Of the 13 requests for rulings, the court, while not adopting the precise language, gave in substance the first, and as to the second substantially ruled that mere continuous possession by the respondent was not enough as against the petitioner, and refused the others; but as to the matter covered by the third and fourth ruled that: "If Jane Courtis and Francis Mason Courtis, the son, held adversely to those under whom the petitioners claim; and if, after the death of Francis Mason Courtis, Jane Courtis held adversely to them to April 21, 1887, which was the date of the deed to Morse; and if, after the deed to Morse, he held adversely to them to the date of filing this petition; and if that length of time, added together, amounts to more than twenty years,—then the title became divested from the petitioner, and vested in the respondents. That is to say, if mother and son occupied adversely during the lifetime of the son, and then the mother, who inherited from him, occupied adversely until she sold to Morse, which was in 1887; and if Morse, after he purchased, occupied adversely until the twenty years expired,—then you can tack together those several periods of time, add them together, and if, together, they equal twenty years, then there had been twenty years' adverse use by the respondents, or those under whom they claim." We think the law thus laid down was correct. *Sawyer v. Kendall*, 10 Cush. 241. The court defined in sufficiently accurate terms the elements necessary to constitute adverse possession as between co-tenants, and also the elements of an estoppel in pais. The petitioner also contends that the deed by the respondent to Dr. Morse, being a deed by a tenant in common of a part of the common estate by metes and bounds, was utterly void as against her. But such a deed is not absolutely void. The rule is stated in *De Witt v. Harvey*, 4 Gray, 486, as follows: "Although a conveyance by a tenant in common of a portion of the estate in severalty is invalid as against his co-tenants, and can be avoided by them, it is nevertheless good by way of estoppel against the grantor and his heirs, and is valid against all persons, unless avoided by the co-tenants." If Jane Courtis, the respondent, was a disseisor at the time of the delivery of the deed (and that was the question on trial), she was none the less such because in fact the title, but for

the disselsin, was in her and the petitioner as tenants in common. If the deed took effect at all, it took effect as the deed of a disselsor, and that was the only claim made by the respondents as to its effect. Upon examining the evidence as reported in the bill, we are of the opinion that the case was rightly submitted to the jury, both on the question of disselsin and that of estoppel under instructions correct and sufficiently full. Exceptions overruled.

(172 Mass. 355)

PHELPS v. STONE.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 6, 1899.)

STATUTE OF FRAUDS—ORIGINAL PROMISE.

Where a building contractor, on the promise of the owner's son to see him paid, and at his request, furnished extras in erecting the building, charging them to the son, to whom he extended the credit, and who, when asked to pay for such extras, made no other objection than that he had no money, a finding that the debt was that of the son, and hence not within the statute of frauds, was warranted, even though the son was not peculiarly benefited by the transaction.

Exceptions from superior court, Worcester county; Hopkins, Judge.

Action by Levi W. Phelps against Henry N. Stone. There was a judgment for plaintiff, and defendant excepted. Exceptions overruled.

C. F. Baker, C. F. Worcester, and W. P. Hall, for plaintiff. A. S. Hudson, for defendant.

BARKER, J. The plaintiff built a store for the defendant's father, and, having been paid the contract price, brought this action to collect of the defendant a bill for extra work and materials furnished in consequence of conversations between the plaintiff and the defendant. The case was referred to an auditor, who reported certain facts, and upon them found for the defendant. It was then tried by the court, the auditor's report being the only evidence; the defendant contending that, as matter of law, the court should find for the defendant upon the facts reported by the auditor. The court, however, found for the plaintiff, and the defendant has filed and entered in this court a bill which, although it is irregular, we consider as a bill of exceptions raising the question whether the court was justified in its finding. Among the facts found by the auditor, his report states that the extra work and materials were performed and furnished under orders given by the defendant and upon the strength of promises made by him to the plaintiff that the defendant would see the plaintiff paid for the work and materials so furnished; that the plaintiff gave credit to the defendant, and charged him with the items, and that shortly before bringing the suit the plaintiff saw the defendant about the claim, and the latter did not object to

paying it, but said he had no money to pay it. These facts justified the court in finding that the bill was for the defendant's own debt, and not the debt of his father, notwithstanding the further facts that the defendant was not peculiarly benefited, and that the father's payments were made at the hands of the defendant, and that his father owned the building. Exceptions overruled.

(172 Mass. 405)

HARDY et al. v. SANBORN et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 6, 1899.)

CLOUD ON TITLE—CONVEYANCE BY DEVISEE—LIFE ESTATES—CONVEYANCE OF FEE BY LIFE TENANT.

1. A devisee's conveyance of real estate before final settlement of the estate by deed reciting that the title conveyed is derived by will, and covenanting against incumbrances except testator's lawful debts, being subject to the executor's right to dispose of the land for debts of the estate and administration charges, is no cloud on his right to do so.

2. A conveyance in good faith for a sufficient consideration of the fee by a life tenant empowered so to convey by the will creating the life tenancy is not fraudulent as to the remaindermen.

Case reserved from superior court, Essex county; Henry K. Braley, Judge.

Bill by Willard C. Hardy, as executor of the will of William N. Sanborn, deceased, and others, against Elizabeth B. Sanborn and others. Heard on the pleadings and proofs, and reserved thereon for the consideration and determination of this court. Dismissed.

W. S. Peters and H. J. Cole, for plaintiffs.
R. E. Burke and H. P. Moulton, for defendants.

HAMMOND, J. By the first item of the will, Elizabeth J. Sanborn, the widow, took a life estate in the real estate of the testator, coupled with the power to sell any or all of the same in fee. We assume, without deciding, that the power of sale does not give her an absolute right to all of the proceeds of such sale. It is claimed by the plaintiff Willard C. Hardy that the sale by Mrs. Sanborn is a cloud upon his title, as executor of the will, since he needs to make a sale of the land for the payment of the debts and charges of administration of the estate of the testator; and by the plaintiffs Addie M. Hardy and Susan A. Poore, that the sale constitutes a fraud upon their rights.

So far as the executor is concerned, any sale of the real estate by a devisee under the will is subject to his right to sell or mortgage under a license of the probate court for the payment of debts and charges of administration, and the deed to William N. Sanborn, Jr., shows upon its face that it is made subject to this right. The grantor states therein that her title "is derived by will of" her "deceased husband," and she covenants that the land is free from all incumbrances "except the law-

ful debts of my [her] deceased husband." It does not appear that the land is held adversely by the grantee, and he is therefore presumed to hold under the terms of his deed. So far, therefore, as the executor is concerned, there does not seem to be any need of this bill. The deed, under the circumstances, is no cloud upon the right of the executor to sell or mortgage by virtue of a license from the probate court. While the answers to the bill affirm the right of the grantor to make the conveyance, they must be interpreted as meaning a conveyance such as this was, namely, subject to these rights of the executor. Whether the sale upon the assumption we have made is a fraud upon the rights of the other plaintiffs depends upon the character and circumstances of the transaction. The bill alleges that "the conveyance was made without any necessity therefor, and the sole motive was to defraud the plaintiffs Addie M. Hardy and Susan A. Poore of the real estate devised to them by the will." But we do not think these allegations of the bill are sustained by the evidence. The evidence shows that the sale was made under the power in the will, and that Sanborn, the grantee, has made arrangements to pay the appraised value of the property, to wit, \$1,400, less the debts and charges of administration; and that he is ready and willing to pay that sum, and also the debts and charges of administration. The sale was made under the power given in the will, for a sufficient pecuniary consideration, and in good faith. The bill therefore should be dismissed, with costs. So ordered.

(172 Mass. 411)

HARDIMAN v. WHOLLEY.

(Supreme Judicial Court of Massachusetts. Essex. Jan. 6, 1899.)

INJURY BY HORSE—LIABILITY OF OWNER.

The owner of a horse rendered nervous by the driver's mistreatment, hitched near a sidewalk, and standing partially on it, is liable to a pedestrian on the sidewalk for injuries received by a kick from the horse, without proof that it was vicious to the owner's knowledge.

Exceptions from superior court, Essex county; John W. Hammond, Judge.

Action by Frank P. Hardiman against John H. Wholley. There was a judgment for plaintiff, and defendant excepted. Exceptions overruled.

A. P. White and H. S. Stearns, for plaintiff. T. W. Coakley and F. J. Keleher, for defendant.

HOLMES, J. This is an action to recover for personal injuries caused by the kick of a horse. The wagon to which the horse was attached had stuck in the mud half an hour before the accident, and this horse and another had been unhitched, and were feeding out of feed bags attached to their heads. There was evidence that this horse had been made nervous by the

effort to pull the wagon out, and by being brutally beaten, and that he was standing partially on the sidewalk. He was standing at right angles to it, and, as the plaintiff approached, suddenly whirled round and kicked him. The case is here upon an exception to the refusal to direct a verdict for the defendant. The refusal was right. It used to be said in England, under the rule requiring notice of the habits of an animal, that every dog was entitled to one worry, but it is not universally true that every horse is entitled to one kick. In England, if the horse is a trespasser, and kicks another, the kick will enhance the damages, without proof that the animal was vicious, and that the owner knew it. *Lee v. Riley*, 18 C. B. (N. S.) 722. See *Lyons v. Merrick*, 105 Mass. 71, 76. So, in this commonwealth, going further, it would seem, than the English law, a kick by a horse wrongfully at large upon the highway can be recovered for without proof that it was vicious. *Barnes v. Chapin*, 4 Allen, 444; *Marsland v. Murray*, 148 Mass. 91, 18 N. E. 680; *Dickson v. McCoy*, 39 N. Y. 400, 401. See *Cox v. Burbridge*, 13 C. B. (N. S.) 430. The same law naturally would be applied to a horse upon a sidewalk, where it ought not to be (see *Mercer v. Corbin*, 117 Ind. 450, 454, 20 N. E. 132); and in this case there was evidence of the further fact that the horse was in an exceptionally nervous condition in consequence of the driver's treatment. Exceptions overruled.

(172 Mass. 375)

MEEHAN v. SPIERS MFG. CO.

(Supreme Judicial Court of Massachusetts. Worcester. Jan. 6, 1899.)

MASTER—LIABILITY—FELLOW SERVANTS.

An accident was caused by using naphtha on cotton waste in cleaning a tank, plaintiff holding a lamp for those doing the cleaning. The evidence showed that the danger was one existing only on this occasion, and not due to any fault of plan, or construction, or lack of repair, or defect in the employer's works. Naphtha was used by order of the superintendent, without instructions from the employer. *Held*, that the superintendent was a fellow servant, and the employer was not liable.

Exceptions from superior court, Worcester county; Francis A. Gaskill, Judge.

Action by Michael Meehan against the Spiers Manufacturing Company. There was a judgment for defendant, and plaintiff excepts. Exceptions overruled.

Wm. A. Gile and F. B. Kelly, for plaintiff. H. Parker and O. C. Milton, for defendant.

BARKER, J. The action is at common law, with the burden upon the plaintiff to show that the negligence from which he suffered was negligence for which his employer was answerable. This burden is not met by evidence which is equally consistent with actionable fault of the employer and with the absence of such fault. At common law a superintendent is for many purposes a fellow

servant with the workmen under him, and the employer not answerable to them in case of the superintendent's negligence, even in giving an order. The plaintiff must go further, and show that the negligence of a superintendent was in a matter as to which the law imputes his carelessness to the master. Upon the evidence, the danger to which the plaintiff was exposed was merely a transitory one, existing only on the single occasion when the injury was sustained, and due to no fault of plan or construction, or lack of repair, and to no permanent defect or want of safety in the defendant's works, or in the manner in which they had been ordinarily used. The accident was caused by using naphtha upon cotton waste in cleaning the inside of a tank, when the fumes of the naphtha were liable to explode upon contact with the flame of a lamp with which the plaintiff standing near by was giving light for their work to men who were within the tank using there the waste and naphtha. The naphtha was used in obedience to an order given by the superintendent. But it did not appear that the naphtha was provided for use in cleaning the tank. It had been used, and, we must assume, properly used, for cleaning machines; and the only fair inference from the plaintiff's testimony is that other and safe materials had been used theretofore in cleaning the tank. It was as reasonable to find from the evidence that the superintendent's act in ordering naphtha to be used on this occasion was merely his own choice between safe materials which he might have directed to be used, and dangerous materials, provided for some other, but proper, purpose, for which choice his employer was not answerable, as to find that in giving the order he was carrying out an intention of his employer to have naphtha used in cleaning the tank. Exceptions overruled.

(172 Mass. 337.)

DUGGAN v. NEW ENGLAND R. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 6, 1899.)

RAILROADS—CROSSINGS—COLLISION—NEGLIGENCE —INSTRUCTION.

In an action for injury caused by a collision of defendant's engine with plaintiff's sleigh at a crossing, there was evidence that plaintiff stopped and listened, and there was no sound of whistle or bell, and that the whistling post was only 1,200 feet from the crossing, instead of 80 rods, as prescribed by law. *Held*, that a charge that, should the jury find that failure to give signals at the prescribed distance contributed to the injury, and that there was not gross negligence on the part of plaintiff, then the jury could infer from those facts that the failure to give the statutory signals contributed to the injury, was proper.

Exceptions from superior court, Worcester county; Francis A. Gaskill, Judge.

Action by William F. Duggan against the New England Railroad Company. There was a judgment for plaintiff, and defendant excepts. Exceptions overruled.

MASS. DEC. 49-54 N.E.—33

This was an action to recover for an injury caused by a collision of the defendant's engine with a sleigh in which the plaintiff was riding at a grade crossing in the town of Franklin. The plaintiff was riding with one Desjarlais, who was driving, in an open sleigh drawn by a single horse, on a highway leading from Franklin towards Woonsocket, and crossing the defendant's railroad at grade at a crossing known as "Clark's Crossing." The plaintiff and one Desjarlais testified that they approached the crossing about 10 minutes past 6 on the evening of February 2, 1897; that when within 25 or 30 yards of the crossing they stopped and listened; that there were some obstructions that prevented a view of the railroad in the direction from which the train came; that there was no whistle and no bell sounded upon the locomotive as the train approached; that they had no bells on their own horse or sleigh; that it was in the country, and there were no sounds to prevent their hearing any noise that might be made. They testified further that there was no bell and no whistle sounded by the locomotive; that they started to cross the railroad at the crossing; when nearly over the crossing, they saw the train right upon them; it struck the sleigh, causing the injury complained of; that they did not hear the train until it was right upon them. There was evidence tending to show that the whistling post was only 1,200 feet from the crossing, instead of 80 rods, as prescribed by the law. The engineer testified that he blew the whistle in the neighborhood of the whistling post; and the fireman testified that the whistle was blown at the whistling post, and the bell rung from the time the whistle ceased blowing, to and over the crossing. Other witnesses testified to the blowing of the whistle and the ringing of the bell at points as far distant as the whistling post, or further. There was evidence that the train was running from 35 to 40 miles an hour. The judge instructed the jury that if the whistle was blown only at a point 1,200 feet from the crossing, and the whistle and bell were then blown or rung continuously or alternately to and over the crossing, that would be a violation of the law, and the plaintiff, so far as that matter was concerned, would have made out his case. He then instructed the jury that they must also find that the omission of the signals contributed to the injury. To this part of the ruling no exception was taken. The court then instructed the jury as follows: "If you are satisfied, under this first count, that that whistling post was less than eighty rods from this crossing, and that the first announcement of the whistle or bell was practically at the whistling post, then the burden which must be maintained by the plaintiff has been maintained, and you are entitled to render a verdict for him. If you are satisfied—if you feel you are satisfied—that that failure to give those signals contributed to the injury, and if you find there was not gross negligence on the part of the

plaintiff, or the person who was driving him, contributing to the injury, it is entirely within your province to infer from those facts that the failure to give the statutory signals did contribute to the injury to the plaintiff." To that part of the instructions in which the court stated that the jury might infer that absence of the statutory signals contributed to the plaintiff's injury, the defendant excepted. The verdict was for the plaintiff.

H. Parker and C. C. Milton, for plaintiff. F. P. Goulding and W. C. Mellish, for defendant.

PARKER, J. The exceptions must be overruled. The portion of the charge excepted to is not open to the construction which the defendant attempts to put upon it,—that the jury were told that they might infer from the failure to give the statutory signals alone that that failure contributed to the plaintiff's injury. The charge was given in view of all the evidence, and was to be acted upon by the jury in dealing with all the evidence. There was evidence tending to show that the plaintiff and his companion stopped near the tracks, and before entering upon them, and listened to ascertain whether a train was approaching. It is possible that at that time, if the law had been complied with by the defendant, the whistle would have been blown or the bell rung, and that the signals would have been heard, notwithstanding the fact that similar signals given after they had started to cross the track were not heard. Exceptions overruled.

(172 Mass. 387)

COBB v. HALE.

(Supreme Judicial Court of Massachusetts.
Plymouth. Jan. 6, 1899.)

APPEAL—SUFFICIENCY OF RECORD.

Where the record on an appeal from a judgment dismissing a petition to vacate a judgment, and from the judgment rendered, does not show on what ground the petition was dismissed, or what were the facts as shown on the hearing, the appeal will be dismissed.

Appeal from superior court, Plymouth county; Albert Mason, Judge.

Action by Sidney O. Cobb against William P. Hale. Judgment for plaintiff in the district court was affirmed in the superior court, and from such judgment, and from an order dismissing defendant's petition to vacate such judgment, defendant appeals. Affirmed.

W. P. Hale, in pro. per. C. B. Snow, for appellee.

FIELD, C. J. We infer from the papers before us that the action was originally brought in the Second district court of Plymouth, where judgment was rendered for the plaintiff, from which the defendant appealed to the superior court, and that on March 7, 1898, in the superior court, this judgment was affirmed on complaint made by the defend-

ant that the appeal had not been properly entered, and that the proper papers had not been filed. Pub. St. c. 155, § 34; Id. c. 154, § 39; St. 1893, c. 396, § 30. The defendant on March 18, 1898, filed in the superior court a petition asking that the judgment be vacated, which, "upon hearing," was dismissed on March 28, 1898; and the defendant on April 4, 1898, appealed to this court. It does not appear on what ground the superior court dismissed the petition, nor what appeared to that court on the hearing to be the facts. There appears also an appeal by the defendant to this court from the judgment rendered in the superior court. There is no matter of law apparent on the record which this court can consider under either appeal. Certainly no error of law appears in the record before us. Petition dismissed. Judgment affirmed.

(172 Mass. 388)

CARLSON v. LYNN & B. R. CO.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 7, 1899.)

STREET RAILROADS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

At the point where plaintiff, while walking along a path, beside the track, on a dark, stormy night, was struck by defendant's car, the car passed within 20 inches of a fence beside the path, which was intended for pedestrians, and was the only one along the highway. The track crossed over from the opposite side of the highway at a point about 700 feet from the place where plaintiff was struck. Plaintiff had listened for cars, and had turned and looked back twice within 700 feet, and had seen nothing. The car was going 20 miles per hour, and had only a small kerosene lamp for a headlight. *Held* sufficient to sustain a finding that plaintiff was not negligent.

Exceptions from superior court, Essex county; John W. Hammond, Judge.

Action by John Carlson against the Lynn & Boston Railroad Company. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

Frank D. Allen, for plaintiff. Walter I. Badger, for defendant.

FIELD, C. J. The single exception is to the refusal of the presiding justice to rule that the plaintiff could not recover. The counsel for the defendant, in his argument before this court, concedes that the evidence warranted the jury in finding negligence on the part of the defendant, but he contends that there was not sufficient evidence to warrant the jury in finding that the plaintiff was in the exercise of due care. There was evidence that the plaintiff was walking in the only path or walk in the highway which was intended for travelers on foot, and which it was customary for people to walk in; that the night was dark, the road muddy, and the wind blowing from the sea in his face as he walked along; that the plaintiff listened to hear if anything was coming, and heard nothing, and within a distance of less than 700 feet

turned around twice and looked to see if anything was coming, and saw nothing; that when he was hit by the car he was from 200 to 300 feet beyond the place where he last looked. The track of the defendant, at the point where the plaintiff was injured, was on the right-hand side of the highway in going from Chelsea to Lynn. On the right-hand side of the track was the path for foot travelers, and on the right-hand side of the path was a wooden fence. Between the side of a passing car and the fence, at the place where the plaintiff was injured, was a space of about 20 inches. The car was going from 20 to 25 miles an hour. There was evidence that the headlight of the car was a small kerosene lamp; that the highway was not lighted; that the crossover of the track from the left to the right hand side of the highway was about 670 to 680 feet before the place where the plaintiff was injured. The car, after it hit the plaintiff, went a considerable distance beyond—estimated from 75 to 120 feet—before it was stopped. There was evidence that almost up to the time of the accident the motorman was facing to the left-hand side of the highway, and not to the right. The evidence of the plaintiff's conduct, testified to by himself and by his companion, Keeney, seems to us evidence of due care on his part. The speed and manner in which the evidence showed that the car was run, on a dark night, on a track so near to the path for foot travelers, made traveling on the path, under the circumstances shown, dangerous for even careful persons. Exceptions overruled.

(172 Mass. 424)

COMMONWEALTH v. LENNON.(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 7, 1899.)**MUNICIPAL CORPORATIONS—OBSTRUCTION OF SIDEWALK—DEFENSE.**

That a constable is removing furniture from a house in obedience to a writ of execution is no justification for violating an ordinance against placing obstructions on a sidewalk.

Report from superior court, Middlesex county; Charles S. Lilley, Judge.

One Lennon, a constable, was charged with violating a city ordinance of Cambridge, in placing obstructions upon a sidewalk while removing furniture from a house by virtue of an execution, and justified under the execution. The court directed a verdict of guilty, and reported the case to the supreme judicial court. Verdict sustained.

F. N. Wier, Dist. Atty., for the Commonwealth. H. H. Winslow, for defendant.

HOLMES, J. The validity of the ordinance is not questioned, nor do we see any ground for questioning it. The defendant justifies on the ground that he acted as a public officer, and in obedience to a writ of

execution ordering him to cause one Halliday to have possession of the tenement from which the furniture was removed. But the fact that the defendant was a constable did not put him above the law, and the writ did not require him to disregard it; for, if we assume that the defendant's duty required him to remove the furniture, irrespective of any request to him (*Fiske v. Chamberlin*, 103 Mass. 495, 496. See *Scott v. Richardson*, 2 B. Mon. 507; *Witbeck v. Van Rensselaer*, 64 N. Y. 27, 32), it did not require him to leave it upon the sidewalk contrary to the ordinance. There is no hardship upon the officer. He may store the goods at the owner's cost (*Preston v. Neale*, 12 Gray, 222), and may require a bond of indemnity from the party who calls upon him to serve the writ (*Clark v. Parkinson*, 10 Allen, 133, 136; *Hamberger v. Seavey*, 165 Mass. 505, 507, 43 N. E. 297). See *Com. v. Millman*, 13 Serg. & R. 403.

Verdict to stand.

(172 Mass. 432)

MANNING v. CARBERRY.(Supreme Judicial Court of Massachusetts.
Norfolk. Jan. 7, 1899.)**WITNESS—IMPEACHMENT—CONTRACTS—EVIDENCE.**

1. Evidence introduced, under Pub. St. c. 169, § 22, which allows a party introducing a witness to prove that he had at other times made statements inconsistent with his testimony at the trial, can be considered only to discredit the witness, and not as independent evidence.

2. Plaintiff, who sued her brother for the board of their father, testified that another brother told her that defendant was going away, and sent him to ask her to take their father to board, and that defendant would pay her; and that defendant had made two payments; but she did not testify whether they were made in payment of an obligation or as a gratuity. Afterwards she had told defendant that he ought to contribute something towards their father's support, and it was not shown that she ever said anything to him concerning the alleged contract. Held insufficient to warrant a finding for plaintiff.

Exceptions from superior court, Norfolk county.

Action by one Manning against one Carberry. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

James E. Cotter, for plaintiff. T. E. Grover and U. L. Sheldon, for defendant.

LATHROP, J. While the bill of exceptions in this case is somewhat voluminous, as it recites all of the evidence given at the trial, the question presented is a narrow one. Hugh Carberry, for whose board the plaintiff seeks to hold the defendant liable, was the father of the parties to this action, and of John Carberry, a witness in the case. There is no doubt that there is evidence from the plaintiff's testimony which would authorize the jury in finding that John Carberry came to see the plaintiff on July 9, 1892, and represented that the defendant

was going to Gloucester, and sent him down to see if she would take his father to board; that she asked whether the defendant would pay her, and John said, "Yes." She further testified that the defendant made two payments, one of \$50 and one of \$10; and added, "That was all I received on account of the board and care of my father." She did not state, however, that at any time she presented a bill to the defendant, or that, when these payments were made, anything was said which would tend to show that the defendant made the payments as money due from him, or otherwise than as a gratuity. Nor was there any evidence when these payments were made. Her testimony a little later would tend to show, not a contract on her part with the defendant, but a solicitation for help in the support of their parent. She testified that in 1894 she said to the defendant: "I am in poor circumstances, Andy, and I think you ought to try and do something for me towards father's board." That he said: "You will be all right, Mary, some one of these days. You will get along all right. You take good care of father, and you will be all right." There is no evidence that at any time she spoke to the defendant in regard to the contract which she testified John made with her in behalf of the defendant, although she testified that the defendant frequently came to her house while her father was living with her. John Carberry testified that he did not remember making any arrangement with the plaintiff; that he did not remember being sent to his sister by his brother, but it might be so. This witness further testified that he called at the office of the plaintiff's counsel with the defendant, and said, in the presence of the defendant and the plaintiff, to the counsel, that his brother sent him down to make arrangements for the board of his father as long as he was away, and that his brother would pay the board. This evidence was put in under the provisions of Pub. St. c. 169, § 22, which allows a party producing a witness to contradict him by other evidence, and to prove that he has made at other times statements inconsistent with his testimony at the trial. Such evidence, however, though it discredits the witness, does not have the effect of independent evidence. *Ryerson v. Abington*, 102 Mass. 528, 530; *Day v. Cooley*, 118 Mass. 524; *Brooks v. Weeks*, 121 Mass. 433.

The plaintiff next contends that the silence of the defendant, when John Carberry made the statements in the office of the plaintiff's attorney, was evidence of the agent's authority to bind him, or amounted to a ratification of the contract. The short answer to this contention is that there is no evidence whether the defendant remained silent or not. For aught that appears, the defendant may have at once protested that he had giv-

en his brother no authority to make any contract in his behalf.

The last witness called by the plaintiff was the defendant, who testified that he sent his brother to his sister to notify her that their father was coming to her house; that he had nothing to do with any arrangement with the plaintiff for his father's board; that his father made his own arrangement, and he (the defendant) gave him the money to do so. The plaintiff contends that the jury were not bound to believe the defendant. This is true, but it does not make his testimony affirmative evidence in support of the plaintiff's claim. We find nothing in the testimony of the witnesses for the plaintiff, whether the jury believed their testimony or disbelieved it, which would warrant a finding for the plaintiff. Exceptions overruled.

(172 Mass. 373)

HOWLAND et al. v. TOWN OF WESTPORT.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 7, 1899.)

EXPERT WITNESS—COMPETENCY.

Whether a person should be admitted as an expert witness to give his opinion on value of land taken in condemnation proceedings is for the judge.

Exceptions from superior court, Bristol county; Caleb Blodgett, Judge.

Action between A. Franklyn Howland and others and the town of Westport. Plaintiffs filed exceptions. Overruled.

Jackson, Slade & Borden, for plaintiffs. H. M. Knowlton and A. E. Perry, for defendant.

FIELD, C. J. The exceptions recite that "the jury viewed the premises, and the parties introduced the testimony of expert witnesses upon the value of the land taken, and the effect of such taking upon the remaining land." The plaintiffs also offered as a witness to the value of the land John A. Macomber, who was examined and cross-examined in regard to his qualifications as a witness upon the value of the plaintiffs' land. The presiding justice ruled that he was not shown to be qualified as an expert to express any opinion as to the value of the land taken, and the plaintiffs excepted to the ruling. Whether a person should be admitted as such a witness depends largely upon the opinion of the presiding justice as to his qualifications upon the evidence. *Phillips v. Inhabitants of Marblehead*, 148 Mass. 326, 19 N. E. 547; *Amory v. Inhabitants of Melrose*, 162 Mass. 556, 39 N. E. 276; *Teele v. City of Boston*, 165 Mass. 88, 42 N. E. 506. Upon the evidence stated in the exceptions we do not think that the ruling of the presiding justice should be reversed. Exceptions overruled.

(172 Mass. 412)

HINCKLEY v. GUYON.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1899.)**LANDLORD AND TENANT — RECOVERY OF POSSESSION — ACTION BY AGENT — LEASE — CONSTRUCTION.**

1. Where the owner of a house agreed that an agent should have full charge of it with authority to rent it, the agent may maintain an action for possession for nonpayment of rent against a tenant to whom he leased it.

2. Where such tenant was ousted by the owner, and afterwards became the owner's tenant, the agent cannot then maintain such action.

3. An agreement by the owner of a house to give another full charge, with authority to rent it, to extend for one or five years, is not a lease, but an agreement for a lease for one or five years, at the option of the other.

Exceptions from superior court, Suffolk county; Elisha B. Maynard, Judge.

Summary process by John H. Hinckley against Martha A. Guyon to recover possession of land. Verdict for defendant, and plaintiff brings exceptions. Sustained.

Defendant claimed to be a tenant at will of one Edwin Dunlap, the owner of the premises. Plaintiff claimed to be a tenant of the same owner by a title anterior and superior to the title of defendant, and that defendant was plaintiff's tenant, and not the tenant of the owner. The written agreement between Dunlap and plaintiff is as follows: "I herein agree to give Mr. Hinckley full charge of my house No. 11 Union Park, Boston, to sell or to rent same, and to collect all rents and to make all necessary repairs, as he may deem fit from time to time. Also to sell the furniture now in house, as best he can; not, however, for less than (\$600) six hundred dollars, without first obtaining my consent. Neither is he to sell the house for less than (\$12,000) twelve thousand dollars, without my written agreement. This agreement to hold good for one or five years from date; or I agree to let the said house to Mr. Hinckley, at his option, for one or five years, with permission to let. He is to agree to pay me five per cent. (5%) on my equity of (\$8,000) eight thousand dollars, and 4% on the mortgage of four thousand dollars (\$4,000). Mr. Hinckley is to do all painting inside that he thinks necessary, and also to do the painting outside; provided, however, he should sell the furniture for more than six hundred dollars I will pay for the painting the outside of house, or as far as the money over and above (\$600) six hundred will go, and, if any money is left after painting outside, it is to go to me. Edwin Dunlap."

W. W. Carruth and J. S. Richardson, for plaintiff. H. N. Allin, for defendant.

FIELD, C. J. There was evidence for the jury that the plaintiff, on his own account, let the premises to the defendant at \$90 a month, in advance, and put her in possession

as his tenant; that the defendant paid one month's rent, and no more; that, after another month's rent became due, the plaintiff gave the defendant 14 days' notice to quit, in writing, in accordance with Pub. St. c. 121, § 12; that the defendant remained in possession; and that, after the expiration of said 14 days, the plaintiff brought this action to recover possession, under Pub. St. c. 175. If the defendant was a tenant, not of the plaintiff, but of Dunlap, or if, having been a tenant of the plaintiff, she had been ousted by Dunlap, having a paramount title, and then had remained in possession as Dunlap's tenant, the plaintiff could not maintain the action. But if she remained the tenant of the plaintiff, and there was evidence of this, then the plaintiff could maintain the action. *Holbrook v. Young*, 108 Mass. 84; *Coburn v. Palmer*, 8 Cush. 124; *Morse v. Goddard*, 13 Metc. (Mass.) 177; *Cobb v. Arnold*, 8 Metc. (Mass.) 398; *Hilbourn v. Fogg*, 99 Mass. 11; *Eddy v. Coffin*, 149 Mass. 463, 21 N. E. 870; *Towne v. Butterfield*, 97 Mass. 105; *Hawes v. Shaw*, 100 Mass. 187. It may be assumed that the written agreement between Dunlap and the plaintiff did not constitute a lease, but only an agreement for a lease, for one or five years, at the option of the plaintiff. *McGrath v. City of Boston*, 103 Mass. 367; *Kabley v. Light Co.*, 102 Mass. 392; *Shaw v. Farnsworth*, 108 Mass. 357; *Eastman v. Perkins*, 111 Mass. 30. Exceptions sustained.

(172 Mass. 464)

SPINNEY et al. v. CITY OF LYNN.(Supreme Judicial Court of Massachusetts.
Essex. Jan. 6, 1899.)**TAXATION—FIRMS—PLACE OF BUSINESS—EVIDENCE—SUFFICIENCY.**

1. Pub. St. c. 11, § 24, providing that firm property should be taxed in the place where the business is carried on, requires property located out of the state to be taxed in the city where the firm does business, rather than in the city where the members of the firm reside.

2. A firm owned a factory outside the state, but it kept merchandise in the city, in the state in which it received orders for goods, did its banking business, and kept its books, and from which a large part of its goods were delivered. *Held*, that it carried on its business in said city, within Pub. St. c. 11, § 24, requiring firm property to be taxed in the place where the firm business is carried on.

Report from superior court, Essex county; Henry N. Sheldon, Judge.

Action by Benjamin F. Spinney and others against the city of Lynn to recover taxes paid under protest. There was a finding for plaintiffs, and the case was reported to the supreme court. Judgment on the finding.

C. K. Cobb, for plaintiffs. S. Parsons and E. T. McCarthy, for defendant.

LATHROP, J. The evidence in the case shows these facts: The plaintiffs, together with one Marston, lived in the defendant city. They were co-partners in business, having a

factory in Norway, Me., and, we assume for the present, their place of business was in Boston. They carried on no business in Lynn. The tax in question was assessed upon the plaintiffs on account of their property in Norway. This was all partnership property, and was properly taxable to them in this commonwealth, under Pub. St. c. 11, § 24, in the place where their business was carried on, namely, Boston. It was, therefore, not taxable in Lynn. *Peabody v. Commissioners*, 10 Gray, 97; *Hoadley v. Same*, 105 Mass. 519; *Ricker v. Trust Co.*, 140 Mass. 346, 5 N. E. 284. In *Bemis v. Boston*, 14 Allen, 366, relied on by the defendant, the place of business was not in this commonwealth. The firm had goods stored in a warehouse in Boston, but had no place of business in that city; the business of the firm being transacted in another state. One of the partners resided in Boston, and his interest in the property of the firm was held to be properly taxable in Boston. The case was decided on the ground that Gen. St. c. 11, § 15 (which is section 24, c. 11, of the Public Statutes), did not apply where the place of business of the firm is out of the commonwealth.

In the case at bar the judge would have been warranted in finding that Boston was the place of business of the firm. The merchandise was bought in Boston, orders for goods were received there, and a large part of the goods were delivered from that city. The books were kept there, and the banking business was done there. The ruling, therefore, was right; and, in accordance with the terms of the report, the entry must be: Judgment on the finding.

(172 Mass. 447)

PORTLAND S. S. CO. v. DANA.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7. 1899.)

APPEAL—DECREE—CONFORMITY TO BILL—REVIEW
—PRESUMPTIONS—TRUSTS.

1. Where the record on appeal consists of bill, answer, decree, and appeal, with a statement that issue was joined, it will be assumed there was a hearing on the merits.

2. On an appeal from a decree, without preserving the evidence, the only question for consideration is the conformity of the decree to the allegations and prayer of the bill.

3. Where a bill alleged that an agent collected money for his principal, and drew a check payable to the principal to cover the collections, requesting that it be not presented until he could make it good by a deposit, and, he having died, a clerk deposited money to meet it, a decree ordering the drawer's executrix to pay plaintiff such money, which she had drawn from the bank, is warranted, on the presumption that the money deposited by the clerk was a trust fund for the decedent's principal, and not assets of his estate.

Appeal from superior court, Suffolk county.

Bill by the Portland Steamship Company against Mary E. Dana as executrix, and the Atlas National Bank. From a decree for plaintiff, defendant Dana appeals. Affirmed.

W. F. Harding, R. E. Harding, and H. J. Edwards, for appellant. E. P. Payson and N. U. Walker, for appellee.

LATHROP, J. This case comes before us on appeal by Mrs. Dana, as executrix, from a decree of the superior court declaring that \$240 of the \$250 withdrawn by her from the Atlas National Bank is held by her as trustee for the benefit of the plaintiff, and ordering her forthwith to pay to the plaintiff the sum of \$240, with interest thereon from March 13, 1897, with costs. The only papers printed in the record are the bill, answer, decree, and appeal, and a statement that issue was joined. We must assume that the case was not heard on bill and answer, but that there was a hearing of the case on the merits. As no evidence is presented to us, the only question is whether the decree conforms to the allegations and prayers of the bill. *Isigi v. Railroad Co.*, 129 Mass. 46; *O'Hare v. Downing*, 130 Mass. 16; *Weld v. Walker*, Id. 422.

It is stated in the plaintiff's brief that the defendant bank filed a demurrer, and, upon a hearing, the bill was dismissed as to this defendant. We need, therefore, concern ourselves only with the question whether the decree against Mrs. Dana was warranted.

The facts, as alleged in the bill, are, in substance, that one Isaac D. Dana was the agent of the plaintiff in forwarding merchandise brought to Boston by the plaintiff's steamboats, and in collecting freight on behalf of the plaintiff from the various consignees; that he had collected freight money to the amount of \$250, which he had neglected to turn over, but in lieu thereof, on February 27, 1897, sent his personal check for said amount to the plaintiff, with the request that it hold it for a few days, until the deposit to his credit in the bank would be sufficient to meet it; that Dana died on March 1, 1897, before the check was made good, but immediately thereafter there was deposited by one Woodbury, his former clerk, money to the exact amount and for the specific purpose of paying the check of \$250, thus making good the money collected by Dana and belonging to the plaintiff, and which he had neglected to turn over; that the check was thereafter presented to the bank for payment, but, the statutory limitation in such cases provided having run (see St. 1885, c. 210, § 2), the bank refused to pay the same; that the bank was forthwith notified that the money belonged to the plaintiff, and was set apart in trust as the plaintiff's property, but the bank refused to pay the money to the plaintiff, and paid it to Mrs. Dana, as executrix of her husband's estate; and that a demand was made by the plaintiff on Mrs. Dana, and she refused to pay the same to the plaintiff. Some of the prayers of the bill were in exact accord with the decree, and need not be further stated.

The relation between Isaac D. Dana and the plaintiff was not that of debtor and creditor,

and money collected by Dana for the plaintiff was held by him in a fiduciary capacity, or as trustee for the plaintiff. If he, in his lifetime, had deposited such money in a bank, although in his own name, the fund would have been impressed with the trust, and plaintiff could have had the trust declared by a bill in equity brought against the bank. *Knatchbull v. Hallett*, 13 Ch. Div. 696; *National Bank v. Insurance Co.*, 104 U. S. 54; *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504; *Savings Inst. v. Copeland*, 160 Mass. 380, 384, 35 N. E. 1132. We cannot assume, in the face of the decree and in the absence of evidence, that the money which Woodbury deposited to meet the check belonged to the general estate of Dana, rather than to the trust fund which Dana had not paid over. As the defendant had not seen fit to bring up the evidence, or to ask the judge to report the facts, we are of opinion that any doubt on this point must be resolved against the defendant. In this view of the case, the amount deposited did not become assets of the estate, and the payment of the money by the bank to Mrs. Dana did not make it assets, nor can she hold it as executrix. *Farrelly v. Ladd*, 10 Allen, 127. Decree affirmed.

(172 Mass. 425)

POWERS v. GODWISE.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1899.)

WILLS—INVALID RESIDUARY DEVISE.

Where a will, after specific bequests, devised the residue to two beneficiaries, share and share alike, one of whom could not take because her husband was a subscribing witness to the will, the share attempted to be devised to her does not go to the other residuary legatee but must be administered as intestate estate.

Exceptions from superior court, Suffolk county; J. B. Richardson, Judge.

Scire facias by Cassius C. Powers against Elisha W. Shaw, as defendant, and George A. P. Godwise, as executor of the will of James M. Shaw, deceased, as trustee. Heard on exceptions to a judgment for plaintiff. Overruled.

C. C. Powers, for plaintiff. G. A. P. Godwise, pro se.

FIELD, C. J. This is a writ of scire facias to recover a certain amount of money from the defendant, who, as executor of the will of James M. Shaw, was charged as trustee in an action by the plaintiff against Elisha W. Shaw. Isaac H. Hazelton, Oliver C. Livermore, and Arnold Livermore were the witnesses, and the only witnesses, to the will. Oliver C. Livermore when the will was executed was, and ever since has been, the husband of Georgie S. Livermore, who was one of the nieces of James M. Shaw, living at the time of his decease. The three articles of the will material to the present case are as follows: "Fourth. I give and bequeath to each

of my nieces living at my decease \$100." "Seventh. I give and bequeath, as a token of remembrance, to each, Elisha W. Shaw, Daniel C. Shaw, Frank M. Shaw, and Sanford P. Judkins, fifty dollars. Eighth. All the rest, residue, and remainder of my estate, whether real, personal, or mixed, I give, devise, and bequeath unto my two nieces now living, Georgie S. Livermore and Fanny M. Hildreth, daughters of my late brother George W. Shaw, deceased, to be equally divided between them, share and share alike, to hold by them and their heirs and assigns forever." The present defendant has paid to the plaintiff \$50, with interest, being the amount of the legacy given to Elisha W. Shaw by the seventh article of the will. The superior court ruled that all legacies given by the will to Georgie S. Livermore are void, because she was and is the wife of one of the three witnesses of the will. Pub. St. c. 127, § 3. The gift of \$100 to Georgie S. Livermore by the fourth article of the will being void, this would go into the residue of the estate given and devised by the eighth article. By the eighth article the residue is given and devised unto two nieces, Georgie S. Livermore and Fanny M. Hildreth, "to be equally divided between them, share and share alike." We infer from the exceptions that all of the residue is personal property. The only question of law raised by the exceptions is whether, that part of the residue given to Georgie S. Livermore being void, the whole residue goes to Fanny M. Hildreth, or whether the part given to Georgie S. Livermore must be administered as intestate estate. We think that the superior court rightly ruled that under the residuary clause one-half of the residue was given to Georgie S. Livermore, and, being void, this one-half must be administered as intestate property. *Lombard v. Boyden*, 5 Allen, 249; *Sohler v. Inches*, 12 Gray, 385; *Swallow v. Swallow*, 166 Mass. 241, 44 N. E. 132; *Frost v. Courtis*, 167 Mass. 251, 45 N. E. 687; *Burnet's Ex'rs v. Burnet*, 30 N. J. Eq. 506. Exceptions overruled.

(172 Mass. 423)

THOMSON v. WAY.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1899.)

CONTRACTS—CONSIDERATION—TENDER—SUFFICIENCY—EXECUTION AGAINST THE PERSON.

1. The promise of a surety on a debtor's recognizance, either not to surrender his principal or to pay the execution, is a sufficient consideration for the creditor's agreement to receive payment of the execution by installments, and to continue the case.

2. A surety on a debtor's recognizance, agreeing to pay the execution by installments on a certain day of the week, in consideration of a continuance of the case against the debtor, and calling at the creditor's office on the day an installment is due, and not finding him there, is not in default if he makes a tender on the day following.

3. A creditor agreeing to continue a case against his debtor in consideration of an agreement of a surety on the debtor's recognizance

to pay an execution against the debtor by installments, cannot default the debtor, after refusing a tender of an installment by the surety, though the tender is not kept good.

Exceptions from superior court, Suffolk county; Francis A. Gaskill, Judge.

Action by James D. Thomson against William T. Way. Judgment for defendant, and plaintiff brings exceptions. Overruled.

James D. Thomson, pro se. C. F. Eldredge, for defendant.

HOLMES, J. This is an action upon a recognizance, given, we infer, under Pub. St. c. 162, § 28, upon the arrest of the principal on execution. The defense relied on at the trial was an agreement by the plaintiff to continue the matter from Saturday to Saturday if the defendant would pay the execution by specified installments. The judge found for the defendant, and found as facts that the agreement was made and kept by the defendant, and that the defendant offered the plaintiff the installment which was due before the plaintiff had the principal in the recognizance defaulted, but that the plaintiff, without cause, refused to receive it. It is stated that the plaintiff excepted to the findings of fact. We assume that this means that the plaintiff excepted on the ground that the findings were not warranted by the evidence.

It is argued that there was no consideration for the agreement. But the defendant testified that he notified the plaintiff that on the return day of the notice to take the oath he should "surrender the principal unless some agreement was made, and thereupon he and the plaintiff agreed that, if he would pay the execution" as just stated, plaintiff would continue the case as just stated. The defendant further implied by his testimony that he did not surrender the principal, and testified to payments and offers to pay. The testimony warranted a finding of consideration either in the defendant's refraining from surrendering the principal or in his promise to pay the execution. The latter promise was not like a promise to the same effect by the principal,—a mere promise to do what he already was bound to do,—such as was before the court in *Abbott v. Tucker*, 4 Allen, 72. See *Doane v. Bartlett*, Id. 74. The question of consideration even in the latter case seems to have been regarded as not free from doubt in *Merrill v. Roulstone*, 14 Allen, 511, 514.

It is urged also that the offer refused by the plaintiff was not on Friday, as agreed, but on the morning of the next day. It does not appear that we have all the evidence before us. But it does appear that the defendant went to the plaintiff's office, and could not find him. Finally, it is pressed that the defendant had not kept his tender good. But this suggestion has no bearing on the case. The only question is whether the plaintiff was warranted, under

his agreement, in defaulting the principal on the recognizance when he did. If at that time the defendant had done all that he was bound to do, it does not matter what he has omitted since.

It hardly is denied that the agreement, if upon sufficient consideration, and kept by the defendant, is an answer to this suit. The question is not open on the exceptions. If it were, it would not be necessary to go further than to say that, so far as the breach relied on is concerned, the judge was warranted in finding that the plaintiff had waived an appearance by the principal upon that day. *Glass Works v. Allen*, 121 Mass. 283. Exceptions overruled.

(172 Mass. 458)

COUPE V. PLATT.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 9, 1899.)

DEFECTIVE PREMISES — LANDLORD'S LIABILITY TO
LICENSEES OF TENANT.

The owner of a tenement provided with outside steps and a platform for the use in common of all the tenants is liable for injuries through a defect in such platform, received by a third person while passing over it on a lawful visit to a tenant in the building.

Exceptions from superior court, Bristol county; Caleb Blodgett, Judge.

Action by Margaret G. Coupe against Margaret J. Platt for personal injuries. There was a judgment for plaintiff, and defendant excepts. Exceptions overruled.

M. R. Hitch, for plaintiff. R. F. Raymond, for defendant.

KNOWLTON, J. The question how far a host is liable to his guest for the unsafe condition of his premises, when he is visited upon an invitation, express or implied, merely in a social way, from considerations of friendship or for pleasure, is not raised by this bill of exceptions. The judge assumed in favor of the defendant that the law of this commonwealth is like that of England, where it is held that, in the absence of traps, neither the poor nor the rich are bound to change the conditions in which they are accustomed to live, in order to furnish for their friends or guests, recipients of their gratuitous hospitality, safer or more comfortable surroundings than they have for themselves and their families. The English law on this subject was somewhat considered in *Hart v. Cole*, 156 Mass. 475-478, 31 N. E. 644, and in *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128; but whether it is to be followed in this commonwealth has never been decided. The question in this case is different. The defendant was a landlord, who maintained outside steps and a platform for the use in common of tenants of different parts of her building. The plaintiff was injured by a defect in the platform while passing over it on a visit to one of the tenants, made on his express invitation to

come on a particular day for a particular purpose. The duty of the defendant to keep the platform safe for the tenant and for those claiming under him grew out of the contract of hiring. It was a part of the contract that the platform should be kept reasonably safe for the tenant for use in connection with his tenement. The contract impliedly included not only the tenant himself but the members of his family, and his servants and agents who might rightfully occupy and use the tenement with him. It included boarders and lodgers, if, in a proper use of the tenement, such person might be received there by the tenant. It included all persons who, in connection with the use of the tenement by the tenant, might properly pass over the platform under the express authority of the tenant and his right. To all such persons, by virtue of her contract with the tenant, the landlord owed the same duty that she owed to the tenant personally to keep the platform reasonably safe. Whether the tenant would or would not have been liable to the plaintiff for an injury received from an unsafe condition of the tenement which he occupied, he expressly authorized the plaintiff to pass over the platform in the exercise of his rights under the contract with the defendant, and the defendant owed the plaintiff the duty which arose from the contract in favor of those who were acting by express authority of the tenant in the tenant's right. *Willcox v. Zane*, 167 Mass. 302, 45 N. E. 923. Exceptions overruled.

(172 Mass. 484)

AUSTIN v. FITCHBURG R. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 12, 1899.)

MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISKS—QUESTIONS FOR JURY—RAILROADS.

1. A brakeman was ordered by a conductor to couple to a train a flat car loaded with bridge stones, which it was customary to secure with stakes, as a rule of the road required. He proceeded to do so without noticing how the stones were loaded, or whether they were secured. The concussion caused by the coupling forced one of the stones over the edge of the car, and it crushed his arm. *Held*, that it was for the jury to say whether he was negligent in not observing that the stones were unsecured.

2. It was also for the jury to say whether he assumed the risk.

3. Evidence that a flat car loaded by a railroad company with bridge stone stood at a station on its road for six days, and that when it was coupled to one of its freight trains the stones were so insecure that it was unsafe for a brakeman to work about the car, sustains a finding that the company was negligent in furnishing for transportation a car loaded in a dangerous manner.

4. Evidence that a railroad company was engaged in transporting a flat car loaded by it with stones for building a bridge on its line sustains a finding that it was its duty to furnish suitable material to prevent the stones from sliding off and injuring employes engaged about the car.

Exceptions from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action for personal injuries by one Austin against the Fitchburg Railroad Company. A verdict was ordered for defendant, and plaintiff brings exceptions. Sustained.

Hesseltine & Hesseltine, for plaintiff.
George A. Torrey, for defendant.

MORTON, J. There are two counts in the declaration; the first under the employer's liability act, and the second at common law. The first count alleges that while he was in the exercise of due care the plaintiff "was severely injured by a large stone improperly placed in a freight car, and in a dangerous condition, by reason of the negligence of said corporation, or of some persons in the service of said corporation, intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence." The second count alleges that the plaintiff, being in the exercise of due care, was injured "by reason of the negligence of said defendant corporation in providing an improper, unsafe, and dangerous car for the transportation of stone, and by improperly loading said car." We think that there was evidence which would have warranted the jury in finding that the plaintiff was in the exercise of due care. He was ordered by the conductor to couple the car to a train about to leave East Deerfield for Athol. The car was a flat car loaded with stone. The stone lay on the floor of the car, secured with cleats, or stakes, or blocking, as was customary. The plaintiff descended from a box car, and went forward, took the link with his right hand, and held it ready to put in the pin. He did not notice how the stones were loaded, or whether they were secured. The concussion caused by the cars coming together forced one of the stones over the edge of the car, and it caught and crushed the plaintiff's arm. Evidently the plaintiff's attention was directed to making the coupling, and it cannot be held as matter of law that he was negligent in failing to observe that the stones were unsecured. Whether he should have done so under the circumstances was a question for the jury. *Snow v. Railroad Co.*, 8 Allen, 441; *Hannah v. Railroad*, 154 Mass. 529, 28 N. E. 682; *Steffe v. Railroad Co.*, 156 Mass. 262, 30 N. E. 1137. What he would have done if he had noticed the want of cleats or stakes was of no consequence. The question was whether, in the exercise of due care, he ought to have noticed that there were none. Neither do we think that the risk was so obvious or so incidental to his employment that he must be held as matter of law to have assumed it. There was evidence, as already observed, that it was customary to secure such stones with stakes, or cleats, or scantling. The rules of the road also required them to be secured. If the plaintiff had not a right to assume that the stones were properly secured, it was at least a question for the jury whether the chances that they might not be secured were so obvious as to constitute one of

the risks which he incurred. We think, also, that there was evidence on which the jury properly could have found that the defendant was negligent in furnishing for transportation a car that was loaded in a dangerous or insecure manner. There was evidence that the car was loaded at Fitchburg by the defendant corporation. It does not appear whether it was in the same condition when received at East Deerfield, and where it was coupled to the train for Athol, in which it was when loaded at Fitchburg and when it arrived at East Deerfield. But there was evidence tending to show that it arrived at East Deerfield May 1st, and remained there till May 7th, when it was coupled to the train for Athol. If the stones had been properly secured, and the cleats or blocking had been removed shortly before the coupling, preparatory to unloading the car a short distance away, it was within the defendant's power to produce evidence of those facts. The car was in its possession, had been loaded by it, was being coupled (as the jury might have found), at the time of the plaintiff's injury, to a freight train of defendant, for transportation to a point further along upon its road, and the stones were there in insecure position upon the car. We think that it would have been competent for the jury to find that the car had been there so long in an unsafe condition for transportation that the defendant knew, or ought to have known, of its condition, and was negligent by reason of furnishing a car which, on account of being improperly loaded, was unsafe for the plaintiff to work upon. It does not appear whether materials for securing the stones were furnished by the defendant corporation. Inasmuch as the car was loaded by it, and the stones were being transported by it to build a bridge which it was building at Turners Falls Junction, the jury would have been warranted in finding, if that was material, that it was its duty to furnish suitable material for securing the stones. It is not necessary to consider whether there was negligence on the part of some person intrusted with and exercising superintendence. See *Donahoe v. Railroad Co.*, 153 Mass. 356, 26 N. E. 868; *Davis v. Railroad Co.*, 159 Mass. 532, 34 N. E. 1070; *Fairman v. Railroad Co.*, 169 Mass. 170, 47 N. E. 613. The result is that the exceptions must be sustained, and according to the agreement judgment is to be entered for the plaintiff for \$4,000. So ordered.

(172 Mass. 331)

BRADY v. NORCROSS.

(Supreme Judicial Court of Massachusetts.
Hampden. Jan. 6, 1899.)

MASTER AND SERVANT—CO-EMPLOYE—NEGLIGENCE
—EVIDENCE.

A temporary staging in a building under construction had been in use by masons and painters more than six months without accident, and had been in the care of the workmen

themselves, and not of the employer. Plaintiff was injured by the splitting of the boards of a bracket supporting the staging, whereby he fell to the ground. There was no evidence that the materials of which the bracket was made were defective or unsuitable, or that the bracket was not originally a safe one, or that the staging had been furnished as a structure by the employer, or that he assumed to exercise any control or supervision as to how it should be built, kept, or adapted for the work, or that he failed to furnish suitable material or employed improper workmen. *Held*, that plaintiff could not recover of him.

Exceptions from superior court, Hampden county; Daniel W. Bond, Judge.

Action by Thomas H. Brady against Orlando W. Norcross. There was a judgment for plaintiff, and defendant excepts. Exceptions sustained.

J. B. Carroll, W. H. McClintock, and J. F. Stapleton, Jr., for plaintiff. H. Parker and C. C. Milton, for defendant.

BARKER, J. The plaintiff, a painter in a building under construction, fell 18 or 20 feet to the floor of a large room, from a plank which was part of a staging built in that room, to be used there by masons and painters in finishing the interior of that room, and to be taken apart and removed when that work should be finished. The staging was made of ordinary construction timber, and consisted of uprights held in place by ledger boards or braces, to which uprights were nailed tiers of brackets, upon which were laid, as the work might require, loose planks to support the workmen. Each bracket consisted of two boards nailed together at one end, and was fastened to an upright by nails driven through the other ends of the boards of which the bracket was made. One of the brackets, while helping to bear the weight of two planks and of three painters, gave way; the boards of which it was made splitting where it was nailed, and letting down the planks and the workmen. The plaintiff has obtained a verdict in tort, upon a common-law count, against one of his employers. At the trial the defendant introduced no evidence, and his principal exception is to the refusal to rule that there was no evidence upon which the plaintiff could recover upon the common-law count. As this was a temporary staging, intended to be used only in finishing the room where it was constructed, if the plaintiff's employers furnished sufficient quantities of suitable materials for staging, employed suitable workmen, and did not themselves undertake the duty of furnishing the staging as a structure, but only of supplying materials and labor by which it might be built, and from time to time adapted to the work, and if the duty of furnishing or adapting the staging as an appliance for use in the work of finishing the room was intrusted to or assumed by the workmen themselves, within the scope of their employment, the employers are not answerable to the plaintiff for his injury. *Kelley v. Norcross*, 121

Mass. 508; Colton v. Richards, 123 Mass. 485; Killea v. Faxon, 125 Mass. 485; Clark v. Soule, 137 Mass. 380; Hoppin v. Worcester, 140 Mass. 222, 2 N. E. 779; O'Connor v. Neal, 153 Mass. 281, 26 N. E. 857; Kennedy v. Spring, 160 Mass. 203, 35 N. E. 779; Adasken v. Gilbert, 165 Mass. 443, 43 N. E. 199; Kalleck v. Deering, 169 Mass. 200, 47 N. E. 698. On the other hand, if the staging was furnished by the employers as a complete structure, or if they themselves supervised and directed its construction, or if, relying upon its construction by their workmen for themselves, the employers negligently failed to provide suitable and sufficient materials, or negligently hired incompetent workmen, the employers might be answerable to the plaintiff. *Arkerson v. Dennison*, 117 Mass. 407; *Mulchey v. Society*, 125 Mass. 487; *Clark v. Soule*, *ubi supra*; *Prendible v. Manufacturing Co.*, 160 Mass. 181, 35 N. E. 675; *Twomey v. Swift*, 163 Mass. 273, 39 N. E. 1018.

There was no testimony tending to show that the employers furnished the staging as a completed structure, or that either of them exercised or assumed to exercise any personal oversight over its construction. Its history was not fully or satisfactorily disclosed by the evidence. The plaintiff began working in the building in August, 1896, and was hurt on March 2, 1897. He testified that the staging was in the room when he began work in the building. Douglass, a quasi foreman of the painters, but who also painted when he had time, testified that he began to work in the building about three months before the accident, and that the staging was then in the room. Ramilly, a painter who fell at the same time with the plaintiff, testified that he could not tell who built the staging. Knight, a painter at work upon the staging at the same time, testified that he did not know who built the staging, but that it was built before he came there to work, in October, 1896. Pike, a painter who went there to work in August, 1896, testified that the painters did nothing about building the staging in that room; that he did not know the men who built it; that it was built under Smith's orders; that the witness thought it was built after he came there, but was not sure. These were all the witnesses, except Smith, who testified merely that he was employed by Norcross Bros. upon the building, and that they were doing the entire work, except that there was a subcontract for the mason work. There was no other evidence as to how the staging was originally erected. Pike testified that Smith was a carpenter, and that he gave orders and directions, and that no one gave orders and directions to Smith, except one Connors, whose relation to the work does not otherwise appear. Douglass also testified that Smith gave orders to build stagings, and orders to take them down when the workmen were through with them, and that the witness himself gave orders, and, if there was trestle work, would say, "Come, boys, let us

put the trestle in that room and go onto it," and that he said this in regard to staging and trestle work. Knight also testified, "We painters did not customarily have anything to do with reference to the building or bracing of stagings," and that he had observed the building of stagings in that building only in the store on the ground floor, and did not notice whether they were built under the direction or order of anybody. Douglass further testified to the previous condition of the staging, and to certain things which occurred on the Saturday previous to the accident, with reference to the preparation of the staging for its use by the painters in doing the work on which they were engaged when the accident happened. In substance, this testimony was that when he first went on the staging, to prime the walls, it seemed to be all right, and did not lean, and he had no trouble with it; that when he came to the second coat another staging had been built over the main stair, and there were braces which held both stagings together, and made them firm. This other staging had been taken down on Friday or Saturday, under Smith's directions, and when Douglass, on Saturday, went on the remaining staging, he noticed that it was shaky and leaned over towards the south wall, and he thought it ought to be braced to make it more firm. So, on this Saturday, before the accident which occurred on the Tuesday following, Douglass, thinking that the staging was weak, and not safe to go on, asked Smith to fix the staging,—to brace it up. Smith said it was all right, "just as it was when we [the painters] worked on it before," and "just as it was when the masons worked on it"; that he had taken no braces out, that he had raised the uprights to put a floor under it; that he did not know that that would have a tendency to weaken it. To this Douglass replied that he thought it would, but Smith again said he thought it was all right, to which Douglass replied, "I am going on there Monday with fifteen or twenty men, and I think the stage ought to be looked after." But Smith said the staging was all right, and did not go with Douglass into the room where the staging was. Douglass then, with another painter under his directions, went and got more braces, and braced the staging from the top, and went down in the yard and got planks and put them on, and then put men to work on the staging to paint the ceiling of the room. He did not make any investigation of the lower part of the staging, and testified that, as far as his knowledge went, it was all right. On cross-examination, Douglass testified that all that was done in the way of rectifying the condition in which he found the staging on Saturday was done by himself and another painter under his direction; that they did something to fix it up; that when he went to fix it he got the material out of the yard; and added: "There wasn't material there to fix up the staging. These planks I got out in the yard was put on

top of the staging, but these ledger boards were all there. Those I didn't have anything to do with. Where I went to get the material for that staging, out in the yard, there was other material of the same kind. I selected whatever planking or other material I and the other painters put upon that staging." And he further testified that it was he and the other painters who got planks and laid them on the top brackets, and that they braced over the uprights against the iron casing, but did not nail braces across the staging, and that whatever was done to the staging to fix it for the work was done by himself and another painter.

The evidence was that the boards of which the brackets were made were of spruce an inch and an eighth thick, and from four to eight inches wide. One end of the plank on which the plaintiff was sitting rested on the bracket which broke, and the other end rested on another bracket. The plaintiff alone was on this plank, but one end of another plank rested on the same bracket, and on this other plank were two other men. The fall of the plank on which the plaintiff was, broke also the bracket on which the other end of the plank had rested. The only theory of the accident seems to have been that the strain of the two planks and the three men split the boards on the bracket where it was nailed, and let it down. It should also be stated that one of the uprights of the staging had at some time been cut off some feet above the floor, although neither this fact, nor the leaning which had been remedied by Douglass on the Saturday before the accident, seems to have had anything to do with the giving way of the bracket. It would seem a very questionable exercise of the power of drawing inferences of fact from facts proved to find from the splitting of the boards of the bracket that the materials of which it was built were originally defective or unsuitable for the purpose to which they were put, or that the bracket was not originally a safe one. The staging had been in use by both masons and painters for more than six months without accident. But if we assume that the giving way of the bracket was of itself evidence of negligence in its construction on the part of some one, as was assumed in *Arkerson v. Dennison*, 117 Mass. 407, 411, and in *Prendible v. Manufacturing Co.*, 160 Mass. 131, 139, 35 N. E. 675, we think it was not evidence from which it could fairly be inferred that the negligence was that of the plaintiff's employers. The burden was upon the plaintiff to show that he was hurt by their fault. The evidence did not tend to show that they furnished the staging as a structure, nor that they assumed to exercise any control or supervision as to how it should be built or kept or adapted for the work, nor that they failed to furnish a sufficient quantity of suitable materials, nor that they employed improper workmen. For more than six months before the

accident this and other temporary stagings in use in the same building had been in the care of the workmen themselves, and not of the plaintiff's employers. In *Arkerson v. Dennison* the staging had been in use but two weeks, and in *Prendible v. Manufacturing Co.* the staging was one to be moved about and used in different localities, and was held to be part of the employer's works, ways, and machinery. That the employers were at fault in the present instance was an inference which a jury ought not to be allowed to draw from the mere fact of the giving way of the bracket, and there was nothing else in the evidence to justify such a finding.

None of the other grounds of exception seem to us sound. The plaintiff would seem to have been in the exercise of reasonable care, and not to have been aware that he was exposed to any risks except those incident to working upon a safe staging.

Although the suit is against one only of the plaintiff's employers, the nonjoinder of the defendant's co-partner is no defense. *Inhabitants of Milford v. Holbrook*, 9 Allen, 17, 22. The evidence, the admission of which was excepted to, seems to have been competent upon the issues raised by the other count; and, when those issues disappeared, the defendant did not ask that the evidence should be withdrawn from the consideration of the jury. Exceptions sustained.

(172 Mass. 472)

HAYDEN et al. v. BARRETT et al.
(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 9, 1899.)

WILLS—HEIRS BY BLOOD—BASTARDS.

A devise was to testator's niece, and after her death to her "heirs by blood." Numerous devises were to other nieces, and their "heirs by blood"; indicating an intention to exclude their husbands and those not related by ties of consanguinity. Held to include the illegitimate son of the niece, he being her heir under the statute.

Report from supreme judicial court, Suffolk county; Oliver W. Holmes, Judge.

Petition by Charles J. Hayden and Francis V. Balch, trustees under the will of Sidney B. Morse, against Fannie E. Barrett and others. Heard on a petition for instructions by a single justice of the supreme judicial court, and case reserved, and reported to the full court. Decree.

William Sullivan, for Ernest L. Morse. E. G. McInnes and C. A. Whittemore, for Fannie E. Barrett and others.

HAMMOND, J. The single question is whether, under the fifth clause of the tenth item of this will, the illegitimate son of Mary Ann Morse takes as her "heir by blood." By the common law of England and of this commonwealth, a bastard in all matters relating to the inheritance of property was nobody's child, and as to such matters his existence

was therefore ignored. *Cooley v. Dewey*, 4 Pick. 93; 2 Dane, Abr. 522, and cases therein cited; *Pratt v. Atwood*, 108 Mass. 40. And accordingly it is also well settled that, in the absence of any language clearly expressing the contrary, all general words in the statutes of distribution, such as "child," "children," "next of kin," and similar words descriptive of classes who are to inherit, do not include illegitimate children. *Kent v. Barker*, 2 Gray, 535, and cases therein cited. And so of similar expressions in a Massachusetts will. *Kent v. Barker*, supra; *Adams v. Adams*, 154 Mass. 290, 28 N. E. 260; *Haraden v. Larrabee*, 113 Mass. 430. If, therefore, the rights of the illegitimate son of Mary Ann Morse depended upon the common law, the decision must be against him. But for two generations and more it has been the statute law of this commonwealth that an illegitimate child shall be the heir of his mother, and the tendency of legislation, as shown by an amendment to the statute, seems to be growing in the direction of change in the common law in this respect more favorable to him. By our statutes, Ernest L. Morse was the heir of his mother and of any maternal ancestor, and, if the mother died intestate, he, being the only child, was her sole heir as to all her property. By the will, the property at her death goes to the "heirs by blood." The illegitimate son, it is true, does not take by descent from his mother, but, if at all, as the person designated by the will. In *Lavery v. Egan*, 143 Mass. 389, 392, 9 N. E. 747, where real estate had been devised to a person for life with contingent remainder to her heirs, it was decided that the husband of the life tenant took as her heir, under St. 1880, c. 211, § 1, which provides that in certain cases a husband shall take in fee the real estate of his deceased wife to an amount not exceeding \$5,000 in value. In giving the opinion Mr. Justice Field says: "Although in the case at bar the heirs of [the life tenant] do not take from her by inheritance, but take as the persons designated by the will, yet we know of no way of determining the person intended by the will, except by ascertaining the persons who by law would have inherited the estate from her if she had died seised of it and intestate." Applying that principle to this case, we have no doubt that, within the meaning of the will as interpreted in the light of the statute, the illegitimate child was the heir of his mother, and it only remains to be considered whether he was her heir "by blood," within the meaning of the will. The expression "heirs by blood" occurs several times in the will. In the first clause of this tenth item, the trustees are directed to pay certain income "to my niece Helen E. Howland, daughter of my said sister Caroline Ware Morris, upon her sole receipt, and free from the control or interference of any husband she may have, and, in case of her death prior to the expiration of said ten years, to pay

said balance, if any, to her heirs by blood." And the second clause of said item is as follows: "To pay one-tenth of the income thereof to my niece Caroline E. Dutton, upon her sole receipt, free from the control or interference of any husband she may have; and, in case of her death prior to the expiration of said ten years, then to pay the said income to her heirs by blood, and at the expiration of said ten years to transfer, pay over, and convey one of said ten parts so divided, as hereinbefore provided, to the said Caroline E. Dutton, or, in case she is not then living, to her heirs by blood." And the same language is used with reference to the legacies to the other nieces and to his nephew, in the same item of the will. All the way through this item the testator was bearing constantly in mind the husbands of these various nieces, and he desired that there should be no control or interference on the part of any such husband during the life of the niece, and then, in the same general line of thought, uses language which finally excludes the husband from having any share in the property after the decease of the niece. It is plain, we think, that the testator intended, by the use of the term "heirs by blood," to indicate those persons whose relationship was by some tie of consanguinity, and to exclude all others, such as husband, wife, or adopted children. He intended to keep the property in the family, and within the tie of consanguinity, but otherwise was content that the law should determine who should be the heir to any niece. Within the meaning of the will, Ernest L. Morse was the "heir by blood" of his mother. Decree accordingly.

(172 Mass. 367)

QUINSIGAMOND LAKE STEAMBOAT CO.
v. PHENIX INS. CO. OF
HARTFORD, CONN.

SAME v. PHENIX INS. CO. OF BROOK-
LYN, N. Y.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 6, 1899.)

INSURANCE—CONDITIONS—VACANCY—WAIVER—
LOCAL INSURANCE BOARD—EVIDENCE.

1. After an hotel was insured, with a condition prohibiting vacancy for more than 30 days without insurer's consent, he became a member of a local board of underwriters authorized to fix minimum rates at which any member of the board would be permitted to insure. When the hotel became vacant, the board, with insurer's acquiescence, voted that the hotel might be vacant a portion of the year free of charge. Insured did not request or know of the board's action, and he never requested a vacancy permit. *Held*, that the action of the board did not constitute a waiver of the vacancy condition.

2. On the issues whether insurer gave vacancy permission, or whether the vacancy conditions of the policy had been waived, and whether insurer was estopped to rely on them, evidence that insurer was a member of a local board of underwriters, authorized to fix minimum rates of insurance, and that the board determined that the property in question might

be vacant a part of the year free of charge, is admissible.

Exceptions from superior court, Worcester county; Francis A. Gaskill, Judge.

Actions by the Quinsigamond Lake Steamboat Company against the Phenix Insurance Company of Brooklyn, New York, and against the Phenix Insurance Company of Hartford, Conn. Judgments for plaintiff, and defendants bring exceptions. Sustained.

W. A. Gile and F. H. Kelly, for plaintiff.
W. S. B. Hopkins and F. B. Smith, for defendants.

BARKER, J. The plaintiff, by policies in the standard form, procured insurance for one year from May 18, 1896, on its hotel. In the description of the property were the words "occupied as a hotel throughout the year." Each policy had a condition under which it would become void, if the property insured become vacant by the removal of the owner or occupant, and so remain vacant for more than 30 days, without the assent, in writing or in print, of the insurer. The firm of Holt & Irwin were tenants of the insured property. It was put in evidence by the plaintiff, and was uncontradicted, that from about the middle of November, 1896, the premises were unoccupied. The fire occurred on or about March 23, 1897. The plaintiff put in evidence a vote of the local board of underwriters passed on November 17, 1896, and a card issued by the board to the insurance agents of the district for which the board acted, and contended that the doings of the board had reference to the insured property, and that this evidence would authorize the jury to find for the plaintiff, notwithstanding the breach of the condition as to nonoccupancy. Whether this contention was right is the principal question for decision.

From the evidence the jury could find the following facts: The local board of underwriters was a voluntary association of persons who were agents of fire insurance companies doing business in Worcester and Shrewsbury. The board was organized with officers and written by-laws, and held weekly meetings. Its expenses were borne in the first instance by an insurance exchange in Boston, composed of special agents of insurance companies, among which companies were the defendants, and the exchange was reimbursed by the companies. A witness who was secretary of the local board testified that its powers and duties were "purely to establish rate of insurance; determine the classification to which rates shall be applied; classifying risks to which rates should be applied." The by-laws also show that the functions of the board were to establish rates of insurance, below which no insurance should be written on property within the territory of the board, as well as to prevent the fostering of prejudice and the making of

misrepresentations against the board or its members, or the insurance companies represented in the board. The board kept in each insurance office in Worcester a card cabinet, to which the secretary of the board and the agents who used the insurance office had access. The cards in these cabinets stated the classifications of risks, and the rates established by the board; the cards in each cabinet being of the same tenor. They were prepared by the secretary of the board in accordance with its action from time to time in classifying risks and establishing rates, and were placed by him in the different cabinets. The drawers of the cabinets were arranged according to streets, and each card represented a risk classified by the board, and the rate established for it by the board. Before a risk is insured, the insurance agent is expected to consult the cabinet, and to get from the card his information as to the classification of the risk and the rate of insurance. The secretary of the board put the cards in their places, and, if a card were in substitution for an old one, took out the old card. The secretary, when he put in new cards, also left in the office proof sheets which enabled the insurance agent to know what had been put into the cabinet. Copies of all policies and of vacancy permits issued by the different agents, and of modifications or changes made in policies, passed through the hands of the secretary of the local board. All this is done to protect one insurance company against another, so that, when a rate is established, it leaves simply a minimum rate at which a policy can be written, and it is not in any way obligatory upon any company to write insurance at that rate. The local board had a rule as to vacancy permits, which was changed at the meeting of November 17, 1896, and which, both before and after that change, required, unless a contrary provision was made in the rating of the risk, a charge for vacancy after 30 days. The charge after the change was, for one month after the 30 days expired, 50 cents for each \$100 of the yearly premium; and for 6 months, 70 per cent. of the yearly premium. When the policies in suit were written, the property insured had not been classified by the local board, no rate for insurance upon it had been established by that board, and the board had not placed in the cabinet any card regulating the writing of insurance on the property. The rate at which the policies were written was \$2 upon \$100 for one year, the terms of the policy not allowing the property to be unoccupied more than 30 days; and the risk was classified by the board, and given this rating, on the third day after the policies were written. Each of the defendants had as agent in Worcester a co-partnership composed of four persons. One of these persons was the vice president of the local board in November, 1896. At the meeting of November 17, 1896, this person and one other member of his firm were present. The firm had signed the articles of association of

the board, and one of its card cabinets, with the card relating to this risk, was then in the office of the firm. At the meeting of November 17, 1896, the local board passed the following vote: "Voted, that permission be granted, free of charge, for the hotel of Holt and Irwin, Lakeside Inn, to be unoccupied a portion of the year." Thereupon printed cards were prepared by the secretary of the board, of the following tenor: "Lake Quinsigamond and Vicinity, West Side. Lake Quinsigamond Steamboat Co. Frame hotel at Woodland Grove, \$2.00; contents, \$2.00; dining pavilion and contents, \$2.00. Unoccupied a portion of the year. Nov. 17, 1896." One of these cards was put by the secretary into each of the card cabinets, including the cabinet in the office of the firm, which was agent of the defendants; and that firm knew of the passing of the rate, the issuing of the card, and that it was placed in the cabinet in their office. There was no evidence tending to show at whose suggestion the vote was passed, or that the action of the local board was communicated to or known by the plaintiff or its tenants. From the description of the insured property in the policies, the lease from the plaintiff to Holt & Irwin, and the tenor of the vote and card, the jury might well find that the vote and card referred to the property insured. It was not contended that any application for a vacancy permit was ever made by the plaintiff or its tenants to the defendants or their agents, or that any permit was issued, or assent to nonoccupancy given, unless the action of the local board amounted to such assent. The defendants were instrumental in organizing and maintaining the local board, of which, presumably with their knowledge and assent, their local agents were members. Two co-partners of the firm which constituted their local agent were present at the meeting of the board which passed the vote, and the firm received the card issued in consequence of the vote. It might be found from this that the defendants were to be charged with knowledge of the action of the local board, and with assent to that action, whatever it might be held to be, when properly construed in connection with the circumstances under which it was taken.

In construing the action of the local board, one matter to be considered is that the board neither had, nor purported to have, power either to make or alter contracts of insurance. So far as appears, the board could classify risks, and establish, and from time to time change, rates, and could take measures to prevent the cutting of rates, and the injury of the business by misrepresentations and other like means; and there its functions stopped. Its actions do not appear to have been intended to be communicated, or to have been in fact communicated, to the persons who might hold insurance upon property situated within the district, or who might wish to purchase such insurance. On November 17, 1896, the plaintiff's

buildings, which had been erected in 1895, were under insurance effected May 18, 1896, for one year. The insured property had not been classified by the board when the policies were written, and no rate had then been established by it for the risk. A rate had been established for it on May 21, 1896, and was that at which the risk stood insured, or \$2 of premium for \$100 of insurance for one year, without permission for nonoccupancy for more than 30 days, unless upon the payment of a charge or increased premium for such nonoccupancy. It was within the legitimate power of the board to lower the rate established by it for the property, by allowing permission for nonoccupancy to be granted free of charge, and to communicate this change of rate to all the insurance offices connected with the board, for the government of all persons in those offices who should have occasion to deal with the risk. This was plainly the whole purpose of the action of the board in passing the vote and in issuing the card. Even if we should assume that the reason of this action by the board was the probability that the property would be unoccupied during the winter, and that the plaintiff would apply to the defendants for their assent to such nonoccupancy free of charge, those circumstances, taken in connection with the others which must also be considered, could not make the action of the board mean more than a change in its rate, under which the defendants could, if they should see fit, grant the plaintiff permits for nonoccupancy without requiring it to pay an additional premium or charge for the permits. In other words, the only permission granted by the vote was permission to the defendants and all other insurers to grant vacancy permits free of charge, if they chose. We are, therefore, of opinion that the action of the board, although known to and acquiesced in by the defendants, was not in itself a permission to the plaintiff for nonoccupancy, or a waiver by the defendants of the conditions of the policies relating to that subject. Nor, upon the evidence as it stood, could the action of the board estop the defendants from relying upon the conceded breach of the condition as to occupancy as a defense to the policies. In the complete absence of evidence that the action of the board was taken at the request or suggestion of the plaintiff or its tenants, or was communicated to or known by them, or that they suffered the property to become or to remain unoccupied, relying upon the vote or other action of the board, or that they for that reason omitted to apply for the assent to nonoccupancy for more than 30 days required by the policies, it could not be found that the plaintiff's position had been changed to its detriment by any reliance upon the action of the board as a permission for nonoccupancy. An essential element of estoppel was lacking.

There was no error in the admission of

evidence. The existence and organization and action of the board, and its relations to the defendants, were relevant to the issues upon trial, whether permission for nonoccupancy had been given, whether the conditions upon that subject had been waived, and whether the defendants were estopped from relying upon the breach of the conditions. The lease from the plaintiff to Holt & Irwin was a proper circumstance to be given in evidence, to be used in construing the action of the board upon which the decision of the main issues turned. The instructions to the jury requested by the defendants should have been given, and the exception to the refusal to give them, and to so much of the charge as was inconsistent with them, must be sustained. Exceptions sustained.

(172 Mass. 384)

PRATT v. MACKEY et al.

(Supreme Judicial Court of Massachusetts.
Plymouth. Jan. 6, 1899.)

**MORTGAGES — FAILURE TO RECORD — ASSIGNMENT
BY MORTGAGOR — EFFECT.**

Under St. 1888, c. 393, invalidating a real-estate mortgage recorded after four months from its date, as against the mortgagor's assignee appointed within one year from the recording, such a mortgage is invalid, as against such assignee, although it was foreclosed before insolvency proceedings were commenced.

Report from superior court, Plymouth county.

Bill by Walter Pratt, assignee of the estate of George M. Buck, insolvent debtor, against William H. Mackey and others. Case reported. Ordered sent to a master in the superior court to state an account.

Chamberlain & Fletcher, for plaintiff. Sweet & Folsom and Hosea Kingman, for defendants.

BARKER, J. The plaintiff seeks to redeem land from a mortgage given by William Mackey, then its owner, on December 1, 1894, to the Plymouth Savings Bank, assigned by the bank on January 14, 1897, to John F. Mackey, and foreclosed by him on March 11, 1897, by sale to William H. Mackey. The plaintiff was appointed assignee in insolvency of the estate of one Buck on April 5, 1897, upon proceedings instituted on March 4, 1897; and so, if the savings bank mortgage was upon his debtor's (Buck's) estate when it was foreclosed on March 11, 1897, pending the proceedings in insolvency, and before his own appointment, he had a right to redeem that estate, notwithstanding the foreclosure,—it being found that his bill is seasonably brought, under Pub. St. c. 157, § 46. The debtor, Buck, took title to the land on April 16, 1895, subject to the savings bank mortgage, and made a second mortgage on May 16, 1896, by deed of that date, to William Mackey, which mortgage was not recorded until December 11,

1896, and so was within the language of St. 1888, c. 393, which provides that "a mortgage of real estate recorded more than four months after its date shall not be valid as against an assignee in insolvency of the estate of the mortgagor appointed in proceedings in insolvency begun at any time after the date of the mortgage and before one year from the recording thereof." This second mortgage was foreclosed on February 11, 1897, by sale to the same William H. Mackey, who afterwards, and as before stated, became the purchaser under the foreclosure of the savings bank mortgage on March 11, 1897. The defendants contend that the foreclosure of the second mortgage on February 11, 1897, before the institution of proceedings in insolvency against Buck, deprived Buck of all estate in the mortgaged land, and that, therefore, no right to redeem the land from the foreclosure of March 11, 1897, made during the insolvency proceedings, is in the plaintiff, under Pub. St. c. 157, § 46. To so hold would provide a simple and easy method of avoiding the provisions of St. 1888, c. 393. We think, on the contrary, that every mortgage which comes within the terms of that statute, and is avoided by an assignee in insolvency of the estate of the mortgagor, must be held to have been void from its inception, and to have been incapable of being the foundation of any rights in any mortgagee or vendee at a foreclosure sale. In no other way can the provision of the statute that the mortgage shall not be valid as against such an assignee be made effectual. The mortgagee and his vendee at the foreclosure sale are charged with knowledge of the statute, and of the record which brings the mortgage within the terms of the statute, and can complain of nothing, if they deal with a title liable to be defeated by the operation of the statute. As against this plaintiff, the mortgage was never valid or operative; and, as against him, the defendants cannot say that Buck's right to redeem the savings bank mortgage was extinguished by the foreclosure of February 11, 1897. See *Harriman v. Light Co.*, 163 Mass. 85, 39 N. E. 1004. The clear distinction between this case and *Smythe v. Sprague*, 149 Mass. 310, 21 N. E. 383, cited for the defendants, is that here the unrecorded mortgage, which, if it were operative as against the plaintiff, would have extinguished his debtor's title, is made invalid as against the plaintiff, while the unrecorded deed in *Smythe v. Sprague* was valid. So, in *Briggs v. Parkman*, 2 Metc. 258, the unrecorded mortgage was a valid one as against the assignee, instead of being made invalid by a statute. *Mansfield v. Gordon* (Mass.) 10 N. E. 773, which holds that an assignee in insolvency cannot rescind a mortgage made by his debtor while a minor, has no application to the present case. Upon the report, the plaintiff is entitled to redeem, and the case should be sent to a master in the superior court to state the account. So ordered.

(172 Mass. 415)

HARDING v. LYNN & B. R. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1899.)

INJURY TO EMPLOYEE—NOTICE.

A notice directed to a street-railway company, whose lines the defendant street-railway company had leased, and whose president was the same, stating that plaintiff, an employé, was injured by being thrown from a car of the lessor company, and returned served on its president, is not a notice to defendant, within the employers' liability act; and therefore St. 1894, c. 389, relating to omissions in the notice to correctly state the time, place, or cause of the injury, is inapplicable.

Exceptions from superior court, Suffolk county; John H. Hardy, Judge.

Action by Charles M. Harding against the Lynn & Boston Railroad Company. There was a verdict for defendant, and plaintiff alleged exceptions. Exceptions overruled.

Marcellus Coggan and E. S. Page, for plaintiff. Lincoln & Badger, for defendant.

MORTON, J. The notice was directed to "The East Middlesex Street-Railway Co.," and states that the plaintiff was injured by being thrown from the top of one of the cars of that company. The sheriff's return of service of the notice is that he served it upon the East Middlesex Street-Railway Company by delivering a copy to A. F. Breed, its president. It appears that Breed was also president of the defendant corporation, and that the East Middlesex Street-Railway Company had recently been leased to the Lynn & Boston Railroad Company. The court excluded the notice on the ground that it was not a notice to the defendant. This was correct. The case is not one in which there was an omission to state the time, place, and cause of the injury correctly, but in which there was no notice whatever to the defendant. St. 1894, c. 389, therefore, does not apply. Exceptions overruled.

(172 Mass. 333)

INHABITANTS OF DUXBURY v. COUNTY COM'RS OF PLYMOUTH COUNTY.

(Supreme Judicial Court of Massachusetts.
Plymouth. Jan. 6, 1899.)

TAXATION—PERSONAL PROPERTY—WHERE ASSESSABLE—"PLACE OF BUSINESS."

1. Partners who reside in H., but saw logs at "a permanent sawmill, dam, and mill privilege" in D., have a place of business in the latter town, within Pub. St. c. 11, § 24, providing that, if partners have places of business in two or more towns, they shall be taxed in each of such places for the proportion of property employed therein.

2. Boards manufactured at a permanent sawmill, and from there transported to a different town to be manufactured into boxes, are not thereby divested of their character of personal property employed at the former place, which is by Pub. St. c. 11, § 24, made taxable to a firm having several places of business at that place where it is employed.

Case reserved from supreme judicial court, Plymouth county; James M. Barker, Judge.

Petition for certiorari by the inhabitants of Duxbury against the county commissioners of Plymouth county, who abated a tax assessed to the firm of Lot Phillips & Co. on wood, boards, and slabs. The firm members resided in Hanover, Mass., but had a mill in Duxbury, where boards were made, which were shipped to the factory of the firm in Hanover and made into boxes. Case reserved. Writ to issue.

Arthur Lord, for plaintiff. Hosea Kingman, for defendant.

FIELD, C. J. We are of opinion that the partnership of Lot Phillips & Co. had a place of business in Duxbury, and that the personal property employed in that business was rightly taxed to the partnership in Duxbury, under Pub. St. c. 11, § 24. If the partners had been accustomed to sell at the mill in Duxbury the boards and slabs which they sawed from logs in the "permanent sawmill, dam, and mill privilege" which they owned there, we should have no doubt that they were engaged in business there, within the meaning of the section. The fact that the boards sawed were box boards, and were mainly used by the partners in the manufacture of boxes at their box factory in Hanover, does not, we think, change the principle. The section provides that, "if partners have places of business in two or more towns, they shall be taxed in each of such places for the proportion of property employed therein." See *Backer v. Watertown*, 137 Mass. 227. It is unnecessary to consider whether the property was taxable in Duxbury, under Pub. St. c. 11, § 20, cl. 1. Writ of certiorari to issue.

(172 Mass. 356)

STEBBINS et al. v. SCOTT.

(Supreme Judicial Court of Massachusetts.
Nantucket. Jan. 7, 1899.)

EXECUTORS AND ADMINISTRATORS—CLAIM AGAINST ESTATE—LIMITATION OF ACTION—WAIVER—CORPORATIONS—DISSOLUTION—ACTION AGAINST STOCKHOLDERS—ACCRUAL OF RIGHT OF ACTION.

1. A claim against an estate, which is assigned after it is barred by limitations, is also barred as to the assignee.

2. A bank suspends business, within the meaning of Gen. St. Kan. 1889, pars. 1200, 1204, providing for an action against the stockholders of a corporation where it shall have suspended business for more than one year, where it suspends payment, although a receiver is appointed, who afterwards pays dividends to creditors.

3. Under Gen. St. Kan. 1889, par. 1204, providing that, if any corporation be dissolved leaving debts unpaid, suits may be brought against any stockholders without joining the company, and paragraph 1200, which provides that for the purpose of such suit a corporation shall be deemed to be dissolved when it shall have suspended business for more than a year, a cause of action accrues against the estate of a deceased stockholder of a bank one year aft-

er suspension of payment, within the meaning of Pub. St. c. 136, §§ 9, 13, limiting action against executors and administrators to two years after their appointment or to two years after the cause of action accrues, although Gen. St. Kan. 1889, par. 1192, provides as an alternative remedy that a creditor may first proceed against the corporation, and, upon return of execution unsatisfied, may then proceed against the stockholders.

4. An executor or administrator has no power to waive a special statute of limitation against the estate.

Exceptions from superior court, Nantucket county.

Action by Lewis A. Stebbins and others against Thomas A. Scott, as executor of the will of Frederick C. Sanford, deceased. From a decree of the probate court ordering defendant to retain funds to satisfy plaintiffs' claim defendant excepts. Reversed.

Elliot D. Stetson, for plaintiffs. H. B. Worth, for defendant.

FIELD, C. J. Under the agreed statement of facts on which this case was determined in the superior court, the only question submitted is "whether or not the special statute of limitations of actions against executors and administrators is a bar to the plaintiffs' claim," etc. The plaintiffs sue here upon a judgment against the United States Savings Bank, a corporation established under the laws of the state of Kansas, recovered in the district court of Shawnee county, in Kansas, on October 26, 1895, on which execution issued, and was returned "wholly unsatisfied," in November, 1895. The writ in that action was dated August 23, 1895. The plaintiffs are the assignees of certain certificates of deposit issued by the bank to eight different persons, who, at different times, from December 20, 1890, to July 6, 1891, deposited with the bank the sums of money represented by the certificates. Each depositor had a separate cause of action against the bank, represented by his certificate. The bank carried on its business in Topeka, Kan., and, as appears in the agreed statement, it suspended payment of its debts and deposits in March, 1891; and afterwards resumed payment, in July, 1891; and "on September 17, 1891, it again suspended payment; and on September 19, 1891, a receiver of said corporation was duly appointed by the court of Kansas; and thereafter the assets of said bank were duly turned into cash, and distributed by said receiver among the bank's creditors." "The assets of said bank were insufficient to pay in full the claims of the depositors, the last dividend being paid June 4, 1894." "Said receiver applied all the assets of said bank to the payment of its liabilities, and was finally discharged on September 4, 1894." Frederick C. Sanford, of Nantucket, of whose will the defendant is executor, died on August 13, 1890, leaving a will, which was duly proved and allowed in the probate court of the county of Nantucket, and of which the defendant was appointed executor on November 10, 1891, and on that date he gave bond

according to law, and afterwards he duly published notice of his appointment, and returned affidavit thereof to said probate court. The two years of limitation provided in Pub. St. c. 136, § 9, therefore, expired on November 10, 1893. The writ in the present action is dated October 17, 1896. Sanford, at the time of his death, owned 20 shares of the capital stock of the bank, of the par value of \$2,000. It is to be noticed that the indebtedness of the bank on which the judgment was rendered in the court of Kansas arose after the death of Sanford, but it has been assumed by the counsel of both parties that the liability of his estate is the same as if the indebtedness of the bank had arisen in his lifetime. We express no opinion about this, but we proceed to deal with the single question which, under the agreed statement of facts, has been submitted to us.

The plaintiffs, on November 19, 1892, as attorneys for an association of creditors of the bank, wrote a letter to the defendant, as executor of the will of Sanford, calling his attention to the liability of the estate of Sanford to the creditors of the bank, and requested that he, as such executor, should pay "50 per cent." of the amount of the stock held by the estate towards a fund for the payment of the creditors, but nothing was paid by the defendant on this request. With knowledge of the death of Sanford and the appointment of the defendant as executor, "after the two-years period of limitation had expired, the plaintiffs took assignments of the certificates" of deposits on which they brought the suit and obtained the judgment in the court in Kansas. "On September 20, 1896, the estate of said Frederick C. Sanford not being finally settled, and said 20 shares of the capital stock of said United States Savings Bank being still in the name of said Sanford on the books of said corporation, a decree was made by the probate court of [the county of] Nantucket, ordering, under the provisions of Pub. St. c. 136, § 13, the defendant, as executor of said Sanford, to retain funds to satisfy" the judgment against the bank, and "such funds are now being held in obedience to said decree."

We assume, without considering it, that under the laws of Kansas an assignee of the several choses in action against the bank could sue the bank in the courts of Kansas in his own name, and could join in one action claims assigned by different persons. If, however, the claims of the assignors against the estate of Sanford were barred in this commonwealth when they were assigned to the plaintiffs, the plaintiffs' claim, as assignees, we think is also barred. The plaintiffs, as assignees, have no greater rights against the estate of Sanford than their assignors would have had if no assignment had been made. The contention of the defendant is that by paragraphs 1200 and 1204 of the General Statutes of Kansas of 1889, which are cited in the margin, the causes of action

of the assignors against the estate of Sanford accrued within two years after the giving of the administration bond. Pub. St. c. 136, §§ 1, 9. If their causes of action accrued within said two years, then the probate court could not lawfully order the defendant to retain assets, under Pub. St. c. 136, § 13. Whether the causes of action so accrued depends upon the construction to be given to said paragraphs 1200 and 1204 and to the agreed statement of facts. We are of opinion that the meaning of the agreed statement of facts is that the bank finally suspended business on September 17, 1891, and that it never resumed business. The agreed facts say that it suspended payment of its debts and deposits; that a receiver of the bank was duly appointed by the court of Kansas; that the assets of the bank were duly turned into cash, and distributed by said receiver among the bank's creditors; that the assets were insufficient to pay in full the claims of the depositors; that all its assets were applied to the payment of its liabilities, the last dividend being paid on June 4, 1894; and that the receiver was discharged on September 4, 1894. We are of opinion that it appears that the bank "suspended business for more than a year" from September 17, 1891. We also are of opinion that paragraphs 1200 and 1204 of the Statutes of Kansas are applicable to such a case, and that, after the expiration of said year, the creditors of the bank each had a cause of action against the stockholders to enforce their individual liability under the statutes of Kansas. *Abbey v. Dry-Goods Co.*, 44 Kan. 415, 24 Pac. 426. The causes of action of the holders of the certificates of deposit against the estate of Sanford, therefore, accrued on September 18, 1892, and they could have brought an action against the defendant as executor at any time from November 10, 1892, to November 10, 1893.

It is argued on behalf of the plaintiffs that the remedy under said paragraphs 1200 and 1204 was not intended to be exclusive, but that creditors of the bank also had a remedy under paragraph 1192 of the General Statutes of Kansas of 1889, also cited in the margin;¹ that the plaintiffs had a right to proceed

against the corporation in Kansas, under said paragraph 1192, and then bring suit here on the judgment there obtained; that the cause of action declared on in the suit here did not accrue until the judgment had been obtained in the courts of Kansas, and the execution issued thereon had been returned unsatisfied; and that the present action was brought within one year thereafter, as required by Pub. St. c. 136, § 14. See *Bank v. Ellis* (Mass.) 51 N. E. 207. The argument is that it does not appear that the corporation actually was dissolved by the decree of the court in Kansas; that there is a good reason why the creditors should postpone their action against the stockholders until they had received their dividends from the assets of the corporation in the hands of the receiver; that the creditors could bring suit in Kansas against the corporation at any time within the statute of limitations of that state, and, if thereafter they obtained a judgment there which was unsatisfied, they could bring suit on the judgment against the stockholders, ~~on~~ on a cause of action that first accrued after such judgment.

The extent of the liability of the stockholders is substantially the same, under either of these provisions of the statutes of Kansas, because a stockholder who pays in full the debt of a creditor of the corporation undoubtedly would be entitled to receive the dividends from the assets of the corporation applicable to that debt. Paragraph 1192 of the Statutes of Kansas apparently gives a remedy to the creditors to enforce the liability of the stockholders in cases where the corporation has not been dissolved, while paragraphs 1200 and 1204 give a remedy where the corporation has been actually dissolved, either by a decree of a court of competent jurisdiction or by the expiration of the time limited in the charter. Whether there is any provision in the Statutes of Kansas for maintaining a suit against a corporation after it has been dissolved does not appear in the papers before us. Paragraphs 1200 and 1204, however, make also provision for the creditors of a corporation to enable them to enforce the liability of the stockholders, where it is shown that the "corporation has suspended business for more than a year," although the corporation has not been actually dissolved. But for this provision, the different remedies would, so far as appears, be held applicable to different states of fact, and to be exclusive of each other. In the last-mentioned case, however, we assume that each creditor has two remedies to enforce the statutory liability of the stockholders; but they are, we think, two remedies for the same cause of action.

The causes of action against the estate of Sanford to which the plaintiffs have succeeded by assignment were, in their original form, barred by the special statute of limitations before they were assigned to the plaintiffs. We think that the plaintiffs cannot

¹ Gen. St. Kan. 1889, par. 1192: If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment.

escape this bar by bringing a suit against the corporation in the courts of Kansas, and then bring an action here on the judgment there obtained. See *Stilphen v. Ware*, 45 Cal. 110. The special statute of limitation of action against the representatives of the estates of deceased persons was enacted for the purpose of insuring the speedy settlement of the estates. All causes of action which have accrued within the time limited must be prosecuted within that time or they are barred. An executor or administrator has no power to waive the special statute of limitations. *Lamson v. Schutt*, 4 Allen, 359; *Wells v. Child*, 12 Allen, 333; *Robinson v. Hodge*, 117 Mass. 222; *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. 641. The original causes of action could have been prosecuted against the estate of Sanford within two years from the time of giving the administration bond. We think, therefore, that the plaintiffs show no cause of action, within Pub. St. c. 136, § 13 et seq. The judgment of the superior court for the plaintiffs must be reversed, and there must be judgment for the defendant. So ordered.

(172 Mass. 420)

HONSUCLE v. RUFFIN et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1899.)

CORPORATIONS—PROMOTERS—FALSE REPRESENTATIONS—EVIDENCE—INSTRUCTIONS—EXCEPTIONS.

1. In an action for falsely representing that a certain amount of capital had been paid into a corporation, an exception to the exclusion of defendant's explanation as to what he meant by a letter in evidence, in which he stated that the corporation had no stockholders, will not be sustained, the exception not showing what the explanation was to be.

2. In an action for fraud in the sale of stock, the court charged that the rule of damages was the difference between the par value of the stock and its value when plaintiff discovered the fraud. *Held*, that error in not charging the measure to be the difference between the par value and the actual value at the time of purchase was harmless, the jury finding that it had no value at any time after the purchase.

3. A request that if plaintiff, by reasonable diligence, could have ascertained the falsity of declarations in a sale of stock, and did not do so, he could not recover, was sufficiently covered by a charge that, if plaintiff ought to have discovered the truth before he put in his money, the jury should find for defendant.

4. In an action against promoters for fraud in the sale of stock, defendants testified that they put certain of their own money into the company's safe, and had spent it for rent, tools, and expenses in behalf of the company, and asked a charge that, if this was used with the intention that it should be applied to the payment of stock, then it was not a liability of the company. *Held* properly refused, the question whether anything was done which was intended as a payment or amounting to a bona fide renunciation of control over the money, except through the company, being omitted from the request.

Exceptions from superior court, Suffolk county; John H. Hardy, Judge.

Action by William R. Honsucle against Stanley Ruffin and others. There was a verdict for plaintiff, and defendants except. Exceptions overruled.

Carver & Blodgett, for plaintiff. Frank K. Linscott, for defendants.

HOLMES, J. This is an action for false representations, by which the plaintiff was induced to buy stock of a corporation. The representations relied on were to the effect that a certain amount of the capital had been paid in. At the trial the plaintiff testified to the representations, and also put in a letter of the defendant Ruffin, written to a third person soon after the conversation, stating that the corporation had no stockholders. Ruffin was asked by his counsel to explain what he meant by the expression, but the court excluded any explanation, on the ground that the meaning was plain and the letter must speak for itself. The defendants excepted.

We should be of opinion that this evidence ought to have been admitted, if that were the only question before us. An entirely different principle applies from that which would govern the interpretation of a contract, will, or other instrument prepared with a view to legal effect, or relied on as founding an estoppel. The letter was important merely as showing knowledge, or a certain state of mind, with regard to the condition of the company, for the purpose of establishing one element of the alleged fraud. Hence, whereas in the case of wills, contracts, etc., we ask what the words used would mean in the mouth of one writing the language in a normal way, under the circumstances, here the meaning of the individual, however inconsistent with the words—his actual state of mind—is the thing to be found, and there is no ground of statute, consideration of the rights of others, or policy to limit our mode of inquiring into it. In *Nash v. Trust Co.*, 163 Mass. 574, 40 N. E. 1089, the majority of the court went much further than this. But the exceptions do not show what explanation was expected. It is difficult to imagine the possibility of any explanation as distinguished from a statement that the words were intended to deceive the attorney general's office, to which the letter was addressed. An explanation of the latter sort requires no particular favor, and short of that it is hard to see how the defendants have been harmed by the exclusion. Although always reluctant to do so, we feel bound to apply the rule requiring the excepting party to show what the testimony was expected to be. *Com. v. Smith*, 163 Mass. 411, 423, 40 N. E. 189, and cases cited.

An instruction was asked that the rule of damages was the difference between the actual value of the property at the time of the purchase and its value if it had been what it was represented to be. *Whiting v. Price* (Bristol; Nov. 1898) 51 N. E. 1084. The jury were instructed that it was the difference between

the par value of the stock which the plaintiff paid and its value when he discovered the fraud. But the jury made the time selected immaterial by finding, in answer to questions, that the stock was of no value either at the time of the purchase or at the date of the writ, as these findings meant that the stock was of no value at any time after the purchase.

Another instruction asked was that if the plaintiff, by the use of reasonable diligence, could have ascertained the truth or falsity of the alleged declarations, and did not do so, he could not recover. The judge told the jury that, if the plaintiff ought to have discovered the truth before he put in the money, they should find for the defendants. This instruction sufficiently saved the defendants' rights. *Whiting v. Price*, supra.

The defendants testified that they had put in the safe connected with the company's office some \$1,300 or \$1,400 of their own money, which, except \$100, had been spent for rent, tools, and trips to New York in behalf of the company. An instruction was asked that, if the money, "was used by the defendants in the furtherance of the business of the corporation, with the intention that it should be applied to the payment of stock, as cash, the certificate of stock to be issued later, then they [the jury] would not be justified in finding that it was a liability of the company." We should be unwilling to grant a new trial for the refusal of this ruling; for, without considering nicely what would amount to paying the money in to the corporation, it is enough to notice that the question whether anything was done which was intended as a payment, or which amounted to putting the money into an inclosure of the company, a bona fide renunciation of control over it except through the corporation, was omitted from the request. It was quite possible that the acts testified to, if done, did not import and were not accompanied by a renunciation of control. *Com. v. Ryan*, 155 Mass. 523, 529, 530, 30 N. E. 364. If the defendants simply spent their money on traveling expenses, etc., with the intent that their expenditures should work as payments on account of stock, while it might be that they would have a claim against the corporation for reimbursement, their intent was ineffectual under the law. It did not bind the corporation or amount to paying in in cash. See *Pub. St. c. 106, §§ 47, 49*.

Exceptions overruled.

(172 Mass. 466)

JOHNSTON v. FAXON et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 9, 1899.)

SALES—DAMAGES—QUESTION FOR COURT—BREACH OF CONTRACT—EVIDENCE.

1. Whether damages for the breach of a contract are within the scope of the risk undertaken is a question of law for the court.

2. One who contracts to furnish a dealer with a certain article at a certain time, will, in the absence of any special agreement, be

held to have adopted the retail price at the time and place of delivery as the basis for establishing damages for nondelivery.

3. Where defendant contracted to furnish plaintiff with a number of special bicycles at a fixed price, by a certain time, and plaintiff received orders at an advanced price from customers for all which were to be furnished, which he was obliged to cancel because of defendant's failure to deliver, damages for the breach, estimated at the difference between the contract price and the amount for which plaintiff could have sold the wheels, are not too remote.

4. In an action for damages for defendant's breach of a contract to furnish plaintiff bicycles by a certain time, evidence of orders received by plaintiff from customers for such wheels at a certain price is admissible to show the amount of damages, though such orders were voidable under the statute of frauds.

Exceptions from superior court, Suffolk county; John H. Hardy, Judge.

Action by William C. Johnston against Edwin Faxon and others. Verdict was directed for plaintiff for one dollar damages, and he brings exceptions. Sustained.

C. B. Todd and W. M. Lindsay, for plaintiff.
C. B. Southard and T. Parker, for defendants.

HOLMES, J. This is an action for breach of a contract to build for the plaintiff, a retail dealer, 300 bicycles of a certain kind, "to be delivered as said Johnston may direct, from January 1, 1895, to July 1, 1895." The defendants broke the contract, and the plaintiff was obliged to cancel most of the orders which he had received, amounting in all to more than 300. The plaintiff was to pay the defendants \$50 a bicycle. The retail price, as fixed by subsequent agreement between the plaintiff and defendants, was \$150. This, or near it, was the price on the orders. The auditor, and the judge of the superior court after him, ruled that the plaintiff could recover only nominal damages, although, if the loss of the orders would not be too remote, his damage was found to be upwards of \$14,000. The plaintiff excepted.

This court has gone a good way in refusing to allow profits to be recovered for on the ground that they were too remote. *Todd v. Keene*, 167 Mass. 157, 45 N. E. 81; *Noble v. Hand*, 163 Mass. 289, 39 N. E. 1020. But, of course, the anticipation of profit, although sometimes disguised under the name of value, constantly is taken into account. If we say that the rule of damages in a case like this is the difference between the contract price and the value of the machines if furnished, the question arises whether, supposing the plaintiff to have been unable to get the machines elsewhere in time for the season, which was over before July 1st, the value should not be determined by the orders and the agreement with the defendants, which would be allowing for the anticipation of profit under another name. *Griffin v. Colver*, 16 N. Y. 489, 491. The contract expressly contemplated that the plaintiff was buying in order to sell again. The defendants knew that was

the object of the agreement. Especially in view of the part they took in fixing the retail price, they must be taken to have expected that the wheels would be sold at an advance. The article was not one to be purchased generally in the market, and therefore they knew that the plaintiff's chance to make the difference between their price and his would depend upon their doing what they undertook.

It is true that the agreement as to the retail price was made in January, 1895, and that the orders came in from December, 1894, to June 1895, while the contract was made in November, 1894. But we presume that the defendants would not care to argue that there was any unexpected rise in retail market values between November and January. Moreover, if the liability were made out in other respects, it might be held that the defendants, by their contract, adopted whatever might turn out to be the retail price at the time and place of delivery. *Shaw v. Nudd*, 8 Pick. 9; *Quarles v. George*, 23 Pick. 400; *Harvey v. Railroad Co.*, 124 Mass. 421, 425; *Sedg. Dam.* (8th Ed.) §§ 737, 738.

The only difficulty in the way of the proposed measure of damages which impresses us is that, when the defendants made their contract, it was not certain, in a commercial sense, that the plaintiff could sell what he ordered. His bicycle seems to have been more or less of an experiment. But as remoteness—that is to say, whether, under given circumstances, upon an ascertained contract, certain damages are within the scope of the risk undertaken—is always a question of law (*Hobbs v. Railway*, L. R. 10 Q. B. 111, 122; *Hammond v. Bussey*, 20 Q. B. Div. 79, 89), and as the auditor found the amount of the plaintiff's damages, if they were not too remote, we are compelled to say that, as between the plaintiff's claim and nominal damages, the former comes nearer to doing justice than the latter, in view of the considerations which we have mentioned. The defendants, by their contract, took the risk of damages to that extent, if it should turn out that the plaintiff could sell as it was contemplated and expected that he would. *Sedg. Dam.* (8th Ed.) §§ 197, 198; *Hammond v. Bussey*, 20 Q. B. Div. 79, 86, 94, 100.

It will be understood that the contracts made by the plaintiff are not recovered for as such. But the orders, covering as they did more than the number of bicycles to be built by the defendants, coupled with the above-mentioned agreement as to the retail price, are evidence of the value of the wheels. *France v. Gaudet*, L. R. 6 Q. B. 199, 204.

If, as we understand, the orders were contracts, conditional only upon being performed in time, it does not matter whether they were good or bad under the statute of frauds. They are equally instructive as to value either way, if they were mercantile agreements intended to be carried out.

Exceptions sustained.

(172 Mass. 373)

MORSE-WILLIAMS CO. v. ELLIS et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 6, 1899.)

BILLS OF EXCEPTIONS—CONSTRUCTION—MECHANIC'S LIENS—APPEAL.

1. A bill of exceptions stating that the court refused certain rulings, but ruled that on all the evidence petitioner was not entitled to the establishment of a mechanic's lien, and dismissed the petition, and that petitioner excepted to the rulings and to the findings made, means that petitioner excepted to the refusal of the rulings requested and to the ruling of the court that on all the evidence petitioner was not entitled to the establishment of the lien and to its order dismissing the petition.

2. A finding, as matter of law, that on all the evidence petitioner was not entitled to the establishment of a mechanic's lien, will not be sustained unless plaintiff was not entitled to such relief on any reasonable view of the evidence.

3. Where the evidence was such that a trial court would have been justified in finding for either party, a finding for one of them will not be reversed on appeal.

Exceptions from superior court, Worcester county; Justin Dewey, Judge.

Petition by the Morse-Williams Company against Lois L. Ellis and others to foreclose a mechanic's lien for elevators put into a building by petitioner. The petition was dismissed, and petitioner brings exceptions. Overruled.

The petitioner asked the court to rule: (1) That an elevator attached to a building by nails, bolts, and screws, and applicable to the use for which the building is erected, is real estate; (2) that the owner of property upon which a mechanic's lien is sought to be enforced for materials ordered by his partner in behalf of a firm of which he is a member is a purchaser of the materials, within the exceptions of Pub. St. c. 191, § 3.

D. C. Brewer and C. T. Davis, for petitioner. S. P. Smith and H. L. Parker, Jr., for respondents.

BARKER, J. The only difficulty in dealing with this bill of exceptions is to know what it means. The case was tried without a jury, and the petition dismissed. A number of facts which appeared from the evidence are stated, and such further testimony as is material was added at length. Two rulings requested by the petitioner are stated, and the bill then concludes as follows: "The court refused to make either of the rulings indicated, but ruled that on all the evidence the petitioners were not entitled to have the lien established, and ordered the petition to be dismissed. The petitioners respectfully excepted to the ruling and to the findings as made, and pray that their exceptions may be allowed." The briefs of both parties, and the arguments addressed to us, go upon the theory that the question for decision is whether, upon the statement of the facts which it is said appeared in evidence, and the additional testimony set out in the bill, it was competent for the court to find for the respondents, and dismiss

the petition. We therefore construe the bill of exceptions to mean that the petitioner excepted to the refusal to give the rulings requested, and that the statement of the court that on all the evidence the petitioner was not entitled to have the lien established, and its order that the petition be dismissed, were the findings to which the petitioner excepted. See *Johnson v. Kimball*, 172 Mass. —, 52 N. E. 386. Therefore these findings are to be dealt with as findings of fact are dealt with, and are to be sustained if founded upon any reasonable view of the evidence. On the other hand, a ruling that as matter of law the petitioner was not entitled to have the lien established, could not be supported if, upon any reasonable view of the evidence, a finding for the petitioner might have been made. Upon this construction of the bill of exceptions the two rulings requested, the first of which clearly could not be given, might both be properly refused as involving questions of law immaterial in view of the facts as determined by the court. The question whether the petitioner's work and materials were furnished in the erection of the building, or were furnished in putting in machines which were sold as personalty, and remained the personalty of the firm which ordered them, as against the owner of the building, depended very little upon how the elevators were attached. If the owner of the building was herself a purchaser of the materials furnished, because of her membership in the firm which ordered them (see *Fletcher v. Stedman*, 159 Mass. 124, 34 N. E. 183), that principle of law would still be immaterial to the decision, if the contract was one for the sale of personalty which did not become part of the building, or if the certificate was not seasonably filed, or if the statement filed was not a just and true account of the amount due. The state of the evidence was such that upon either of these questions the court below was justified in finding either for the respondent or the petitioner, and, as the court did find for the respondent, its action cannot be disturbed or reversed. Exceptions overruled.

(172 Mass. 453)

BOYLAN v. EVERETT et al.

(Supreme Judicial Court of Massachusetts.
Norfolk. Jan. 7, 1899.)

ANIMALS—INJURIES BY DOGS—"KEEPERS"—QUESTIONS FOR JURY.

1. In an action against its alleged keeper for injuries done by a dog, under Pub. St. c. 102, § 93, declaring such a liability against keepers of dogs, it is a question for the jury whether defendant was keeper of the dog, and, therefore, a charge that damages was the only question was properly refused.

2. A person who allows a dog to be on his premises, occasionally feeding and petting it, and calling and commanding its obedience, is not, as a matter of law, its keeper.

3. One who had "some control" and custody over a dog is not, as a matter of law, its keeper.

4. That a dog was kept upon premises by the owner's nephew, and with consent, is not

conclusive that the owner of the place was a keeper of the dog, if he gave it food, protection, maintenance, or keeping.

Exceptions from superior court, Norfolk county; Edgar J. Sherman, Judge.

Tort by one Boylan against one Everett and others. There was a verdict for defendants, and plaintiff excepted. Overruled.

This was an action of tort to recover damages for injury caused by the bite of a dog which was not owned by defendants, but was the property of their nephew, who boarded with defendants. In the superior court the plaintiff asked the court to rule: First. That on the facts the only question for the jury was as to damages. Second. That "the keeper of a dog is one who harbors it, exercises control over it, although to be a keeper of a dog it is not necessary that one should have the whole or entire control of it, and there may be several keepers of the same dog"; and that "where a person allows a dog to be on his premises, occasionally feeding and petting it, sometimes calling and commanding its obedience, or simply permitting the dog to be one of the family, he is then the keeper of the dog, and becomes liable for damages caused by it." Third. "It is for the jury to say whether they believe the plaintiff has shown by a fair preponderance of all the evidence that the defendants had some control and custody over the dog. If they did, they are responsible for him as keepers." Fourth. "If the dog belonged to defendants' nephew, and he kept it on the defendants' premises with their consent, and they did anything to maintain or keep him, gave him food, or protected him, or provided for him in any way, they would be, in the sense of the law, keepers of the dog." The court refused to give the rulings as requested. The jury found for defendants, and plaintiff excepted.

T. E. Grover and J. Hewins, for plaintiff.
P. H. Cooney, for defendants.

LATHROP, J. The bill of exceptions in this case does not state that it contains all of the evidence material to the issue involved, and the question whether the defendants were the keepers of the dog, within Pub. St. c. 102, § 93, was a question of fact for the jury. *Barrett v. Railroad Co.*, 3 Allen, 101; *Collingill v. City of Haverhill*, 128 Mass. 218; *McLaughlin v. Kemp*, 152 Mass. 7, 25 N. E. 18; *Whittemore v. Thomas*, 153 Mass. 347, 26 N. E. 875; *O'Donnell v. Pollock*, 170 Mass. 441, 49 N. E. 745. The first instruction requested was, therefore, rightly refused.

The first part of the second instruction requested was given in substance. We do not think that the judge was required to give the last part of this request, as matter of law. "The mere fact that a dog is kept by its owner on the premises of another, with the knowledge or acquiescence or permission of the owner of such premises, does not of itself make the owner of said premises the

keeper of the dog." *Whittemore v. Thomas*, ubi supra. Nor can we say that the facts that the defendants fed and caressed the dog, called it in and sent it out, and that it was treated "the same as anybody would that had a dog at their home," which is the testimony of the defendants, and which we assume to be the meaning of the last part of the second request, required the judge to rule, as matter of law, that the defendants were, therefore, the keepers of the dog, irrespective of the fact that the dog belonged to their nephew, who was a boarder with them.

As to the third request, we do not think that if the defendants exercised some control over, and had some custody of, the dog, it therefore followed that the plaintiff was entitled to a ruling, as matter of law, that the defendants were responsible for him as keepers.

We are further of opinion that the judge was not bound, as matter of law, to give the fourth ruling requested. While the acts recited may be evidence of keepership, more or less significant, according to the other facts appearing in the case, it cannot be said that they are conclusive.

The exception taken to the charge is only so far as it is inconsistent with the requests made. It seems to us that the requests were rightly refused, and that the case was properly submitted to the jury on the evidence. Exceptions overruled.

(172 Mass. 468)

LESLIE v. GRANITE R. CO.

(Supreme Judicial Court of Massachusetts.
Norfolk. Jan. 7, 1899.)

MASTER AND SERVANT—PERSONAL INJURIES—DEFECTIVE APPLIANCES—QUESTION FOR JURY
—EVIDENCE—EXPERT OPINIONS.

1. A refusal to direct a verdict for defendant employer was proper, where the injury sued for was caused by a sudden lurch of a large stone, which broke the guys of the derrick by which the stone was being turned, and testimony of experts was conflicting as to whether the manner of attaching the tackle caused the lurch, there being a question of negligence.

2. There was no error in admitting evidence that wrought iron is stronger than cast iron, of which an alleged defective clip was made, where it was not shown until afterwards that clips for that purpose were always made in cast iron, and that the ones used were the best obtainable.

3. A master, relying on evidence that it used the best obtainable appliances for a given purpose, to show that the breaking of such appliances involved no negligence, should have requested an instruction to that effect.

4. What is the best way to handle heavy stones with a derrick, so as not to unduly strain it, is a matter of expert knowledge.

5. An expert, who testified that a certain way of applying tackle to a stone was wrong, may be asked his reason for such opinion.

6. It is discretionary with the trial judge to allow an expert to state his reasons for an opinion given without objection, though by so doing an opinion on the issues of fact is called for.

Exceptions from superior court, Norfolk county; Daniel W. Bond, Judge.

Tort by John Leslie against the Granite Railroad Company. There was a verdict for plaintiff, and defendant excepted. Exceptions overruled.

J. E. Cotter and J. W. McAnarney, for plaintiff. J. Lowell and J. A. Lowell, for defendant.

LATHROP, J. The exceptions in this case relate to the refusal of the judge, at the close of all the evidence, to instruct the jury to return a verdict for the defendant, and to the admission of certain evidence offered by the plaintiff. No requests for instructions were made, and no exception was taken to any part of the charge. There was evidence from which the jury would have been warranted in finding the following facts: The plaintiff had been set to work, with five other workmen, cutting a large stone that was on the surface of the ground near the top of the defendant's quarry, and near a large derrick. At the same time other men were at work on another stone, 18 feet long by 8 feet high, and 2½ feet thick. This stone weighed about 30 tons. It stood on its edge, and it was necessary to turn it so as to work on its top. One Robertson, who was the defendant's superintendent and the foreman of its quarry, and who had charge of the men, called a number of quarrymen from the quarry to operate the derrick and turn the stone. He directed the men how to put a chain about the stone and where to fasten it, which was back of the top edge of the stone, with a slip link. The end of the chain was then attached to the boom of the derrick. The derrick was started, the stone moved, and canted on its edge, and then lurched over. This brought a strain on the derrick, and one guy gave way and then another. The plaintiff was struck by one of the guys and injured.

Several experts were called by the plaintiff, and were asked a hypothetical question as to the usual method of turning such a stone, describing its size and situation as shown by the evidence, by such a derrick, describing the derrick. To this question the defendant objected. The witness described a different method from that used by Robertson, which would avoid the jerk. One of the witnesses testified, in effect, that the method pursued in this case caused the stone to lurch, and that, when that came, it was impossible not to have the strain, and that either the guy would give way or the chain would break. While the experts for the defendant contradicted the experts for the plaintiff, it is clear that there was evidence for the jury that there was negligence in the handling of the stone, which caused the guy to give way.

It appeared that the end of the guy which gave way was fastened to the guy, after passing through a ring, by a patent clip call-

ed the "Crosby Clip," made of cast iron. One witness for the plaintiff, who was an expert in iron and steel, testified that there was a difference in the strength of cast iron and wrought iron. The plaintiff's counsel then asked the witness which was the stronger of the two, wrought iron or cast iron. This question was excepted to. The witness answered, "wrought iron." At the time this question was allowed to be put there was no evidence in the case in regard to these clips except that they were used to fasten the guys, as before stated. Robertson subsequently testified for the defendant "that the patent clips, such as were used on the guys of this derrick, and one of which broke, were the best that could be bought, and that this was the first of these clips that he ever knew to break." One other witness testified for the defendant that "the Crosby clip was the best kind of clip obtainable." There was also evidence that the derrick was regularly inspected. On this evidence, the defendant contends that, as it bought the best clip known, the breaking of it was not evidence of negligence, and that the case came within the rule stated in *Reynolds v. Woolen Co.*, 168 Mass. 501, 47 N. E. 406. In this case it is said: "Machinery used in textile manufacturing is ordinarily built and furnished by persons whose business it is to make machinery, and who, if reputable makers, are more likely to turn out safe products than men whose chief skill and thought are developed in some other line of work. Mill owners usually procure their machines of reputable makers. Such conduct meets the standard of ordinary care, and it is not negligence on the part of an employer to place in his mill, and, after proper inspection, to use, machinery so bought." If we assume that the clip came within this rule, the defendant should have asked for instructions based upon the supposition that the jury believed the defendant's witnesses. But this does not affect the competency of the evidence at the time it was introduced. There was at that time nothing to show that such a clip was made only of cast iron, and, indeed, this fact appears only inferentially from the evidence for the defendant. The evidence tended to show that the clip could have been made of stronger material than was used, and had a bearing upon the question of reasonable care.

The defendant further contends that the testimony of the experts should have been excluded, on the ground that it was a matter within the common knowledge of the jurymen. The question was as to the proper way of turning a stone so as not to bring an undue strain upon the derrick. It can hardly be said that this is a matter of common knowledge, when the defendant's experts differed so widely from those of the plaintiff on this subject.

The only other objection relates to a question put to one Cook. This witness, who

was called as an expert by the plaintiff, testified on cross-examination that it would be an improper way to chain the stone, putting the chain entirely around it. On re-direct examination, the plaintiff's counsel asked the witness his reason why he stated it would be improper to place the chain entirely around the stone in turning it. This question was objected to. The witness was allowed to answer, and the defendant excepted to the question. We see no ground for this exception. An expert may state the grounds and reasons of his opinion. *Hawkins v. Fall River*, 119 Mass. 94; *Eldt v. Outter*, 127 Mass. 522; *Com. v. Leach*, 156 Mass. 99, 102, 30 N. E. 163. The defendant, however, objects that the question should not have been allowed, because it called for an opinion on the issue, which was for the jury to decide. But the witness had been allowed, on cross-examination, without objection by the defendant, to make the answer he made, and we are of opinion that it was within the discretion of the judge to allow him to state the reason for his opinion. Exceptions overruled.

(172 Mass. 449)

UNITED STATES NAT. BANK OF NEW YORK v. VENNER.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1899.)

ACTION ON JUDGMENT—TITLES OF PARTIES—IDENTITY—EVIDENCE—AMENDMENT OF WRIT.

1. Where a writ in the superior court is defective, in that it does not set out the plaintiff's name with sufficient accuracy, the supreme court will allow an amendment without sending the case back for a new trial.

2. A judgment in favor of "The United States National Bank" is sufficient to support an action thereon by "The United States National Bank of New York, N. Y."

3. In an action on a judgment in favor of "The United States National Bank," where the judgment roll shows that the complaint set forth that the bank was carrying on business as a national bank in New York City, evidence that plaintiff is the only bank of that name doing business in New York is sufficient to prove plaintiff's identity with the judgment creditor.

Exceptions from superior court, Suffolk county; J. W. Hammond, Judge.

Action by the United States National Bank of New York against one Venner on a judgment recovered in the state of New York. From a finding for plaintiff, defendant excepts. Exceptions overruled.

F. Dodge and C. Walcott, for plaintiff. C. F. Choate, Jr., and A. F. Clark, for defendant.

LATHROP, J. The writ in this case describes the plaintiff as the United States National Bank of New York, N. Y., a banking association or corporation duly established by law, being duly organized and incorporated under the laws of the United States of America, and having its usual place of business in the city and state of New York. The declaration is as follows: "And the plaintiff says

that by the consideration of the supreme court of the state of New York held at New York for the city and county of New York, in said state of New York, on the 7th day of January, 1897, it duly recovered judgment against the defendant for \$7,428.25 debt or damage, together with \$1,221.95 interest, and costs of suit, taxed at \$118.40, amounting in all to \$8,768.60; that said judgment had never been vacated, set aside, or satisfied, and now remains in full force and effect, as appears from the records of said court, and the defendant owes it the amount of said judgment, with interest." The answer was a general denial. There was also filed by the defendant a special demand for proof "of the incorporation of the United States National Bank of New York, N. Y., plaintiff." At the trial the plaintiff put in evidence certified copies from the comptroller of the currency of its articles of association, its organization certificate, and the certificate authorizing it to do business. These documents showed the incorporation and existence of a national bank under the name of "The United States National Bank of the City of New York." The plaintiff put in evidence the judgment roll of the supreme court of New York, duly authenticated as required by Pub. St. c. 169, § 67, and Rev. St. U. S. § 905. The plaintiff also put in evidence tending to prove the identity of the bank that recovered the judgment with the plaintiff in this action, and evidence tending to show that there was not in New York any other bank having the same or a similar name. The defendant put in no evidence, and asked the judge to rule that the plaintiff could not recover. The judge refused so to rule, and found for the plaintiff.

The only ground urged by the defendant in this court in favor of his request for a ruling is that there is a variance between the allegation and the proof, in that the writ describes the plaintiff as the United States National Bank of New York, whereas the judgment was in favor of the "United States National Bank." But an examination of the judgment roll shows that while the judgment was rendered in favor of "The United States National Bank," called in one place in the roll the "United States National Bank," the complaint sets forth that the plaintiff is "an association or corporation duly organized and existing under the act of congress of the United States known as the 'National Bank Act,' and carrying on business in the city of New York as a national bank." We are of opinion that there is no merit in the defense. If the defect had been specifically pointed out in the superior court, the writ could have been amended by setting forth with accuracy the name of the plaintiff, and by alleging in the declaration that the plaintiff recovered judgment in the name of the United States National Bank. And, if we considered it necessary that this should be done, we should not send the case back for a new trial, as the amendment could be made in the superior

court at any time before judgment. *Cleaves v. Lord*, 3 Gray, 66; *Nichols v. Prince*, 8 Allen, 404, 408; *Denham v. Bryant*, 139 Mass. 110, 112, 28 N. E. 691. It is obvious, however, that the words in the writ in the present action, "of New York, N. Y.," do not necessarily import to be a part of the plaintiff's name, but may be considered as descriptive only. If so, there is no variance. *Thatcher v. Bank*, 19 Mich. 196. But if the words "of New York, N. Y.," are considered as part of the title of the bank, we are of opinion that no material variance is shown. In *Bank v. Lee*, 112 Mass. 521, the writ described the plaintiff as "the Washington County National Bank, a corporation duly established by law, and doing business in Greenwich, in the state of New York." To prove its corporate existence, it put in evidence an organization certificate of "the Washington County National Bank of Greenwich," to be located in the town of Greenwich, county of Washington, and state of New York, and a certificate of the comptroller of the currency that "the Washington County National Bank of Greenwich, in the county of Washington and state of New York," had been duly organized. It was contended that on account of the variance of name there was no proof of the organization of the plaintiff as a corporation. But it was held that, "in the absence of evidence that there was any other bank of that name at that place, the evidence introduced warranted the inference that the organization proved was that of the plaintiff corporation." See, also, *Thatcher v. Bank*, *ubi supra*. The question before the court in the case at bar was whether the plaintiff in this action was the same plaintiff that recovered the judgment declared on. There can be no doubt that the judge was amply warranted in finding that it was. Exceptions overruled.

(172 Mass. 439)

JACQUITH v. MASSACHUSETTS BAPTIST CONVENTION et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1899.)

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE —EVIDENCE—PRESUMPTIONS—MERITORIOUS CONSIDERATION.

1. A conveyance of land by a husband to his wife, without pecuniary consideration, must stand as a gift to the wife, in the absence of sufficient evidence to overcome the presumption that it was so intended.

2. A conveyance by a husband to his wife, as a provision for her benefit, being on a meritorious consideration, was not fraudulent as against creditors of the husband, where it did not appear that he was indebted at the time beyond his probable means of payment, remaining after such conveyance, or that it operated in fact to hinder, delay, or defraud creditors, or that he had an actual intent to defraud subsequent creditors.

Appeal from superior court, Suffolk county; J. B. Richardson, Judge.

Bill in equity by Harry J. Jaquith, assignee of the joint and separate estate of Henry A.

Davis and another, against the Massachusetts Baptist Convention and others, to annul, as fraudulent, certain transfers of real estate, for an accounting of rents and profits, and for other relief. Heard on agreed facts and other evidence produced at the hearing. From a decree dismissing the bill, plaintiff appeals. Affirmed.

H. J. Jaquith and W. R. Bigelow, for appellant. Dudley P. Bailey, for appellees.

HAMMOND, J. The conveyances, prior to October, 1896, affecting the property, taken in chronological order, were as follows: The deed of August 15, 1894, from Pratt to Henry A. Davis; the mortgage of the same date from Davis to the Massachusetts Baptist Convention; a subsequent mortgage of the same date from Davis to Pratt, discharged on the records August 23, 1896; another mortgage, of September 6, 1894, from Davis to his father, discharged December 7, 1894; a deed of December 4, 1894, from Davis to Richardson, and a deed of the same date from Richardson to Viola L., the wife of said Davis; a mortgage of April 18, 1896, from Viola and her husband to Marqueeze; and a deed of September 2, 1896, from Viola and her husband to said Richardson. At the time of the foreclosure of the mortgage held by the Massachusetts Baptist Convention, which took place in October, 1896, the record title to the property stood in Richardson, subject to this mortgage and to the mortgage given to Marqueeze. The Massachusetts Baptist Convention sold the premises at public auction to Lizzie E. Pratt, wife of Ezra F. Pratt; and the Pratts gave a mortgage back to the Massachusetts Baptist Convention to secure their note for a part of the purchase money, and this mortgage is still held by the mortgagee. It is not denied by the plaintiff that the foreclosure proceedings were in due form. But the plaintiff says that the conveyances of December 4, 1894, by which the record title to the property passed from Henry A. Davis to his wife, were without consideration, and void as to creditors, and that the conveyance of September 2, 1896, to Richardson was without consideration. It appears from the statement of agreed facts that there was no pecuniary consideration moving from the wife to the husband at the time he caused the title to pass to her. But, where a husband conveys land to his wife, the presumption is that it is a gift to her; and, although the presumption may be rebutted by evidence, we do not find in the facts agreed, or in the other evidence presented, sufficient evidence to overcome the presumption. It must stand as a gift to the wife, and the only remaining question on this part of the case is whether it is void as against creditors.

It does not appear that at the time of the transfer the husband was insolvent, or in contemplation of insolvency, or that there were any creditors then existing who have

not since been paid whatever at that time was due them. Nor does the evidence warrant the conclusion that the conveyance was made for the purpose of delaying or defrauding creditors, nor does it appear that there was not left in the hands of the husband sufficient to pay his creditors as their claims matured, and he actually did pay until more than a year afterwards. It is well settled in this commonwealth that a conveyance of property made on a meritorious consideration, as of blood or affection, is not per se fraudulent as against creditors. This conveyance was made on a meritorious consideration,—the making of provision for a wife. It does not appear either that the grantor was indebted at the time beyond his probable means of payment, remaining after the conveyance, or that it did in fact operate to hinder, delay, or defraud creditors, or that he had an actual intent to defraud subsequent creditors,—that is, an intent to contract debts, and a design to avoid payment of them by the conveyance; and a court is not warranted in finding such fraudulent intent from proof simply that the conveyance was made with a design to settle the property upon the grantor's wife, so that it should not be exposed to the hazards of his future business, or liable for any future debts which he might contract. *Thacher v. Phinney*, 7 Allen, 146; *Winchester v. Charter*, 12 Allen, 606. Applying these well-known principles, we are not satisfied upon the evidence that this transfer to the wife is void as to creditors. Nor do we see in the subsequent transactions any evidence to satisfy us that the property ever thereafter passed to the husband. Such being the case, the plaintiff has no standing in court to contest the foreclosure proceedings, and the other questions discussed by counsel become immaterial. Decree affirmed.

(157 N. Y. 453)

INGERSOLL v. NASSAU ELECTRIC R. CO.
(Court of Appeals of New York. Jan. 10, 1899.)

STREET RAILROADS — CONSTRUCTION AND OPERATION—CONSENT OF ABUTTERS.

Laws 1839, c. 218 (re-enacted as Laws 1890, c. 565, § 78), providing that any railroad corporation may contract with any other railroad corporation for the use of their respective roads and thereafter use the same in such manner and for such time as may be prescribed in the contract, is not in conflict with Const. art. 3, § 18, providing that no law shall be enacted permitting street railroads to construct their lines without first obtaining the consent of the owners of one-half in value of the abutting property; or with Laws 1890, c. 565, § 91, as amended by Laws 1896, c. 855, providing that a street railroad or extensions or branches thereof shall not be built or "operated" unless the consent of abutters is obtained; or with Id. § 102, providing that no street-surface railroad shall construct, extend, or operate its tracks in that portion of a street where such a road is already constructed without consent of the other road, but that the two railroads may unite in the use of tracks on the condemnation thereof in the manner prescribed for the benefit of one of the companies. Hence consent need not be obtained by a street-railroad

company operating under a contract over a portion of another company's tracks.

Vann, J., dissenting.

Appeal from supreme court, general term, Second department.

Action by Oliver W. Ingersoll against the Nassau Electric Railroad Company. A judgment for defendant was affirmed by the general term (34 N. Y. Supp. 1044), and plaintiff appeals. Affirmed.

William G. Cooke and Frederick T. Hill, for appellant. Charles A. Collin and Henry Yonge, for respondent.

PARKER, C. J. I quite agree that if all the views expressed in the opinion in *Colonial City Traction Co. v. Kingston City R. Co.*, 153 N. Y. 540, 47 N. E. 810, were intended to be applicable to every conceivable case in which the tracks of one surface railroad might be used by another, then would we, indeed, be placed in an embarrassing position, as we stand confronting a statute that has been in existence since 1839, providing that "it shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation, for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract." That is precisely what the Atlantic Avenue Company undertook to do in contracting with this defendant for the use by the latter of the former company's double tracks through a portion of a certain street in the city of Brooklyn. This statute was not pressed upon the attention of the court in the *Colonial Traction Co. Case*, because there it was not directly involved. Instead of a contract between two railroads by which one was permitted to use some portions of the tracks of the other, that was a proceeding by the one to condemn the right to use the tracks of the other, and was, by that other, resisted to the uttermost. On a motion for a reargument the possible effect of some of the expressions made use of in the opinion, in a situation like this, was pointed out, and the court promptly gave assurance that it had not decided to override the statute of 1839, that statute not being directly involved. This assurance was furnished by an opinion written by the learned judge who had spoken for the court in the decision of the case, and he said: "It is also suggested that our opinion has raised apprehension as to its effect as a precedent upon railroad leases and traffic agreements, of which there are said to be many now in force all over the state. It was not our intention to decide any case but the one now before us, which simply involved the standing of the plaintiff to make the application in question, and our opinion should be read in the light of that purpose. If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the court." We are thus brought to

the consideration of a question which may have been incidentally written about, but has never been decided by this court. It has never been decided because it has not been involved. Aye, more than that, it has not been considered; for there has been nothing in any situation actually presented to this court to suggest that such a question might arise. This defendant, relying upon the statute to which we have referred, entered into a contract, made in conformity with the provisions of such statute, by which it acquired the right to run its cars over some portion of the tracks of the Atlantic Avenue Railroad. The plaintiff, an abutting owner, sought to restrain the defendant from enjoying the privilege for which it contracted, but the courts have so far held that the defendant's acts were entirely legal, and that the plaintiff has no legal right or interest with which the defendant interferes through the use that it makes of the tracks of the Atlantic Avenue Railroad Company. That this decision cannot be questioned on principle is certain if it be the fact that at the time of the acquisition of the franchise over the street in question by the Atlantic Avenue Railroad Company such a statute as the act of 1839 was in existence, and was not in conflict with the constitution or some other statutory provision. All these questions were discussed by the court in *People v. Brooklyn, F. & C. I. Ry. Co.*, 89 N. Y. 75. The assignor in that case, as in this, was the Atlantic Avenue Railroad Company; in each case the right sought to be acquired by the defendant was the right to run its cars over certain tracks of the assignor company, and the justification for the contract according the right was the act of 1839 (chapter 218, § 1). It was claimed in that case that the act of 1839, by the authority of which the contract was made, was rendered invalid by the constitutional provision of 1875 (article 3, § 18), continued in the revision of 1894. But the court held that the act of 1839 was unaffected by that constitutional provision, in that it did not undertake to affect existing legislation, but instead to restrict legislative power as to future legislation. Said the court: "The whole scope of the section is to dictate to the lawmaking power what it may or may not do thereafter, what bills it may pass and what it shall not, and not at all to affect or act upon past legislation which at the time was entirely lawful." That decision has not been questioned in the slightest degree in any case to which our attention has been called, prior to the present review. But, as it is now challenged, a brief consideration of the reasons justifying it will not be out of place.

It is conceded that the act of 1839, entitled "An act authorizing railroad companies to contract with each other," has been continued in force from the time of its enactment to the present, and is now to be found in section 78 of the railroad law. Upon its incorporation into section 78 of the railroad law

by the revision of 1890, the act of 1839 was, with many other laws, in terms repealed by section 182 of the railroad law. Laws 1890, c. 565. Section 182, however, declared that: "The provisions of this chapter, so far as they are substantially the same as those of laws existing on April 30, 1891, shall be construed as a continuation of such laws, modified or amended according to the language employed in this chapter, and not as new enactments." Independently of this provision, under the settled doctrine of statutory construction, the effect of the revision of the statutes by a re-enactment of previous statutes would have operated as a continuance of the provisions of the former statute instead of a repeal and a new enactment. But the legislature, by the provision that we have quoted, took away all opportunity for question by enacting that such revision constituted a continuation of the enactments incorporated therein. Thus is fully supported the assertion that the act of 1839 has been in full force and effect from the day of its enactment to and including the present time. The act applies to both steam and street-surface railroad corporations, and authorizes both traffic agreements and leases. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692; *People v. Brooklyn, F. & C. I. Ry. Co.*, supra; *Woodruff v. Railroad Co.*, 93 N. Y. 609. It is unaffected by the provision of the constitution that "the legislature shall not pass a private or local bill in any of the following cases." Thirteen specifications follow, one of which contains, among other things, the following: "The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners." Const. art. 3, § 18, as amended in 1874 and continued in the revision of 1894.

Statutory enactments in existence at the time of the adoption of this provision of the constitution were not aimed at, for the reason doubtless that chapter 140 of the Laws of 1850 (section 28, subd. 5) provided that the assent of the corporation of a city was necessary to authorize the construction of any railroad upon the streets of a city, and chap-

ter 140 of the Laws of 1854 (section 1) prohibited the construction without the consent of a majority in interest of the owners of property upon the streets upon which a railroad is to be constructed. But as it was possible for the legislature to change the statutes in that respect, in the language of Judge Finch, in 89 N. Y. 75, "it [the constitution] commands the legislature not to 'pass' a private or local bill for certain specified purposes, and ordains that those purposes shall be accomplished through the aid of general laws, and then restrains their range by a further condition that even by a general law the legislature shall not authorize 'the construction or operation of a street railroad' except in certain cases." The framers of the amendment to the constitution of 1874 apparently saw no objection to the principle of the act of 1839; otherwise they would have prohibited the making of a contract with one railroad by another for the use of its tracks without the consent of the abutting owner. This they did not attempt to do, either in terms or by indirection, and yet they knew, or must be presumed to have known, the legislation pertaining to that general subject. The attempt was to place restrictions upon the legislative power, but, so far as the section quoted is concerned, it had relation only to the building of new roads, and necessarily to the acquisition of new franchises. It aimed, not at the destruction of vested rights, such as the Atlantic Avenue Railroad Company had acquired in the street in front of the premises of this plaintiff, either directly by overthrowing the statute, or indirectly by compelling the assignee under the contract to obtain the consent of abutting owners. Such consent was in fact given when the abutting owners first consented to the building of the railroad, for the consent was necessarily given in the presence of a statute declaring that the franchises would permit the corporation to contract with another railroad corporation for the use of its road. This assertion is based upon the assumption that the Atlantic Avenue Railroad Company acquired its franchise after the passage of the act of 1854, which required the consent of the abutting owners. We do not, however, rest our decision upon that ground, for we are not advised by the record of the date on which the Atlantic Avenue Railroad Company acquired the right to construct and operate its railroad on Bergen street, between Rogers and Nostrand avenues; but in any event, as we have already seen, both on reason and authority (*People v. Brooklyn, F. & C. I. Ry. Co.*, supra), the act of 1839 has not been affected by the constitution, and hence the Atlantic Avenue Railroad Company has a right to contract with another corporation for the use of its tracks. If the Atlantic Avenue road acquired its franchise after the act of 1854 had been passed, then the plaintiff necessarily consented to the making of such a contract, as we have already observed; if the fran-

chise was acquired before, that road, nevertheless, became vested with the right to make such a contract by the statute of 1839. The constitutional amendment of 1874 did not, as we have seen, attempt to take away that right, nor did it attempt to vest in the legislature the power to take it away by legislative enactment. Those provisions had relation solely to future legislation that might affect the creation of new corporations, and not the destruction of old ones, or any of the rights such corporations had secured under statutory authorization. If, then, it be true (as we shall attempt to show later that it is not) that the legislature has since the constitutional amendment of 1874 attempted to deprive the Atlantic Avenue Railroad Company and other surface-railroad corporations similarly situated of a valuable part of their franchises, such legislation is unconstitutional and void. If the purpose of the legislation under consideration was to deprive an assignee corporation of the right to use the tracks of another corporation without the consent of abutting owners, then the effect intended and actually accomplished (if the enactment be valid) is to burden what was an absolute right with a necessity for the consents of abutting owners before the right can be made available to the assignee corporation. Such a burden in practical effect might destroy that which was originally vested in the assignor corporation as a part of its franchise; for, as the law now stands, a railroad corporation desiring to use the tracks of another railroad cannot acquire from the municipality or the abutting owners a franchise to run cars over those tracks. Every part of the franchise was given to and acquired by the corporation constructing the railroad; no part of it was retained, nor any right to carve out of it another franchise, in whole or in part. The consent of the abutting owners that one railroad corporation should use the tracks of another could not, therefore, confer or contribute towards the bestowal of a franchise, and in the event of their refusal to consent they might very well claim that the appellate division is not authorized to grant consent in such a case under our present statutes, and thereupon insist that they were in a position to prevent the use of the tracks by the assignee corporation until their demands should be complied with. If, however, this contention should not avail, the appellate division might in the exercise of its discretion refuse to consent, and thus operation under the contract would be prevented. But if the burden were less onerous,—indeed, if it were only slight,—it would be beyond the legislative power to impose it.

It is well settled that a perfected railroad franchise, constituted either by direct legislative grant or by consent of local authorities and property owners in pursuance of the constitution and general laws, especially when followed by actual construction and operation, is a property right that cannot be after-

wards taken away or diminished, either by subsequent constitutional amendment or by legislative or municipal action, except in the exercise of the police power or the right of eminent domain. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 602, and cases cited. In that case Chief Judge Ruger, at page 41 of the opinion, says: "We will refer to a few only of the statutes on this subject from which the implication arises not only that the state intended to invest these franchises with the character of property, but also to enable their mortgagees, purchasers, and assigns to enjoy their use under an indefeasible title. Thus, railroad corporations, having been authorized to contract with other corporations for a qualified transfer of such franchises for terms unlimited except by the agreement of the parties. Laws 1839, c. 218. * * * The statutes cited, as well as others not specially referred to, indicate the general policy of the state to render such interests independent of the life of the original corporation, and transferable as property by means of judicial proceedings and otherwise, under certain restrictions not pertinent to our present purpose particularly to consider. *People v. Brooklyn, F. & C. I. Ry. Co.*, 89 N. Y. 84." Salability is an essential element of property, and the destruction or the diminution thereof is a taking of property that cannot be done except through the exercise of the right of eminent domain or of the police power. *Wynehamer v. People*, 13 N. Y. 378; *In re Jacobs*, 98 N. Y. 98; *People v. O'Brien*, supra; *Roddy v. Railroad Co.*, 32 App. Div. 311, 52 N. Y. Supp. 1025. In the latter case the court had under consideration the question now before us, and Mr. Justice Hatch, in delivering the opinion of the court, well stated the conclusion necessarily resulting from his argument, as follows: "The right or privilege to contract for its use with other railroads, and thereby derive a profit, was as much a part of its franchise as was the right to lay its tracks or operate its cars. This was a source of use which made its property and franchise valuable, and the corporation could no more be deprived of this right than the right of operating in any other respect as authorized by law." The salability of the property right in question is affected, and its value diminished, if not destroyed, if the assignee thereof cannot make use of it without the consent of the abutting owners. It therefore follows that if the legislation under consideration on its face attempts to prevent a railroad corporation from possessing the right to contract for the use of its road with another corporation, from conferring on that other the absolute right to make such use, it is wholly without authority and void, and for that reason the judgment under review is right. But it seems to us very clear that the legislature has made no such attempt; for there is no statute that has for its purpose the cutting down of railroad franchises so as to eliminate therefrom the element conferred by the statute of 1839. In-

stead of sections 91 and 102 being in conflict with section 78, they are in harmony with it, and together clearly state the legislative policy as it has been understood from the beginning by the profession and the courts. They mark out the methods for the creation of franchises, and, together with other sections, measure their extent. The legislation has relation to the creation of surface railroads, not their total or partial destruction. It points out on the one hand, how, if at all, a franchise to operate a street-surface railroad may be obtained. One of the necessary steps is the obtaining of the consent of the municipal authorities; another is that the consent of a majority in interest of the abutting owners shall be obtained, but, if it cannot, then the consent of the appellate division may be obtained in its stead, when the road may be constructed notwithstanding the refusal of the abutting owners to consent. Other sections declare the rights that are thus acquired, which together are called a franchise, and among those sections is section 78, which provides that one of the rights thus acquired is that of contracting with another corporation to lease to it the right to use its road. Thus, somewhat in advance of orderly argument, have I presented my deductions from a consideration of the whole subject. My justification, however, is in the hope that thereby the purpose of the statutes to be referred to may be more readily appreciated.

We have already seen that section 78 of the railroad law continued in force chapter 218 of the Laws of 1839. Indeed, we are all agreed in that respect, and it means much; for it points out that it has been the public policy in this state for a period of nearly 60 years to permit railroad corporations to contract with other railroad corporations for the use of their roads, a public policy unchallenged in any direction by the people, either through their organic law or through statutory enactments, unchallenged directly in any case by the courts, and challenged indirectly but once. Upon the subject of the granting of similar franchises the constitution has been the subject of amendment, and later of revision, but no single sentence can be pointed out that indicates a purpose of changing the established public policy so far as it authorizes railroad corporations to contract with other railroad corporations for the use of their roads. This section 78 of the railroad law, therefore, rests on sure foundation, and is buttressed by many more years of influence in railroad construction than the consent of the abutting owners, which was not deemed necessary in this state prior to the year 1854. This assertion may seem strange in the light of the attempt to subordinate every other feature of the railroad law to that of the consent of the abutting owners; but such consent has not been for a very long time really necessary; and, if it be refused, the consent of the appellate division may be had in its stead. Let us now look at the legislation up-

on the subject of consents. In the early history of the statutes the consent of local authorities and property owners to the construction of street-surface railroads in city streets was not required. The first appearance of legislation upon that subject was a single sentence contained in subdivision 5, § 23, c. 140, of the Laws of 1850, reading as follows: "Nothing in this act contained shall be construed to authorize * * * the construction of any railroad not already located in, upon or across any streets in any city, without the assent of the corporation of such city." This subdivision was amended by chapter 582 of the Laws of 1864; but the sentence quoted was not affected, and it was continued in the general railroad act of 1850 without change until its re-enactment in section 91 of the railroad law of 1890. It was not until 1854 that the legislature saw fit to require, as a condition precedent to the construction of a street-surface railroad in a city, the consent of a majority in interest of the owners of property abutting upon streets; but by section 1, c. 140, of the Laws of 1854 it was provided: "The common councils of the several cities of this state shall not, hereafter, permit to be constructed in either of the streets or avenues of said city a railroad for the transportation of passengers, which commences and ends in said city, without the consent thereto of a majority in interest of the owners of property upon the streets in which said railroad is to be constructed being first had and obtained." This sentence continued in force without change until it was re-enacted in section 91 of the railroad law of 1890. The next general legislation upon this subject was section 3, c. 252, of the Laws of 1884, which continued in force without amendment until its re-enactment in section 91 of the railroad law. Since the enactment of the general railroad law, sections 90 and 91 have been amended by section 91, c. 676, Laws 1892; chapter 434, Laws 1893; chapters 545, 933, Laws 1896; and by chapter 855, Laws 1896. A reference to the character of the amendments will not be serviceable, but such portions of existing sections 90 and 91 of the railroad law as are material to the present discussion read as follows:

"Sec. 90. Street Surface Railroad; General Provision. A corporation organized for the purpose of building and operating or extending a street railroad, or any of its branches, for public use in the conveyance of persons and property in cars for compensation, upon and along any street, avenue, road or highway, in any city, town or village, or in any two or more civil divisions of the state, must comply with the provisions of this article."

"Sec. 91. Consent of Property Owners and Municipal Authorities. Such railroad shall not be built, extended or operated, unless the consent in writing, acknowledged as are deeds entitled to be recorded, of the owners of one-half in value of the property bounded on, and also the consent of the municipal authorities

having control of that portion of a street or highway upon which it is proposed to build or operate such railroad shall have been first obtained."

We have thus given a review of the legislation in this state as to the necessity of consents of local authorities and property owners to the construction, maintenance, or operation of street-surface railroad tracks in streets. It is evident that the legislature, from the beginning to the end of this general legislation, has never intended to require consents of local authorities or property owners to the operation by one railroad company of its cars over the tracks of another railroad company by virtue of a traffic contract with such other railroad company, but that it intended to require such consents only to the construction, maintenance, or operation of new railroad tracks constituting either main lines, branches, or extensions. Giving to the phraseology of the statutes its ordinary meaning, we have a perfectly working harmonious system, one that accords not only with the professional understanding of its purpose, but with the history surrounding the development of the different branches of the law, until finally they were consolidated into one general act. When the legislature incorporated chapter 218, Laws 1839, into the general railroad act, and provided that it should constitute a continuance of that chapter, and not a repeal and re-enactment thereof, it made it perfectly clear that it was the legislative intent not only that such a right should thereafter be continued to all railroad corporations created under and by virtue of the provisions of the general law, but that it should preserve the statute from even an opportunity of controversy as to whether it was in violation of the spirit of the constitutional amendment of 1874. That amendment did not, as we have seen, affect past legislation, and therefore could not by any possibility be said to affect a provision of law upon that subject that should be continued in a general railroad law instead of being re-enacted. So, too, it continued the legislation upon the subject of the consents of the municipalities, and also the legislation upon the subject of the consent of the abutting owner. It is quite evident that it was the legislative understanding that these several enactments were in harmony with each other and could stand together, and there really does not seem to be any room for questioning it; but, if there were, it would be the duty of the courts to harmonize the enactments. No such effort, however, is needed. By the general railroad law, in order to acquire the right to construct, extend, or operate a railroad upon a public street there must be obtained—First, consent of the municipal authorities; second, consent of a majority in interest of the abutting owners, or, if that cannot be had, the consent of the appellate division. When these consents have been obtained, and the railroad corporation obtaining them has in all other respects complied with the com-

mands of the general railroad law, it acquires what is known as a franchise, and one of the important features of that franchise consists in the right to contract with another corporation for the use of its tracks, which right becomes a part of the franchise. Thus reading together the several sections of the railroad law (and we see no other way in which they can possibly be read except by eliminating absolutely from consideration the oldest and most firmly grounded of all the statutes we have referred to), we come necessarily to the conclusion that the court below was right in holding that the Atlantic Avenue Railroad Company, when it acquired its franchise, secured as a part of it the right to contract with another railroad company to use its tracks, a right that neither the municipality nor the abutting owner could take away or impair.

Already our consideration of the general subject has proceeded to unreasonable length, but it may not be out of place to state the point of divergence resulting in such totally different views. On the one hand, the underlying idea is that, in order to run over the tracks of another railroad, a railroad corporation must acquire a new franchise for that particular purpose, which, if true, would necessarily require the consent of the municipality and the abutting owners; while, on the other hand, it is that such railroad acquires a franchise as to streets upon which it constructs its railroad, but its right to use the tracks of the other railroad it gets by contract with the corporation owning the franchise, and all of it, which includes by the express terms of the statute the right to make a contract for such use. Let us stop a moment to see what is involved in the claim that a new franchise is required to operate on the tracks of another railroad. (1) It necessarily denies that the constructing railroad obtained by its franchise all that the statute provided for. (2) It assumes that there can be more than one franchise over the same right of way, and indeed as many franchises as there might be railroad corporations desiring its use. (3) That the right to confer it was reserved to the abutting owner, notwithstanding the statute positively declared it should pass to the constructing railroad. (4) That what the statute granted was not an absolute right, but something which might ripen into one provided the necessary consents could be obtained, notwithstanding the absence of a sentence, phrase, or word suggesting such a limitation. (5) That the right to contract for the use of its property conferred by the statute upon the constructing railroad is not interfered with by enjoining every other railroad corporation from making use of the tracks, although a contract for that purpose be obtained. That such a holding would be of far-reaching effect no one can doubt. That it would confer as a right that which at present is but a shadow, and deprive others of rights vested as firmly and as sacredly as any of the rights we treas-

ure and enjoy, there can be no doubt. And where is to be found the basis for this radical change in the well-understood law of the state,—this claim that, notwithstanding the statute invests a corporation with such a right, it is not available, because section 91 of the statute provides that “a street surface railroad, or extensions, or branches thereof, shall not be built, extended or operated unless the consent in writing * * * of the owners of one-half in value of the property” be obtained? The words “or operate” in that sentence are seized hold of to the exclusion of all the other portions of the railroad law, to destroy the right expressly conferred by another section. There is no rule of construction which will permit a court to give these words such an effect. The history which occasioned the incorporation of the words “or operate” does not suggest that it was intended for such a situation as we have here presented; on the contrary, it is well known that early in the history of street-surface railroad building it was quite common to construct extensions on Sundays or legal holidays, and then for the managers to say, “What are you going to do about it? You can’t tear up our tracks, and you can’t prevent us from using what is our own.” Hence a mandate of the constitution, and a statute depriving a corporation of any advantage by reason of such construction, by denying to it the right to operate in the absence of consents. The statutes, considered together, as we have already pointed out, show that it was intended to apply to the creation of new franchises, and the language employed is entirely appropriate to that end, and as thus construed it is in harmony with section 78. Special attention is called to section 102 of the railroad law, as clearly indicating the legislative understanding of the sense in which the words used by it were employed. It prohibits a street-surface railroad corporation from “constructing, extending or operating” its road in any portion of a street in which there is already a street-surface railroad, without the consent of the latter corporation, but authorizes it to use the tracks of the other street-surface railroad for a certain distance upon condemning the right to do so by proceedings in court. A franchise, in the full sense of that term, to operate in such a street, cannot be obtained without the consent of the other corporation, the municipal authorities, and abutting owners. But something that the corporation has can be obtained, viz. the right to run cars over its tracks in that street, and this by condemnation proceedings. The point of view from which it is possible to see in the words “or operate” such portentous meaning as to cause them to override and destroy rights vested by virtue of the command of solemn statutory enactments is taken through sympathy for the abutting owner. No statute has ever, in terms, conferred upon him an absolute right to prevent the operation of cars. He never had any consideration in the premises under

the laws of this state until the act of 1854, and from that day to this his refusal to consent has been of no avail if, in the judgment of the appellate division, the public interest required that a railroad should be constructed. But it is said that the language of the statute that was intended to measure out just the amount of consideration that should be paid to him does not do so in fact, because the potency of the words “or operate” enables him to claim as a right that he can prevent the use of the tracks in front of his premises by a new railroad under a contract with the old railroad, to whose construction he had consented. In no judicial opinion reaching such a conclusion have the provisions of the act of 1839 (now section 78 of the railroad law) received consideration, and it is submitted that when read in connection with the other provisions of the railroad law, as it is the duty of the court to do, and read for the purpose of ascertaining the true intent and meaning of the several provisions, the conclusion must be reached that this defendant has the right to use the tracks on the block in question by contract with the Atlantic Avenue Railroad Company. The judgment should be affirmed, with costs.

GRAY, J. (concurring). Although I was not present when the Colonial City Traction Case was decided (153 N. Y. 540, 47 N. E. 810), I should yield a loyal obedience to its authority, however much I might differ in my views from those expressed in that decision, if I thought it foreclosed the discussion in the present case. But I think it does not do so, and that the question of the effect of the act of 1839 is now so presented, under the facts, as to enjoin upon us, not a nullification of what was decided in the former case, but a consideration of whether the right possessed by a street-railway company to contract with another for the use of its track has been abrogated. The former case did not, necessarily, involve the present question. The opinion of the Chief Judge has pointed out the distinction between the cases, and I feel myself free to concur with him in the conclusions which he has reached.

VANN, J. (dissenting). On the 25th of October, 1894, the plaintiff, an abutting owner upon Bergen street, in the city of Brooklyn, brought this action to restrain the defendant, a domestic corporation organized under the general railroad act of 1890, from constructing, operating, or maintaining a surface railroad through Bergen street in front of his premises, upon the ground that it had not obtained the consent of the property owners as required by law. Upon the trial it appeared that on the 19th of June, 1894, the defendant received the consent of the local authorities of said city to construct and operate a street railroad through several streets, including one block on Bergen street, upon condition that it should comply with all the provisions of the

railroad law, but it had not obtained the consent of a majority of the property owners on said block or of the appellate division of the supreme court to the construction or operation of said road thereon. The Atlantic Avenue Railroad Company, organized in 1872, had for many years prior to the commencement of this action operated a double-track street-surface railroad along Bergen street in front of the premises of the plaintiff, who owned no part of the street. On the 13th of October, 1894, an agreement was entered into between the defendant and the Atlantic Company, which, among other things, provided that "the Nassau Company, for the purpose of operating its railroad on said portion of Bergen street [being the part in question], may use the tracks and wires of the Atlantic Company thereon, and may, upon and along said portion of Bergen street, place and maintain its feed wires upon the poles of the Atlantic Company, and shall pay the Atlantic Company a proper rental for such use of said tracks, wires, and poles." After the commencement of this action, and on the 2d of November, 1894, a second agreement was entered into between said companies, which provided that "the cars of the Nassau Company may be moved over the tracks of the Atlantic Company on Bergen street [through the block in question], and the Atlantic Company agrees to furnish the power to move the said cars on said portion of Bergen street. The Nassau Company agrees to pay the Atlantic Company annually for the use of said tracks and power such sum as the parties hereto may hereafter agree upon, and, if they fail to so agree, the annual compensation shall be determined as provided in section 102 of the railroad law." The action was tried at a special term of the supreme court, and the justice presiding held that the defendant, under "an agreement" (not specifying which), had "the legal right to operate its railroad over the tracks of the Atlantic Avenue Railroad Company in Bergen street, * * * notwithstanding the property owners upon Bergen street * * * have not given their consent to the construction and operation of the defendant's railroad; that the proposed operation by the defendant of its railroad on Bergen street is lawful, and that the plaintiff is not entitled to an injunction enjoining and restraining the defendant from such operation; that the defendant, not having the consent of the property owners on Bergen street, * * * is not entitled to construct a railroad thereon," and judgment was directed accordingly, without costs to either party. The trial court thus held that the consents of abutting owners were not required for the operation of a street railroad, as distinguished from the construction thereof, and the general term affirmed the judgment, one of the learned justices dissenting.

There is no dispute as to the facts, and the question presented for us to determine is whether the defendant had a legal right, as against the plaintiff, under the circumstances

stated, to operate its railroad upon the tracks of the Atlantic Avenue Company through that portion of Bergen street passing in front of the plaintiff's premises. The determination of this question requires us to consider section 18 of article 3 of the constitution (chapter 218, Laws 1839), and several sections of the railroad law. Said section of the constitution provides that "the legislature shall not pass a private or local bill in any of the following cases." Then follow 13 specifications, and among others the following: "Granting to any corporation, association or individual, the right to lay down railroad tracks." After this enumeration the section provides that "the legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners." Const. art. 3, § 18, as amended in 1874 and continued in the revision of 1894. The statute of 1839, entitled "An act authorizing railroad companies to contract with each other," provides that "it shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract." Laws 1839, c. 218. While this act was repealed in 1890, the repealing statute provided that the provisions of the railroad law, so far as they are substantially the same as those of laws previously existing, "shall be construed as a continuation of such laws, modified or amended, according to the language employed in this chapter and not as new enactments." Laws 1890, c. 565, § 182. By section 78 of the railroad law, the provision already quoted from the act of 1839 is repeated in *hæc verba*. Section 90 of the railroad law, so far as now material, is as follows: "The provisions of this article shall apply to every corporation which under the provisions thereof, or of any other law, has constructed or shall construct or operate, or has been or shall be organized to construct or operate, a street surface railroad, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons and property for compensation, upon

and along any street, avenue, road or highway, in any city, town or village, or in any two or more civil divisions of the state, must comply with the provisions of this article." Laws 1890, c. 565, § 90; Laws 1893, c. 434, § 90. Section 91, the next in order, provides that "a street surface railroad, or extensions or branches thereof, shall not be built, extended or operated unless the consent in writing, acknowledged or proved as are deeds entitled to be recorded, of the owners of one-half in value of the property bounded on, and also the consent of the local authorities having control of that portion of a street or highway upon which it is proposed to build or operate such railroad, shall have been first obtained." The rest of said sections are not material in this controversy, nor are the amendments passed in 1896 and 1896. Laws 1895, c. 545; Laws 1896, c. 855. Section 102 prohibits street-surface railroad corporations from constructing, extending, or operating their roads or tracks in that portion of any street in which there is already a street-surface railroad without the consent of the corporation owning and maintaining the same, except that any street-surface railroad company may use the tracks of another street-surface railroad company for a certain distance, varying with the population of the place where it is located, upon condemning the right to do so by proceedings in court. These are all the provisions of the constitution or statutes that are regarded as material to the determination of the question before us.

The act of 1839 must be regarded as having been continuously in force from the date of its passage until the present time, for, although that statute has been repealed in form, it has been continued in fact by consolidation with many others in the comprehensive act now known as the "Railroad Law." The statute of 1839, in connection with the constitutional amendment above quoted, received consideration from this court in *People v. Brooklyn, F. & C. I. Ry. Co.*, 89 N. Y. 75, where it was held that said act was not affected by the constitutional provision, which prohibits future legislation only, without reference to previously existing laws. In no other respect is that case regarded as analogous to the one before us, for it was an action brought by the state through its attorney general to restrain the defendant therein from running its cars upon Atlantic avenue in the city of Brooklyn. There was no defendant except the railroad proceeded against. The abutting owners were not parties, and their rights were not passed upon. On page 91 the court said: "It is the state which sues. No private citizen is seeking to vindicate his individual rights. That would present a very different case from the one before us. It is the state, representing the whole people, which seeks to restrain the defendant from exercising the right which the state, representing the whole people, expressly conferred." The case of *People v. O'Brien*, 111 N.

Y. 1, 18 N. E. 692, was also brought by the attorney general, while *Beveridge v. Railroad Co.*, 112 N. Y. 1, 19 N. E. 489, was brought by a stockholder, and in neither were the rights of abutting owners involved. The act of 1839 was doubtless passed with reference to steam railroads only, as no other kind was then in existence. It is questioned whether, as continued in force by section 78 of the railroad law, it has any other application, for it is not found in the article entitled "Street Surface Railroads." Assuming, however, that it now has a general application, the question remains whether the defendant, by virtue of its agreement with the Atlantic Avenue Company, can run its cars over the tracks of the latter in Bergen street, without the consent of the abutting owners or the approval of the supreme court. As stated in another form, the question is whether the running of its cars through its own operating agents, by means of the power furnished by the Atlantic Company on the tracks of the latter, is operating its road; and, if so, is such operation prohibited by constitution or statute, except on compliance with the conditions mentioned? In *Colonial City Traction Co. v. Kingston City R. Co.*, 153 N. Y. 540, 47 N. E. 810, we held that "the use by a street-surface railroad company of a few hundred feet of the intervening tracks of another company, to form a connection between the main portions of its own track, over which to run its own cars and transport its own passengers as part of a continuous route," was "an 'operation' of its road, within the meaning of the provisions of the constitution and of the statute." The question there presented was whether the Colonial Company could condemn the right to use the tracks of the Kingston Company to connect main portions of a line to be operated as an independent railroad without first obtaining the consent of the local authorities and the abutting owners. That case is, therefore, analogous to this, to the extent of determining what is meant by the phrase "operating a railroad." In discussing that question, we said, "If the appellant shall finally succeed in acquiring the right to run its cars for a short distance on the respondent's tracks, it will still be operating its own railroad, not that of another company, over that part of its route as well as any other. It clearly would not be operating the respondent's railroad, but using a portion of the tracks of the respondent to operate its own railroad. Two different companies cannot operate the same railroad at the same time, although both may use the same track in part to operate their respective roads. When the statute provides that 'any street surface railroad company may use the tracks of another street surface railroad company' upon certain conditions, permission to 'use the tracks,' implies use for the purpose of operating its cars thereon. Manifestly no other use is intended. A railroad is none the less in operation between two points because it runs its cars

for a part of the way over the tracks of another road. When a railroad corporation acquires the right to run its cars over a street, whether upon its own track or that of another, that right becomes a part of the railroad, and in exercising that right the corporation operates its own road. The operation of a railroad includes the running of cars, and when a company runs its own cars, receives its own passengers, and collects its own fares over a continuous route of four miles, and all the trackage belongs to it except a connecting link of a few hundred feet in the middle, which it acquires the right to use through the power of eminent domain, we think it is to be regarded as operating its own railroad over the entire route, within the meaning of the constitution and the statute. The prohibition is in the disjunctive, and is directed against operation the same as it is against construction." While in discussing that case language was used not applicable thereto, because it was a case of condemnation, but applicable to a case like this where there is a consent by one railroad to permit another to use its tracks, still the language above quoted was directly applicable and germane to the case then in hand. Upon the reargument we limited the effect of the decision to proceedings in invitum to acquire the right to use the connecting track of another company, but in no other respect did we modify our previous conclusion. 154 N. Y. 493, 48 N. E. 900. There is no difference between the two cases so far as the meaning of the word "operation" is concerned, except that in this case the power is furnished by the company owning the tracks, while in that case it was to be furnished by the company running the cars. I think the decision was correct, and that, unless it is distinctly overruled in an essential feature, we are bound to hold that the defendant under its agreement with the Atlantic Avenue Railroad, what road could it operate except its own? The courts below have held that a street-surface railroad may be operated upon a public street without the consent of a majority of the abutting owners or of the supreme court, notwithstanding the command of the constitution and the railroad law. As we said in the Kingston Case, "the consent required is not simply to the laying of the tracks, but also to the operation of the road. * * * An abutting owner might be willing to permit one company to operate its line through the street in front of his property, which would involve the passage of but three or four cars an hour, but not be willing that several companies should have that privilege, which might involve the

passage of a car every two minutes. It is not the laying of tracks, but the running of cars, that constitutes the chief burden, both upon the street and the property of the abutting owners. Consent to the burden of one road should, in reason, be limited to that road with whatever increase of business it may have, but should not be extended to as many roads as can crowd their cars into operation upon the street. It would be an unreasonable construction to hold that this is what the public authorities or the private citizens intend when they consent to the building and operation of a street railroad. Instead of an advantage to the public or to those owning property on the street, which is the inducement to obtain consent, it might result in a heavy and unexpected burden upon both, without any power to prevent it, and yet with no intention to consent to it. It would be a perversion of the consent given by extending it far beyond the intention of the parties." I do not wish to retreat from the position thus taken, which was concurred in by every member of the court who took part in the decision. The legislature had the power to prevent railroad companies from operating their roads without first obtaining the consents of the abutting owners, for it has all the power of legislation that the people can grant except as it is restrained by the constitution, which contains no prohibition upon the subject. *Koch v. City of New York*, 152 N. Y. 72, 75, 46 N. E. 170. The legislature exercised that power in the very act under which the defendant was organized, and the restriction was, therefore, a part of the charter which gave it the right to exist. By accepting the charter it became bound to comply with all the provisions of the railroad law applicable to corporations of its class. The prohibition was clear and distinct, for section 91 provides that a street-surface railroad "shall not be built, extended or operated" without the required consents. The operation of the road is as distinctly forbidden as the building or extension thereof. It is impossible to separate the prohibition from any one of the three acts of building, extending, or operating without violence to the language used. If a railroad cannot be built without the consents, it cannot be operated without the consents. The command of the statute applies with the same force to the one act as to the other. We have no power by construction to strike any of the forbidden acts from the statute, but it is our duty to give equal force to each. A forced construction weakens respect for the law and impairs the confidence of the public in the courts.

It is, however, contended that the right of the Atlantic Avenue Company to contract, under the act of 1839, for the use of its tracks by another road, was a property right of which it could not be deprived except by the power of eminent domain or the police power. If the contract had been made between the two roads before the passage of the act re-

quiring consents as a condition precedent to the operation of the defendant's road, a different question would have arisen, as to which I express no opinion. In this case, however, the prohibition was in force not only before the traffic agreement was made, but before the defendant was in existence, and it has no right to enter into the agreement without complying with the condition required by its charter. The Atlantic Avenue Company is not a party to this action, and its rights are not involved. If the legislature had the right to create the defendant, it had the right to restrict its power in any way that it saw fit, either by wholly preventing it from making certain kinds of contracts, or by preventing it from making them except upon a prescribed condition. A corporation can make no contract whatever except through the permission, express or implied, of the legislature. It is a "mere creature of law," and has no powers except those conferred by statute, either specifically or by necessary implication. When the legislature created the defendant it had the right to prevent it from operating its railroad, under a traffic agreement or otherwise, without the consent of the abutting owners or the procedure in court authorized in lieu thereof.

It is contended that, if we hold that a traffic agreement cannot be made between two surface-railroad companies so that one may operate its railroad over the tracks of the other without the consent of the abutting owners, the precedent will injure the value of railroad properties as well as the bonds secured by mortgages thereon in the hands of purchasers in good faith. The argument based upon inconvenience does not change the meaning of the statute, although in a case of doubtful construction it is worthy of attention. The meaning of section 91 of the railroad law, however, is not doubtful, and, if the managers of street-railroad corporations have misunderstood or disregarded it, the evil should be at once arrested. Moreover, those who have made investments in street railroads are not alone to be considered, but the thousands of abutting owners whose property is diminished in value by the constant running of cars before their doors are also entitled to consideration. The capital invested in street railroads is small when compared with the capital invested in homes that are disturbed, as well as accommodated, by the great traffic on these roads. The rights of both classes of investors are to be considered, but it is for the legislature, under the constitution, to so regulate their rights as to do the most good with the least harm. We must take the law as it is written, and, as we require obedience from others, must obey it ourselves. The legislature has not left the railroads in the hands of abutting owners, but, in lieu of their consent, has provided a reasonable substitute through judicial proceedings, and it is safe to assume that the railroad companies are quite as capable of taking care of them-

selves as the abutting owners. It is our province to declare the law, and I think we should discharge that duty in this case by holding that the railroad law prohibits the defendant from operating its road upon the tracks of another company, through a public street, without first obtaining the consents required by that act. The judgment should be reversed and a new trial granted, with costs to abide the event.

PARKER, C. J., reads for affirmance. All concur (GRAY, J., in memorandum, and BARTLETT and MARTIN, JJ., in result), except VANN, J., who reads for reversal.

Judgment affirmed, with costs.

(157 N. Y. 483)

GRAY et al. v. CENTRAL R. CO. OF NEW JERSEY.

(Court of Appeals of New York. Jan. 10, 1899.)
SALES—ACTION FOR NONACCEPTANCE—DAMAGES—INTEREST.

In an action for nonacceptance of a steamboat at a contract price, there having been no well-defined market value, interest could not be allowed on the damages recovered; the case being within the rule that on unliquidated demands interest is recoverable only if the amount might, with approximate certainty, have been ascertained.

O'Brien and Bartlett, JJ., dissenting.

Appeal from supreme court, general term, First department.

Action by John Gray and another against the Central Railroad Company of New Jersey. A judgment for plaintiffs was modified by the general term (31 N. Y. Supp. 704), and both parties appealed. Affirmed.

Jacob F. Miller, for plaintiffs. Robert Thorne, for defendant.

GRAY, J. This action was brought to recover of the defendant damages because of a breach of its contract to buy a steamboat. The plaintiffs had judgment upon the verdict of a jury, which awarded interest upon the sum in which the plaintiffs were found to have been damaged. Upon appeal to the general term, that court ordered a modification of the judgment, by reducing the verdict to the amount found by the jury, exclusive of interest, and affirmed the judgment as so modified. From the judgment of affirmance the plaintiffs and the defendant have appealed; the former because of the reduction in the amount of their recovery, and the latter because any recovery by the plaintiffs was sustained.

In so far as the judgment appealed from affirms the plaintiffs' recovery of damages for breach of the contract, I see no legal reason for disturbing it. The important question for us to determine arises upon the plaintiffs' appeal from the determination of the general term that the jury should not have been allowed to add interest to the amount in which

they found the plaintiffs to have been damaged. This being an action for the recovery of unliquidated damages, whether interest was recoverable therein depended upon how far the plaintiffs' demand was such that it was capable of being ascertained or computed, if only approximately, by reference to established market values. That is to say, if this case were one where, according to the evidence, it appeared that a steamboat, like the one in question, had a more or less well-established value in the market, so that, upon the indefensible refusal of the defendant to complete its contract of purchase, it could be said to have been chargeable with a knowledge of the damage sustained, actual or approximate, then the plaintiffs' recovery should carry interest, as matter of law. *McMahon v. Railroad Co.*, 20 N. Y. 463; *Mansfield v. Railroad Co.*, 114 N. Y. 331, 21 N. E. 735, 1037.

The evidence shows that this steamboat had been bought by the plaintiffs from the United States government, and was thereafter offered for sale by them as a secondhand steamferryboat. There was evidence given by two witnesses, called by the plaintiffs, as to what was the fair market value of such a vessel. But that there was a "market value," or "price," in the ordinary sense of those terms, for such an article, was not made out by the evidence, or, at least, not in a satisfactory or conclusive manner. The witnesses who testified upon the subject were competent to express an opinion as to what such a vessel was worth in her condition; but that would only go to prove what her actual value may have been, in the opinion of those familiar with the business of boat building, and would not, necessarily, show that there was any established market value or rate. From the evidence it would rather seem that the "market value" spoken of was merely synonymous with the "actual value." The instruction given by the trial judge to the jury was that the plaintiffs' damage must be measured by the difference between the contract price and the market value of the boat at the time she should have been received, and that, in addition, they were entitled to add interest to the amount found to be that difference. An exception was taken by the defendant to that instruction, and at the general term the court, in reviewing the judgment upon the appeal, was at liberty to determine upon the facts whether such an instruction with regard to interest was correct. If, from those facts, it did not appear to the court that the evidence justified a finding of there being an established market value, or rate, for such vessels, by reference to which the defendant might have ascertained the extent of the damage which the plaintiffs might sustain from its refusal to complete the contract, then, I think, the determination of the court, in striking out the award of interest from the verdict, should not be disturbed by us. I think, not only that there was a clear latitude for the exer-

cise by the general term of its judgment in that respect upon the facts, but that it could not be well said that those facts brought the case within the rule as to the allowance of interest upon unliquidated demands, as we must regard it to be settled by the decisions of this court. In the early case of *Van Rensselaer v. Jewett*, 2 N. Y. 135, the rule was laid down that, where a debtor is in default for not paying money, delivering property, or rendering services, in pursuance of his contract, he is chargeable with interest, from the time of default, on the specified amount of moneys, or the value of the property or services, at the time they should have been paid or delivered. That was a case where the action was for rent payable in specific articles. In the subsequent case of *McMahon v. Railroad Co.*, 20 N. Y. 463, where the action was to recover for work performed and materials furnished by the plaintiff in the construction of the defendant's road, the case of *Van Rensselaer v. Jewett* was referred to and carefully considered. Judge Selden said that "the old common-law rule, which required that a demand should be liquidated, or its amount in some way ascertained, before interest could be allowed, has been modified, by general consent, so far as to hold that, if the amount is capable of being ascertained by mere computation, then it shall carry interest; and this court, in the case of *Van Rensselaer v. Jewett*, went a step further, and allowed interest upon an unliquidated demand, the amount of which could be ascertained by computation, together with a reference to well-established market values, because such values in many cases are so nearly certain that it would be possible for the debtor to obtain some proximate knowledge of how much he was to pay. That case went, I think, as far as it is reasonable and proper to go in that direction. So long as the courts adhere even to the principles of that case, they are not without a rule which it is possible to apply." In *Mansfield v. Railroad Co.*, 114 N. Y. 331, 21 N. E. 735, 1037, where the action was for damages for breach of a contract to construct a grain elevator, Judge Bradley, with some care, reviewed the question, and the cases where it had been discussed, and he sums up the matter in this language, in referring to the doctrine of the cases: "So far as I have observed, it has not been extended to actions to recover unliquidated damages for breach of contract, unless the means are accessible, to the party sought to be charged, of ascertaining the amount, by computation or otherwise, to which the other party is entitled." It was held in that case, because the amount of the claim for damages was entirely uncertain, and was closely contested by the defendant, that the question of interest should have been excluded from the consideration of the jury upon the trial. These cases, and others which might be cited, in my judgment, have so far settled the rule in this state that we should not undertake at the present day to abrogate

it, and the careful consideration which it has received by the courts justifies us in refusing to give it any further extension.

Nor can it be said that adherence to the rule is pre-judicial to the rights of those who are situated as were the plaintiffs here. When the defendant refused to perform its contract, the plaintiffs could have brought an action against it to recover the contract price of the vessel, in which case a recovery by them would carry interest. Or they could have sold the vessel for the account of the defendant, and have brought an action to recover the difference between the amount realized upon the sale and the contract price, in which case a recovery would also carry interest. What the plaintiffs did, however, instead of adopting either one of these courses, was to retain the property as their own, and to bring this action for the damages sustained by the refusal of the defendant to perform its contract. They thus brought themselves within the operation of the established rule, so far as a recovery of interest was concerned, and failing to make a case, upon the evidence, in which interest became recoverable upon the amount of damages proved to have been sustained, the rule should control. I think the judgment should be affirmed, but without costs to the plaintiffs or to the defendant.

O'BRIEN, J. (dissenting). I agree with Judge GRAY on all the questions in the case except the question of interest. I think the ruling at the trial on that question was correct, and that the action of the general term in striking out the item of interest cannot be sustained. The right of the plaintiffs to recover interest as part of the damages has long been settled by numerous decisions of this court. The defendant agreed in writing to buy from the plaintiffs a ferryboat for \$15,000. The jury found that there was a breach of the contract on the part of the defendant in refusing to receive the boat when tendered in conformity with the contract, and they awarded as damages to the plaintiffs the difference between the contract price and the market value of the vessel at the time and place of delivery, with interest on that sum from the date of the breach. The trial of the action took place many years after the alleged breach, and the interest amounts to nearly twice the sum which was found to be the difference between the contract price and the market value. The learned general term held that interest was not allowable upon such a claim, and therefore modified the plaintiffs' judgment by striking out the interest and affirming the recovery for the remainder of the claim.

In an action to recover damages for the breach of an executory contract for the sale of personal property, the circumstance that the demand is unliquidated is no answer to a claim for interest on the sum which represents the difference between the contract price and the market value at the time of the

breach. If the amount which the party in default is bound to pay in satisfaction of the contract can be determined by computation or by reference to market values, then interest must be allowed, as matter of law, as part of the damages to be computed on the sum which the defaulting party should have paid at the time of the breach in order to make his contract good. In *Van Rensselaer v. Jewett*, 2 N. Y. 135, the rule is thus stated in the headnote: "Where a debtor is in default for not paying money, delivering property, or rendering services, in pursuance of his contract, he is chargeable with interest from the time of default on the specified amount of money, or the value of the property or services, at the time they should have been paid or rendered." In *Dana v. Fiedler*, 12 N. Y. 50, the court reiterates this rule in the following language: "Interest is a necessary item in the estimate of damages in this class of cases. The party is entitled on the day of performance to the property agreed to be delivered. If it is not delivered, the law gives, as the measure of compensation then due, the difference between the contract and market prices. If he is not also entitled to interest from that time as matter of law, this contradictory result follows: that, while an indemnity is professedly given, the law adopts such a mode of ascertaining its amount that the longer a party is delayed in obtaining it the greater shall its inadequacy become. It is, however, conceded to be law that in these cases the jury may give interest by way of damages, in their discretion. Now, in all cases, unless this be an exception, the measure of damages in an action upon a contract relating to money or property is a question of law, and does not at all rest in the discretion of the jury. If the giving or refusing interest rests in discretion, the law, to be consistent, should furnish some legitimate means of influencing its exercise by evidence, as by showing that the party in fault has failed to perform, either willfully or by mere accident, and without any moral misconduct. All such considerations are constantly excluded from a jury, and they are properly told that in such an action their duty is to inquire whether a breach of the contract has happened, not what motives induced the breach. That by law a party is to have the difference between the contract price and the market price, in order that he may be indemnified and because that rule affords the measure of his injury when it occurred; that he may not as matter of law recover interest, which is necessary to a complete indemnity; that nevertheless the jury may, in their discretion, give him a complete indemnity, by including the amount of interest in their estimate of his damages, but that he may not give any evidence to influence their discretion, — presents a series of propositions some of which cannot be law. The case of *Van Rensselaer v. Jewett*, 2 N. Y. 141, establishes a principle broad enough to include this case, and has freed the law from this as well as

other apparent inconsistencies in which it was supposed to have become involved. The right to interest, in actions upon contract, depends, not upon discretion, but upon legal right, and in actions like the present is as much a part of the indemnity to which the party is entitled as the difference between the market value and the contract price."

It may be observed that the claim involved in that case was for the recovery of damages for the nondelivery of merchandise purchased under an executory contract, and the only question discussed was whether interest was in the discretion of the jury, or belonged to the successful party as matter of right and as part of his indemnity for the breach of the contract. The rule was again stated in the case of *Adams v. Bank*, 36 N. Y. 255, in these words: "The principle which governs the allowance of interest was clearly enunciated in *Van Rensselaer v. Jewett*, 2 N. Y. 185, that, whenever a debtor is in default for not paying money in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him, and just indemnity, though it may sometimes be more, never can be less, than the specified amount of money, with interest from the time of the default until the obligation is discharged. And, if the creditor is obliged to resort to the courts for redress, he ought, in all such cases, to recover interest in addition to the debt, by way of damages. * * * But the courts in this and other states have, for many years, been tending to the conclusion, which we have finally reached, that a man who breaks his contract to pay a debt shall indemnify the creditor, so far as that can be done, by adding interest to the amount of damage which was sustained by the breach."

In actions to recover damages for the breach of a contract to perform work or labor, or to render services of any kind, the claim is generally unliquidated, and the amount of the indemnity for the breach can be determined only by proof of the value of the work or of the services. The value in such cases rests largely in opinion; and it frequently happens that there is no fixed market value upon which the damages can be based, and yet this court has held that in such cases interest is recoverable, as matter of law, upon the sum representing the damages from the time of the breach (*McCullum v. Seward*, 62 N. Y. 316; *McMahon v. Railroad Co.*, 20 N. Y. 463); and the rule has been applied in a great variety of cases where actions were brought to recover damages for the breach of a contract to buy or sell goods or to perform work or render services (*Mygatt v. Wilcox*, 45 N. Y. 306; *Mercer v. Vose*, 67 N. Y. 56; *White v. Miller*, 78 N. Y. 396; *De Lavallette v. Wendt*, 75 N. Y. 579; *Wilson v. City of Troy*, 135 N. Y. 104, 32 N. E. 44; *Selleck v. French*, 1 Am. Lead. Cas. [5th Ed.] 615).

I think this case is clearly within the prin-

ciple decided in these cases. The rule is based upon the most obvious principles of justice, and this case will furnish a good illustration of the injustice which the principle adopted by the court below sanctions. The defendant has had the use of the money which it was bound to pay to the plaintiffs in satisfaction of the contract for nearly 30 years, and at the end of this long period it has been held that it is not bound to pay the plaintiffs any more than at the day of the breach. The ancient rule, long since repudiated, that interest cannot be allowed upon unliquidated demands, when applied to a case like this, simply sets a premium on injustice. It encourages litigation, since the party in default upon his contract may always contest the claim without any liability to have it increased by the lapse of time, and all this upon the pretense that there was no way in which he could find out how much he ought to pay his neighbor for a violation of his contract.

But even that well-worn argument is not urged in this case, since resort is had to what may properly be called a pure fiction in order to sustain the decision below, depriving the plaintiffs of a great part of the damages which the jury awarded them. It is said that the general term may have disallowed the item of interest upon its view of the facts; that is to say, it may have held that there was no proof, or not sufficient proof, of the market value of the vessel at the time of the breach, and hence interest was not recoverable. I am not willing to impute any such reasoning to the learned court below. If there was no proof, or not sufficient proof, of market value, then the plaintiffs could not have recovered anything, for the plain reason that they failed to make out their case. The right to recover the principal sum depended upon precisely the same evidence as the right to recover the interest, and hence, if there was any defect at all in the proofs, it went to the whole judgment, and not simply to a part of it. We cannot, with any propriety, impute to the learned court below the conclusion that the proof of market value was sufficient to permit the plaintiffs to recover the principal, but insufficient to permit them to recover the interest, when both elements of damage depended upon precisely the same facts. If the plaintiffs failed to prove the market value of the vessel, there was no other proof in the case upon which a claim for damages could be based, and if they did prove it for one purpose they proved it for all purposes.

Now, as matter of fact, every one must know that it was impossible for the court below to take any such view of the case. The fact that the judgment was affirmed as to the principal sum and reversed as to the interest, when both items rested on the same evidence, shows very clearly that it did not attempt to do such an inconsistent thing. Certainly we should not assume that the learned court

below decided that there was proof of market value to sustain the verdict for the principal sum, but no such evidence to sustain the award of interest, without first looking into the opinion for such a strange conclusion. The ground upon which the court proceeded is there stated with the utmost clearness, and it is scarcely necessary to add that no such reasoning process as is now attributed to the court was even suggested. It was held as matter of law that interest could not be recovered, since the claim was unliquidated. That view has some support in the earlier cases, but to assume that the court denied the right to interest because the proof of market value was not sufficient, while it held just the other way as to the right to recover the principal, would hardly be respectful to that learned tribunal.

There is no possible ground to sustain this judgment by reference to the facts. It can be sustained only upon the ground that the learned court below placed it,—that interest on an unliquidated claim of this character cannot, as matter of law, be allowed in computing the damages. That, I think, was formerly the law, but the modern decisions, more in conformity with good sense and justice, have established a different rule. The rule now is that, in actions to recover damages for breach of an executory contract for the sale of personal property, the plaintiff is entitled to recover interest on the sum representing the damages at the date of the breach, when that sum can be ascertained by computation or by reference to market values. In this case that sum was ascertained by the jury, under the charge of the court, by reference to the market value of the vessel, and in no other way; and it therefore follows that the plaintiffs had the same right to recover the interest as they had to recover the principal. The judgment below, in so far as it modified the recovery, should be reversed, and the judgment entered upon the verdict affirmed, with costs in all courts.

HAIGHT, MARTIN, and VANN, JJ., concur with GRAY, J., for affirmance. BARTLETT, J., concurs with O'BRIEN, J., for reversal. PARKER, C. J., not sitting.

Judgment affirmed.

(187 N. Y. 495)

PEOPLE ex rel. JACOBUS v. VAN WYCK,
Mayor.

(Court of Appeals of New York. Jan. 10, 1899.)

APPEAL—MANDAMUS—MUNICIPAL OFFICERS—VETERANS—ASSESSORS.

1. An order of the appellate division refusing a writ of mandamus will not be reversed, where it does not state on what grounds the decision is based.

2. Laws 1896, c. 821, § 1, providing that honorably discharged soldiers and sailors shall be preferred for appointment and employment in the public service, and that no such person holding a position by appointment or employment

shall be removed except for incompetency or misconduct, applies to subordinate positions, and does not include an assessor in New York City, who is a public officer vested with discretion in the performance of his duties, and not subject to the direction and control of a superior officer; and hence, as to such person, Greater New York Charter, § 127, providing that veterans already in the service, who are entitled by law to serve during good behavior, shall be retained in like positions under the new municipality, does not apply.

Bartlett, J., dissenting.

Appeal from supreme court, appellate division, First department.

Mandamus by the people, on the relation of John W. Jacobus, against Robert A. Van Wyck, as mayor of the city of New York. An order granting a peremptory writ (53 N. Y. Supp. 71) was reversed by the appellate division (Id. 914), and relator appeals. Affirmed.

Elihu Root and Henry L. Stimson, for appellant. John Whalen, Theodore Connolly, and Terence Farley, for respondent.

PARKER, C. J. The order appealed from must stand, because: (1) In the language of this court in *People v. Jeroloman*, 139 N. Y. 14, 18, 34 N. E. 727, "the order of the general term of the supreme court [in this case, the appellate division] does not state upon what ground the decision is based, and the writ may have been refused as a matter of discretion. We do not look into the opinion for the grounds upon which the court proceeds in such cases." The record discloses that the orders in the two cases are in all essential respects alike, and therefore the decision in *Jeroloman's Case* is controlling in this one. (2) If the merits be open for consideration, then should the order be affirmed on the ground that the position of assessor in New York is not affected by chapter 821 of the Laws of 1896, entitled "An act respecting the employment of honorably discharged Union soldiers and sailors in the public service of the state of New York, relative to removals?"

The relator, Jacobus, was in office as one of the assessors of the city and county of New York at the time that city, with Brooklyn and various other communities, became united into one municipality, under and by virtue of chapter 378 of the Laws of 1897. Promptly upon the inauguration of the new city government, the mayor appointed five persons to constitute the board of assessors, as section 943 of the charter required him to do. But the appellant insists that, while the mayor obeyed that section of the statute, he disobeyed section 127 of the charter, which made it his duty to retain in like position, and under the same conditions, all persons who were, at the termination of the former municipal government, entitled to serve during good behavior, or who could not be removed except for cause; that the two sections should be read together, and, reasonably construed, they mean that, while the mayor has the power and it is his duty to appoint a board of assessors, still, if there should happen to be at the time of the

appointment an incumbent of a similar position who was an honorably discharged veteran, then he should select that person as one of his appointees.

The question that we think is involved on this review is whether the office in controversy is within the provisions of the so-called "Veteran Acts." This query is important to a class, for it involves the claim of right to a continuance in office in other than subordinate positions, during life, or good behavior rather, of what has become a very large class, namely, all honorably discharged soldiers, sailors, or marines who have served as such in the Union army or navy during the Rebellion or in the Mexican war, or who shall have served the term required by law in the volunteer fire department of any city, town, or village in the state. Laws 1896, c. 821; Laws 1898, c. 184. It is important to the public, for there are many positions in the various municipal governments in this state in which the incumbent is required to exercise a substantial measure of discretion, affecting the rights and interests of a large portion, if not all, of those interested in the municipality. It has generally been deemed wise to keep the terms of such officers comparatively short, so that the people may frequently have opportunity to make changes, provided the incumbents prove unsatisfactory. And they do frequently make changes, often for the better, when, if it were necessary to make out a cause for removal for incompetency or misconduct, such a result could not be accomplished. There are occasionally men who are competent and never guilty of such misconduct as would support their removal from office, and who yet ought not to fill one, because their conception of their own importance and special worthiness to discharge all the duties of any position without the least suggestion from others causes them to manifest such irritability at the inquiries of the timid touching their supposed rights as to persuade the latter to suffer small injustices rather than further prosecute their grievances. There are certainly quite enough men of this type, and of other types not much less objectionable, that could be readily suggested, did the limits of an opinion permit, to justify the plan, always approved by the people, of short terms for all important executive and legislative positions. But the refusal to grant life terms, unless removed for cause, has been in part at least placed upon a broader foundation, viz. the inherent difficulty attending the removal of a public officer for incompetency or misconduct. Individuals will ordinarily bear in silence the wrongs that an entire community suffer from one in authority, rather than take upon themselves the expense, annoyance, and notoriety incident to a prosecution. And, when prosecution in such a case is undertaken, it quite too often fails, because the dishonor attending removal is so great as to beget great sympathy for the accused, which, in turn, prompts the jurors to take a charitable view of the first offense and of minor offenses gen-

erally. It is not now of much moment, however, whether the reasons leading to the establishment of short terms were well or ill founded; for it is quite certain that the rule has been thoroughly ingrafted into our governmental system, and as yet no marked signs of disapproval of the settled order of things in that respect have appeared.

We approach, then, a consideration of the "Veteran Act," appreciating that, if it does apply to the leading appointive executive officers of a municipality, it is in contravention of the general public policy on the subject, and therefore it should be clearly made to appear that such was the legislative intent. Section 127 of the charter, upon which the relator relies, provides: "All veterans either of the army or navy or the volunteer fire departments, now in the service of either of the municipal and public corporations hereby consolidated, who are now entitled by law to serve during good behavior, or who cannot under existing law be removed except for cause, shall be retained in like positions and under the same conditions by the corporation constituted by this act, to serve under such titles and in such way as the head of the appropriate department or the mayor may direct." It will be observed from a reading of the statute that its purpose was to continue in the service of the city such members of the class to which it refers as would have been entitled to continue in office had the consolidation of the several municipalities into one great municipality not been brought about by the statute of which this section forms a part. In other words, it did not attempt to add to or take from the statutes then in force and intended for the protection of veterans and others within the class, but rather to secure those who could be removed from office only for incompetency or misconduct from being removed on the coming in of a new administration in the same city, in the event that a like position should be found in the new and greater municipality. So, we are to inquire whether the office of assessor is such an office that an incumbent of it would be entitled to continue in office despite the judgment and wishes of the incoming mayor, had New York not been merged in the greater municipality. The act upon which the relator relies is chapter 821 of the Laws of 1896, and is as follows: "Section 1. Section one of chapter three hundred and twelve of the laws of eighteen hundred and eighty-four, entitled 'An act respecting the employment of honorably discharged Union soldiers and sailors in the public service of the state of New York,' is hereby further amended so as to read as follows: '§ 1. In every public department and upon all public works of the state of New York, and of the cities, counties, towns and villages thereof, and also in non-competitive examinations under the civil service rules, laws or regulations of the same, wherever they apply, honorably discharged Union soldiers, sailors and marines shall be preferred for appoint-

ment, employment and promotion; age, loss of limb or other physical impairment which does not, in fact, incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties of the position involved. And no person holding a position by appointment or employment in the state of New York or of the several cities, counties, towns or villages thereof, and receiving a salary or per diem pay from the state or from any of the several cities, counties, towns or villages thereof, who is an honorably discharged soldier, sailor or marine, having served as such in the Union army or navy during the war of the Rebellion and who shall not have served in the Confederate army or navy, shall be removed from such position or employment except for incompetency or misconduct shown, after a hearing, upon due notice, upon the charge made, and with the right to such employé or appointee to a review by writ of certiorari; a refusal to allow the preference provided for in this act to any honorably discharged Union soldier, sailor or marine, or a reduction of his compensation intended to bring about a resignation, shall be deemed a misdemeanor, and such honorably discharged soldier, sailor or marine shall have a right of action therefor in any court of competent jurisdiction for damages, and also a remedy by mandamus for righting the wrong. The burden of proving incompetency or misconduct shall be upon the party alleging the same. But the provisions of this act shall not be construed to apply to the position of private secretary or deputy of an official or department or to any other person holding a strictly confidential position.'"

Chapter 716 of the Laws of 1894, of which the act just quoted is an amendment, contained the same provision as to preferences in appointment and employment, and declared that there should be no power of removal, except for incompetency and conduct inconsistent with the position held by the employé. Shortly after the law went into effect, an employé was removed from office, the appointing officer asserting that the person removed was incompetent, and his conduct was inconsistent with the discharge of his duties, that being the cause specified in the statute; and the courts held that, as there did not appear to be anything in the record tending to show that the power was exercised in bad faith and contrary to the public interest, the removal should be regarded as justified. The relator in that proceeding claimed that he was, under the statute, entitled to a prior notice and hearing, but it was held otherwise. Thereupon the chapter that we have quoted above was passed, for the purpose of so amending the act of 1894 as to prevent a removal until after a hearing upon due notice and upon charges made, with the right of such employé or appointee to a writ of certiorari; and this was the only important amendment. So, when this court considered the act of 1894 in

the case of *People v. Morton*, 148 N. Y. 156, 42 N. E. 538, it had before it this statute, so far as the question under consideration is concerned. Chief Judge Andrews, in delivering the opinion of the court, said of the statute: "It was intended to create a privileged class entitled to preferential employment in subordinate positions in the public service, the foundation of the preference being meritorious service, as soldiers and sailors in the war for the preservation of the Union."

* * * The act applies to employés of every grade in the public service or on the public works of the state, and the cities, towns, and villages thereof. The preference is given, not only in clerical or other subordinate positions, but to every person seeking public employment as a laborer on the canals or on the streets of a city, or in any capacity, however humble." This interpretation of the statute is in accord with the general understanding of it, and is borne out by the title of the act, which is "An act respecting the employment of honorably discharged Union soldiers and sailors in the public service of the state of New York, relative to removals." Certainly, the title does not suggest that public officers, vested with discretion in the performance of their duties, subject to no direction, but, on the contrary, empowered to appoint clerks and other subordinates, and fix their compensation, were intended to be affected by the statute, the purpose of which was stated in its title. And as the term "position" that the statute makes use of is an indefinite one, and may include officers, or be limited to cases of employés, it is proper to refer to the title of the statute to determine its scope and intent. *People v. Davenport*, 91 N. Y. 574; *People v. Spicer*, 99 N. Y. 225, 1 N. E. 680; *Bell v. Mayor*, etc., 105 N. Y. 139, 11 N. E. 495. Thus referring to the title, and according to it its proper weight, we readily perceive that the word "position," in the connection in which it is used, is intended to embrace all subordinate places in the public service, and that the statute is limited in its operations to those engaged in the public employment, as that term is ordinarily used, which does not include the more important municipal offices.

So far as we have observed, the view taken by Chief Judge Andrews, that the veteran acts apply only to subordinate positions, is in harmony with all judicial expression on the subject, and is not only justified, but required, by the statute, when its provisions are read in connection with its title. It will be difficult at times to determine whether a given position is a subordinate one or not, and possibly no rule can be laid down by which one class can always be readily distinguished from the other. But other cases need not be anticipated, as it is sufficient for our present purpose that there is no difficulty in determining that the position in question is not a subordinate one. The incumbent of the office of assessor is inferior in rank to that of the mayor by whom he is appointed; but he is not subject to the

direction of the mayor, or to any one else, in the discharge of the very important and quasi judicial duties pertaining to his office. His duties are enjoined by statute, and are within a smaller compass than those placed upon the mayor by the same act; but, within the limits defined by the statute for each officer, the one is not more independent in the discharge of his duty than the other. The mayor has subordinates, to whom he may, from time to time, assign duties, and direct the manner of their performance, but the board of assessors are not among them. On the contrary, the latter have subordinates, and as many as they deem necessary, whom they appoint and remove, whose salaries they fix, and whose duties they assign. The provisions of the charter on that subject read as follows:

"Sec. 943. The mayor shall appoint five persons, who shall constitute the board of assessors. The salary of each member of said board shall be three thousand dollars a year. The said board shall be charged with the duty of making all assessments, other than those required by law to be confirmed by a court of record, for local improvements for which assessments may be legally imposed in any part of the city of New York as hereby constituted. The said board shall appoint a secretary and such clerks and subordinates as may be necessary, and shall fix their salaries, not exceeding in the aggregate the appropriation made for such purpose in the final estimate. The secretary, clerks and subordinates of the board of assessors, of the mayor, aldermen and commonality of the city of New York, shall be and act as secretary, clerks and subordinates of the board of assessors herein provided for until and unless they shall be removed or superseded by the last-mentioned board of assessors." The comptroller, corporation counsel, and president of the board of public improvements constitute a board for the revision of assessments, with power to consider on the merits all objections made to any assessment. On such revision the board of revision may confirm an assessment, or refer it back to the board of assessors for revision and correction in such respects as it may determine (section 944); but it cannot in any other respect interfere with the actions, proceedings, or determinations of the board of assessors.

We have thus briefly called attention to some of the reasons that have led us to the conclusion that the members of the board of assessors are not subordinates, but together they constitute an independent body, charged with the performance of important public duties, in the doing of which they act upon their own responsibility, their acts being subject to no review except where objections are made to an assessment, when the board of revision may review their determination. But the power of review no more makes of the assessors subordinates than the power of review by the appellate division makes justices of the supreme court, sitting at chambers,

subordinates. The test by which to determine whether they are subordinates is not whether a review of such of their determinations as are quasi judicial may be had, but whether, in the performance of their various duties, they are subject to the direction and control of a superior officer, or are independent officers, subject only to such directions as the statute gives. If the latter, then the officer is not a "subordinate," as the term is used in the decisions bearing upon this subject.

It is urged upon us that this question is no longer an open one in this court, because of the decision in *People ex rel. Haverty v. Barker*, 1 App. Div. 532, 37 N. Y. Supp. 555, affirmed in this court without opinion, 149 N. Y. 607, 45 N. E. 1133. But no such question was before the court or considered in that case. The commissioners of taxes and assessments in *Haverty's Case* were apparently of the opinion that *Haverty* could be removed only for cause, and, after notice, proceeded to take evidence as to his competency to perform the duties of his office, and, at the termination of the hearing, removed him. On a review of the proceedings by certiorari, the action of the commissioners was reversed, because of errors upon the hearing in the admission and rejection of evidence. No other question was presented to the courts, and no claim made that the veteran acts were without application to the situation. The courts were simply asked to consider the questions presented by the exceptions taken on the hearing. The order should be affirmed, with costs. All concur, except *BARTLETT, J.*, dissenting, and *MARTIN, J.*, absent. Order affirmed.

(157 N. Y. 507.)

KINGSLAND v. FULLER et al.

(Court of Appeals of New York. Jan. 10, 1899.)

MORTGAGES—FORECLOSURE—SALE SUBJECT TO INCUMBRANCES—NOTICE—MISTAKE.

1. The notice of sale at a mortgage foreclosure declared that the sale was to be made subject to an agreement between a prior owner and another, and gave the date of the instrument, and the time and place of record. The purchaser inspected the premises before bidding, and saw that there was a vacant space of eight feet from an adjoining building. *Held*, that he was bound to complete his purchase, though, under said agreement, the lot was subject to an easement requiring said space to be kept vacant.

2. A notice of a foreclosure sale stated that the sale was to be subject to a certain agreement, giving the date and place of record, but mistakenly recited that an easement created by the agreement was in the westerly wall of an adjoining building, instead of the easterly wall. The purchaser inspected the lot, which had a vacant space of eight feet from said adjoining building, which was the easement created by the agreement. *Held*, that the mistake would not justify the purchaser in refusing to complete his purchase.

Bartlett and Haight, JJ., dissenting.

Appeal from supreme court, appellate division, First department.

Action by *Cornelius F. Kingsland*, trustee

of the will of A. C. Kingsland, deceased, against Edgar C. Fuller and others, to foreclose a mortgage. From an order denying a motion to compel Albert J. G. Riemann to complete his purchase at foreclosure sale, plaintiff appealed to the supreme court, which affirmed the order (53 N. Y. Supp. 624), and he again appeals. Reversed.

J. Frederic Kernochan and Henry F. Miller, for appellant. Henry Hoyt, for respondents.

O'BRIEN, J. The plaintiff made an application to the court in this action to compel the purchaser of premises sold at public sale under a judgment of foreclosure to accept the referee's deed, and complete his purchase. No objection is made to the foreclosure proceedings. They were in all respects regular, and the judgment valid. In pursuance of the judgment, the premises were sold by the referee at public auction, after due publication of the notice of sale. The purchaser admits that, some days before the sale, he read the notice; and it appears, without contradiction in the moving papers, that the notice and terms of sale were distinctly read at the sale. The purchaser, who now refuses to accept the deed, signed the usual memorandum stating that he had purchased the premises described in the annexed printed "advertisement of sale," and agreed to comply with the terms and conditions, and to complete the purchase on the 16th of March, 1898. The time was extended at his request until the 14th of April following. On that day the referee tendered to him a deed duly executed, in pursuance of the judgment, and in conformity with the terms of sale, and requested payment of the balance of the purchase money, with interest. The purchaser declined to receive the deed or complete the purchase, on the ground that there was a material clerical error in the description of the premises. The nature of that error will appear hereafter. No other excuse was then made by the purchaser for refusing to comply with the terms of the sale. Subsequently, the attorneys for the plaintiffs in the judgment instituted these proceedings, to compel the purchaser to accept the deed and to complete his purchase. The only answer to this application that the purchaser makes is that, by a written agreement of record between a prior owner of the premises and the owner of the adjoining house and lot, a charge or burden was imposed upon the premises, which is in the nature of an incumbrance, and, in so far as that instrument affects the title to the property, the referee's deed will not convey an absolute title in fee. It appears that the premises are correctly described by metes and bounds in the notice of sale. The sale was made subject to the agreement made between the prior owner and the other party to the instrument, giving the date thereof, and the time and place of record in the notice of sale. The question therefore is not whether this

instrument imposes a charge or burden upon the premises, but whether the purchaser was tendered a deed which conveyed to him the title which he purchased.

When mortgaged premises are described in the notice of sale, and are actually sold subject to an outstanding incumbrance, which is referred to in the notice and at the sale, the purchaser is chargeable with knowledge of the contents thereof. He is supposed in law to have read the instrument, and to have made his bid, and signed the conditions of sale with a view to its provisions; and he is also chargeable with knowledge of what was apparent and obvious upon the premises. *Riggs v. Pursell*, 68 N. Y. 193. The agreement or instrument which affects the title to the premises in question provided that the owner of the house and lot should have the right to insert, in the easterly wall of the adjoining house already built, the floor and roof timbers to the depth of four inches inward from the easterly face of said wall, and also to make such necessary additions to such wall for flue or fireplaces as should be necessary or convenient. In consideration of this privilege, the owner of the premises in question, his successors and assigns, became bound not to erect any building on their lands which should extend more than 45 feet in distance southwardly from the building line of Sixty-Fifth street, and that any back building or extension should be at least 8 feet distant easterly from the easterly face of the wall of the adjoining house. The covenants in this agreement undoubtedly ran with the land, and imposed restrictions upon its use. But since the instrument was distinctly referred to in the notice of sale, and at the sale, the plaintiff made his bid and signed the terms of sale subject to all of its provisions. He is presumed to have read the instrument, and to have become informed with respect to its contents, and thereby he was chargeable with notice of its effect upon the title to the premises. Moreover, it is undisputed that before the date of sale the purchaser went upon the premises, and inspected them. The vacant space of eight feet which the instrument provided for was perfectly apparent and obvious to every one. Therefore, the purchaser having made his bid with full knowledge of the situation, and also with knowledge of the contents of the instrument referred to in the notice, he cannot now refuse to perform his contract by reason of the existence of any charge imposed upon the land by the instrument. *Reed v. Gannon*, 50 N. Y. 345; *Jones, Mortg.* § 593; *Gilbert v. Peteler*, 38 N. Y. 165; *Kling v. Bardeau*, 6 Johns. Ch. 33; *Bank v. Delano*, 48 N. Y. 326. When a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that which he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence fa-

tal to his plea of ignorance. *Williamson v. Brown*, 15 N. Y. 362.

The purchaser, in his affidavit, in opposition to this proceeding, does not even allege that he was ignorant of the contents of the instrument referred to, or the actual, visible situation of the premises. There is really but one ground upon which he relies to resist this application for specific performance, and that is that the published notice of sale, while it correctly described the parties to the instrument, its date and place of record, referred to the "rights, privileges, and easements of said party of the first part in the westerly wall of the building adjoining said premises, derived through" said instrument. The agreement did not relate to the westerly wall of the adjoining building, but to the easterly wall. It referred to the westerly wall of the building in question, and to the easterly wall of the adjoining building. But, on reading the agreement, no one could be misled by this error of the printer or of the scrivener. The instrument is perfectly plain, and, since the purchaser actually visited and inspected the premises before his bid, the use of the word "westerly," instead of "easterly," in the notice describing the wall, is quite immaterial. Such an objection is entirely without substance, and altogether too frivolous to justify a refusal to perform the contract. It seems to me that upon this application the purchaser presented no substantial or reasonable excuse, based either upon law or facts, which justified the court in relieving him from the performance of his contract. The property was advertised and offered for sale expressly subject to every burden and restriction imposed by the terms of a recorded instrument clearly described in the notice of sale, which was publicly read at the sale before any bid was made. As already stated, the purchaser does not now allege that he was ignorant of the extent or scope of the restrictions or advantages created thereby; and, whether he was or not, the law charges him with such knowledge. He inspected the premises, and looked for himself, and thus acquired actual knowledge of the true situation. The owner of the house and lot offered for sale was restricted from covering the whole lot with a building, and was required, after using the adjoining wall, to leave an open space for light in the rear, 8 feet wide, beginning at a point 45 feet from the street line. It could not be very material whether this restriction applied to the east or the west side of the lot; but, if it was, then the purchaser was clearly informed just where it was by the description in the notice of sale, by the terms of the instrument therein referred to, and to which the title sold was made subject, and finally by his own examination of the premises. He saw the open space which the instrument provided for, and having seen it, with a view of bidding at the sale, cannot now claim, and does not claim, that he did not know whether it was on the east or the west side of the ad-

joining house, if that was of any consequence. The owner of the judgment under which real property is sold is entitled to know when the judgment has been executed, and whether the bidder is a real purchaser in good faith, or merely speculating on future contingencies, ready to perform if the bargain turns out to be a good one or the property advances in value, but equally ready to refuse performance in case of a decline. It is difficult to see how any mortgagee who sells property under a judgment of foreclosure, subject to some outstanding incumbrance, can ever know with any certainty whether he has made a sale or not, if the bidder, after signing his contract of purchase with full knowledge of the circumstances, can be permitted by the courts to refuse performance for reasons so devoid of substance and so apparently frivolous in character. The order appealed from should be reversed, and the application granted, with costs to the plaintiff in all the courts. *Al* concur, except *BARTLETT* and *HAIGHT, JJ.*, dissenting, and *MARTIN, J.*, absent. Order reversed, etc.

(157 N. Y. 520)

PEOPLE ex rel. FLOOD v. GARDINER,
Dist. Atty.

(Court of Appeals of New York. Jan. 10, 1899.)

VETERANS—REMOVAL—CONFIDENTIAL POSITIONS.

Subpoena servers appointed by the district attorney of New York county are frequently, of necessity, in the rooms of assistant attorneys while they are examining witnesses preparatory to criminal prosecutions. They are often made acquainted with the facts contemplated in the indictment of persons not under custody, and serve subpoenas on witnesses against such persons, and are intrusted with papers containing confidential information, and are required to serve notice on sureties for accused parties out on bail. *Held*, that the position of subpoena server is "strictly confidential," within the exception in Laws 1884, c. 312, permitting the removal of a veteran holding such a position at the pleasure of the appointing officer.

Haight, Bartlett, and Martin, JJ., dissenting.

Appeal from supreme court, appellate division, First department.

Application for mandamus by the people, on the relation of James J. Flood, against Asa Bird Gardiner, district attorney of New York county. From an order denying the application, relator appealed to the appellate division (53 N. Y. Supp. 451), which reversed the order, and defendant appeals. Reversed.

Asa Bird Gardiner, in pro. per. James C. Cropsey, for respondent.

PARKER, C. J. We approve of the decision made at special term, and the reasons assigned by Mr. Justice *KELLOGG* in support of it, and should not feel called upon to add a word, but for the statement of facts at the appellate division, which leaves out so much that is material that it does not seem to us to present the situation as it really is. The legal question involved is, was the relator's position in the district attorney's office

a strictly confidential one, as that term is used in the so-called "Veteran Act"? If it was, then the special term correctly disposed of the controversy; otherwise the appellate division did,—for the relator was an honorably discharged sailor, and entitled to be continued in the public employment in a subordinate position, unless that particular position belongs to the class covered by one of the exceptions to the veteran act (Laws 1884, c. 312), viz. "a position strictly confidential."

The district attorney of the city and county of New York has a number of assistants, who occupy positions created by statute, and whose salaries are fixed by law; but in addition to that he is obliged to avail himself of extra help, such as clerks and stenographers, and so-called "process servers," and others who serve in various capacities. The creation of such offices, and the designation of incumbents to fill them, have always been entirely discretionary with the district attorney, and have not been made subject to the state civil service rules, nor to the rules and regulations of any of the departments of the government of the city and county of New York; and the same is true as to that particular office in all of the other counties of the state. The expense of conducting the district attorney's office in the city and county of New York is made a county charge, but as a matter of convenience, and in anticipation of county charges payable by the municipality, appropriations are annually made by the board of estimate and apportionment to meet all necessary expenses. Regardless of such appropriations, however, the district attorney has always been, and still is, required to make appointments, and avail himself of the services of individuals, whose expenses are to be met by the county; the question of the capacity of the persons to be employed, and the compensation to be paid, resting in his discretion. By section 614 of the Code of Criminal Procedure, it is provided that a peace officer must serve any subpoena delivered to him, or the subpoena may be served by any other person. The duty of serving subpoenas is not by this section exclusively imposed upon the district attorney, who may require the work to be performed by peace officers, but he is authorized to designate other persons to perform that duty; and the reason for such authorization will quite satisfactorily appear, when we state some of the duties that are necessarily performed by persons so designated. In pursuance of the authority conferred by this section of the Code, the district attorney of the city and county of New York has designated a number of persons from time to time, as the exigencies of public business have seemed to require, to serve subpoenas, and perform a variety of other important duties, to some of which reference will be made. For convenience, the persons so appointed have been called "subpoena servers," and we shall hereafter speak of them as such, although there is no statutory office of that

character. It is a designation of a class of persons in the district attorney's office who are engaged in serving subpoenas, as well as in other work. The relator, while in the employment of the district attorney, was a process server. The subpoena servers spend the greater part of their time in the district attorney's office, where they must be ready to perform emergent services, which daily and hourly arise. They are constantly thrown in contact with the district attorney's assistants in their private offices, while such assistants are engaged in private examination of witnesses, whose mere presence, should it be known to a defendant or his counsel, might seriously prejudice the prosecution. The subpoena servers are frequently, of necessity, in the rooms of such assistants while examinations are being conducted, and are thus made aware of everything that occurs in the office. In the discharge of the duties of the office by the district attorney and his numerous assistants, it is often necessary to make subpoena servers acquainted with the facts of the contemplated indictment of persons not in custody, and they are intrusted with processes to bring before the grand jury witnesses against persons not in custody, which processes recite the name of the accused party; and thus it is important that the district attorney should be at all times able to give to these officers his implicit confidence, and to trust in their integrity and discretion. Otherwise, by connivance or collusion with interested defendants, prosecutors and witnesses for the people might be kept out of the way of him who would serve the processes upon them. Oftentimes, in order to secure the presence of delinquents, it becomes necessary to acquaint the subpoena servers with the general facts of the case. Frequently the subpoena servers are intrusted with the custody of papers containing confidential statements of facts and information, the disclosure of any part of which might frustrate the district attorney in the discharge of important public duties. These officers are also required to serve notices on sureties for accused parties out on bail, on sureties under recognizance, and counsel for defendants; and frequently, after a defendant has been convicted or has pleaded guilty, if the court suggest a desire for information touching the previous history of the defendant, with a view to determine the measure of punishment, witnesses are summoned and an investigation undertaken to acquire the desired information, and such service is almost invariably rendered by the subpoena server. These facts are undisputed, although the affidavit of the relator states some other facts.

It would be indeed unfortunate for the public service if the district attorney's office of New York county, or of any of the counties in this state, should be obliged to have continued in its service a person having to discharge duties of the character set forth in the affidavits presented by the appellant. Those

affidavits are in no wise contradicted. They are made by the district attorney and by Mr. Henry W. Unger, assistant district attorney, who has successively filled the offices of bail clerk, pardon clerk, secretary to the district attorney, chief clerk, and deputy assistant district attorney, before his promotion to his present position, and who has had, therefore, opportunity to thoroughly understand and fully appreciate the importance of the retention of employes in that particular service who can be implicitly trusted under any and all circumstances. If there was any mistake about the statements contained in these affidavits, the relator had opportunity to procure the affidavits of others who in times past have been connected with the district attorney's office in one capacity or another, but he did not do it; he left the affidavits unchallenged; and we must assume that they are not only true, but that they do not at all exaggerate the importance of maintaining absolute freedom in the district attorney to employ and discharge at will men upon whom are imposed such important duties. It is true that the relator, in his petition, undertakes to describe the duties that he personally had to perform; and he says that he never received any communication whatsoever from the district attorney of New York from the date of his appointment to the date of his discharge, and was never directed by that officer to do or perform any act whatsoever, and that the district attorney had never spoken to him, except on the day of his appointment. His duties he described as follows: "I was occasionally called upon by one of the assistant district attorneys of said county to explain why I had been unable to find a certain witness whom he wished to subpoena, and also occasionally sent by one of the assistant district attorneys to do some errand for him,—to carry his coat or bag, or some other package for him, to different places, or some like act." This is, doubtless, a true statement of what he did, and we must assume that it is what he had to do. But it in no wise contradicts the assertion of the affidavits made later, to which he had opportunity to reply, that the duties he performed were not all that were required of persons whom, for convenience, they term "subpoena servers." It indicates merely that the work that the relator did in fact do was about all that the then incumbent of the district attorney's office thought he should be called upon to perform. But because he could not discharge the general duties of the position of "subpoena server," so-called, or because he was not deemed worthy to discharge them, does not at all affect their confidential character.

The learned justice at special term, in discussing this question, said: "It seems that the duties of a subpoena server are determined by the district attorney. The services of the subpoena server may be dispensed with altogether, or the numbers may be increased or diminished as the needs of the district at-

torney's office may require. His duties are nowhere defined. That he comes in close contact with the secretly working machinery of the public prosecutor is apparent; indeed, he, in practice, has charge of an important part of this machinery; and, while his duties may, in a measure, be ministerial, he becomes possessed of many important secrets, to divulge which might easily cripple the best efforts of his superior. It is clear to one who understands the duties of a district attorney, the methods necessary to adopt to successfully prosecute criminals, that the relation of the highest confidence must exist and be preserved on the part of the prosecuting officer towards every subordinate who can or may under any circumstances be possessed of office secrets, or operate any part of the secret machinery of the office. Any weakening of this confidence, whether it arises through actual cause or suspicion of matters unprovable, at once affects the efficiency of the service. There is no cure for this but removal. To tie the hands of the district attorney would make it impossible for him to preserve between himself and his subordinates that essential element,—absolute confidence. I think the position to which the relator asks to be restored is properly classified when placed within the exception mentioned in the so-called 'Veteran Act,' and the writ should be denied."

These reasons, and the decisions of this court in *People ex rel. Crumney v. Palmer*, 152 N. Y. 217, 46 N. E. 328, and in *Chittenden v. Wurster*, 152 N. Y. 345, 46 N. E. 857, fully support, as we think, the decision of the special term. The order of the appellate division should be reversed, and that of the special term affirmed, with costs.

HAIGHT, J. (dissenting). An able and ingenious argument has been presented to show that a subpoena server occupies a strictly confidential relation to the district attorney. It falls, however, to convince me that such a relation was ever intended by the legislature. It is true that this controversy arises under the veterans' act, and not under the civil service statute. But, if the position is strictly confidential under that act, it follows that it must be so regarded under the civil service act. Taking this case as a precedent, what position is there in the civil service of this state, above that of common day-laborers, in which an equally forcible and plausible argument may not be made in support of the claim that it is confidential? Take the police in the cities of the state; secret orders to watch suspected places and arrest wrongdoers are of daily occurrence. Must policemen be held to be confidential? The bookkeepers in the various departments of the state must, of necessity, know much of the transactions of the office, and of the secrets contained in its files and documents. The comptroller is required to audit and pass upon the claims presented against the state. He relies upon his book-

keepers for the details in the items of accounts, and for information in reference to the merits of the claims. Are not these book-keepers also confidential? Where are we to draw the line? We said in *Chittenden v. Wurster*, 152 N. Y. 845, 46 N. E. 857, that the rule laid down in the *Crummey Case*, 152 N. Y. 217, 46 N. E. 323, ought not to be extended, and yet it is now proposed not only to extend the rule in that case, but to cast aside all previous rules and restrictions laid down by this court, and throw open the door so wide as to permit a great majority of the positions in the civil service of the state to be held to be confidential, and, consequently, not subject to the provisions of the statute requiring appointments to be made to office, so far as practicable, upon competitive examinations. It does appear to me that the holding that a subpoena server is a strictly confidential employé will result not only in virtually nullifying and rendering ineffective the statute, but the constitution as well.

PARKER, C. J., reads for reversal. GRAY, O'BRIEN, and VANN, JJ., concur. HAIGHT, J., reads dissenting opinion, and BARTLETT and MARTIN, JJ., concur. Order reversed, etc.

(157 N. Y. 574)

ARCHIBALD v. NEW YORK CENT. & H. R. R. CO

(Court of Appeals of New York. Jan. 10, 1899.)

APPEAL—REVIEW—GRANTS OF LAND UNDER WATER—PRIORITY—CONDITIONS SUBSEQUENT—APPURTENANCES—ADVERSE POSSESSION—SUFFICIENCY—EVIDENCE—TAXES—CHAMPERTY—RAILROADS.

1. Where a finding is supported by evidence, and is affirmed by the appellate division, it will not be disturbed by the court of appeals.

2. Where land under water is conveyed by the state to the owner of the adjacent uplands, it becomes appurtenant to the uplands, and will pass by a conveyance of the latter without specific description.

3. A railroad company cannot acquire title to land under water, title to which is in the state, by taking possession, filling it up, and filing a map thereof under Laws 1846, c. 218, § 4, and Laws 1848, c. 30, § 5, authorizing it to alter its line and cause a map to be filed.

4. A grant of lands by the state will not carry land previously granted to others.

5. A breach of conditions subsequent in a grant by the state can be taken advantage of by the state only, and then only in a direct proceeding for that purpose.

6. The survey of land and filing of a map by a railroad company are not a sufficient basis for an adverse possession within the statute avoiding grants for champerty.

7. One claiming by adverse possession must show a substantial inclosure, and actual occupancy during the required period, which is definite, positive, and notorious.

8. The rule that the true owner will be considered as constructively in possession unless the land is in the actual hostile possession of another under claim of title, applies with especial force to land not susceptible of actual occupation and cultivation.

9. Payment of taxes is no evidence of adverse possession.

Appeal from supreme court, appellate division, Second department.

Action by Mary H. Archibald against the New York Central & Hudson River Railroad Company. A judgment for plaintiff was modified by the appellate division (37 N. Y. Supp. 836, 1143), and defendant appeals. Affirmed.

Ira A. Place, for appellant. Ralph E. Prime, for respondent.

O'BRIEN, J. This action has assumed the form of one in equity to abate a nuisance: which it is alleged the defendant maintains upon the plaintiff's land, but in every substantial respect it is really an action at law to recover the possession of real property. There was no question made, however, in the courts below, with respect to the form of the action, and no question of that kind is raised here. The case must, therefore, be reviewed in this court in the same way as if it had been in form what it is in fact,—an action at law to recover the possession of real property. The principles of law that apply in such cases must control the disposition of this appeal.

The controversy is concerning the title and possession of two small parcels of land which originally were under the waters of the Hudson river. Each parcel is described in the complaint in a separate cause of action. The second parcel thus described, and which is known in the case as "Parcel No. 2," is not really a subject of controversy between the parties. The defendant does not dispute the plaintiff's title to that parcel, nor does it claim any title in itself. It simply alleges by way of defense as to that cause of action that the defendant was never in possession of the land, and was not in possession at the time of the commencement of the action. This is simply an averment which concedes the plaintiff's title, denies any interference either with her title or possession, and asserts that there never was any cause for this action in so far as it relates to this particular parcel. The trial court, however, has found that at the time of the commencement of this action the defendant was in possession of the parcel, and exercising certain acts of ownership over it, which justified the plaintiff in including it in the controversy. It is admitted that the defendant at least occupied some small part of it for a switchman's shanty, and, while there is some dispute in regard to its responsibility for the maintenance of the telegraph poles and wires, yet the case is in such condition that we have no right to say that the findings of the trial court are against evidence. They are supported by sufficient evidence, and, having been affirmed on review by the appellate division, they are not open to review here. The question, therefore, in regard to this parcel may be eliminated from the discussion, and the judgment below, in so far as it relates to that, cannot be disturbed.

The real controversy between the parties was with respect to the title to the first parcel described in the complaint, and which is known in the case as "Parcel No. 1." This, like the other parcel, was originally under the waters of the river, and the judgment below is to the effect that the plaintiff was entitled to recover an undivided half of it, the other half having been found to belong to the defendant. The plaintiff's title to this parcel is founded upon the patent from the commissioners of the land office to her remote grantors, bearing date the 18th of July, 1870. These grantors were then the owners of the adjoining upland, and apparently were entitled, for that reason, to a grant from the state. One or more of the mesne conveyances under which the plaintiff claims title does not specifically describe this parcel. It is, however, I think, included within general words of description sufficient to identify it so as to pass by a conveyance. Moreover, when land under water has been conveyed by the state to the owner of the adjacent uplands, the lands under water so conveyed become appurtenant to the uplands, and will pass by a conveyance of the latter without specific description. The grant from the state must, under the statute, be made to the upland owner, who, as such, has the prior right; and hence it would seem to be unnecessary, when the latter conveys his lot or farm to which the land under water is appurtenant, to describe the land under water separately. So we think that the various grants to the plaintiff from the parties to whom the state conveyed the parcel in question sufficiently described it to vest title in the plaintiff, in the absence of some prior grant or superior title in the defendant.

It is contended that the plaintiff failed to prove possession of the parcel in question in herself or predecessors in title within 20 years prior to the commencement of the action. But, having proved *prima facie* that she was vested with the legal title, then, under section 368 of the Code, her possession is to be presumed, and the possession of any one else is presumed to be under or in subordination to this title. It becomes necessary, therefore, to examine the defendant's claim of title in order to determine whether it has a better one than the plaintiff. The defendant is the successor in interest of a railroad corporation created by chapter 216 of the Laws of 1846. The two corporations were merged and consolidated in the defendant under an agreement made in 1869, authorized and confirmed by chapter 917 of the laws of that year. The defendant's claim of title originated in the filing of a map in 1868, which it is assumed covered the parcel in question. This map was made and filed under the fourth section of the act incorporating the defendant's predecessor in interest, and under the fifth section of chapter 30 of the Laws of 1848, which provides that if, at any time after the location by the railroad company of its track, and the filing of the map,

it should appear to the directors that the line, or some part thereof, might be improved, it should be lawful to alter the line, and cause a new map to be filed. It appears that shortly before the consolidation of the original railroad with the defendant in 1869, it proceeded to fill in the parcel of land under water which is now in controversy, and to prepare it for the uses of the corporation. There seems to be no dispute concerning the fact that the defendant or its predecessor did fill up that part of the river, and thus reclaimed the land in controversy. In other words, this parcel of land in its present condition was created by the defendant or its predecessor by filling in the shores of the river with earth. But no title has been acquired by the defendant in that way, or by indicating the parcel upon the map. The railroad company could not acquire title to land under water by taking possession of it and filling it up. The title still remained in the state, and the grant from the sovereign to the owner of the adjoining upland would carry the title to him. *Blakslee Mfg. Co. v. Blakslee's Sons Iron Works*, 129 N. Y. 155, 29 N. E. 2; *People v. Commissioners of Land Office*, 135 N. Y. 447, 32 N. E. 139; *Aldridge Case*, 135 N. Y. 83, 32 N. E. 50; *Saunders' Case*, 135 N. Y. 613, 32 N. E. 54; *Saunders v. Railroad Co.*, 144 N. Y. 75, 38 N. E. 992. But the defendant, on the 26th of December, 1873, procured from the commissioners of the land office a grant of certain lands under water on the shores of the river for its corporate purposes, and which grant, it is claimed, included the parcel in question. But, since the grant to the plaintiff's remote grantors antedated that to the defendant by three years, it follows that the state had no title at the time to the parcel in question that it could convey to the defendant. There is nothing in the language of the patent indicating that the commissioners of the land office supposed that they had any title to this parcel which they could convey, although the general language of the description may have covered it. The prior patent to the plaintiff's predecessors was a grant for commercial purposes, and upon condition that within a specified time the subject-matter of the grant should be applied to commercial uses by the construction of docks and other conveniences for the promotion of commerce. It is said that the grantees did not apply the property to any such uses within the time specified, and we will assume that that is so. But this does not enable the defendant to treat the prior patent as invalid or void, or permit an attack upon it in a collateral way. If there had been a breach of the conditions subsequent in the grant, the defendant is not at liberty to take advantage of that omission. The state only can claim the right to vacate the patent for breach of conditions subsequent, and then only in a direct action or proceeding for that purpose. The defendant can raise no such question in this court.

The learned counsel for the defendant con

tends that the prior patent from the state to the plaintiff's remote predecessors was void for champerty. This point assumes that when that grant was executed and delivered the defendant held the land adversely under a specific claim of title, but it had no record or paper title whatever at that time. The railroad had then filed a map and made a survey. But that clearly was not a sufficient basis for an adverse possession within the statute availing grants of land for champerty. The conveyances in the chain of plaintiff's title made in 1887 and subsequently are attacked on the same ground. The only specific title that the defendant then had was the patent of 1873, in which various parcels of land under water situate in different counties of the state are described in general language. But since the state had already conveyed the land in question to the parties under whom the plaintiff claims, the general description of lands in the grant to the defendant does not necessarily include the parcel in question. The patent to the defendant should not be construed as a grant of any lands which the state had conveyed by prior deed, and which it did not own when the conveyance to the defendant was given. Moreover, the trial court found all the facts with respect to adverse possession in the plaintiff's favor, and hence it is not open to the defendant to attack any of the deeds in the plaintiff's chain of title for champerty. *Crary v. Goodman*, 22 N. Y. 170; *Saunders' Case*, 135 N. Y. 613, 32 N. E. 54.

The principal question litigated upon the trial was under the defense of adverse possession, and that is the most prominent question presented by the argument in behalf of the defendant in this court. It is quite likely that upon the proofs in the case it could be held, as matter of law, that the defendant had been in the actual possession and occupation of the parcel since about the year 1887. But it was necessary, in order to sustain this defense, for the defendant to show that such adverse possession existed for at least 20 years prior to the commencement of the action, or from about the year 1873; and the trial court has found that it has not been in the actual, exclusive, or continuous possession, occupation, or use of the parcel for that period. Whether the defendant had held the premises adversely for a sufficient period of time to bar this action was, in its nature, a question of fact; though, if the facts and all inferences to be drawn from them were undisputed, it might be a question of law. The burden of proving adverse possession was upon the defendant, and it had to encounter, in the first place, the presumption of law that the plaintiff was in possession under her title derived through the patent of 1870 from the state. The defendant's possession was, at best, upon the evidence, somewhat equivocal. It cannot be said, as matter of law, upon the evidence in the record, that any one was in the actual possession and occupation of the parcel during

the period of 20 years prior to the commencement of the action. The land was not inclosed or cultivated, or put to the exclusive use of any one. When the defendant's right rests entirely upon a claim of adverse possession, it must be shown that there has been a real substantial inclosure and actual occupancy; a *possessio pedis*, which is definite, positive, and notorious. *Jackson v. Schoonmaker*, 2 Johns. 230, 235. The rule applicable to the defense of adverse possession was stated by this court in the case of *Bliss v. Johnson*, 94 N. Y. 242, in the following language: "The settled principles of law require courts to consider the true owner as constructively in possession of the land to which he holds the title, unless they are in the actual hostile occupation of another under a claim of title; and this rule is still more imperative in the case of wild and uncultivated tracts or lands which are not legally susceptible of actual occupation and cultivation. *Doe v. Thompson*, 5 Cow. 371; *Thompson v. Burhans*, 79 N. Y. 99. This possession is deemed to continue until there is an actual disseisin and expulsion of the true owner from the land; and when such dispossession terminates, if it does terminate within twenty years, the possession is, by construction of law, considered as having again returned to him who holds the legal title." The parcel of land in controversy was of such character and so situated that it was scarcely susceptible of actual occupation and cultivation. Passengers to and from the railroad station passed over it. It was, in a certain sense, connected with the grounds surrounding the station, and not until the defendant extended its railroad track over it, and set up a derrick upon it about the year 1887, can it be said that there was any actual occupation or possession by any one. It was, therefore, competent for the trial court to find, upon all the evidence, that there was no adverse possession by the defendant within 20 years sufficient to bar the plaintiff's right of recovery.

There is one other question in the case, and that arises upon an exception to the exclusion of proof offered by the defendant that it had paid the taxes on the parcel in question since the year 1880, and down to the year 1894. It was stated that this evidence was offered for the purpose of supporting and showing the defendant's claim of possession. Payment of taxes is no evidence of possession, either actual or constructive. *Greenleaf Case*, 141 N. Y. 395, 399, 36 N. E. 393. It has sometimes been regarded as an act which shows a claim of title, but not a claim of possession; and, if there had been any controversy in the case with respect to the nature of the defendant's claim of title, it would possibly have been competent for the defendant to show that it had paid the taxes on the land. But there was not, and could not have been, any question with respect to the nature of the title which the defendant claimed. It claimed under the patent of 1873, preceded, as it was,

by the filing of a map including the parcel in question, and by the act of filling up the space, and thus creating dry land as it exists. The payment of taxes by the defendant could have added nothing to its possession or its claim of title, and, since that fact could have had no influence on the issue of actual possession, the ruling of the court excluding the proof, whether right or wrong, was immaterial, and therefore the exception is not available to the defendant for the purpose of reversing the judgment. For these reasons we think the judgment below should be affirmed, with costs. All concur, except GRAY, J., absent. Judgment affirmed.

(157 N. Y. 513)

PEOPLE ex rel. ECKERSON et al. v. ZUNDEL et al., Town Assessors.

(Court of Appeals of New York. Jan. 10, 1899.)

TAXATION — ASSESSMENTS — MUNICIPAL CORPORATIONS — RES JUDICATA.

1. The fact that judgments based on proceedings to review assessments for two preceding years fixed them at the same sum does not bind the assessors on the third year, the assessors not being the same, and there being material changes in the value of the property of the town since the former assessments.

2. A town is not responsible for, nor bound by, the acts of its assessors, they being independent public officers, whose duties are prescribed by law; and hence a judgment based on proceedings to review their assessment for one year is not binding on the town for the next.

Appeal from supreme court, appellate division, Second department.

Certiorari by the people, on the relation of James Eckerson and others, against Charles H. Zundel and others, as assessors of the town of Haverstraw. There was a judgment of the appellate division (53 N. Y. Supp. 1111) affirming a judgment of the special term, entered on the confirmation of a referee's report, and defendants appeal. Reversed.

Irving Brown, for appellants. Ralph E. Prime, for respondents.

MARTIN, J. In 1888 this proceeding was commenced by certiorari to review the assessment for that year of a piece of the relators' real property, which contained about 28 acres of land, situated in the town of Haverstraw, N. Y. It was instituted under the provisions of chapter 269 of the Laws of 1880. The appellants were the assessors of the town for the year 1888. In 1886 and 1887 the land in question was assessed by the appellants' predecessors in office at \$140,000. In each of those years the relators sued out a writ of certiorari to review the assessment, and it was adjudged in each proceeding that it should be reduced to the sum of \$45,650. This case involves the assessment for the year 1888 only. Upon the day fixed by law for reviewing assessments, the relators applied to the assessors for a reduction of their assessment to the amount established as the value of the

property by the judgments in the proceedings for the years 1886 and 1887. This application was based wholly upon the claimed effect of those judgments, the relators insisting that they were binding and conclusive upon the assessors as to the amount of the assessment for the year 1888. The appellants, however, declined to make the reduction. This proceeding was then instituted; and subsequently, upon the writ and return, the court appointed a referee to take evidence pertinent to the issues, and to report such testimony, with his findings of fact and conclusions of law. The referee took proof, and made and filed the required findings and conclusions. The judgments which had been entered in the former proceedings were received in evidence, over the objection of the appellants. The special term held that the former judgments were binding and conclusive upon the assessors, and that it was their duty to have made the assessment for 1888 conform to those judgments as to the value of the property assessed. To that conclusion, and to the reception of the judgments in evidence, the appellants excepted. The court overruled the appellants' exceptions, and confirmed the findings and conclusions of the referee. It made his findings and conclusions those of the court, to the same effect as though they had been fully set forth in separate findings by it. Thereupon it adjudged that the assessment for the year 1888 was unequal, that the petitioners were thereby injured, that the valuation of \$65,000 should be reduced to \$45,650, awarded costs against the appellants personally, and ordered the assessment to be corrected in accordance with its determination.

The respondents rely upon the case of *People v. Carter*, 119 N. Y. 557, 23 N. E. 926, to defeat this appeal. In that case, where, in proceedings to reduce an assessment, it appeared that the assessments for the two preceding years had been made at the same sum, and in similar proceedings there had been a determination fixing the actual value of the property assessed, it was held that in the absence of evidence of an increase of value, or of some change affecting its assessable value, the former adjudications were binding upon the parties to them, upon a review of their assessment for the third year. The doctrine of that case is not applicable to this. There the parties were the same. The assessors were the same persons who made the preceding assessments, and it was under those circumstances that it was held that, upon a review of the assessment for the third year, the prior adjudications were binding upon them, unless there had been some change. But in the case at bar, of the three persons who were assessors in 1888, but one was an assessor in either 1886 or 1887, and he did not verify the roll. So that two of the appellants were not parties to the former proceeding at all, and the one who was took no part in making the assessment in question. Moreover, the court found that in 1888 the amount of the assess-

ments upon the real estate in the town was increased more than \$150,000 over those of the two preceding years; that there were numerous changes in the assessed values of the property therein; that the relators' assessment was \$75,000 less than in the previous years; and that changes had been made in the condition of the property in the town between the years 1887 and 1888. Thus, the distinction between the Warren Case and the case at bar is manifest, and the former does not sustain the decision in this case.

This leads us to consider, independently of that case, whether the judgments in the former proceedings were binding upon the appellants. We think the facts that a majority of the appellants were not parties to the former proceedings, that changes in the situation of the property of the town had occurred, and that the assessment of the relators' property had been reduced, disclosed a situation where the former adjudications were in no way binding upon the appellants in making the assessments for the year 1888. By statute, the appellants were required to assess all the real and personal property liable to taxation in their town at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor, to make oath that they had so estimated the value of the property assessed, and were made guilty of perjury if they swore falsely as to the assessment made by them. 1 Rev. St. pt. 1, c. 13, tit. 2, § 17, amended by Laws 1851, c. 176; Laws 1851, c. 176, amended by Laws 1884, c. 57, and Laws 1885, c. 210. They were bound to assess the property of the relators at its full and true value, and to verify their assessment. There was imposed upon them the duty of exercising their own judgment in appraising it, after employing all the tests ordinarily adopted for that purpose, including a personal survey or examination of the property. When they had exercised their judgment, their determination was subject only to such review or correction as the law prescribes. *People v. Coleman*, 107 N. Y. 541, 14 N. E. 431.

The contention of the respondents that the judgments in the proceedings for the years 1886 and 1887 were binding upon the town of Haverstraw, and hence controlling in this action, cannot be sustained. Assessors are independent public officers, whose duties are prescribed by law. *Mechem*, Pub. Off. § 28. They are in no legal sense the agents or representatives of the town, and the town is not responsible for their acts or omissions. *Lorillard v. Town of Monroe*, 11 N. Y. 392. Thus, the appellants, in assessing the relators for the year 1888, in no just sense acted for the town, or in any way bound it. What they did was to discharge the public duties imposed upon them by statute, for which the town was in no way responsible. Nor was the town liable for the acts of the assessors for the years 1886 and 1887. Those were independent acts of the persons who were assessors dur-

ing those years, and neither their acts nor any adjudication against them as such assessors were binding upon the town or the persons succeeding to the office. There was no privity between the persons who were assessors for 1886 and 1887, and those who were assessors during the year 1888, except so far as the same persons were assessors in those years. We are aware of no principle upon which it can be properly held that assessors, who are required to make a sworn appraisal of the value of the property assessed, are concluded by the action of other and preceding assessors, or by any judgment that may be recovered against them in relation to assessments of preceding years. The assessment for each year is a distinct proceeding, separate from other assessments; and a judgment against one set of assessors ought not to be held to control the action of other assessors who are subsequently elected. In *People v. Roberts*, 155 N. Y. 408, 413, 50 N. E. 53, this court held that the determination of an assessing or taxing officer, that an assessment made for one year should be canceled for the reason that the property was not the subject of taxation, was not conclusive upon succeeding officers against assessments made for subsequent years. In that case, in discussing the functions of assessing officers, this court said: "Officers upon whom the duty of making assessments for the purpose of taxation is imposed are independent public officers, exercising public powers, charged with special public duties, possessing no jurisdiction as agents of the state, and for whose acts the state is not liable. Nor is the state responsible for any mistake or misfeasance by them in the performance of their duty. The statute imposes on such officers the duty to perform certain distinct and definite acts." The principle of that case is adverse to the contention of the respondents, and seems quite decisive of the question under consideration.

The court below evidently fell into error when it held that the appellants were bound by the decisions in the proceedings to review the assessments for the preceding years, especially when they made the fact that they did not blindly follow those judgments in determining the value of the relators' property the ground of imputing to them gross negligence, bad faith, or malice as a basis for costs against them personally. Under the circumstances of this case, the former judgments did not deprive the appellants of the right, or relieve them from the duty, of exercising their judgment in the manner prescribed by statute. Until the relators in a proceeding to review the action of the appellants have established an inequality of assessment, they are not entitled to the relief sought. Obviously, the finding of the court below that the relators' property was assessed unequally, or for a greater sum than its value, was based upon the sole ground that the assessment was for a larger amount than

was determined by the courts to have been its value in the years 1886 and 1887.

We are of the opinion that, under the proof and circumstances of this case, the courts below erred in holding that the judgments entered in the proceedings to review the assessments for the years 1886 and 1887 were binding upon the appellants in making the assessments for the year 1888, and that the judgments of the appellate division and of the special term should be reversed, the report of the referee set aside, and the proceedings remitted to the supreme court for further consideration. All concur, except GRAY, J., absent. Judgments reversed, etc.

(157 N. Y. 528)

PEOPLE v. DUNN.

(Court of Appeals of New York. Jan. 10, 1899.)

JURY—STATUTE—SPECIAL JURY IN CRIMINAL CASES—CONSTITUTION—TRIAL BY JURY—DUE PROCESS OF LAW—DISCRIMINATION—JUDICIAL POWER OF COMMISSIONER—RIGHT OF APPEAL—LOCAL LAWS.

1. Laws 1896, c. 378, providing for a special jury in criminal cases, does not violate Const. art. 1, § 2, providing that the trial by jury shall remain inviolate.

2. Laws 1896, c. 378, providing for a special jury in criminal cases, and providing that the special jury commissioner in selecting the panel shall exclude persons having certain disqualifications which would subject them to challenge, is not unconstitutional, as denying defendant due process of law.

3. Such law does not discriminate against defendants in criminal cases by creating two classes of jurors.

4. Nor is it void as delegating judicial powers to the special jury commissioner.

5. Laws 1896, c. 378, providing for a special jury in criminal cases, and providing that the rulings of the trial court in admitting or excluding evidence upon the trial of any challenge for actual bias shall be final, is not unconstitutional, as depriving defendant of a right of appeal, since no such right is guaranteed by the constitution.

6. Laws 1896, c. 378, providing for a special jury in criminal cases in each county having a population of 500,000 or more, does not violate Const. art. 3, § 18, prohibiting private or local bills as to "selecting, drawing, summoning, or impaneling grand or petit jurors."

Appeal from supreme court, appellate division, First department.

Frank Dunn was charged with murder in the first degree, and he appeals from an order (52 N. Y. Supp. 968) granting a special jury. Affirmed.

The defendant was charged with the crime of murder in the first degree, and, upon being arraigned, pleaded not guilty. Thereafter the people applied for a special jury to try the issue, under the provisions of chapter 378 of the Laws of 1896. The application was granted by the appellate division of the supreme court in the First department. Leave to appeal to this court was then granted, upon the ground that a question of law was presented which ought to be here reviewed, and the following question was certified, to wit: "Is the act of the legislature embodied in

chapter 378 of the Laws of 1896, providing for a special jury in criminal actions in certain cases, a valid and constitutional exercise of legislative power?" The title of the act is as follows: "An act providing for a special jury in criminal cases in each county of the state having a certain population and for the mode of selecting and procuring such special juries; also creating a special jury commissioner for each of such counties and regulating and prescribing his duties." The first six sections of the act provide, with respect to the manner of appointment of special jury commissioners, "for each county of the state having a population of 500,000 or more," their terms of office, compensation, etc., and that they shall be furnished by the commissioners of jurors of the counties with lists of persons liable to serve as trial jurors, from which to select special jurors, as the justices of the appellate division shall direct, etc. Section 7 prescribes the qualifications for each special juror, namely: He must be: "(1) A male citizen of the United States of at least ten years' standing, and a resident of the county. (2) Not less than thirty nor more than seventy years of age. (3) In possession of his natural faculties, and not infirm. (4) Free from all legal exceptions; of good character; of approved integrity; intelligent; of sound judgment; able to read and write the English language understandingly; and well informed; and he shall have an adequate knowledge of the duties of a juror." Section 8 provides that the commissioner shall not select as a special juror any person by law disqualified or exempt from service as a trial juror; nor one who has been convicted of a criminal offense, or found guilty of fraud or other misconduct, by the judgment of any civil court; nor one whose conscientious opinions are opposed to the death penalty; nor one who doubts his ability to render an impartial verdict, uninfluenced by newspaper reading or hearsay; nor one whose opinions would prevent his finding a verdict of guilty upon circumstantial evidence; nor one whose prejudice against a law of the state would preclude his finding a defendant guilty of violating such law; nor one whose prejudice against any particular defense would prevent his giving a fair and impartial trial upon its merits; nor one who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that no presumption is thereby created against him. Section 9 empowers the commissioner with respect to inquiries and examinations into the qualifications of special jurors, etc. Sections 10, 11, and 12 provide for the keeping of a list of the jurors selected, for the preparation of suitable ballots, and for the exemption of special jurors from service as ordinary jurors, etc. Section 13 provides that either the district attorney or the defendant may apply to the appellate division for a special jury, where it is made to appear "that a fair and impartial trial of such

issue cannot be had without a special jury, or that the importance or intricacy of the case requires such jury, or that the subject-matter of the indictment has been so widely disseminated or commented upon by the press or otherwise as to induce the belief that an ordinary jury cannot, without delay and difficulty, be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case requires that the trial of such issue be had by a special jury." The other sections of the act are unnecessary to be referred to particularly, as they relate to the machinery for the drawing of special jurors and for the formation of a special jury, except that section 19 provides that the rulings of the trial court in admitting or excluding evidence upon the trial of any challenge for actual bias shall be final.

David Mitchell, for appellant. Asa Bird Gardiner and Charles E. Le Barbier, for the People.

GRAY, J. (after stating the facts). I think that the question which has been certified to us should be answered in the affirmative, and, were it not for the general interest and the importance which it possesses, we might well leave the discussion with the opinion as delivered at the appellate division. It must be perfectly apparent that the act has but the one direct object, of facilitating the administration of justice in criminal cases, by providing for the impaneling of a fair, competent, and impartial jury, without the difficulty and delay with which the procedure is so frequently attended. If it can be upheld as a valid exercise of the legislative power, it will confer no inconsiderable boon upon the community,—a consideration which comes somewhat to the aid of the rule that every intendment shall be in favor of the constitutionality of legislative enactments.

The appellant objects to this act as being unconstitutional and invalid upon several grounds. He charges that it is violative of the right of trial by jury; that it creates two classes of jurors and discriminates unequally; that it delegates judicial powers to the special jury commissioner to determine the qualifications of jurors; that it takes away the right of appeal from the ruling of the court on a challenge to the special juror; and that it violated the constitutional provision against the passage of private and local bills.

Is the statute violative of the right of trial by jury, as secured by the constitution of the state? That instrument provides that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." Article 1, § 2. This provision, as well as that which secures a person against deprivation of life, liberty, or property without "due process of law" (Id. § 6), were imposed by the people as restraints upon the

power of the legislature. The guaranty of the trial by jury is substantially the same as it stood in the original constitution, and its insertion simply preserved the right as it had been exercised before the adoption of the organic law of the state. This act does not appear, upon its face, to be violative of any constitutional provision; but, upon looking back of the adoption of a constitution and into the usages of the English people under the common law, do we find anything which would lead us to the belief that the creation of a system of special juries for the trial of causes is subversive of personal and inalienable rights? I find nothing, and we are certainly able to point out that special juries were known to the common law from early times. The institution of trial by jury is entitled to all the reverence which a custom deserves that is so historically interwoven with the growth and development of the rights of the English people. But it should be no superstitious reverence, warping and prejudicing our inquiry into the true significance and extent of the custom which has become a constitutional right. The system of trial by jury had its origin, through many sources, in the early institutions of the English people, and the provision in *Magna Charta* that no man should be deprived of his life, liberty, or property, or be condemned, "but by lawful judgment of his peers," has been generally credited with establishing, or defining, the right of trial by jury. The correctness of this belief is somewhat open to doubt, inasmuch as the provision more probably referred to the existing custom of a trial by peers. 3 *Reeve, Eng. Law*, 247; *Forsyth, Jury Tr.* 108. In *Reeves'* work it is said that trial by jury was not then known. But, however that may be, it did guaranty a procedure in trials, from which, it is generally agreed, eventually sprang the modern jury system as practiced under the common law of England. That the jury should be composed of 12 persons was due to the fact that 12 was a favorite number in the earliest times for various kinds of legal ceremonies or functions, and, for its great antiquity, was held in reverence. 1 *Reeve, Eng. Law*, 84 et seq. It is not without interest to observe that in the earlier times the jurors were witnesses, who pronounced upon their knowledge of the facts, and it was not until the times of Edward VI. and Queen Mary that the old procedure was softened by the selection of jurors dispassionate and indifferent between the parties, before whom witnesses were called to inform their consciences. 1 *Reeve, Eng. Law*, 271. That special juries were known to the common law is shown in *Forsyth's* work on *Trial by Jury* (page 173), and an instance is cited, in 1450 (29 *Hen. VI.*), of "a petition for a special jury; that is, jurors 'who dwell within the shire, and have lands and tenements to the yearly value of xxi,' to try a plea which it was supposed might

be pleaded in abatement on a bill of appeal of murder." In *Rex v. Edmonds*, 4 Barn. & Ald. 471, which was a criminal case tried before a special jury, it was observed of special juries by Chief Justice Abbott that it had not "hitherto been ascertained at what time the practice of appointing special juries for trials *ad nisi prius* first began," and that it was "introduced for the better administration of justice, and for securing the nomination of jurors duly qualified in all respects for their important office. It certainly prevailed long before St. 3 Geo. II. c. 25, and was recognized and declared by that statute, which refers to the former practice." See, also, *Thomp. & M. Jur.* § 12. Under the provisions of St. 6 Geo. IV. c. 50, the special jurors' list was made from the ordinary jurors' book, and from among those described in that book "as esquires, or as persons of higher degree, or as bankers or merchants." There were statutes which, in the reigns of Henry VIII. and of Philip and Mary, authorized the impaneling of bystanders, if a sufficient number of jurors returned by the sheriff did not appear, and such a practice was very early authorized in the United States courts. See *Rev. St. U. S.* §§ 804, 805.

From this brief inquiry, we would seem to be justified in saying that special, as well as struck, juries were resorted to at common law, and that the mode of selection of jurors was a matter for legislation.

It is to be observed that our constitution does not secure to the defendant any particular mode of jury trial, nor any particular method of jury selection. It secures, simply, the right to a trial by a common-law jury of 12 men. *Wynehamer v. People*, 13 N. Y. 378, 458; Judge Cooley, in his work on Constitutional Law (3d Ed. p. 321), says: "By 'jury' in the constitution is meant a common-law jury. This is a tribunal of twelve persons, impartially selected for the purposes of the trial, in accordance with rules of law previously established." In *Stokes v. People*, 53 N. Y. 164, 173, it was held that the mode of procuring an impartial jury "is regulated by law, either common or statutory, principally the latter; and it is within the power of the legislature to make, from time to time, such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury." It was further said that "the end sought by the common law was to secure a panel that would impartially hear the evidence, and render a verdict thereon uninfluenced by any extraneous considerations whatever." In *Walter v. People*, 32 N. Y. 147, it was held that the constitutional provision carried no limitation of, or restriction upon, the legislative power, except as to the right guaranteed, viz. a jury trial in all cases in which it had been used before the adoption of the constitution. In the same case it was considered that, even if the right to peremptory challenges were a right given by the common law, it could, nevertheless, be restrained, or

withheld altogether, at the legislative will. In *People v. Petrea*, 92 N. Y., at page 143, it was held competent for the legislature to regulate the mode of selecting and procuring grand jurors (citing *Stokes' Case*),—an institution equally regarded as one of the securities of civil liberty.

The system of trial by jury, as it grew up at common law, had its root in the endeavor to secure to a defendant a trial of his cause by a fairly-selected body of his equals, rather than by his rulers, or by magistrates, or by persons designated by them, and the usage finally obtained of taking 12 jurymen from the vicinage to judge upon the facts developed by the evidence of witnesses. The right was conceded to the citizen of having the judgment of an impartial committee, or body, of his fellow citizens, upon charges involving his life, or his liberty, or his property, and two elements became essential ingredients of the right, viz.: That the jurors should be 12 in number; and that they should be capable of deciding the cause fairly and impartially. I know of no authority, and I can perceive no good reason, for holding that there is some inherent right, superior to legislative regulation, to any particular mode by which the panel of jurors is returned from which the 12 are to be chosen to sit. The ordinary reading of the constitutional provision does not suggest it, and the decisions of this court in the cases referred to negative the idea. That the mode of selecting a jury is within legislative regulation, and that it is not necessary, in order to preserve the right of trial by jury, to preserve any particular mode of designating jurors, however such mode may have been previously in force, is a doctrine which has received the support of the decisions of courts in other jurisdictions. *Lommen v. Gaslight Co.*, 65 Minn. 196, 68 N. W. 53; *Perry v. State*, 9 Wis. 19; *State v. Slover*, 134 Mo. 607, 36 S. W. 50; and see, upon the question of struck juries, *Fowler v. State*, 58 N. J. Law, 423, 34 Atl. 682.

Whether, therefore, we examine the question in the light of authority, or of reason, we find that the object aimed at under the common law, and which the constitutional provision must be deemed to have intended, is the obtaining of an impartial jury of 12 men, and how that shall be accomplished is a matter within legislative regulation. Of what consequence is it that the trial jury is to be taken from a particular body of persons liable to serve as jurors, which the legislature has provided to be created out of the general body of the county, if the jurors who compose it, in fact, represent the citizens of the defendant's vicinage? Will it be any the less an impartial and a representative jury? While the ordinary commissioner of jurors is to draw from the citizens of the county and pass upon their qualifications and exemptions, the special commissioner of jurors provided for by this act is invested with additional power to facilitate the administration of justice by sifting out

from the general body drafted, and eliminating therefrom those who should not sit, or who would be disqualified from acting, in the criminal branch of the court, whether from the standpoint of the prosecution or of the defendant.

Nor can it be rightly said that the defendant is denied that "due process of law" which the constitution guaranties to him. There is no peculiar magic in these words. They were used in Magna Charta in the same sense as the words, "by the law of the land." 2 Co. Inst. 50. They mean law in its regular course of administration through courts of justice, and they secure to the defendant the benefit of those fundamental rules of the common law by which judicial trials are governed. *People v. Sickles*, 156 N. Y. 547, 51 N. E. 288. If the law of the state has made provision for the choosing of an impartial jury for the trial of a defendant, his trial is none the less by due process of law because the jury is composed of persons taken from the body selected by the special commissioner of jurors from the general list, as being generally free from those defects which must, or should, cause them to be rejected, either by the prosecution or by the defendant. That official merely exercises similar functions to those of the ordinary commissioner of jurors, and their exercise is restricted to the list as furnished to him by the latter. As it was observed in the opinion below, "the ordinary jury commissioner does not select the particular panel which is summoned to try a man. Still less does the special jury commissioner. Nor does the latter exercise any judicial function as to the qualifications of the 12 men who may ultimately be chosen to serve. His work is preparatory and tentative. In the end, the court alone exercises the judicial function of deciding upon the qualifications of the jurors, and it does so entirely unhampered by the previous examination and inquiry of the commissioner." I think that we may dismiss the objections that the defendant is deprived by this act of due process of law, or that it subjects him to any unequal discrimination, with the remark that, if he is secured a trial before an impartial jury taken from the county and conducted according to the law of the land, he has had all the benefit of the constitutional guaranty. No substantial right is infringed upon; for, as it is suggested in the opinion below, neither the letter nor the spirit of the constitution guaranties to him a chance to select an ignorant or partial jury.

It is quite to misapprehend the object effected by this act to say that it creates two classes of jurors, and therefore discriminates adversely, in its operation, upon those who are to be tried in the criminal branch of the court. The defendant is to be tried by 12 of those men, taken from the body of the county, whose general qualifications to sit in criminal cases have been, by the machinery of law, more particularly ascertained, but who are still to be subjected to judicial inquiry as

to their qualifications and impartiality, as in the case of an ordinary panel. We might assume that there were, in a sense, two classes of jurors provided for in the trial of civil and criminal cases, and still find nothing in the point which affects the validity of the legislation. As we have seen, special juries were known to the common law, and that the legislative body has the power to regulate the method of selecting jurors, within the limitations only that the right to a trial by an impartial jury is not taken away, has been repeatedly recognized in the courts.

Nor are any judicial powers delegated to the special jury commissioner. He exercises the same ministerial power that the ordinary commissioner of jurors does, in examining the qualifications of those liable to serve as jurors. He is the official created by the law, upon whom is devolved the duty of eliminating from the jury list persons declared by law to be unfit, or disqualified, to sit in criminal cases, and of having in readiness, for the time when a special jury is ordered by the court, for the better administration of justice, a list from which a panel of fit and impartial jurors may be chosen. To say, as the appellant does, that the special jury commissioner has the power to select the jurors who are to determine the case, is as incorrect as it is to say that the qualifications of each class of jurors are entirely different. In the first place, all that that official does, or can do, is to prepare such a list of jurors, from the general list of the county, as will enable, not only the prosecution, but the defense, to choose a jury for the impending trial, without that difficulty and delay which would be occasioned by the examination and necessary rejection of persons on the county list who are unfit to serve, morally, mentally, or physically. In the second place, while it is, in a sense, true that the persons upon the two lists are differently qualified with respect to service in the criminal branch, it would be incorrect to regard that difference as other than one based upon their fitness for the jury service demanded. The argument that the defendant has more chances for success, or more rights, before a jury drawn from the general list, is incomprehensible, unless upon the theory that he has some inherent or substantial right to the chance of making his defense before a jury composed of men whose ignorance, or partiality, or mental constitution, might result in a disagreement, if not in an acquittal. That would be reducing the constitutional guaranty to an absurdity.

As to the objection that the right to appeal from the rulings of the trial court upon challenges is taken away, the opinion below has sufficiently answered it in holding that no right of appeal is guarantied by the constitution, and that such a right is entirely within the legislative judgment. The defendant's right to challenge is not taken from him, as in the Nevada case cited by him (*State v. McClear*, 11 Nev. 39), but only the privilege

of an appeal from the rulings of the trial judge.

One more objection remains to be considered, which is that the act is repugnant to section 18 of article 3 of the constitution, providing that the legislature shall not pass a private or local bill as to "selecting, drawing, summoning, or impanelling grand or petit jurors." The first section of the act makes it applicable to "each county of the state having a population of five hundred thousand or more." The general operation of the law is subject, therefore, but to the one restriction, that the county where it is to apply must have a certain population. Within the cases of *In re Church*, 92 N. Y. 1, and of *Ferguson v. Ross*, 126 N. Y. 459, 27 N. E. 954, this must be regarded as a general and not a local act, although, by reason of the limitation based on population, only a limited number of counties of the state may receive its benefit. The *Henneberger Case*, 155 N. Y. 420, 50 N. E. 61, affords no support to the appellant's contention. It was decided upon its special circumstances, as it was perfectly proper to do. *People v. Newburgh & S. P. R. Co.*, 86 N. Y. 6. The act in that case was a most palpable device to evade the constitutional prohibition against passing local bills for laying out highways. It contained seven conditions, which had all to be met before it could become operative. The combination of restrictions was unprecedented in any other act, and was so remarkable as to practically localize the operation of the law, and so we held that it would be absurd to call it a general law. What was said in the course of the opinion sufficiently meets the point now made as to its bearing upon the present case, viz. that, "in so far as acts have been made, by their terms, applicable to counties, cities, towns, or villages, according to their limits of population, or to the cases of counties or towns which adjoin cities of a certain population, although, by strict construction, they might be deemed to contravene the section of the constitution, they will be saved from condemnation by the rule of construction which determines their validity as general laws upon a consideration of the special circumstances, and declines to view them as only local, because by reason of a limitation based on population, or some condition having reference to population, but one locality, apparently, may actually receive their benefits." There is nothing in this act to limit its general application in all cases where the population of the county has attained a certain size, and such a condition might reasonably be considered as possible generally. As it was pointed out in the *Henneberger Case*, there are good reasons why, in a general law, reference should be had to conditions of population. I think that the act in no respect operates to the prejudice of the defendant, and I am unable to see any good reason for pronouncing the legislation invalid. The question certified to this court should be answered in the affirmative, and the order ap-

pealed from therefore affirmed. All concur, except O'BRIEN, J., not voting. Order affirmed.

(157 N. Y. 534)

PEOPLE v. PLACE.

(Court of Appeals of New York. Jan. 10, 1899.)

HOMICIDE—MOTIVE—APPEAL—VERDICT—EVIDENCE—GENERAL OBJECTIONS—EXPERTS—CREDIBILITY—QUESTION FOR JURY—NEW TRIAL.

1. Where evidence of the circumstances attending a homicide, and of the cause of death, as given by medical experts, is conflicting, the verdict of a jury determining such issues is conclusive on appeal.

2. Unfriendly relations existed between defendant and deceased, her stepdaughter, and frequent quarrels occurred. On one occasion defendant said to her husband, who interfered: "You had better keep her out of my way. I will do her up." On the morning of the homicide, defendant and deceased quarreled; and deceased declared her intention to leave, and went to her room, on the top floor of the house, when defendant poured an acid into a glass of water, with which she went to deceased's room, continued the quarrel, and threw the contents of the glass into the face of deceased. A servant, hearing a woman scream, went into the house, and heard some one screaming on the top floor. Later, defendant appeared, discharged the servant, told her she was going to give up the house, and directed her to buy defendant a railroad ticket, and also to state to any who might call for deceased that she had gone down town. Defendant's husband returning home before she left, she struck him three blows with an ax, and his cries brought assistance, when deceased was found dead on her bed. There was a small wound on her temple, and the eyes were burned. Defendant was found in another room, in which gas was escaping from two burners she had torn down, and she stated she wanted to kill herself. Experts testified that deceased had been blinded before death, and died from smothering or asphyxiation. *Held*, that the evidence was sufficient to support a verdict of murder in the first degree.

3. The question of credit to be given the testimony of an expert which is contradicted is for the jury, and one with which the court of appeals has no authority to deal.

4. In determining whether a new trial of a capital case shall be granted, under Code Cr. Proc. § 528, authorizing the court of appeals to order a new trial if satisfied that justice requires it, such court is not authorized to review controverted questions of fact based on conflicting evidence.

5. Where evidence showed that defendant was very jealous of deceased, her stepdaughter, quarreled with her frequently, destroyed her clothing, compelled her to do manual work for which servants were paid, and would leave the table if her husband addressed conversation to deceased, which relations arose from the fact that defendant believed deceased retained the affections of her father to a greater extent than defendant, it is sufficient to justify a jury in finding a motive for defendant's killing deceased.

6. Where defendant killed her stepdaughter, evidence that on her husband's return, before she escaped, she assaulted him with an ax, is admissible in a prosecution against her for the homicide, as showing her demeanor and anxiety to conceal the crime, though it also tends to show her guilty of a crime other than that charged.

7. It is not error to overrule a general objection to a question which states no grounds, though such question was objectionable as asking for a conclusion.

8. Where defendant's husband had two bottles in his desk, one containing muriatic, and the other pyrogallie, acid, and defendant obtained a powder from one of these bottles, which she admitted was acid, which she dissolved and threw into the face of deceased, evidence of a chemist who analyzed the contents of the bottles, showing the character of the acids, is admissible to show that defendant had the means of committing one of the acts which attended, and may have induced, the homicide.

Appeal from Kings county court.

Martha Place was convicted of murder in the first degree, and she appeals. Affirmed.

On March 18, 1898, the defendant was indicted for the crime of murder in the first degree. It was alleged in the indictment that she deliberately, with premeditation, and from a deliberate design to effect the death of Ida Place, smothered and asphyxiated her, by forcibly placing, pressing, and holding over against and upon the head, face, mouth, and nose of Ida Place, so that she was unable to breathe and inhale air, certain bedclothing, bedquilts, pillows, and other articles, by reason and in consequence of which the said Ida Place, of such smothering and asphyxiating, died in the borough of Brooklyn on February 7, 1898. To this indictment the defendant pleaded not guilty, and the issue thus joined was brought on to trial before the county court of Kings county, and resulted in a verdict of murder in the first degree. Thereupon a judgment of conviction was entered, and the defendant was sentenced to the punishment of death, in the manner and at the place prescribed by law. From the conviction, sentence, and judgment the defendant appealed to this court.

Robert Van Iderstine, for appellant. Robert H. Elder, for the People.

MARTIN, J. In the month of August, 1893, the defendant became the housekeeper of William W. Place. At that time the family of Mr. Place consisted of himself and his daughter, Ida, who was about 14 years of age. Three months afterwards the defendant and Place were married. Anterior to the marriage the relations between the defendant and Ida were pleasant, and continued so until about a year afterwards. From that time, however, until the homicide, their relations were unfriendly, and quarrels frequently occurred. Dissensions also arose between the defendant and her husband, growing out of the disagreement between his wife and daughter. On one occasion, when her husband unexpectedly returned to his house after starting for his place of business, he found the defendant chasing Ida around the rooms, and when he remonstrated with her she said: "You better keep her out of my way, or I will do her up." Upon another occasion she said to him: "You had better keep her out of my sight. I have warned her. Let her beware." Their relations finally became so unpleasant that, during a portion of the time

before the homicide, Ida was boarded by her father away from their home. On Saturday morning, February 5, 1898, the defendant asked her husband for her monthly allowance of \$20, which he refused, and a quarrel ensued. Upon the next day she again asked for it, and he again refused. In the morning of Monday, which was the day of the homicide, just before her husband left for his place of business, the defendant said to him: "I want my money. I am going down town." To which he replied: "I shall not give you that money. I have said to you plainly what I mean, and I intend to stand by it this time." To this she answered: "If you don't give it to me, I will make it cost you ten times more." He then spoke to his daughter, and kissed her good-by. He bade his wife good-by, but did not kiss her. As he passed her in going from the house, she said something which he did not understand. Shortly after he left, the defendant went into the back parlor, where Ida was sitting; and a conversation occurred as to family difficulties, during which Ida declared her intention to go away and not return. The defendant asked her if her father gave her money that morning, to which she replied, "None of your business." The defendant then remarked, "When he gives you money, he won't give me any," to which Ida answered, "That is nothing to you," and picked up a cigarette box and threw it at the defendant, who then "went for her." Ida again declared her intention to leave and not return, and then went up stairs. A few minutes later the servant of the family, who was in the back yard, heard a loud scream, which sounded like a woman's. She went into the kitchen, then into the hall, and opened the door to the stairway, when she heard sounds like doors being locked and some one screaming on the top floor. It stopped while she was listening, and she paid no further attention to it. After this Ida was never seen alive, unless by the defendant. This occurrence took place at about a quarter after 8 o'clock. At nearly 9 o'clock the defendant called the servant to her room on the top floor, told her she was going to give up the house, and that she would have to leave. She then paid her wages, and five dollars in addition, as she had given her no notice of her discharge. Later she asked the servant to get an expressman to take her trunk to the station, to buy her postage stamps, and to go to the bank and get her bank book. The servant obtained the stamps and bank book, and took them to the defendant, who was then in her room. She also procured an expressman to take the defendant's trunk to the station or ferry. Although the servant expressed a desire to remain another day, to do the washing and ironing, the defendant requested her to leave the house before Mr. Place came home; saying that she did not want her to remain, because when he came he might ask her questions. At about 12 o'clock she requested the servant to

buy her a ticket for New Brunswick, which she did; leaving the house for that purpose at about half-past 12. She first told her she was going on the 3:15 train, but afterwards that she was going at another time. Her instructions to the servant were that, if any one rang the bell and asked for Ida, to say she had gone down town; and persons who called at the house in the afternoon were not admitted. The servant did not see Ida after Mr. Place left the house in the morning. She went from the house at about 5 o'clock in the afternoon, leaving the defendant there alone. The defendant told her that she was going to leave Mr. Place, because he had hurt her, and she could not stand it. During the afternoon the defendant wrote Mrs. McArran, "I will make you a present of my rubber plant and bicycle." That letter was received at half-past three, and Mrs. McArran soon after called at the house. She rang the bell twice, but no one came to the door. She then went to an adjoining house, rang the bell, and while waiting there the defendant's servant came out. When she saw her she went to the basement, and then asked to see Mrs. Place. Afterwards the latter came from the kitchen to the dining room, where Mrs. McArran was standing, and said she would see her in a moment; that they were hurrying to get away before Mr. Place came home. Mrs. McArran then said, "I received your letter, and came up to see what was the trouble." To this the defendant replied, "We had more trouble this morning, and I am going to leave him this time for good," and added that she wanted Mrs. McArran to have her bicycle. She finally said she was going to New Brunswick, and, when Ida was asked for, she replied, "He is boarding Ida out, and she hasn't been in to-day." Mrs. McArran then took the wheel and left the house, having seen no one except the servant and the defendant. During the afternoon, when the bell rang, the defendant told the servant not to go to the door.

The defendant's husband returned home about half past 6 p. m. As he entered the hallway he hung his coat and hat upon the rack, and started towards the back parlor, when he heard a noise at the head of the stairs, and saw the defendant coming down. As he stood there he almost immediately received a blow upon his head from a hatchet or ax in her hands, and soon received a second blow upon the side of his head. He cried out, and made an effort to reach the front door. While passing along the hallway he received a third blow upon his hand. He reached the door, cried "Murder!" when some one came to his assistance, and he was taken to a neighbor's house, and from there to a hospital. Thereupon several persons entered the house. Upon going to the third story, they found Ida in her room, lying dead upon her bed. Her face was partially downward, with the head towards the foot of the bed. There was no clothing upon it, except a sheet and pillow,

which were under her head or body. The other bedclothing lay in a pile upon the floor between the foot of the bed and the wall of the room. The body lay straight, one arm under the head, and the cheek resting upon the arm. No wounds were found upon the throat, or any portion of the head or body, except a small spot which was discovered upon the temple when the scalp was removed. This was not observable from the outside. Blood was oozing from her mouth, and there was a little upon the pillow or bedclothes. The body was cold and rigid, and the eyes discolored. The skin was redder than was natural, although not blistered. The eyes were burned so that the pupils were of a bluish color, and there was some discoloration around the mouth and the right side of the cheek. One of the chairs in the room was broken. The defendant was in the front room, lying upon the floor, with bedclothes over her head, and the gas was escaping into the room from two burners which she had torn down. When subsequently asked why she had turned on the gas, she replied that she wanted to kill herself; that she wanted to die. When found, she seemed unconscious, and was carried into the parlor below. The officers who discovered her attempted artificial respiration, and continued their efforts until the ambulance surgeon arrived and took charge of her. Upon a subsequent examination no external marks of violence was found upon the body of the decedent, except her face was congested, livid, puffed, swollen, and her eyes were partially open, the cornea protruding slightly, and there were crystals in the outer portion. Her lips were puffed and swollen, and there was considerable froth and blood-stained mucous between the lips and under the upper lip. Her tongue protruded between her teeth, which were slightly apart. The white of her eye had a dull blue-grayish cast. The organs of the body were found to be fairly healthy, with the exception of the eyes. There was a suffused condition of the skin of the face, and larynx, pharynx, and trachea were blue and congested. The brain was normal. The lungs, the heart, and all the organs of the body were healthy, except the eyes, which had been disturbed by some corrosive fluid or acid, causing a hardening or flattening of them so that their convexity had entirely disappeared. The dark portion of the eye was darker, and the white was also darkened. The lower lip was corroded. Under the scalp on the left temple was found a place about the size of a silver dollar which was discolored, and which was proved to have resulted from violence of some kind. An expert called by the people testified that the cause of the decedent's death was asphyxia; that she was blind before her death, which was occasioned by some corrosive substance; that the existing condition of the mouth, throat, tongue, trachea, larynx, and pharynx was produced by violence, and could not have occurred from any other cause. The proof

disclosed that the defendant's husband had in his desk in the house both pyrogallic and muriatic acid, that they were the only acids there, and that either would destroy the sight when thrown into the eye.

After her arrest, the defendant admitted in the presence of several officers and the matron of the prison in which she was confined that she had trouble with her husband on the morning of the day of the homicide; that Ida was in the back parlor with her father, and that she knew they were talking about her; that after her husband left she went upstairs, got a white powder out of his desk, put it in a glass, filled it with water, went to the door of Ida's room, asked why she was making so much trouble in the house, and, upon her replying that she was not making any more trouble than the defendant was, threw the contents of the glass into her face; that afterwards, and in the afternoon of that day, she went downstairs, saw an ax, brought it up with her, and gave as a reason for doing so that she knew her husband would "go for her" when he came home, and she wanted something with which to defend herself. When an ax in the possession of one of the detectives was shown her, and she was asked if that was the ax, she replied: "Yes; I think so. I thought it was smaller,"—and afterwards stated that she threw it out of the bedroom window into the yard. As a witness upon the trial, the defendant admitted having gone to her husband's desk and obtained what she said were salts, which were in a blue bottle, and used for headache; that she put them in a glass, filled the glass with water, and, after having some words with Ida, she threw the contents in her face. She also testified that she desired to leave the house before the return of her husband, for the reason that, if she did not, he would not let her go. She was afraid he would lock the door and keep her in the house. After she was taken to the jail she wrote another letter to Mrs. McArran, which contained the following: "My Dear Friend: The horrible news is circulated. I should prefer death to it. Through Will's threatening I was driven to desperation. But enough. I say no more about it."

The testimony of the witnesses called by the prosecution, when supplemented by the admissions of the defendant and the other proof given on the trial, was sufficient to establish the existence of the foregoing facts and circumstances beyond a reasonable doubt. While there was a conflict in the evidence, still, whether the transaction and circumstances were as claimed by the prosecution, or were as testified to by the defendant and her witnesses, was clearly a question for the jury. This is so, not only as to what transpired, but also as to the expert evidence relating to the cause of the decedent's death, and the correctness of the premises upon which the conclusion of the people's experts rested. Although the condition of the body of the decedent, as described by the witnesses who saw it after death,

presented most of the post mortem appearances of death by suffocation as they are laid down by various writers upon medical jurisprudence, yet it is said that the proof of the conditions of her body did not clearly establish the cause of death. But it must be remembered that homicidal suffocation is a crime which it is always difficult to detect, and the mere physical conditions of the body after death, as distinct and satisfactory indications of the fact, will seldom exist. Therefore resort must be had to collateral proof to show that the death was not the result of natural or accidental causes, and to show circumstances which point to the real cause, and the means employed to effect it. In the administration of the criminal law the people are generally required to rely to a great extent upon the collateral circumstances which point to the crime and the perpetrator of it. If the medical testimony of the prosecution was believed, the jury was justified in relying upon it in determining the issues in this case. Here, as is usual in cases where expert evidence is given, the defense called an expert, whose testimony, if true, tended to show that but little reliance was to be placed upon the testimony of the experts called by the prosecution. The question, however, whether the testimony of the people's experts was to be believed, or that given by the defendant's expert was true, was to be determined by the jury alone. Therefore, in the further examination of this case, we must assume that the foregoing facts and circumstances were properly established, and upon their sufficiency to justify it the conviction in this case must stand or fall.

The appellant insists that in considering the question of the sufficiency of the proof, and the inferences to be drawn from it, the doctrine of the case of *People v. Harris*, 136 N. Y. 423, 33 N. E. 65, should be applied. In that case it was, in effect, held that while, to justify a conviction for a crime upon circumstantial evidence, there must be positive proof of the facts from which the inference of guilt is to be drawn, and that inference must be shown to be the only one that can be reasonably drawn from the facts, yet where the evidence, taken together, leads irresistibly and exclusively to a conclusion of guilt, with which no material fact to establish it is at variance, it constitutes the higher form of evidence, and may not be disregarded by court or jury. We recognize this as a proper statement of the law which is applicable in this case. Applying the doctrine of that case to the facts and circumstances in this, it seems quite obvious that they justified the jury in finding the defendant guilty of the crime charged. To justify a conviction, the prosecution was required to establish the death of the person killed, and the fact of killing by the defendant, as alleged in the indictment. The former is required to be established by direct proof, and the latter beyond a reasonable doubt. Pen.

Code, § 181. The death of Ida Place was properly established as required by law, so that the only remaining question is whether the proof which tended to show that the defendant killed her was sufficient to justify the jury in finding that fact.

The evidence relied upon to establish the defendant's guilt was circumstantial. It, however, tended to show a motive on the part of the defendant for the commission of the crime, and the means employed were within her reach; that the opportunity to commit the offense existed; that she alone was in a position to have committed it; that she made false statements as to the presence of the decedent in the house; that she made preparations for flight, and had recourse to fraud and misrepresentation to conceal the death of the decedent; that she attacked her husband upon his return, to avoid discovery and prevent his interfering with her escape; that she admitted an attack upon the decedent by which she destroyed her eyesight; and that she attempted to take her own life. This proof points with almost unerring certainty to the defendant as the perpetrator of the crime charged. All the circumstances and proof in the case are not only consistent with her having killed her husband's daughter, but are inconsistent with any other conclusion. Therefore, after a thorough study of the evidence contained in the record, and a careful consideration of the facts and circumstances disclosed, we are led irresistibly to the conclusion that the verdict of the jury was fully justified.

The defendant contends that in examining this case the evidence of Dr. Henderson should be entirely disregarded. We know of no principle or rule of law which would justify us in disregarding that evidence. He was called and sworn as a witness upon the trial, and while the evidence of an expert called by the defendant, if credited, would tend to weaken and discredit his evidence in many essential particulars, still the question whether his testimony was worthy of credit, or the testimony of the defendant's experts should be believed, was a question for the jury, and one with which this court has no authority to deal.

The appellant also claims that a new trial should be granted under section 528 of the Code of Criminal Procedure. That section provides, "When the judgment is of death, the court of appeals may order a new trial, if it be satisfied * * * that justice requires a new trial, whether any exception shall have been taken or not in the court below." That provision of the statute has been several times under consideration, and this court has, with singular uniformity, held that, in determining whether a new trial should be granted under its provisions, it is not its province to review and determine controverted questions of fact arising upon conflicting evidence, but that the jury is the ultimate tribunal in such a case, and with its decision the court may not inter-

fere, unless it reaches the conclusion that injustice has probably been done. *People v. Cignarale*, 110 N. Y. 23, 26, 17 N. E. 135; *People v. Trezza*, 125 N. Y. 740, 26 N. E. 933; *People v. Kelly*, 113 N. Y. 647, 21 N. E. 122; *People v. Hoch*, 150 N. Y. 291, 44 N. E. 976; *People v. Youngs*, 151 N. Y. 210, 222, 45 N. E. 460; *People v. Constantino*, 153 N. Y. 24, 35, 47 N. E. 37; *People v. Decker*, 157 N. Y. 186, 51 N. E. 1018. Therefore, in examining the question whether a new trial should be granted upon the ground that justice requires it, it is our duty to assume the existence of the facts as they are established by the finding of the jury. When that is done, it becomes extremely difficult to discover any basis upon which we would be justified in holding that a new trial should be granted. The natural, logical, and almost inevitable inferences which arise from the facts and circumstances established by the evidence lead to the conclusion that the decedent's death was occasioned by violent means, and that the violent acts which caused it were perpetrated by the defendant. We think no other reasonable conclusion can be fairly drawn from the evidence contained in the record, and that the defendant is not entitled to a new trial upon that ground.

Another claim of the appellant is that, as the conviction in this case was based upon circumstantial evidence, it was important to establish a motive in the defendant for the commission of the crime, and that the people failed to show any adequate one. While it must be conceded that evidence of a motive had an important bearing upon the question of the defendant's guilt or innocence, yet the claim that no adequate motive was proved cannot, we think, be sustained. An examination of the record discloses that the relations which had existed between the defendant and Ida for several years had been of an unpleasant character, and that quarrels between them had often occurred during that time. It was also proved that upon two occasions, at least, the defendant made threats which indicated a purpose upon her part to injure the decedent; that at times the defendant would not speak to Ida, and would leave the table if Mr. Place entered into conversation with her; that she had hidden her underclothes and destroyed her hat; that she refused her company at the house, and required her to do manual labor for which servants were paid; that upon one occasion, previous to the homicide, Mr. Place had to force the defendant to the floor, to protect himself; and that there would be weeks when she would not speak to her husband. These relations between them arose principally from the fact that Ida retained the affections of her father to a greater extent than did the defendant, or at least she believed such to be the case. Her jealousy seems to have been intense, and to have influenced, if it had not controlled, the actions of her life for several years. One of the usual inducements to crime is the de-

sire of revenging real or fancied wrongs. The existence of such a condition of affairs may well be regarded as evidence of a motive upon the part of the defendant, even for the commission of such a crime. Although no motive would be sufficient to induce a perfectly just person to commit crime, yet the experience of courts has been that often the gravest crimes are induced by slight motives. We think the evidence in this case was sufficient to justify the jury in finding a motive for the commission of the offense.

Another alleged error upon which the defendant relies for a reversal relates to the admission of evidence as to what occurred between the defendant and her husband upon his return on the day of the homicide. The contention of the defendant is that this evidence was inadmissible because it involved proof of one crime to establish the defendant's guilt of another. It is an elementary principle of law that the commission of one crime is not admissible in evidence upon the trial for another, where its sole purpose is to show that the defendant has been guilty of other crimes, and would consequently be more liable to commit the offense charged. But if the evidence is material, and relevant to the issue, it is not inadmissible because it tends to establish the defendant's guilt of a crime other than the one charged. *People v. McLaughlin*, 150 N. Y. 365, 386, 44 N. E. 1017. The prosecution was allowed to prove an assault by the defendant upon her husband when he returned home, and when the death of Ida could no longer be concealed unless he was removed or his life destroyed. The demeanor, conduct, and acts of a person charged with crime, such as attempted flight, a desire to elude discovery, an anxiety to conceal the crime or the evidence of it, are always proper subjects of consideration, as indicative of a guilty mind, and in determining the question of the guilt or innocence of the person charged. *Greenfield v. People*, 85 N. Y. 85; *People v. O'Neill*, 112 N. Y. 355, 363, 19 N. E. 796; *Pierson v. People*, 79 N. Y. 424; *Rex v. Clewes*, 4 Car. & P. 221; *Reg. v. Crickmer*, 16 Cox, Cr. Cas. 701; *Wills*, Circ. Ev. p. 67; *Rosc. Cr. Ev.* (11th Ed.) p. 18; *People v. Hughson*, 154 N. Y. 153, 162, 47 N. E. 1002; *People v. Ogle*, 104 N. Y. 511, 514, 11 N. E. 53; *Hope v. People*, 83 N. Y. 418; *People v. Barber*, 115 N. Y. 475, 22 N. E. 182; *Coleman v. People*, 55 N. Y. 81; *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138; *People v. Shea*, 147 N. Y. 79, 41 N. E. 505; *Lindsay v. People*, 63 N. Y. 143, 154; *Ryan v. People*, 79 N. Y. 593, 601; *People v. Conroy*, 97 N. Y. 62, 80. In *Pierson v. People*, supra, where there was an intimacy between the prisoner and the wife of the decedent before and after his death, and the former disappeared 11 days afterwards, a clergyman was called as a witness, and testified that the prisoner and the wife of the decedent called at his residence some days after the homicide, and that he married them, after the prisoner stated under

oath that there was no legal objection to his being married, and this court held that the evidence was competent, although it tended to prove another crime than that charged in the indictment. In *Rex v. Clewes*, A. was indicted for the murder of H. It was claimed that A., having malice against P., hired H. to murder him, which he did, but that, H. being detected, A. murdered H. to prevent the discovery of A.'s guilt respecting the murder of P.; and it was held that the prosecutor might give evidence of the murder of P. *Wills*, in his work on Circumstantial Evidence, says: "Instances of killing to conceal other crimes are frequent, and evidence of the murder of one person may be given in evidence upon a trial for the murder of another, if such evidence tend to show that the prisoner might have had a motive arising out of the other murder for committing that with which he was charged." Without further examination of the authorities cited, it may be said that they establish a principle which sustains the ruling in this case. If the defendant, instead of assaulting her husband to prevent his discovery of the death of his daughter before she effected her contemplated escape, had set fire to the building to avoid detection, there would be no doubt, we apprehend, that evidence of that fact would be admissible. Again, if she had stolen a horse and carriage to aid her in her flight, there would be no doubt that evidence of it should be received. The jury may well have found that the purpose of her assault was to kill her husband, and thereby prevent a discovery of her crime until she had an opportunity to escape. We find no error in the reception of that evidence which would justify a reversal of the judgment.

Upon the trial William W. Place was called as a witness. After proving by him that the relations between the defendant and Ida were pleasant until the fall of 1894, he was asked this question: "Since the fall of 1894, what has been the general feeling, as you have observed it, between Mrs. Place and your daughter, Ida?" This was objected to, but without stating any grounds of objection. The objection was overruled, and the defendant excepted. The witness answered: "Seemed to be a general feeling of malice and hatred towards my daughter; denying her many privileges; denying her all home comforts." He then testified that as a rule his wife did not speak to his daughter in his presence, except on very rare occasions, and gave in detail evidence of facts and circumstances tending to show that the defendant entertained feelings of malice and hatred towards her. He testified as to their quarrels, and the manner in which the defendant treated Ida, including the threats she made. The appellant now insists that the admission of that evidence was error, as the witness was allowed to characterize and give his opinion as to a series of actions, conversations, and course of conduct between two persons, other than himself, ex-

tending over a period of years. In the first place, it is to be observed that no such grounds of objection were stated. The attention of the court was in no way called by any objection to the form of the question, or to the fact that it involved a conclusion or opinion. The objection was simply general, and such as would naturally lead to the belief that it was intended to merely raise the question of the admissibility of evidence showing the relations which existed between the defendant and Ida. Such evidence was competent as bearing upon the question of the defendant's motive, and, if she desired to object to the form of the question, her objection should have plainly stated that ground. It is at least doubtful if at the trial the defendant's counsel had in view the question which he now raises as to the admissibility of the evidence. As a general rule, to entitle a party to review the rulings of a trial court upon the question of admitting or rejecting evidence, there must have been a proper objection taken to the evidence when offered, and an exception to the ruling made thereon. It is well-settled law that the decision of a trial judge overruling a mere general objection to evidence will be sustained on appeal, unless it clearly appears that there is some ground of objection which could not have been obviated if it had been specified, or unless the evidence called for was, in any aspect of the case, incompetent. *Quinby v. Strauss*, 90 N. Y. 664. Applying this rule to the question under consideration, we are of the opinion that the objection taken was not sufficient, and that the defendant's exception to the ruling does not present the question which he now argues. Moreover, it is obvious that no substantial rights of the defendant were prejudiced by the reception of this evidence. Its manifest purpose was to show the relations between the defendant and Ida, and that was done by proof of their specific acts, conversations, and declarations. Although the question objected to was answered, it is manifest that the facts upon which the answer was based were given, and that the jury must have understood the answer as based upon those facts alone. We find no error in this ruling which would justify a reversal under the provisions of the Code of Criminal Procedure, which requires us to give judgment on appeal without regard to technical errors or exceptions which do not affect the substantial rights of the parties.

Another exception relied upon by the appellant was to the evidence of Henry V. Walker, a chemist, who analyzed the contents of the two bottles that were in the desk of Mr. Place, where the defendant went to obtain the powder which she dissolved and threw into the eyes of the decedent. We think this evidence was properly admitted. The proof showed that the defendant's hus-

band kept in his desk muriatic and pyrogallie acid; that she went there, and obtained a powder from one of these bottles, which she admitted was acid; that she dissolved it, and threw the contents into the face of the decedent. We think this proof was sufficient to justify the prosecution in showing the character of the acids which were in her husband's desk. The purpose of the proof was to show that the defendant had the means of committing one of the acts which attended or preceded the homicide, and which may have induced it.

The defendant also insists that the court erred in the following portion of its charge to the jury: "It is provided by our statute that no person can be convicted of murder or manslaughter, unless the fact of the killing, and the fact that it was by the agency of the defendant, are each established as independent facts; the killing by direct evidence, the latter beyond a reasonable doubt. I do not understand, from the position of learned counsel, that the fact that on the 7th day of February, 1898, Ida Place met her death in some way, is questioned; so that may be taken as a conceded fact in the case. Thus, you are brought, at the threshold of this case, to the consideration of the question which underlies it all, and that is, what was the cause of death? Was it asphyxiation, or was it a death from natural causes? The people say it was asphyxiation. The defendant denies it. The people have produced testimony in the shape of the statement of Dr. Henderson, who says positively it was a case of asphyxiation. They have produced testimony of the circumstances that attended the finding of the body, the condition of the body, color of the face, the general appearances; and all these things they say indicate beyond a reasonable doubt that this was a case of asphyxiation. On the other hand, the defendant maintains that the evidence shows no such thing; that it does not show the cause of death; that it does not show it was a violent death, or anything other than a natural death. So at the outset it is for you to say, on this evidence, was this a death from asphyxiation or not? If you conclude, on this evidence, that it was a case of death from asphyxiation or suffocation, then you come to the other questions in the case, namely, did this defendant cause the death of Ida Place, and, if she did, under what circumstances did she do it?" We find no exception to this portion of the charge, nor are we able to discover any error in it which would justify us in disturbing the judgment.

Having thus examined all the questions raised upon this appeal, and finding none sufficient to justify a reversal of the judgment, it follows that it should be affirmed. All concur, except GRAY, J., absent. Judgment of conviction affirmed.

(157 N. Y. 566)

**SCHOOL BOARD OF BOROUGH OF
BROOKLYN v. BOARD OF EDU-
CATION OF CITY OF NEW
YORK et al.**

(Court of Appeals of New York. Jan. 10,
1899.)

**STATUTES—CONSTRUCTION—GREATER NEW YORK—
APPORTIONMENT OF SCHOOL FUND.**

1. Where the provisions of a statute are apparently in conflict, its general purpose will be considered, and such construction will be given to each provision as will conform to the intention of the legislature and best promote the harmonious operation of the whole.

2. Greater New York Charter, § 11 (Laws 1897, c. 378), constituting the unexpended school fund previously raised separately by the boroughs of which the new city is composed a general and special school fund of the new city from July 1, 1898, and requiring an apportionment thereof according to the school attendance and number of teachers in the different boroughs during the preceding school year, requires that such an apportionment be made from said date, and not from January 1, 1899, though school matters were first under the control of the board of the new city January 1, 1898, and section 1065 provides for an apportionment of \$100 for every teacher under the charge of "the board" for the preceding school year, and though one of the boroughs will receive an apportionment largely in excess of the sum contributed by it, and section 10 provides that funds raised by the boroughs "should be used as nearly as may be for the objects for which they were raised," in view of section 901, providing that an excess or deficit of funds to be raised by any particular borough should be equalized in the budget of the following year.

Appeal from supreme court, appellate division, Second department.

Application for mandamus by the school board of the borough of Brooklyn against the board of education of the city of New York and others. From an order of the special term granting the writ (53 N. Y. Supp. 1000), defendants appealed to the appellate division, which affirmed the order (54 N. Y. Supp. 185), and they again appeal. Affirmed.

E. Ellery Anderson, for appellants. Ira Leo Bamberger, for respondent.

O'BRIEN, J. The court below has sustained an order made on the relator's application, directing that a peremptory writ of mandamus issue requiring the board of education of the city of New York to forthwith apportion the general school fund, amounting to \$4,633,812.76, among the several borough school boards of the city in the manner provided and required by section 1065 of the charter. The school boards of the other three boroughs of the city were made parties to the proceeding, and they filed answers to the petition of the relator. The answer in each case was, in substance, that certain action taken by the board of estimate and apportionment in regard to the distribution of this school fund, which is set forth in the petition, was final and conclusive, and that no further duty or right to apportion the fund is vested in the defendant, the board of education.

The controversy involves the construction

of at least four different sections of the new charter. Counsel on both sides of this controversy have been able to find in the various and somewhat complicated provisions of the statute language and expressions which would seem to support their respective contentions. This, perhaps, is not surprising, considering the purpose of the enactment and the circumstances under which it became a law. The commissioners who framed the act and the legislature that enacted it were confronted with a problem in constructive legislation of great difficulty. The act provided for a comprehensive scheme of municipal government for a new city, which was to embrace four different municipal organizations that at the time were under as many different forms of municipal government in full operation, and the problem was to mold them into one, and at the same time to retain the old institutions and regulations until the new scheme was put into full operation. The difficulty of carrying out so complicated a scheme must necessarily leave much for the courts to pass upon. It is their duty to give construction to the various provisions of the charter according to the spirit and purpose which induced their enactment, and where the provisions are apparently in conflict we must seek out the general purpose of the law, and give such construction to each section and provision as will conform to the intention of the legislature and best promote the harmonious operation of the whole. *Blaschko v. Wurster*, 156 N. Y. 442, 51 N. E. 303. The new charter, chapter 378 of the Laws of 1897, became a law by the approval of the governor on the 4th day of May, 1897. A few of its provisions were to take effect at that date, but generally the main provisions and the whole act were to become operative at a future day, and the 1st day of January, 1898, was fixed as the time when the whole scheme was to go into full operation. It provided for a general department of education, which was to possess certain powers over the subject of education throughout the whole city. The head of this department was to be known as the board of education, and that body is the defendant in this proceeding. It also provided for school boards in the several boroughs embraced within the city, which were to have charge of the schools in such boroughs under the general direction of the board of education, which was to represent the schools and the school system of the city. The powers and duties of the board of education were general. Those of the several school boards were local. It was provided by the tenth section of the act that, although the charter was passed in May, 1897, yet that during that year the proper authorities of the various municipal and public corporations consolidated by the act should prepare a budget for the year 1898, as required by their then existing laws, and to levy taxes for that year according to existing laws as though no consolidation had taken place, and that the taxes thus levied in the year 1897 for the ex-

penses of government in the year 1898 might be used for the expenses of the new city in such manner as the board of estimate and apportionment for that year might determine, and that it should be the duty of that board to apportion the said funds of the various departments created by the new charter so that such funds should be used as nearly as may be for the objects for which they were raised. It is contended in behalf of the defendants that this provision of the charter has been ignored in the decision below. It is admitted that the borough of Brooklyn or its school board is to receive under the order appealed from the sum of \$325,000 more than it raised for school purposes in the year 1897, and this large sum in excess of its contribution to the fund is at the expense of the other three boroughs, which must, under such distribution, receive less than they contribute for the support of schools, and hence it is urged that the money contributed by the other three boroughs for school purposes will not, under the operation of the order appealed from, be used as nearly as may be for the objects for which it was raised. If this position is not modified or answered by other provisions of the charter, which will be referred to hereafter, it ought to have great force and weight in determining this controversy in favor of the defendants, since no statute of this character should receive a construction that would accomplish such manifest injustice if any other construction were reasonably possible. Reading section 10 by itself, it would be clearly unjust to apportion to the borough of Brooklyn from the funds in the treasury for school purposes in the year 1898 such a large sum in excess of what it had levied and collected for school purposes in the previous year. But we think that this apparent injustice is corrected by other sections of the charter, and that in the end this excess must be restored to the localities from which it was raised, so that, while there may be some temporary inconvenience by reason of the construction which the courts below have given to the charter, yet no permanent injustice can be done, and that the apprehensions of the learned counsel for the defendants in that respect are not well founded. This will be seen quite clearly from the other provisions of the charter which must now be noticed. It is provided by the next section (section 11) that the board of estimate and apportionment shall, out of the residue of the various funds raised for the support of the public schools of the different parts of the city during the year 1898, constitute, from and after July 1, 1898, the special school fund and the general school fund for that year, so that the schools of the city may begin in the autumn of the year 1898 to be conducted upon the basis of this division of funds, and, in general, upon the system prescribed in the new charter; that up to July 1, 1898, the school moneys shall be spent as raised, for all school purposes, by the various school boards respectively. The section

ends with the express provision that the new system for the public schools of the city, as provided by the charter, shall go into full effect on the 1st of July, 1898. It is admitted by the learned counsel for the defendants that the distribution of the school funds upon the basis provided for by the order now under review would be correct on or after the 1st of January, 1899, but that, inasmuch as the other section above referred to provides that the school funds raised shall be used, as nearly as may be, for the objects for which they were raised, the general system for the support of schools provided for by the charter could not go into complete effect until the 1st of January, 1899. But the eleventh section is very clear and explicit. It is impossible to mistake the purpose of the lawmakers, that the distribution of moneys for the new system of education was to be made on and after, and all the provisions of the charter relating to education were to be in complete operation on, the 1st of July, 1898, to the end that the schools might begin in the following autumn, and be conducted upon the system prescribed in the new charter. That system is very clearly outlined in section 1065, which provides that the general school fund shall be apportioned among the several school boards by the board of education in proportion to the aggregate number of days of attendance of the pupils resident in the boroughs under their charge, between the ages of 5 and 15 years, at their respective schools, during the last preceding school year, and also of such pupils resident therein over 4 years of age as shall, during the last preceding school year, have attended any kindergarten school established under the direction of the school boards pursuant to the provisions of the act. It also provided that the aggregate number of days of attendance of the pupils was to be ascertained from the records kept by the teachers as therein prescribed,—that is, by adding together the whole number of days of attendance of each pupil in the schools under the charge of the respective school boards. Here, therefore, was a provision for the distribution of the school fund upon the basis of attendance; but there was further provision to the effect that each school board should receive from the fund a distributive quota of \$100 for every qualified teacher, or for the successive qualified teachers, who should have actually taught in the schools under the charge of the board during the term of not less than 32 weeks of 5 successive days each, inclusive of legal holidays. Through the operation of this basis of distribution Brooklyn receives, under the new system, a much larger proportionate share of the general school fund than was raised there under the act. It is said that, on the 1st of July, 1898, there could not have been 32 school weeks under the new system, since that did not take effect until January 1, 1898, and the last preceding school year referred to in the section must mean a full school year under the new system, and

since that time had not elapsed the section could not be applied to a distribution of the school fund prior to January 1, 1899. But we think that the period of 32 weeks, and the last preceding school year referred to in the section as the basis of distribution, does not necessarily mean a school year, or a term under the new system, and that it was the evident intention of the lawmakers in providing for giving effect to the new system on the 1st of July to permit the computation of those periods from the 1st of July, 1897. The framers of the charter contemplated that old regulations were to be used to put the new ones in full operation, and one of the main questions in this case is when the old ceased and the new began.

The injustice in apportioning to Brooklyn such a large sum in excess of what was raised in that locality for school purposes is, we think, answered by the provisions of section 901, by which, inasmuch as the amounts due in the way of taxes for state and municipal purposes for the year 1898 will have to be levied in the boroughs of Brooklyn, Queens, and Richmond prior to the 1st day of January, 1898, but not in the city of New York, in order to prevent double taxation outside of the limits of the then existing city of New York for the year 1898, it was provided that in that year the balance so caused to be raised by tax should be raised exclusively from property within the limits of the old city. It was further provided that in case the amount levied or collected from any borough outside of the city as it then existed, and which was available to the uses of the new city for the year 1898, should be more or less than its due proportion of the expenses of the new city for that year, then such excess or deficit should be equalized and adjusted in the budget of the following year, to the end that each borough should bear its fair proportion of the expenses of the city for the year 1898, and that the municipal assembly should have full power by appropriate ordinances to enforce that provision, and it was vested with power to make such adjustment by different rates of taxation or otherwise in the several boroughs, to the end that, taking the years 1898 and 1899 together, each borough should pay its equitable and proper proportion of the general expenses of the city for both years. This provision, we think, confers authority upon the municipal assembly or other proper authorities of the new city to charge in the budget of the next year—that is, the year 1899—to the borough of Brooklyn the amount now claimed by it, and which has been awarded to it by the order in question, that is in excess of the sum which it raised by taxation for school purposes in the previous year under section 10, and to credit this sum to the boroughs from which it was taken by the apportionment of the school fund sanctioned in the courts below. This construction is entirely warranted by the language of the section,

and it rectifies any apparent injustice in the distribution of the school fund authorized by the order now under review. It is said, however, that in the meantime the appropriation for salaries of teachers and other expenses of the schools is impaired by a diversion of more money to Brooklyn than has been raised there. That is probably true, but it is, as before observed, nothing more than a temporary inconvenience which can be relieved in a very short time. It was perhaps impossible to abrogate or suspend the functions of the four municipalities, provide for their consolidation into one, and put into operation a new system of government applicable to the whole, without some embarrassment and inconvenience such as this construction must recognize. Something of the kind was evidently contemplated in section 10, which provides for the apportionment of the taxes levied in the year 1897 in such a way that the funds should be used as nearly as may be for the objects for which they were raised. If it were supposed that the school funds raised or levied in the several boroughs in that year were to go back to the source from which they came, there was no apparent necessity for using the phrase "as near as may be," since the relative proportion of the school fund could be computed, upon the defendants' construction of the statute, with substantial mathematical accuracy. This direction for the use of the taxes levied in the three boroughs in the year 1897 should receive a reasonable construction, so that it may not conflict with the very plain provisions of section 11, providing for putting the new system for the support of the schools into operation on the 1st of July, 1898. The construction adopted permits the harmonious operation of all the sections referred to without doing violence to language or conflicting with the general purpose of the act. We are of the opinion, therefore, that the construction given to these several provisions of the charter by the learned courts below was correct, and that the order should be affirmed, with costs. All concur. Order affirmed.

(157 N. Y. 603)

MATTES v. FRANKEL et al.

(Court of Appeals of New York. Jan. 10, 1899.)

EASEMENTS—RIGHT OF WAY—APPURTENANCES—ESTOPPEL—STATUTE OF FRAUDS.

1. A barn on one lot could be approached only by a way over an adjoining lot of the same owner, who in negotiating a sale of the first lot took the purchaser over the way, pointing it out as the right of way to the barn. It had been so used for 30 years. *Held*, that the right of way passed as an appurtenant to the grant, though not mentioned in the deed.
2. The purchaser having relied on the representation in accepting the conveyance, the vendor was estopped to deny the purchaser's right of way, in spite of the statute of frauds.
3. The vendor could not assert that the right

of way, having existed before the lots vested in the same owner, merged in the dominant estate, since by his representations he consented to subjecting his remaining lot to the easement.

Parker, C. J., and O'Brien, J., dissenting.

Appeal from supreme court, general term, Third department.

Action by Phillip Mattes against Charlotta Frankel and Joseph Schwartz. From a judgment of the general term (20 N. Y. Supp. 145) affirming a judgment for defendants, plaintiff appeals. Affirmed.

Peter Cantine, for appellant. Carroll Whitaker, for respondents.

BARTLETT, J. This is an action to recover damages for an alleged trespass, the plaintiff thereby seeking to test the validity of defendants' claimed right of way to reach the barn on the rear of their premises over his lands. By the verdict of the jury and the affirmance of the general term all the material and controverted facts are conclusively found against the plaintiff, and we are called upon to consider the questions of law.

In March, 1889, the plaintiff conveyed to the defendants improved real estate on Partition street, in the village of Saugerties, Ulster county, being a lot 19 feet 3 inches in front and rear, and 470 feet deep. The buildings consisted of a store and dwelling in front the full width of the lot, and a barn and shed about 100 feet in the rear of the front buildings. These buildings were over 30 years old at the time of the conveyance. The barn on the defendants' premises had been reached by a right of way that was open and notorious for more than 30 years, and one witness swearing he had known the "alleyway" for "forty-odd years." The undisputed facts as to title will make this matter of the right of way clear. In 1853 one John Glennon owned the lot which now lies next north of defendants' lot and is at present owned by the plaintiff. In 1853 one Abigail Heath owned the lot immediately north of John Glennon's lot. Glennon and Mrs. Heath, in August, 1853, by deed laid out a lane between their two lots 8 feet wide and 150 feet deep. Six feet of the width of this lane was conveyed by Mrs. Heath, and 2 feet by Glennon, the latter paying Mrs. Heath \$100 in addition. The record does not disclose when this way was first laid out, but the evidence shows an alley of some kind prior to 1853. It was through this lane and over the lot now owned by the plaintiff that defendants and their predecessors in title reached the barn on defendants' premises. Plaintiff took title to the lot he now owns, on the north of defendants' lot, in May, 1867, and of defendants' premises in April, 1869. Plaintiff conveyed the latter to defendants in March, 1889, the deed making no mention of the right of way. It is to be taken as established against plaintiff on this appeal that during the negotiations that led up to this conveyance he walked through the lane

and over his own lot to the barn with defendant Schwartz and a third party, and pointed out that route as the right of way to the barn,—not a new right of way he was then creating, but as an existing one, visible to the eye, and over which they had passed. It is further to be taken as established that defendants relied upon this statement and representation when they received the conveyance from plaintiff. It thus appears that the plaintiff stands before the court in a position destitute of all equity, and seeking to inflict great injury upon defendants by invoking certain technical legal principles, which he insists enable him to accomplish his purpose.

It is argued in his behalf that, the deed being silent as to the right of way, the plaintiff's representations in respect thereto are immaterial and merged in the written instrument. It is further insisted that defendants seek to establish a title or interest in real estate by estoppel in contravention of the statute that requires that such title or interest must pass by operation of law or by a deed or conveyance in writing. It is also urged that, the title to the dominant and servient estates being vested in the plaintiff, the latter estate was merged in the former. The learned trial judge submitted the case to the jury with the statement that defendants had shown no right of way by prescription or necessity, but allowed the jury to determine whether the representations alleged to have been made by the plaintiff as to the right of way were in fact made, and charged them that, if they so found, "the plaintiff so practically located what he sold as to give the defendants such a license coupled with an interest to go through this alley that he cannot and ought not to be permitted to revoke it."

We are of opinion the charge of the trial judge that the right of way, under the circumstances, did not pass by the use of the word "appurtenances" in the deed, was more favorable to plaintiff than he was entitled to ask. No principle of law is better settled than that some things pass by a conveyance of lands as incident and appurtenant thereto, though not named therein. This is the case with a right of way or other easement appurtenant to land. *Voorhees v. Burchard*, 55 N. Y. 98. In the case cited the grantor, owning certain premises upon which there was a sawmill, conveyed by metes and bounds the portion thereof upon which the mill was located, with appurtenances, describing it as his mill property. Between the premises conveyed and the highway was a piece of land for many years used as a way to the mill and as a mill yard for storing logs. There was no other access from the mill to the highway, and the use of the land was necessary to the mill as a mill yard. This court held that an easement in said land for a way and a mill yard was carried by the principal thing conveyed. In the case at bar we have the defendants' entire front on the

street occupied by the building, and no possible way of reaching their barn from Partition street except by removing a portion of the building or purchasing a new right of way. When the plaintiff sold these premises, and made the representations he did as to the right of way, the general rule comes in that everything is granted by which the grantee may have and enjoy such use. 3 Kent. Comm. 420, 421. The plaintiff, by his representations as to the right of way, clearly consented to subject his remaining land to the easement of defendants, and elected to make it a servient estate to that extent. *Lampman v. Milks*, 21 N. Y. 505. This is in addition to such rights as defendants and their predecessors in title had acquired by more than twenty years' use of the right of way as appears by the undisputed evidence.

We are also of opinion that the plaintiff is estopped from denying the defendants' right of way by reason of his declarations and representations in respect thereto. The fact that the party to be estopped made representations in hostility to his record title existing at the time does not prevent the court from enforcing against him the general rule that when a party, either by his declarations or conduct, has induced a third person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission if the consequence would be to work an injury to such third person or to some one claiming under him. *Trustees v. Smith*, 118 N. Y. 641, 23 N. E. 1002, and cases cited. In the case just cited it was held by the Second division of this court that if one is induced to purchase lands on representations of another designed to influence his conduct, and creating a reasonable belief on his part that he is thereby acquiring a valid title to the same, under which he acts, the party who thus influenced him is estopped from setting up title to himself, existing at the time of the purchase, against that of the purchaser. The enforcement of this principle in no way contravenes the statute that requires title or interest in real estate to pass by operation of law or by a deed or conveyance in writing. In *De Herques v. Marti*, 85 N. Y. 609, this view of the law of estoppel is fully sustained. *Folger, C. J.*, said: "The fact that it is real estate that is concerned, the title to which and the rights in which are generally to be affected by instruments in writing formally executed, does not prevent the operation of the estoppel. Looking on in silence and not asserting a right, when other parties are making purchase and transfer of lands, will estop from asserting an antagonistic right therein." We are of opinion that the defendants' right of way passed to them under the deed they received from plaintiff, and that the latter is also estopped from interfering with the same by his representations, acted upon by the defendants. It follows that the judgment appealed from should be affirmed, with costs.

PARKER, C. J. (dissenting). Considered from a pecuniary point of view, this action is a trivial one, but the principle to be established by our decision is one of importance, and, possibly, of far-reaching consequences. Whether the defendants had a right of way across the rear of plaintiff's lot to a barn on their own lot is the subject of controversy. The defendants sought to establish their title by necessity, by prescription, and by estoppel, and they also claimed that the right of way passed as an appurtenance to the plaintiff's grant to them of a lot, for the benefit of which they claimed the right of way to have been originally created. All the judges who have had to do with this litigation, from the trial judge to and including the members of this court, have agreed that the alleged right of way did not pass as an appurtenance to the plaintiff's grant, and that the defendants failed to establish title by necessity or by prescription. The trial court was of the opinion that, if the defendants' testimony was true, the plaintiff, pending the negotiations for the purchase from him of the lot by the defendants, did point out to them "the said route as the right of way to the barn" upon said lot; the defendants, in making the purchase, relied upon such representations; and, therefore, title by estoppel resulted. With that view the appellate division agreed. The plaintiff denied ever making any such representation, and his testimony is corroborated; but the jury believed the defendants, and the conflict of testimony is of no importance whatever on this review, except in so far as it calls attention to the fact that we have here present an illustration of the danger that the law-making power aimed at when it enacted that "no estate or interest in lands * * * shall hereafter be created, granted, assigned, surrendered or declared unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the parties. * * *". This provision, which found its proper place in that portion of the statutes relating to fraudulent conveyances and contracts, was intended to prevent fraud, and to render it impossible, either by honest errors of memory or perjured statements, to overthrow titles, and to create doubt and distrust where certainty and confidence should exist. The right of way claimed by the defendants is, of course, an interest in lands within the meaning of the statute, and it will hardly be asserted by any one, at this late day, that it was within the power of this plaintiff to have vested in these defendants title to this alleged right of way by parol. *White v. Railway Co.*, 139 N. Y. 19, 34 N. E. 887; *Welsh v. Taylor*, 134 N. Y. 450, 31 N. E. 806; *Crosdale v. Langan*, 129 N. Y. 604-610, 29 N. E. 824; *Taylor v. Millard*, 118 N. Y. 244, 23 N. E. 376; *Nellis v. Munson*, 108 N. Y. 453, 15 N. E. 739; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Pierce v. Keator*, 70 N. Y. 419.

It has not been pretended in this case that

the plaintiff, at the time he conveyed to the defendants the lot adjoining the one over which the alleged right of way passes, could by any oral promise or agreement have vested in the defendants an easement consisting of a right of way across the lot not sold and have attached it to the land conveyed. The contention, rather, is that, while he could not vest in the defendants an interest in the lot not sold, and attach it to the lot sold, if he should try ever so hard to do so, by parol, yet, if he represented that there was such a right of way when in fact there was not, and could not be, as matter of law, which the defendants were presumed to know, then the plaintiff will be held to be estopped from denying that he created such an easement and annexed it to the freehold conveyed by him to the defendants. If this contention be sustained, then the doctrine of estoppel has made great encroachments upon the statute. A vendor of real estate has only to point to wagon tracks across lands retained by him, or to a private alleyway on valuable city property, and say to an intending purchaser, "This is your right of way," in order to carve out a servient estate from lands reserved by him and attach it to the lands subsequently conveyed. I think it can be quite readily demonstrated that the doctrine of estoppel has not been carried to such length; but, before taking up that subject, it may be well to present the situation involved a little more fully. In 1854 plaintiff's present lot was owned by John Glennon, while the next lot adjoining it on the north was owned by Abigail Heath. By deed these parties created a lane between the two lots for the use of each lot. On the south side of Glennon's lot was defendants' lot, upon which was situated a barn, and the owner of it was permitted, whenever he chose to do so, to drive through the lane and then across the rear of the defendants' lot to the barn. Thirteen years later, and in April, 1869, the plaintiff purchased the Glennon lot, and two years later he purchased the lot now owned by these defendants. It is not pretended that at the time the plaintiff purchased the last lot a right of way had been established across the rear of the first-purchased lot and annexed to the lot last purchased. If, on the contrary, an estate by grant or prescription, from which a grant is presumed, had been carved out of the first lot, still owned by the plaintiff, and annexed to the second lot purchased by him, nevertheless the legal effect of the purchase of the last of the two lots was to merge the servient in the dominant estate. Both estates cannot exist in the same person, and the effect of vesting the separate estates in a given piece of real estate in one person is to merge the lesser estate in the greater. *Ger. Real Estate* (5th Ed.) 766; 2 *Washb. Real Prop.* (5th Ed.) 398, 399; *Jones, Easem.* § 835; *Washb. Easem.* (4th Ed.) 685. When the owner sells a portion of the property, he has the power to revive the easement thus merged or to create a new easement;

but he must do it by express words, used in the conveyance of the land to his grantee, or by a separate grant. So, had there been a right of way established, in conformity with law, across the rear of the defendants' property, upon the vesting of the title to both lots in the plaintiff the easement became extinguished, and the situation thereafter, down to the time of the conveyance of the lot to these defendants, was precisely the same as if there had never been an easement called a right of way across the plaintiff's lot. But the real position was even less favorable to the defendants' contention, if such a thing were possible, for, at the time the plaintiff acquired title to the lot now owned by the defendants, there was no right of way annexed to it across the lot first acquired and still owned by the plaintiff. There was a road occasionally and perhaps frequently used, but the right to use it had not been granted as required by the statute, nor had it been acquired by prescription, which implies a grant. The plaintiff, then, owned on April 24, 1869, two lots, and he continued to be the owner until March 12, 1889, a period of about 20 years, when he conveyed to the defendants one of the lots, and at the time the negotiations for the sale were pending he pointed out a route leading from the lane across other premises belonging to him as "the right of way to the barn," and the defendant Schwartz testified that in making the purchase he relied upon such representations, and thus it is said the plaintiff became estopped from denying that it was the defendants' right of way.

There are few older principles or rules of law than that of estoppel, which for centuries has been employed to bar a party from alleging or denying a fact to the injury of another contrary to his own previous allegation or denial. It signifies that a man, for the sake of fair and honest dealing, should be prevented from declaring that to be false which through his instrumentality has been accredited and acted upon as true. But the party who invokes the doctrine must have acted not only on the faith of the representation, but must have been justified in doing so. Now, assuming, as we must, that the plaintiff said, "Here is the right of way to this barn," or "pointed out the said route as the right of way to the barn," we note that he did not assert that it was annexed in any way to the lot that he was about to convey to the defendants, nor that he would convey it; and certainly these defendants, like all other parties, are presumed to have known the law, and hence they knew at the time this statement was made that the only way that they could acquire an easement in the remaining lot of the plaintiff was by grant. Such was the statute, and, as they were presumed to know the law, for the purpose of the disposition of this question they did in fact know it, and, knowing it, they were not deceived by the alleged misrepresentations of the plaintiff.

2. There was no right of way over the premises nor easement of any other kind connected with or annexed to the lot which they were about to purchase, and, as they knew the fact to be that the plaintiff was the owner of both lots, they were chargeable with knowledge as matter of law that, if there ever had been an easement in the nature of a right of way over the plaintiff's other lot, that easement had been extinguished nearly 20 years before by the merger of all the estates in both lots in one person. It follows that, if the language alleged to have been employed by the plaintiff was capable of being understood as meaning that there was a right of way over the plaintiff's other lot, annexed to the one defendants were about to purchase, the defendants were not justified in acting upon it, in the face of the law declaring that such a thing could not be. The defendants were about to purchase real estate, and they knew, or at least were bound to know, that the contract of the parties would be expressed in the deed; that all prior negotiations would be merged in it, and that they would receive nothing except that which would be expressly granted by deed; that they could not, as the outcome of negotiations with this plaintiff, secure one lot by deed and still another or any part or interest therein by estoppel. If the deed failed to convey to the defendants all that they bought, their remedy was to bring suit for a reformation of the deed on the ground of mutual mistake, or of mistake on their part and fraud on the part of the other party. They have concluded, instead, to be pioneers in a hitherto unexplored field of alleged legal rights and remedies, and keep the lands acquired by deed, while they attempt to wrest other lands, or an interest therein, from their grantor, through the doctrine of estoppel, because of something said pending the negotiations which finally ripened into a deed. The matter really does not seem to admit of discussion, but it has been forced upon us by an attempt to apply here certain decisions which were made for entirely different situations. It is said that: "If some person other than this plaintiff had owned the lot sold to the defendant, and he had stood by when that person offered to sell the premises, together with the right of way, and he had not asserted his title to the right of way, he would have been estopped from claiming title thereto,"—citing *De Herques v. Marti*, 85 N. Y. 609, *Trustees v. Smith*, 118 N. Y. 641, 23 N. E. 1002, and other cases. True. And if this plaintiff were a third party, instead of being a party to the contract, the cases cited would be applicable, for in such a case the plaintiff would have been in the position of having assented to a statement of fact which might perhaps have been true, and which the purchaser could have believed, namely, that there was a right of way over the plaintiff's land and annexed to the premises which the defendants were about to buy, a right which

would pass by conveyance of the dominant estate as an appurtenance to the lands. *Jones, Easem.* § 18; *Pierce v. Keator*, 70 N. Y. 419. It would, therefore, be a duty to speak and prevent fraud, and a failure to perform that duty prevents a party from asserting something different from the representation that induced the situation complained of. But this plaintiff is not a third party; instead, he is a party to a contract which presumably embraces all the negotiations between the parties. To such a situation totally different rules apply. It is to the contract that each must resort, not only to ascertain, but to protect, whatever right or interest he may have. The contract may be done away with for fraud. If it does not express the real agreement of the parties, it may be so reformed in equity that it will; but while it stands it must be treated by the parties and the courts as containing the entire agreement upon the subject. The judgment should be reversed and a new trial granted, with costs to abide the event.

BARTLETT, J., reads for affirmance; GRAY, HAIGHT, MARTIN, and VANN, JJ., concur. PARKER, C. J., reads for reversal, and O'BRIEN, J., concurs.

Judgment affirmed, with costs.

(157 N. Y. 541)

WILLIAMS v. HAYS.

(Court of Appeals of New York. Jan. 10, 1899.)

LOSS OF VESSEL—NEGLIGENCE OF OFFICERS— QUESTION FOR JURY.

1. It is a good defense to an action against a master for the negligent destruction of a vessel that his want of care was due to temporary insanity, resulting from exhaustion caused by his efforts to save it.

2. The captain of a brig, after working 48 hours to save it from a storm, became exhausted, and, after taking 15 grains of quinine, fell asleep in the cabin. The vessel refusing to mind her helm, the captain was awakened with difficulty, and was informed by a passing tug that the vessel's rudderpost was split. The tug offered to tow the brig to port, but the captain declined. One of the crew was let down from the stern, examined the post, and informed the captain that it was split; but he made irresponsible answers, and appeared in a dazed condition, and to be either drunk or insane. Another tug passed, and offered to tow the vessel, but was also declined. During this time the mate was on deck, obeying the captain's orders. The brig became unmanageable, drifted upon the beach, and was destroyed. The captain testified that he remembered nothing that occurred on that day. *Held*, that whether the captain's condition was so apparent as to charge the mate with negligence in not forcibly taking charge of the vessel was for the jury.

Bartlett, J., dissenting.

Appeal from supreme court, appellate division, First department.

Action by Paul Williams against Williams Hays. From a judgment of the appellate di-

vision (37 N. Y. Supp. 708) affirming a judgment in favor of plaintiff, defendant appeals. Reversed.

Henry W. Goodrich, for appellant. Lawrence Kneeland, for respondent.

HAIGHT, J. This action was brought by the plaintiff, as assignee of the Phoenix Insurance Company, to recover the amount of insurance paid by the company to Parsons and Loud under a policy of insurance issued to them as the owners of one-sixteenth of the brig Emily T. Sheldon. The brig had been wrecked on Peaked Hill Bar, on Cape Cod, near Provincetown, Mass.; and it is alleged that the loss occurred through the negligence of the defendant, who was the master and part owner of the brig, and who commanded her at the time of the loss. The plaintiff claims the right to recover in this action upon the theory that the insurance company became subrogated to the rights of the owners, whom it had insured. The answer denied the allegations of the complaint that the loss was caused through the negligence, carelessness, misconduct, and improper navigation of the defendant, and alleges that at the time of the wreck he was unconscious of his acts, and irresponsible therefor, and was not in a condition to navigate the brig, on account of sickness, etc. At the conclusion of the evidence, the trial court directed a verdict in favor of the plaintiff, holding that the insanity of the defendant furnished no defense. The defendant's counsel objected to the direction of the verdict, and asked to go to the jury upon the questions: "First, whether or not the defendant became insane solely in consequence of his efforts to save the vessel during the storm; second, whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm, and the quinine which was taken therefor; third, whether the mate was so cognizant of the condition of the master, of the insanity or other incompetency of the master, as to require him to take the command of the vessel away from the master; fourth, whether the mate exercised due judgment in regard to the condition of the master; fifth, whether the defendant, in consequence of his efforts to save the vessel during the storm, became mentally and physically incompetent to give the vessel any further care than he did." These requests were refused by the court, and a verdict was directed, to which rulings the defendant's counsel duly excepted.

On Thursday, the 18th day of March, 1886, the brig Emily T. Sheldon left Boothbay, Me., with a cargo of ice, bound for Annapolis, Md. At the time of sailing, the weather was fair, and remained so for about 16 hours, at which time a storm commenced, with high winds and rain, with a light snow. At the time of the commencement of the storm, the vessel was in George's Channel, and the defendant asked to work her about, trying to find his

way out, until it became practically impossible to tell where he was. He headed her in what was supposed to be the direction of Cape Cod, but, not being able to make the cape, she was hove to, to ride out the gale. This was about 4 o'clock in the afternoon of the 20th, and she remained hove to until about that time in the afternoon of the 21st, and then the defendant stood her off for what was supposed to be Cape Cod. On Monday morning, the 22d, between 4 and 5 o'clock, Thatcher Island lights were sighted by the defendant. The storm had then abated, but there was a heavy roll of the sea. The defendant then turned the vessel over to the mate, telling him to keep her by the wind until he made Cape Cod light. He then went below, and laid down upon a lounge in his cabin, but, before doing so, took 15 grains of quinine. It appears that during the storm he had had but little rest; had not gone to his berth or undressed; had eaten but little, and that for the last 48 hours he had been constantly upon deck; that he was worn out, exhausted, felt sick, and feared he was to have an attack of malaria. At about 11 o'clock, the second mate, to whom the vessel had been turned over, called the mate, saying that the vessel did not act very well. The mate then went upon deck, and about half past 11 the steward called the defendant. He was lying, dressed, upon the lounge. He did not get up at the first call, and subsequently the steward pulled him off from the lounge, in order to arouse him. He then got up, but within a few minutes was again found lying upon the lounge, and the steward went to him again, and finally succeeded in getting him up on the deck of the vessel. There are some little differences in the testimony of the witnesses in reference to the order of events thereafter occurring. According to the recollection of some of the witnesses, the captain came on deck about half past 12, after the crew had been at dinner. After he came on deck, the tug Storm King came up on their weather quarter, and said that the rudderpost of the brig was split, and asked the captain if he did not want a tow. He said that he did not; that he guessed "we are all right." The Storm King then went away, and about 1 o'clock another boat came up under the stern of the brig, and offered a tow, but was refused by the captain. McDonald, who kept the log of the vessel, testified: "After the boats went away, the vessel began to go off and come to, and she would not mind her helm at all, and the sea was edging her into the beach all the time. Then I went over, and looked over the stern, but I could see nothing. Then I got into the bowline; that is a rope with a noose in it, being around my waist; and I was let down over the stern, and I looked at the rudderpost, and it was split, but I could not tell how badly. I went back on deck, and said that the rudderpost was split, and the captain said he didn't think it was, and said, 'I can't see it, and you can't, I think.' Then I began to

think there was something wrong with the captain; that he did not act as he used to. Still, I could not see anything wrong with his manner, except when he spoke to me about the vessel; and he then told me to square the yards to see if the vessel would go off again, and we did, and she did go off, but she came right back again; and I lowered the main trysail down again, and hove the helm up again, but she did not go off; she went sideways in onto the beach, and struck," at about 2:30 o'clock. Considerable evidence was taken with reference to the condition of the captain, all of which tends to show that he staggered about the vessel, making irresponsible answers to questions, appeared to be in a dazed condition, and to be either drunk or insane. After the brig struck, a life-saving boat came alongside, and offered to take him ashore; but he refused to go, and the crew of the life boat had to remain for several hours before they finally succeeded in coaxing him to go with them. He was taken ashore, but, according to his testimony, remembers nothing that occurred until the next day. The brig became a total wreck.

This action was considered in this court on a former review (143 N. Y. 442, 38 N. E. 449), at which time the law of the case was settled, except upon two points. It was then held that the defendant, as charterer of the brig, was liable for losses which occurred through his want of care or skill in the navigation of the vessel; that he was required to exercise such care and skill as a reasonably careful and prudent owner would ordinarily give to his own vessel; and that an insane person is responsible for his torts the same as if sane. The opinion contains some comments of the judge, which have been understood as indicating an intention to do away with any distinction between misfeasance and nonfeasance, and to hold that lunatics and infants were just as liable for their failure to act as they were for their affirmative torts. But, when the judge comes to sum up the result of his examination of the authorities, he concludes by stating the rule to be that, if the defendant "caused her destruction by what in sane persons would be called willful or negligent conduct, the law holds him responsible." The final conclusion reached by the judge we accept as the law of this case. Whether a lunatic or a person mentally incapacitated should be held responsible in all instances for his nonfeasance or failure to act, we will not now stop to consider.

The judge then proceeds in his opinion to say: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and, while it was raging, his efforts to save the vessel were tireless and unceasing; and, if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to

be attributed to him as a fault. In reference to such a case we do not now express any opinion. * * * If it should be found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should therefore be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness." We thus have two questions presented for consideration: First, Did the defendant become mentally and physically incompetent to care for and navigate the vessel, solely in consequence of his efforts to save the vessel during the storm? And, second, if he was thus mentally and physically incapacitated, were his mate and crew guilty of negligence in not taking the command of the vessel, and procuring a tow? Upon directing a verdict in favor of the plaintiff, the trial court said: "Assuming, as we must, for such purpose, that the condition of the defendant was the result of exhaustion, caused by his efforts to save the ship from the perils of the storm, and the heavy dose of quinine which he took as a remedy, I fail to see how that presents any exception to the principle laid down by the court of appeals, that a person of unsound mind is responsible for the consequences of acts which in the case of a sane person would be negligent. In other words, the standard by which he is to be judged is the same as that which must be applied to the actions of a sane person. It certainly seems to be a cruel doctrine; but as it is apparently based upon the principle that, as between two innocent persons, the loss must fall upon him who caused it, rather than upon the other, the best that can be said about it is that it is a rule which serves the convenience of the public, to which individual rights must give way." It will thus be observed that the case was disposed of below upon the ground that the defendant was liable even though assuming that his condition was the result of exhaustion caused by his efforts to save the ship from the perils of the storm, and the question as to whether the mate was guilty of negligence was not considered. The appellate division has affirmed, following in its opinion, the reasoning of the trial judge.

We cannot give our assent to such a view of the law. To our minds it is carrying the law of negligence to a point which is unreasonable, and, prior to this case, unheard of, and is establishing a doctrine abhorrent to all principles of equity and justice. In this case, as we have seen, the storm commenced on Friday, continued through Saturday and Sunday, and it was not until 5 o'clock Monday morning that the defendant was relieved from the care of his vessel. For three days and nights he had been upon duty almost con-

tinuously, and for the last 48 hours had not been below the deck. The man is not yet born in whom there is not a limit to his physical and mental endurance, and, when that limit has been passed, he must yield to laws over which man has no control. When the case was here before, it was said that the defendant was bound to exercise such reasonable care and prudence as a careful and prudent man would ordinarily give to his own vessel. What careful and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion? To do more was impossible. And yet we are told that he must, or be responsible. Among the familiar legal maxims are the following: The law intends what is agreeable to reason; it does not suffer an absurdity. Impossibility is an excuse in law, and there is no obligation to perform impossible things. Co. Litt. 78; 9 Coke, 22; Co. Litt. 29; 1 Poth. Obl. pt. 1, c. 1, s. 4, § 3. Applying these maxims to the case under consideration, we think the fallacy of the reasoning below is apparent, and that it cannot and ought not to be sustained.

As to whether the mate should be chargeable with negligence is a question which has not as yet been determined. It is said that he did nothing to save the vessel. It appears that he was on deck, obeying the orders of the captain. The circumstances surrounding him were peculiar. Possibly he might have put the captain in irons, and taken the command of the vessel, but mutiny at sea is criminal, and heavily punished. In order to justify such action, he must be satisfied of the derangement of his superior officer, and be able to command the assistance of the crew. Whether the condition of the captain was so apparent at the time as to charge the mate with negligence in not resorting to strong measures, we think, was a question of fact for the determination of the jury, and that it was not within the province of the court to dispose of it as a question of law. The judgment should be reversed, and a new trial granted, with costs to abide the event.

BARTLETT, J. (dissenting). I am of opinion there was no question for the jury in this case. The learned counsel for the defendant asked to go to the jury on two questions:

First, "Whether or not the defendant became insane solely in consequence of his effort to save the vessel during the storm." It is true that Judge Earl, writing in this case for the court on the former appeal, stated that, if the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. It is, however, undisputed that the record now before us is identical in all essential respects with the one then under examination, and it therefore follows that the determination of this court that the insanity of the defendant was no defense is the law of this case, and was properly fol-

lowed by the trial judge when he directed a verdict for the plaintiff.

Second, "Whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm, and the quinine which was taken therefor." Judge Earl stated in his opinion upon the former appeal that if it were found upon a new trial that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should therefore be held that no fault could be attributed to him on account of what he personally did, or omitted to do, then the question would still remain whether the carelessness of his mates and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their failure to act. There is no conflict of evidence on this latter point, and only a question of law is presented to this court on undisputed facts,—whether the captain was not liable for this loss, not only on account of his insanity, but for the reason that the mates and crew, having full knowledge of the captain's mental incapacity, and that the rudder was useless, failed to intervene and save the vessel, but allowed her to drift with the dead swell upon the beach, with all sails set and no anchors out, in a light wind blowing off shore, in the middle of a pleasant afternoon, with two steam tugs lying by, and offering a tow to a port nine miles distant. There was no request to go to the jury as to the conduct of the crew. The liability of the captain for the acts of his mates and crew is well settled. Story on Agency (section 314) states: "The policy of the maritime law has therefore indissolubly connected his (the master's) personal responsibility with that of all the other persons on board, who are under his command, and are subjected to his authority." With the same record before us as on the former appeal, I am unable to understand why the former decision of this court should not be followed. 143 N. Y. 442, 38 N. E. 449. I vote for affirmance.

All concur with **HAIGHT, J.**, for reversal, except **BARTLETT, J.**, who reads for affirmance. Judgment reversed, etc.

(157 N. Y. 616)

SNYDER et al. v. LINDSEY et al.

(Court of Appeals of New York. Jan. 10, 1899.)

JOINT-STOCK COMPANY—RESOLUTION—PAROL EVIDENCE TO VARY—SUBSCRIPTION OR LOAN—EVIDENCE—APPEAL—HARMLESS ERROR—FRAUD OF MANAGER—LIABILITY—CREDITS.

1. A finding of fact by a referee, when confirmed by the general term, is conclusive on the court of appeals.

2. A resolution of the directors of a joint-stock company, authorizing a certain person to contribute capital and become a partner, and the certificate of stock issued in accordance therewith, cannot, in the absence of fraud or mistake, be varied by parol evidence to show that the transaction was a loan, and not a contribution.

3. On an issue as to whether a certain transaction with a joint-stock company was a loan or a contribution of capital, evidence as to what was to be done with the money is immaterial.

4. When a resolution of the directors of a joint-stock company shows on its face that a certain person was authorized to contribute capital and receive a larger share of the profits than the other members, evidence that such person put in his money on different terms than the others is immaterial.

5. The exclusion of testimony to vary a resolution of a joint-stock company so as to show that a transaction under which a certain person furnished money to the company was a loan, and not a contribution of capital, is harmless error, where the witness afterwards testified that the company owed said person nothing besides his stock, and that the mortgage in controversy was given to secure the money paid under the resolution.

6. The general manager of a mercantile business of a joint-stock company, without the consent of the other stockholders, mortgaged the stock of the company to his son. The latter then gave a bill of sale of the stock to a clerk in the store, who, in turn, transferred the stock back to the manager, who disposed of it as his own. Held fraudulent as to the other stockholders.

7. A stockholder of a joint-stock company, who fraudulently disposed of the property of the company, and paid debts against the company, is entitled to a credit for such payments on the amount for which he is held liable.

Appeal from supreme court, general term, Fifth department.

Action by Jacob Snyder and others against Carmi V. Lindsey and others. From a judgment of the general term (36 N. Y. Supp. 1037) affirming a judgment for plaintiffs, the defendant Lindsey appeals. Modified and affirmed.

O. H. Hopkins, for appellant. O. P. Stockwell, for respondents.

O'BRIEN, J. For about two years prior to November, 1893, a large number of persons, including the plaintiffs and the defendant, owned and conducted what is known as a "Farmers' Co-operative Store." They conducted a general mercantile business in the purchase and sale of merchandise. It was not incorporated, although it adopted by-laws and elected officers in practically the same way as a corporation or joint-stock association. The primary purpose of the association was to furnish to its members such goods as they needed, at a reduced price. The capital for the conduct of the business was furnished in small sums by each member, for which he received a paper in the form of a certificate of stock, which represented his interest in the concern. It was, for all practical purposes, a mere partnership as between the members themselves and their creditors. On the 11th day of November, 1893, the defendant Lindsey was the president and general manager of the association, and on that day, as the referee has found, he proceeded to execute and deliver to his son a chattel mortgage on all the property of the concern, which consisted of a quantity of goods then in the store. The consideration expressed in this mortgage was

\$1,500, said to be for money loaned to the association. The mortgage became due on the 14th of January following, and contained the usual clause permitting the mortgagee to take possession of the goods whenever he deemed himself unsafe. The referee has found that in fact the concern did not owe the son anything, and that the mortgage was without consideration and fraudulent. On the same day of the execution of the mortgage, the son executed to another person, who was a clerk in the store under the defendant, a bill of sale of all the goods, constituting, as already stated, the whole assets of the concern. A short time after, under some arrangement between the defendant and the party who had received the bill of sale, the defendant took possession of all the property as his own, and assumed to sell and dispose of it at public and private sale, not as the property of the association, but as the individual owner of the whole concern, in virtue of the transfer made by him to his son, and by his son, through a bill of sale, to another party, and by that party again to the defendant himself. The referee has held that all these transfers were fraudulent; that the defendant acquired no title to the property under them; and, having sold the goods and appropriated the proceeds to his own use, that he must account for the same in this action, which is brought by two members of the concern, in their own behalf and in behalf of their associates. The conduct of the defendant in thus dissolving the association and putting an end to the business was held to be wholly unauthorized.

The questions arising upon the trial of the case were mainly, in their nature, questions of fact; and, the findings of the referee upon such facts having been confirmed by the general term, we have no power to interfere with them. The defendant claimed that the chattel mortgage which he executed and delivered to his son, the bill of sale by the son to a third party, and the transfer by that third party to the defendant, were with the consent of the other members of the association. But the referee found, upon sufficient evidence, that no such consent was given.

The only questions before us for review arise upon one or two exceptions taken by the defendant's counsel upon the trial before the referee. On the trial the defendant claimed that, at the time he executed the chattel mortgage, his son was a creditor of the concern, and the assignee of another member of the association, who also claimed to be a creditor; and he sought to establish the fact that the mortgage was given as security for this debt. The facts in regard to this claim were these: It seems that the association had a number of directors, and at a meeting held on the 28th day of January, 1893, a resolution was passed in substance as follows: That the son, who was a member of the association, and one of his neighbors, named

Cowden, were to invest the sum of \$1,000 each in the concern, and receive for their compensation 3 per cent thereon. They and a clerk in the store were also to receive 5 per cent. between them for handling and shipping farm products in car lots, and for the money so advanced they were to take 100 shares each of the stock of the concern, and share pro rata in profits with the other shareholders. They were also given the privilege to withdraw the amount so invested in the stock of the company at the end of a year, by selling goods from the store at regular rates. The resolution also provided that a committee should be appointed to look after the printing of a constitution and by-laws, and to take necessary steps for the incorporation of the concern. This resolution was recorded in a book kept for that purpose, and the defendant, his son, and the other party so investing the money were present, and at all times had access to these records. The son and Cowden received certificates of stock in the same form as those issued to other members. The defendant at the trial called one of the shareholders as a witness, who testified that he was present at the meeting when this resolution was passed. The defendant's counsel propounded to him the following question: "What was said at that meeting in regard to what should be done with the money by the company?" This question was objected to by the plaintiffs' counsel. The objection was sustained, and an exception taken. The defendant's counsel then offered to show that this money was put in by the defendant's son and his associate, who had assigned to him, "upon different terms than those on which the other members put money into the association, and that they were to have the privilege of selling the goods and drawing their money out in that way." This testimony was objected to, the objection sustained by the referee, and an exception taken.

The two exceptions may be considered together. It is manifest that the resolution passed by the directors, and the certificate of stock issued thereafter, represented the contract or agreement under which the defendant's son and his assignor advanced the money to the co-partnership of which they were members. It was either a loan, or an accession to their capital. They became by the transaction either lenders of money or shareholders in the partnership. Whether they were the former or the latter may be solved by a very simple and practical test. If, after they had put in the money, the concern had made large profits, instead of losses, would they have been entitled to share in those profits beyond the stipulated or legal rate of interest? In other words, if, after this arrangement, they insisted upon sharing in the profits of the concern, however extensive, and the other members objected and claimed that the moneys so invested were a mere loan, and not a contribution to the capital, as a reason

for depriving them of the right to share in the profits, could such claim of the other members be upheld? It seems to me not, and that it is quite clear that, in view of the circumstances as evidenced by the resolution and certificate of stock, the other members could not claim that they were mere lenders of money, entitled only to the simple interest stipulated, and without any right to share in the profits of the concern as partners. The resolution and the certificate, when read together, clearly import, as matter of law, that the money was advanced by these members as capital, subject to the risks of the business, and entitled to share in the profits. It would not have been competent for the other members to deprive the son and his associate of their share of the profits, had there been any, to be computed upon the amount of the money thus put into the concern, and an offer of proof for that purpose must have been excluded. They would not have been permitted to show by oral proof that the resolution and certificate constituted a contract between the persons advancing the money and the other members, different from that which appears upon the face of the instruments. They would not be entitled to show that, at this meeting, verbal declarations were made by which the contract was made to assume the form of a loan of money to the concern. The rule of law cannot be different when these conditions are reversed. Upon the trial it was for the interest of these two persons to show that the transaction was a loan, and not a contribution of capital. But the written evidence of the transaction showed otherwise, and it could not be varied or contradicted by parol proof, in the absence of fraud or mistake. But the referee, I think, was also justified in sustaining the objections on other grounds. The question, "What was said at that meeting in regard to what should be done with the money by the company?" called for no material fact. It was utterly immaterial what was said with respect to the disposition that the company should make of the money after it had been paid over to it. That did not tend in the least to show whether the money was advanced as a loan or as an accession to the capital, which was the only material question in that connection.

The offer to show that the money was put in by these two persons on different terms than that under which the other members put in their money was also immaterial; for, on the face of the resolution, it appeared that such was the fact, since there was a provision made for the distribution to them of a larger share of the profits than the other members were entitled to. The offer was not, in terms, or by any fair implication, to prove that those two members advanced the money upon a loan, but merely to show that the money was paid over under a different arrangement, and all that appeared on the face of the resolution. Moreover, it is evident that, had the witness been permitted to an-

swer the question, the testimony could not have aided the defendant, since at a subsequent stage of the trial he himself testified, in substance, that, at the time of the execution of the chattel mortgage, the association was not owing his son anything outside of his stock, and that the mortgage was given to his son to secure the money he paid under the resolution.

It is difficult to see how the referee, in any view of the case, could have sustained these transfers. The defendant was the general manager of a partnership conducting a mercantile business, and, as such, mortgaged, without the consent of the other partners, all the firm property to his son, and in effect dissolved the partnership and terminated the business. His son, to whom he gave the mortgage, then proceeded to give to a clerk in the store under the defendant a bill of sale of the goods, and that clerk, by some arrangement, immediately transferred the possession and ownership of everything back to the defendant, who proceeded thereafter to dispose of the stock as sole owner thereof, to the exclusion of all the other associates. It was, in substance and legal effect, a transfer by the defendant to himself of the partnership stock. He was occupying a trust position towards the other members of the association, as well as to the creditors, and he could not in this way become possessed of the entire assets of the concern. *Clafin v. Bank*, 25 N. Y. 293; *Welles v. March*, 30 N. Y. 344; *Bain v. Brown*, 56 N. Y. 285; *Taussig v. Hart*, 58 N. Y. 425; *Murray v. Beard*, 102 N. Y. 505, 7 N. E. 553. The defendant was therefore properly held liable to account to the partnership for the value of the goods thus appropriated by him. But the value of the goods was one of the principal questions litigated at the trial, and there is reason to believe that the inventory value, which was finally adopted by the referee, was in excess of the real value. The evidence, however, was conflicting, and the finding of the referee in that respect is not open to review here.

It appears, and is conceded, that the defendant, about the time the goods went into his possession, or perhaps before, paid debts against the concern to the extent of \$896.57. One of the creditors of the concern had brought an action against it, and procured an attachment for a debt of about \$700, which was a lien upon the property at the time it went into the defendant's hands. The defendant, having paid and discharged this lien, and some other small claims, should not be required to account for the full value of the goods to the representatives of the partnership. The only interest that the concern had in the goods was represented by their true value after deducting therefrom all liens which the creditors had. The value of the goods for which he should account should be diminished by the sums so paid by him, and, of course, his status and claims as a creditor should be correspondingly diminished. The

judgment should be modified in this respect, and, as so modified, affirmed, without costs to either party in this court. All concur (MARTIN, J., in result), except GRAY, J., absent. Judgment accordingly.

(157 N. Y. 551)

NEW YORK SECURITY & TRUST CO. v.
LIPMAN et al.

(Court of Appeals of New York. Jan. 10,
1899.)

REVIEW — FINDINGS OF FACT — FACTORS' ACT —
WAREHOUSE RECEIPTS—PLEDGES—PRIORITY—RIGHTS OF PLEDGEE.

1. Where trial was had at special term and the decision was general in form, it will be presumed on appeal that all the facts warranted by the evidence and necessary to support the judgment were found.

2. L. & Co., merchants at Dundee, consigned bales of burlap to their agent in New York, and delivered the bills of lading with the consular invoices to defendants, who sent them to L. & Co.'s agent, thereby enabling him to obtain the goods from the custom house and deal with them as L. & Co.'s property, defendants taking in return a so-called "trust receipt," by which L. & Co. acknowledged receipt of the goods, and promised to hold the proceeds in trust for defendants and remit the same as soon as the goods were sold. The goods were received by L. & Co. in New York, placed in a bonded warehouse, and open receipts taken therefor, a part of which were subsequently delivered to plaintiff as security for a loan to L. & Co., plaintiff having no knowledge that any persons other than L. & Co. had any interest in the goods. *Held*, that under the factors' act (Laws 1880, c. 170), providing that every factor or agent intrusted with the possession of a bill of lading or other document, or of merchandise for sale, or as security, shall be deemed the owner so as to give validity to a sale or advances upon the goods, plaintiff's lien evidenced by the warehouse receipts was superior to the rights of defendants.

3. A warehouse gave a depositor open negotiable receipts for bales of goods deposited, deliverable only upon the return of the receipts, and according to their custom held the number of bales called for against such receipts without agreeing to deliver any particular bales. The depositor, after pledging the receipts, without notice to the pledgee withdrew the bales first deposited and replaced them with others of equal value. *Held*, that the lien of the pledgee was transferred to the new bales, the release of the old bales constituting a valuable consideration for subjecting the new ones as deposited to the same lien.

4. The lien of a pledgee of negotiable warehouse receipts in the name of the pledgor is not affected by their exchange for a single receipt covering the same property in the name of the pledgee.

Appeal from supreme court, general term, First department.

Action by the New York Security & Trust Company against Hong Kong & Shanghai Banking Corporation and others. From a judgment of the general term (36 N. Y. Supp. 355) affirming a judgment of the special term in favor of plaintiff, the banking corporation and other defendants appeal. Affirmed.

Michael H. Cardozo and S. Sidney Smith, for appellants. William B. Hornblower and Howard A. Taylor, for respondent.

VANN, J. This action was brought to settle conflicting claims to the proceeds of a quantity of burlaps sold by the plaintiff under a warehouse receipt, pledged to secure a loan of money, no question being raised by any defendant as to the propriety of an action in equity. All the claimants derived title through the firm of Lipman & Co., manufacturers and importers of Dundee, Scotland, who were represented in this country by one Ludwig Gutmann as their general agent. Their business was to finish goods taken in the rough from the looms, put them in shape for the market, and export them. The plaintiff claimed special title, as pledgee, to all the burlaps, consisting of 200 bales, while the Hong Kong & Shanghai Banking Corporation, Antony Gibbs & Sons, and Cotesworth & Powell, who alone are before us as appellants, claimed general title to 22, 15, and 9 of said bales, respectively. Other claims were presented by different parties, but they are not now material, as the owners or representatives thereof have not appealed.

The question presented is whether any of the appellants had any title to the bales claimed by them, and, if so, whether that title was good as against the plaintiff. The trial was before the court at special term, and, as the decision was general in form, all the facts warranted by the evidence and necessary to support the judgment are presumed to have been found. *Amherst College v. Rich*, 151 N. Y. 288, 320, 45 N. E. 876. Evidence was given tending to show that on the 1st of December, 1891, Lipman & Co. had on storage with the Terminal Warehouse Company in the city of New York 801 bales of burlaps, for 500 of which negotiable warehouse receipts were subsequently given to that firm. When their agent, Mr. Gutmann, first took out receipts of that kind, he was asked by the representative of the warehouse company for which bales he wanted them, and whether he wanted them for any particular bales, and he said no, that he wanted no bale marks in the receipts, so that he could substitute other bales equal in kind and quality for those in storage whenever he liked. After this conversation, the warehouse receipts were always made out as thus requested, without identifying marks, and substitutions were made from time to time as bales were taken out of the bonded warehouse and sold, until none of the bales on hand December 1, 1891, were in the warehouse on December 15, 1892, when the controversy before us arose. The shipping documents accompanying each importation of Lipman & Co., and delivered by Mr. Gutmann to the custom house authorities, consisted of a bill of lading, a consular invoice, and a warehouse entry. The bill of lading was made out to Lipman & Co. as both consignor and consignee, except in the case of Antony Gibbs & Sons, who were themselves named as consignees, but they indorsed on the back of the instrument the words, "Deliver to the order of Messrs. Lip-

man & Co., New York," and signed the same by their firm name. The consular invoice contained a declaration signed by a member of the firm of Lipman & Co. to the effect that he was the manufacturer of the goods imported, and the United States consul at Dundee certified, among other things, that he was satisfied that the person making the declaration was the person he represented himself to be. The warehouse entry, dated at the custom house, New York, was headed, "Entry of merchandise imported," at a date named, "by Ludwig A. Gutmann," and to it was annexed the declaration of Gutmann, acknowledged before a notary public, that he was the ultimate consignee of the merchandise mentioned in the annexed entry and invoice, and that Lipman & Co. were the owners thereof. All these papers, except the last, were mailed to Gutmann, who, on presentation thereof at the custom house, was enabled, in the usual course of business there, to take out the warehouse entry and obtain a permit to send the goods to a bonded warehouse, where they were stored subject to the order of Lipman & Co. The Terminal Warehouse Company was accustomed to issue to Lipman & Co. two kinds of receipts for goods thus stored, one of which was nonnegotiable and simply a memorandum that the goods were held on storage for Lipman & Co., and the other, which was the kind issued for the bales in question, was negotiable, and stated in substance that the warehouse company had "received in Rositer stores No. 4 U. S. bonded on storage for account of Lipman & Company" so many bales of burlaps, "marks various * * * deliverable only upon return of this receipt and the payment of charges accrued thereon." The word "negotiable" was printed across the face of the receipt.

After December 1, 1891, the exact date not clearly appearing, Lipman & Co. borrowed \$50,000 from the plaintiff upon their note at four months, in the usual form, with the added statement that said firm had pledged to the plaintiff as security five negotiable receipts of the Terminal Warehouse Company, dated December 1, 1891, for 100 bales of burlaps each, with authority to sell the same, "or any securities that may be substituted in lieu thereof," upon certain conditions duly named. Said warehouse receipts, which were in the form already described, were annexed to the note and delivered therewith, duly assigned by Lipman & Co. in blank, at the time the loan was made, and at the same time the plaintiff learned from actual inspection in the warehouse that 500 bales of burlaps were stored therein subject to the order of Lipman & Co. At the date of the loan Lipman & Co. gave the plaintiff to understand that the goods represented by the receipts belonged to them, and nothing was at any time said to indicate that any one else had any claim upon them. The plaintiff had no information as to the financial standing of the borrowers, and the loan was made upon the strength of the facts thus

stated. On the 7th of September, 1892, said note was renewed, upon the same security and in reliance on the same facts. Subsequently Lipman & Co. paid \$30,000 upon the note then held by the plaintiff, and three of the receipts were thereupon surrendered, so that on the 15th of December, 1892, when Lipman & Co. failed, they still owed the plaintiff \$20,000 on said note, to secure which it held the two remaining receipts, for 100 bales each, running to Lipman & Co. and indorsed in blank, and upon the day last named it delivered to the warehouse company said two receipts and received in exchange one receipt for 200 bales made out in its own name. There were just 200 bales then on hand. Upon the strength of this receipt, and pursuant to the terms of the note, the plaintiff took possession of the 200 bales in question, and sold them on the 28th of January, 1893, for the sum of \$22,823.84. Nothing was said to the plaintiff at any time by any person about substituting new bales for those covered by the original receipts, but in fact Lipman & Co. took out old and put in new bales almost daily. Mr. Gutmann, who was well qualified to speak upon the subject from actual observation, testified that all the bales of burlaps were substantially equivalent in value, and there was no evidence to the contrary. The title of the appellants rests upon certain trust receipts, so called, signed by Lipman & Co. through Mr. Gutmann, dated at New York, to the effect that said firm had received from the appellants, respectively, a bill of lading for a certain number of bales, which, as the receipt further stated, "we hereby agree to hold as their property and to keep insured against fire, * * * and on sale of said goods, or any portion thereof, we further bind ourselves to remit * * * the proceeds thereof as soon as received; the intention of the undersigned in giving this trust receipt being to protect and preserve unimpaired the title and interest of" the appellant named "in said goods, and to act in the premises entirely as their trustees; it being further understood that on the proceeds of the said goods being handed over to" such appellant "the trust which has been hereby created shall thereupon cease." In the case of Cotesworth & Powell there was also evidence showing a large sum due them from Lipman & Co. on a balance of account, and certain correspondence was read showing that Cotesworth & Powell had agreed to lend money to Lipman & Co. on the security of such trust receipts. All this evidence was wanting in the case of the two other appellants, except that each held a trust receipt, differing somewhat in phraseology, but similar in legal effect to that held by Cotesworth & Powell. The receipt given to Antony Gibbs & Sons contained a promise on the part of Lipman & Co. that "on the sale of said goods or any portion thereof" they would remit to Gibbs & Sons the proceeds as soon as received. The receipts given to the Hong Kong & Shanghai Banking Corporation did not con-

tain the words "on sale of said goods or any portion thereof," but contained a promise upon the part of the receptors "to deliver to the bank's agent in New York the warehouse receipt for the same," together with a fire policy and a custom house withdrawal entry. Lipman & Co. did not carry out the promises made by them in the receipts, nor does it appear that any of the appellants ever made any request to have them carried out. The evidence showed that when Lipman & Co. shipped goods to this country they transmitted the bills of lading and consular invoices to one of the appellants, who then sent them to Gutmann for Lipman & Co., with a blank trust receipt to be signed. Mr. Gutmann was accustomed to sign the trust receipt in the name of his firm, and return it, holding possession, however, of the bills of lading and the consular invoices, which he presented at the custom house, and without which no one could have obtained the goods, and received the usual permit to store. Lipman & Co. were thus enabled to obtain warehouse receipts and to pledge or dispose of the same. The plaintiffs never saw the bills of lading or consular invoices so furnished to Lipman & Co. or their agent. Lipman & Co. owned the goods before the loans were made to them by the appellants, respectively, and before the bills of lading and consular invoices were delivered to the appellants, who did not buy the goods themselves upon the request of Lipman & Co., or otherwise, and never had any interest therein except as stated. The receipt for 200 bales given by the warehouse company to the plaintiff on the 15th of December, 1892, embraced all the bales then stored to the order of Lipman & Co. A part of these bales were those covered by the trust receipts of the appellants. This is the history of the bales in question which came into the lawful possession of Gutmann, as agent of Lipman & Co., through the usual evidence of title furnished by the appellants themselves. By means of the bills of lading and consular invoices which they delivered to Lipman & Co., with the intention, as the special term is presumed to have found, that the firm should obtain possession of the goods and sell them, they took possession of them in the usual and legal way, and stored them with the warehouse company, after the date of the last renewal of the note held by the plaintiff. The trust receipts were a secret arrangement between the appellants and Lipman & Co., known only to themselves, the effect of which, as between themselves, assuming that they truthfully express the actual transaction, it is unnecessary to decide. There is some reason to believe that the appellants were simply pledgees out of possession, and hence with no title. As to third persons, the naked receipts, without other proof, such as the making of a loan or of advances, were slender evidence of title, and although the attention of the appellants was repeatedly called to this defect during the trial, no effort was made to

remedy it, except to some extent by Cotesworth & Powell, as already stated.

Independent of the question of substitution, which will be considered later, these facts bring the case directly within the provisions of the factors' act, which declares under what circumstances a factor or agent shall be deemed the true owner as to third persons acting in good faith. Laws 1830, c. 179. That act makes "every factor or other agent, intrusted with the possession of any bill of lading, custom house permit or warehouse keeper's receipt, for the delivery of any" merchandise, or if he has not the documentary evidence of title, if he is "intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon * * * the true owner thereof, so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced or negotiable instrument or other obligation in writing given by such other person upon the faith thereof." *Id.* § 3. By the next section it is declared that the holder of an antecedent debt, who accepts or takes merchandise in deposit from any such agent as security therefor, shall not acquire thereby any right other than was possessed by the agent at the time of the deposit. Subsequent sections protect the true owner to a certain extent by enabling him to redeem the merchandise when pledged, and to recover any balance upon the sale thereof. They prohibit those to whom merchandise may be committed for transportation or storage only from selling or hypothecating the same, and finally make it a misdemeanor for any factor or agent to sell, pledge, or dispose of any merchandise or documentary evidence of title for his own benefit contrary to good faith and with intent to defraud the true owner. *Id.* § 7. While Lipman & Co. are called trustees in the receipts given by them to the appellants, we think they were agents within the meaning of the factors' act. Two of the receipts authorize a sale by Lipman & Co., while the third fairly contemplates a sale by the use of the words "said merchandise or the proceeds thereof." This also appears from evidence outside of the receipts. Lipman & Co. were "intrusted with the possession of" the bills of lading and the consular invoices, to which formal declarations, duly acknowledged, were attached, stating that they were the owners of the goods. Having the lawful evidence of title, furnished by the appellants to enable them to sell the goods and remit the proceeds, they became agents for that purpose. Their authorized action was that of agents, and was of the kind contemplated by the factors' act as ordinarily done by agents. Calling them trustees does not make them trustees as to third persons with no notice of the secret agreement. The object of the statute was to protect innocent persons who deal in reliance upon apparent ownership, resting

upon possession either of the merchandise itself or documentary evidence of ownership. *Cartwright v. Wilmerding*, 24 N. Y. 521; *Pegram v. Carson*, 10 Bosw. 505; *Mechem*, Ag. § 995. We have carefully examined the authorities relied upon by the appellants, but find nothing in conflict with these views.

The remaining question relates to the substitution of bales. The appellants claim that the plaintiff never advanced any money on account of their bales, and that it never at the request of Lipman & Co. surrendered any goods pledged to it in substitution for the bales belonging to the appellants. This is true, but the special term is presumed to have found, according to the evidence, that prior to the original loan Lipman & Co. had established with the bonded warehouse a course of dealing by which the warehouse company issued negotiable open receipts to them for certain specified quantities of burlaps without specifying any particular bales; that the warehouse company held against such open receipts as many bales as they called for, always retaining a sufficient quantity to cover all open receipts outstanding, the holders of which could at any time call upon the warehouse for the quantities specified therein; that at the date of the failure of Lipman & Co., by the process of transfer in the warehouse, the bales consigned by the appellants to Lipman & Co. were held by the warehouse company to satisfy the open receipts that it had given to Lipman & Co., and which were then held by the plaintiff. The legal effect of the open warehouse receipt was an undertaking by the warehouse company to deliver the number of bales specified therein, stored with it by Lipman & Co., to that firm or their assigns upon the return of the receipt. It hence was under an obligation to keep on hand the number of bales called for by such receipt as long as it was outstanding. It did not agree to deliver any particular bales, for the receipt was open and contained no identifying marks. If it delivered the number of bales stored with it by Lipman & Co. called for by the receipt, upon the return thereof, it satisfied its engagement. According to the uncontradicted evidence, all the bales were practically of the same value, and when the plaintiff demanded 200 bales, under the open negotiable receipts, pledged to it by Lipman & Co., the warehouse company was under obligation, as bailee for the plaintiff, to deliver the number of bales called for, and if it did so its contract with the plaintiff as assignee of the open receipt was fully performed. Hence the warehouse company, being under this obligation, was in the position, when it surrendered the original 200 bales to Lipman & Co., or upon their order, of parting with value under the agreement in force between them as to the substitution of new bales in the place of old ones withdrawn. Their liability to account to the plaintiff for 200 bales was a good consideration for the substitution of 200 other bales, or like constituent units, upon the surrender of

the former. This is made very plain by the opinion of the circuit court of appeals, written in a case brought by one Blydenstein against this plaintiff as defendant to recover part of the proceeds of the 200 bales in question upon a claim similar to those asserted by the appellants in this action. *Blydenstein v. Trust Co.*, 15 C. C. A. 14, 67 Fed. 469. We close our review by quoting from that opinion, as follows: "The trust company, therefore, on September 7, 1892, obtained a valid lien on 500 bales of Lipman & Co.'s burlaps then stored in the warehouse. Thereupon the warehouse company became its bailee, and held the bales for it. *Gibson v. Stevens*, 8 How. 384. Whenever thereafter Lipman & Co. asked to substitute other similar goods of their own for those originally delivered as collateral, the surrender of an equal quantity of the original security of equal value would be a valuable consideration for the giving of the new security. The pledgee, as to the latter, would be a holder for value, and the exchange would have no effect upon the rights of the pledgee as founded upon the original contract. *Coleb. Coll. Sec. § 15; Clark v. Iselin*, 21 Wall. 360. The same rule should apply where the goods offered in substitution and in exchange, for which goods already pledged are surrendered, are such as have been intrusted to the factor in the manner provided for by the factors' act, when the surrender is made upon the faith of the factor's possession. The contract for disposition of such goods is not for 'advances of money,' but it would be too narrow a construction of the state statute, which, according to the decisions of the state courts, should be liberally construed, to hold that one who parts with money's worth in the form of valuable property is deprived of its protection because he did not first transform such property into cash. When, therefore, Lipman & Co., after having deposited the 38 bales in warehouse, subject to their order, called upon the warehouse company to deliver 38 bales already covered by the pledged receipts, and with no older free bales than these to substitute in their place, they did in fact apply for an exchange of part of the security collateral to their loan, thus offering to pledge the new 38 bales if the old ones were delivered to them. The offer was accepted, and, on the faith of their possession of the bales which they thus offered to pledge, the older bales were given up to them. This was a valuable consideration, parted with in good faith, and entitles the person paying it to the protection of the factors' act, as against the plaintiffs [here the defendants], who had intrusted Lipman & Co. with the possession of the goods. The trust company, on December 15, 1892, had a valid lien on all of the 200 bales remaining in the warehouse under the two uncanceled open receipts of December 1, 1891, and they certainly did not lose such lien by returning the original receipts to the warehouse and accepting in exchange a single one in their own

name for the full account." We think the judgment should be affirmed, with costs. All concur, except PARKER, C. J., not sitting, and GRAY, J., absent. Judgment affirmed.

(152 Ind. 111)

BRUNSON v. MARTIN et al.

(Supreme Court of Indiana. Jan. 13, 1899.)

WILLS—USE OF INCOME—RESIDUUM.

A testator devised to his wife the life use of all his property, and provided that she should use but the rents and profits of his estate, or so much thereof as she could make profitable use of, and enjoined on his executors the duty to assist her and attend to all her business. *Held*, that it was a power to use the income, and, the widow not doing so, the rents and profits remaining with the executors at her death fell into the residuum.

Appeal from circuit court, Jay county; D. W. Comstock, Judge.

Action by Samuel Brunson, administrator of the estate of Margaret Stoltz, deceased, against Frederick Martin and others, executors of the will of George Stoltz, deceased. There was a judgment for defendants, and plaintiff appeals. Affirmed.

J. W. Thompson, W. H. Williamson, and S. A. D. Whipple, for appellant. S. W. Haynes, Geo. W. Hall, and J. J. La Follett, for appellees.

JORDAN, J. Appellant, as the administrator of Margaret Stoltz, instituted this proceeding by a petition in the lower court, making the appellees Martin and Stoltz, executors of the last will and testament of George Stoltz, deceased, and certain legatees under said will, parties defendant to the action. By his petition appellant sought to secure an order of the court directing the executors of George Stoltz to pay over to him, as administrator of Margaret Stoltz, deceased, \$8,000 which they had in their hands at the date of said Margaret's death. A demurrer for insufficiency of facts was sustained by the court to this petition, and a final judgment rendered thereon against appellant, from which he prosecutes this appeal.

The facts set out in the petition may be thus summarized:

Appellant is the administrator of the estate of Margaret Stoltz, who died intestate in 1896, leaving surviving her no children, but leaving as her heirs certain other numerous persons, mentioned in the petition. The appellees Frederick Martin and Daniel Stoltz are the executors of the last will of George Stoltz, who died in 1891, leaving no children, but leaving as his widow said Margaret Stoltz, and also leaving surviving him certain brothers and sisters, and other persons related to him by consanguinity. In 1889 he executed the will in controversy, and the parts thereof material to the question mooted in this case are the following:

"Item 1. I give and bequeath to my beloved wife, Margaret Stoltz, the use of all

my real and personal property during her lifetime, that she may use it in any manner she knew me to use it, also for religious and charitable uses; and my executors shall assist her and attend to all her business if she shall so request. She shall use but the rents and profits of said estate, or so much thereof as she can make profitable use of. Item 2. I give and devise the farm on which we now live, containing ninety and $\frac{75}{100}$ ($90\frac{75}{100}$) acres, and situated in Wabash township, in Jay county, Indiana, to Louis P. Fenning and Mary A. Fenning, his wife, and her heirs, subject to the life estate of my said wife, Margaret, as set out above, and subject to the payment by said Louis P. and Mary A. Fenning to Caroline Martin (or her heirs), wife of George Martin, fifteen hundred (1,500) dollars, and to Adam Stoltz, my brother, or his heirs, fifteen hundred (1,500) dollars. Five hundred dollars shall be paid to each of them one year after the death of my said wife, or, should I survive her, one year after my death, without interest, and five hundred dollars to each of them at the end of each year, with 6 per cent. interest, until all is paid." By item 3 the testator bequeathed to his sister certain property as therein mentioned, and by items 4, 5, 6, and 7 he devised certain other property and money to other legatees, who apparently were the relatives of his said wife, Margaret. By item 8 he gave \$10 to his brother Philip Stoltz. Items 9 and 10 of the will are as follows: "Item 9. The residue of my estate, after the payment of all debts and funeral expenses, I give and bequeath to my sisters Caroline Martin and Margaret Mueller and to my brother Adam Stoltz, or their heirs. Item 10. I hereby appoint as executors of the foregoing will Frederick Martin and Daniel Stoltz, with the hope and request that they will attend to the wants of my wife while she lives, should she survive me, and be faithful in carrying out all they know to be my will, for which they shall be paid a fair recompense here and approving conscience toward God."

Appellant's decedent, Margaret Stoltz, elected to accept the provisions made for her in her husband's will in lieu of her rights in his property under the law. This will was duly probated in August, 1891, in the Jay circuit court, and appellees Martin and Stoltz were duly qualified as executors, and took upon themselves the discharge of the duties of said trust, and at the commencement of this action were still acting in the discharge of such duties.

The petition alleges that the personal property of the testator, George Stoltz, which came into the hands of his executors, consisted in part of horses, cattle, sheep, wagons and farm implements, wheat, corn, and other cereals, of the value of \$2,000, and also consisted in part of accounts, notes, bills, and choses in action, of the value of \$10,000; said personal estate, as an entirety, aggregating

\$12,000. Personal chattels above mentioned, other than the notes, bills, and accounts, were sold by the executors at public sale, and the money arising therefrom, together with that arising out of the interest on notes, bills, and accounts, was received by the executors, and by the latter was loaned and reinvested, and by their management of the said estate in this manner there was created or arose, by way of interest, rents, and profits, or the income upon the property, between the death of the testator and the demise of his said wife, a fund amounting to \$8,000, which remained unused in their hands at the date of Margaret Stoltz's death, which fund, when combined with the corpus of the personal estate, amounted to \$20,000 remaining in the hands of these executors at the death of the said widow. No part of this income of \$8,000, accruing as aforesaid, was paid over to the said Margaret Stoltz, or accounted for to her, by the said executors. Neither does it appear that she, at any time during her life subsequent to the death of her husband, exercised the power under his will to use any part of said income as it accrued, or made any demand or claim whatever upon said executors that they pay over to her, or account to her for, any portion thereof. Neither does it appear, from any of the facts set out in the petition, that the said Margaret contracted any debts upon the faith that the said income so accrued should be applied in payment thereof; and, for aught appearing to the contrary, she at no time exercised any power or right to receive the said money so accrued from the said executors for her use, or that she required any part thereof as necessary for her support and maintenance during her life; and, for anything appearing to the contrary, the only purpose for which appellant, as her administrator, is seeking to secure the payment of the money to him by the executors of George Stoltz is that it may be distributed through him as a medium to the numerous heirs of his decedent, none of whom are shown to be of any blood relation to the said testator. Appellant averred in his complaint that when he inventoried the property belonging to the estate of his decedent, Margaret Stoltz, he omitted from said inventory the money or fund now in controversy, for the reason that at that time he had no knowledge of the facts, but that prior to instituting this action he demanded that appellees, as executors, pay over to him the said fund or money, for which he now sues, and that they account to him, under the will of the said testator, for the amount due to the estate of his decedent, all of which, it is alleged, they refused to do.

The claim of counsel for appellant is that under the will in question Mrs. Stoltz, widow of the testator, was given an absolute life estate in all of his property, and that she was entitled to all of the rents, profits, and income that arose out of the real and per-

sonal property, after the death of her husband until her death, whether she actually received it or not, and that any amount not claimed or turned over to her by said executors, prior to her death, must be paid by them to appellant as her administrator, and pass into and become a part of her estate. Upon the other hand, counsel for appellees contend that, inasmuch as Mrs. Stoltz failed in any manner to avail herself of the power to use the income accruing from the money at interest, and from the rents and profits of the estate, given her under her husband's will, therefore the part not used or claimed by her during her life, which remained in the hands of the appellees as the executors of the will of George Stoltz, belongs to his estate, and passes to his residuary legatees.

The question propounded for our decision, under the facts and the will set out in the petition, is, what rights did the testator intend to confer upon his wife under the provisions of his will? It is apparent, we think, that the draftsman who prepared the will in controversy was not skilled in the drafting of such instruments, and perhaps it may be said he employed, in some respects, inapt words in expressing the meaning of the testator. The question, therefore, involved in this appeal, depends upon the interpretation of the will of George Stoltz. In the construction of a will, courts seek to ascertain the intention of the testator, as this is the guiding rule or canon of interpretation, affirmed by the authorities from Blackstone down to the present time. As the authorities sometimes state it, "the intention of the testator is the pole star," and, in a judicial search to ascertain this intention, courts will look to and consider the entire instrument, and isolated facts and clauses of the testament will not be selected, and their meaning determined, without considering them in connection with other parts of the will. Neither will such isolated parts or clauses be permitted to control the general tenor of the instrument in regard to the testator's intention. Unless some principle of public policy or some unyielding legal rule interferes, the intention of the testator, when ascertained, must be observed and enforced by the court. It is also a canon of construction relative to wills that the court, when necessary, may also, in addition to considering the provisions of the will itself, look to and consider the circumstances under which it was executed, both in respect to the condition of the testator and also that of his property and family, and the court will endeavor, under such circumstances, as far as possible, to put itself in his position. *Eubank v. Smiley*, 130 Ind. 393, 29 N. E. 919; *Nading v. Elliott*, 137 Ind. 261, 36 N. E. 695; *Bullerick v. Wright*, 148 Ind. 477, 47 N. E. 931.

As the facts disclose in the case at bar, neither George Stoltz, the testator, nor his wife, had any children. He seems to have had several brothers and sisters, whom he made legatees under his will. His wife, also, as re-

vealed by the complaint, had numerous relatives of her own blood, and some of these, by the provisions of the will, were made the objects of her husband's bounty. After declaring what the several legatees mentioned were to receive, the testator provided, by item 9 of his will, that, after the payment of all debts and claims against his estate, his two sisters, Mrs. Mueller and Mrs. Martin, and his brother Adam Stoltz, were to be the beneficiaries of the residuum of his estate. By the first item of his will, the testator gave to his wife, Margaret Stoltz, the right to use all of his real and personal property during her life in like manner as she knew him to use it, including religious and charitable purposes. The testator, however, declares at the close of item 1, in emphatic language, that "*she shall use but the rents and profits of said estate, or so much thereof as she can make profitable use of.*" (Our italics.) He also, in the same item, enjoins upon his executors, on the request of his wife, to assist her and attend to all of her business. By item 2 he devised the home farm to Fenning and wife, subject to the life estate of his wife "as above set out," and provided therein, in effect, that these devisees, who appear to have been occupying the home farm at the time the will was executed, should continue to occupy it, upon the same terms that they then did, for the purpose of keeping his wife, in the event she survived him, and for the payment of taxes accruing against the premises; or, in other words, the Fennings, after the death of the testator and during the life of his wife, were to continue in the use and occupation of the home farm, in consideration that they kept Mrs. Stoltz and paid the taxes upon the farm. In item 10 he expresses the hope, and requests, that his executors will attend to the wants of his wife during her life, and that they be faithful in carrying out all which they know to be his will. The desire of George Stoltz, the testator, to fully provide for the needs of his wife, in the event she survived him, is clearly and strongly evinced by the provisions of his will, and that he intended that she should be liberally supplied with all that might be necessary for her wants and comfort during her life there can be no doubt. By item 1 of the will it is evident that the testator only intended to bequeath to his wife the right to the use of his real and personal property for life, and that he desired that she use it in the manner he had, including donations in the furtherance of religious and charitable purposes. To more particularly define his meaning, or express himself in regard to the right or power which he intended to confer upon his wife under his will, he declares, in effect and in unmistakable terms, that "*she shall use but the rents and profits of said estate,*" or, in other words, so much of such income as she can profitably use.

The word "use," as employed in this will, is of potential significance, and must be given its full force and effect. As a general rule,

the use of a thing does not mean the thing itself, but means that the user is to enjoy, hold, occupy, or have in some manner the benefit thereof. See *And. Law Dict.* p. 1069. If the thing to be used is in the form or shape of real estate, the use thereof is its occupancy or cultivation, etc., or the rent which can be obtained for its use. If it is money or its equivalent, generally speaking, it is the interest which it will earn. As we have heretofore said, in the interpretation of the will in question, it is the intention of the testator, and his alone, which we are required to seek. A will, in its construction, is not open to the same rule which applies to mutual contracts, from which both parties expect to derive some benefit. In such a case, the court seeks to ascertain the intention of both parties to the contract, and anything which it can be said that either party did not agree to cannot be considered within the intention. Not so, however, with a will; for it is but the act of the testator, and he alone fixes the terms and conditions to please himself, while those who are the objects of his bounty simply accept or reject that which is bestowed upon them. Manifestly, when the provisions and terms embraced in item 1 are construed together as a whole, it is disclosed that the intention of the testator was to restrict the right to his wife to the use during her life of so much of the income of his estate accruing after his death as she could put to a profitable use or purpose; the adjective "profitable," no doubt, being employed in the sense of "beneficial" or "advantageous," and the testator possibly intending to be understood thereby that his wife should have the right to use so much of the income of his estate as she could, for her own benefit and in the furtherance of religious and charitable purposes. We cannot ignore the words, "give and bequeath to my beloved wife * * * the use of all of my real and personal property during her lifetime," and the further provision, in the same connection, that, "she shall use but the rents and profits of said estate, or so much thereof as she can profitably use." By this language and expression, the testator certainly intended that his wife should have, not an absolute estate in the income, but only the use of so much thereof during her life in the manner provided. *Goudie v. Johnston*, 109 Ind. 427, 10 N. E. 296.

The executors of the will of George Stoltz were directed therein to assist his wife, and attend to all her business and wants, while she lived. If they, as his executors, were to attend to the business and wants of his wife during her life, he evidently intended that their trust should at least continue until her death, and that they, as such executors, should have the management—except as it may be said to have otherwise been impliedly directed in the will—of the corpus of his estate, from which the income for the use of his wife was to be derived. The gift to the wife, under the will, was not absolutely of the in-

come in question, but it was the gift of the right or power, if she desired to exercise it, to use during her life the income arising out of the property mentioned or set apart by the testator for that purpose; and it is clear that, like any other power, it must be exercised by her prior to her death, in order to absolutely vest in her such property rights in the income as would pass to her estate at her death. Therefore, appellant, as her administrator, under the circumstances, does not occupy the position of his decedent, were the controversy to the fund in dispute between the latter and the executors of her husband's will.

It may be said, however, we think, that the question as to the extent to which Mrs. Stoltz might have exercised the power so conferred upon her, in respect to the amount of the income that she would use, was a matter left by her husband, under his will, largely to her own discretion, to be exercised within the spirit or intent of the bequest, assisted by his executors in the event she saw proper to invoke their aid. If she had exercised the right which the will gave her during her life to use this income, as it accumulated in the hands of the executors of her husband's estate, and had invested it in other property, or reduced it to her possession or control, prior to her death, for the purpose of using it, a different question would be presented; but the facts do not reveal that she ever exercised, or attempted in any manner to exercise, the power which the will gave her to use the money constituting the income or fund in question, nor is she shown to have ever made any demand for its use, nor does it appear that, prior to her death, she contracted any debts in reference thereto. She seems to have been satisfied in not exercising her right, and apparently was contented to leave the income to accumulate, unused by her, in the hands of the executors of her husband's will. The right or power to the use of this fund she certainly was required, under the circumstances, to exercise during her life, and as she failed to do so prior to her death, and there being no facts shown in the petition that would entitle her administrator to exercise it after her death, the demand of the appellant must fail. *Ford v. Ticknor*, 169 Mass. 276, 47 N. E. 877; *Nadling v. Elliott*, supra.

It cannot be successfully asserted that there is anything in the will, or in the circumstances surrounding the testator at the time of its execution, so far as the same are disclosed, which indicate that he intended that the income arising from his estate, remaining unused or unclaimed by his wife in the hands of his executors at her death, should be turned over by them to her administrator, and thereby pass into her estate, for the benefit of her heirs, to the exclusion of his brothers and sisters, kin of his own blood, whom he had made his residuary legatees. Appellant's decedent, therefore, having failed to exercise in any manner her right to the fund in controversy during her life, but leaving it, as she

did, unused and unclaimed in the hands of the executors of her husband's will, it must be considered and held to be a part of his estate, and, after the payment therefrom of all debts and claims against said estate, the remainder thereof must be distributed to the residuary legatees, as provided by his will. *Holbrook v. McCleary*, 79 Ind. 157; *Heilman v. Heilman*, 129 Ind. 59, 28 N. E. 310.

It follows that appellant, under the facts set out in his petition, is not entitled to have the money in question paid over to him by the appellees for the benefit of his decedent's estate, and the court, therefore, did not err in sustaining the demurrer. Judgment affirmed.

(152 Ind. 98)

WILLIAMS v. ATKINSON et ux.

(Supreme Court of Indiana. Jan. 12, 1899.)

BOUNDARIES—STATUTORY SURVEYS—SURVEYOR'S RECORD—EVIDENCE—INSTRUCTIONS.

1. Under 1 Rev. St. 1852, p. 469, providing that in proceedings to establish corners, lines, etc., the county surveyor must give notice to the adjoining landowners, unless they are all present and consenting to the survey, a surveyor's record, reciting that "the parties" were "present and consenting to the survey," without naming them, is insufficient to render such a record admissible in evidence.

2. Where a surveyor's record fails to show that notice was given to the owners of lands adjoining a line sought to be established, as required by 1 Rev. St. 1852, p. 469, such defect is not obviated by any presumption that the officer did his duty, he not being required to give such notice.

3. On an appeal from a statutory survey, it is not error to exclude a contract between appellant and a former owner, which mentions the quantity of land appellant is to get, but contains nothing as to the location of the disputed line.

4. On an appeal from a statutory survey, the court excluded a letter from a former owner to appellant, stating that no private survey made by the latter would be recognized, and warning him to keep off the land until a legal survey should be made. *Held* not error, since it proved nothing, and no advantage could inure to appellant from any admission contained therein.

5. Instructions authorizing a finding on evidence improperly admitted are erroneous.

6. An agreement between landowners that a survey shall be made does not justify a surveyor in changing a corner or line lawfully established by a previous survey.

7. A notice by the owner of land that he will cause an official survey to be made, or his consent in writing that a survey may be made, for the purpose of establishing corners or lines, does not operate as a waiver or abandonment of any right such owner has under previous surveys.

Appeal from circuit court, Newton county; M. B. Laury, Special Judge.

Action by Frank Atkinson and wife against Thomas Williams. There was a judgment for plaintiffs, and defendant appeals. Reversed.

Stuart Bros. & Hammond, J. W. Dyer, and E. Grant Hall, for appellant. Fraser & Isham, for appellees.

DOWLING, J. Frank Atkinson and Rachel Atkinson, who were the plaintiffs below, appealed from a statutory survey made by one Garis to the Benton circuit court. The survey appealed from was set aside, and, upon the appointment and order of the court, a second survey was made by one Kolb. Frank Atkinson and Rachel Atkinson again appealed. The venue of the cause was changed to Newton county, and a trial in the Newton circuit court resulted in a verdict and judgment against the survey so made by Kolb. Motions for a new trial and in arrest of judgment were made and overruled, and exceptions were taken to these decisions. The judgment upon the verdict directed that the Kolb survey be set aside, and that Lewis S. Aster, a competent surveyor, be appointed to make a new survey, and to establish the line between sections 28 and 29, in township 24 N., range 7 W., in Benton county. There was also a judgment for costs against Williams. From this judgment Williams appeals to this court, and the errors assigned are the overruling of the motions for a new trial and in arrest of judgment.

Frank Atkinson seems to have no interest in the controversy, and was probably joined as a plaintiff below only because he was the husband of Rachel Atkinson. As the motion in arrest of judgment is not discussed in appellant's brief, the objection to this ruling is waived. The reasons for a new trial which we consider material relate to the admission in evidence of a supposed record of what is referred to as the "Robertson Survey," the exclusion of certain documentary evidence offered by appellant, and the giving of and refusal to give certain instructions.

By the admission of counsel for appellees, the substantial controversy is as to the admissibility in evidence of the so-called "Robertson Survey." Upon the trial below the appellees were permitted to introduce in evidence, over the objection and exception of the appellant, the following writing:

"Wm. T. Rowe.

A  D

"The parties present and consenting to survey and location of corners. James Howeth and Thomas Crawson was sworn as chain carriers. Perpetuated section corner between sections 20, 21, 28, 29, in town 24 north, range 7 west, by a post at thence located quarter section or $\frac{1}{4}$ mile corner at 'C,' by oak post marked $\frac{1}{4}$ s., and also the $\frac{1}{4}$ sec. corner between A. C. by oak post marked $\frac{1}{4}$ s."

"H. Robertson, Co. Surveyor.

"Survey May 14th, 1853."

The action of the court in admitting this paper in evidence was erroneous. As the law stood when this survey is alleged to have been made, ten days' notice of such survey was required as to the resident owners of the adjoining lands, or, if such owners were non-residents of the county, three weeks' notice

by publication in a newspaper nearest to such land, unless all the proprietors of the lands adjoining the corner which the county surveyor was required to establish or perpetuate, and the line, which he was required to view and establish, were present and consenting to the survey, or had consented thereto in writing. 1 Rev. St. 1852, p. 469. The supposed record of the Robertson survey wholly fails to show that any notice was given, or that all the proprietors of the lands adjoining the corner to be perpetuated and the line to be established were present and consenting to the survey, or that they had so consented in writing. The words, "The parties present and consenting to survey and location of corners," do not import that all the proprietors of the lands to be affected by such survey were present and consenting. Who the "parties" so alleged to be present were, or whether they were the owners of the lands adjoining the corners to be perpetuated, or the lines to be viewed and established, does not appear. To render the supposed record admissible in evidence, the names of such owners of the adjoining lands as were present should have been set out, or it should have been shown by other evidence that they had been duly notified, had consented in writing to such survey, or were present and consenting to it. Such evidence by parol or in writing would have been competent. This omission in the document offered was not supplied by any kind of proof. If notice was not given to the adjoining landowners, or if they did not consent in writing, or were not present and consenting, the surveyor had no authority to establish or perpetuate a corner, or to view and establish a line, and his proceedings under such circumstances were void. This defect in the supposed record is not obviated by any presumption that the officer did his duty. It was not his duty to notify the proprietors of adjoining lands, to bring them before him, or to obtain their consent to the survey. The cases referred to by counsel for appellees in support of the proposition that, where a public record is silent as to notice, the law will presume that notice was given, relate only to courts of general jurisdiction. Where the court is one of inferior and limited jurisdiction, such as the court of a justice of the peace, no such presumption is indulged, but it must affirmatively appear that notice was given. *Railroad Co. v. Shultz*, 31 Ind. 150; *State v. Gachenheimer*, 30 Ind. 63. It is said in *Strosser v. City of Fort Wayne*, 100 Ind. 443: "The right to notice is a fundamental one, and it is a rule of wide application that, in order to take from a citizen any rights or to impose upon him any burdens, notice of some kind must be given him." This rule applies as well to statutory proceedings where notice is required, such as official surveys of lands, as to the proceedings of courts.

The exclusion by the court of the written agreement between appellant and Templeton,

the assignee of Cephas Atkinson, a former owner of section 28, was proper. While the contract mentioned the quantity of land appellant was to get, it afforded no evidence of the true location of the disputed corner or line.

Appellant offered in evidence a letter from Templeton, the assignee of Cephas Atkinson, stating that no private survey made by appellant would be recognized, and warning appellant to keep off of section 29 (then held by Templeton, as such assignee) until a legal survey should be made, and the corners and lines legally established. The court sustained an objection to this evidence, and, we think, correctly. It proved nothing, and no advantage could inure to appellant from any supposed admissions made in it.

The court of its own motion gave to the jury instructions Nos. 11 and 12, to which appellant excepted. Both of these instructions were based upon the record and documentary evidence of the Robertson survey, which, as we have decided, was improperly admitted. While these instructions might be unobjectionable under some circumstances, as abstract statements of the law, they were not applicable to the facts of this case, and were calculated to mislead the jury. The court having permitted the record of the Robertson survey to be given in evidence, and no proof that the owners of the adjoining lands affected by that survey were present and consenting thereto having been made, except such as was furnished by the recital in that record, these instructions authorized the jury to find, from that recital alone, that such owners were present and consenting to the survey. This, we think, was error.

Appellant also complains of instruction No. 2, given by the court at the request of appellees, but the objection is not well taken. The instruction states the law correctly. An agreement between landowners that a survey shall be made does not justify the surveyor in changing a corner or line lawfully established by a previous survey.

The rulings of the court in refusing to give instructions Nos. 1, 2, 3, and 4 are called in question. These instructions informed the jury, in substance, that they should not consider the Robertson survey, of which, as we have seen, there was no proof; that the question they were to try was whether the Kolb survey was correct; that the Robertson survey was not conclusive as to the location of the corner in dispute, and, if considered at all, it was to be considered in connection with other evidence in the case; and that the jury was to determine, upon the whole of the evidence, whether the Kolb survey was substantially correct and conformed to the original government survey. These instructions state the law correctly, and should have been given.

The last point discussed by appellant's counsel is the legal effect of an agreement, signed by each of the proprietors of the lands adjoining the disputed corner and line, substan-

tially as follows: "For the purpose of establishing the southwest corner and the northwest corner of section twenty-eight (28), and the line dividing said section twenty-eight (28) from section twenty-nine (29), and perpetuating the same, in township twenty-four (24) north, of range seven (7) west, in the county of Benton and state of Indiana, and for the purpose of saving the expense of publication and service of notice, I hereby waive service as required by statute, and consent that such survey may be had on Thursday, May 9, 1895, and hereby represent that I am the owner of the," etc., "in said county and state. [Signed by owner of land described.]" It is contended by counsel for appellant that this paper operates as a waiver of former surveys, and is an agreement to disregard them. We put no such construction on it. The sole and only effect of this agreement was to dispense with the notice required by the statute. *Wood v. Kuper*, 150 Ind. 622, 50 N. E. 755. Neither a notice by the owner of lands that he will cause an official survey to be made, nor the consent of such owner, in writing or otherwise, that a survey may be made, for the purpose of establishing corners or lines, operates as a waiver or abandonment of any right such owner may have under previous surveys. Such notice or consent does not in any manner or to any extent set aside former surveys, or authorize any one to disregard them. A demand for a survey, or the consent of the owner of lands that a survey may be made, is not to be construed as an admission that the location of a corner or line is uncertain, or that such corners or lines have been incorrectly located by any previous survey, or that any corner or line established or located by a former survey is to be set aside.

For the errors of the court in admitting the record of the Robertson survey, and in giving and refusing to give the instructions referred to in this opinion, the judgment is reversed, with instructions to grant a new trial.

(152 Ind. 431)

SPACY v. EVANS. 1

(Supreme Court of Indiana. Jan. 13, 1899.)

TRESPASS—LICENSE TO CUT STANDING TREES—REVOCATION—SURVEYS—ESTOPPEL.

1. Standing trees may be the subject of a parol sale, so as to give the purchaser a license to go on the land and remove them.

2. The death of such a licensor before the license is executed effects a revocation of the license.

3. The owner of land who causes or consents to a statutory survey loses none of his rights, and is not estopped from claiming title to his land, though such survey remains unappealed from, since it is only prima facie evidence in favor of the lines and corners so run and established, and nothing more.

Appeal from circuit court, Warren county; J. M. Rabb, Judge.

Action by Arthur Evans against John W. Spacy. There was a judgment for plaintiff, and defendant appeals. Affirmed.

1 Rehearing denied.

E. F. McCabe, for appellant. C. V. McAdams, for appellee.

DOWLING, J. This is an action by the appellee against the appellant for a trespass of appellant in wrongfully entering upon the lands of the appellee, as alleged, and cutting down and removing therefrom a growing hedge. Answer in denial, and a special plea stating, in substance, that the land on which the hedge stood belonged to the mother of the appellee, that appellant purchased the hedge from her, and that upon her death the appellee inherited said lands, and had knowledge of such purchase, but had not forbidden appellant to remove such hedge.

A demurrer to this paragraph was sustained, and this decision presents the first question for review. Standing trees may be the subject of a sale by parol, so as to give the purchaser a license to go upon the land to cut and remove them. 1 *Ld. Raym.* 182; *Owens v. Lewis*, 46 Ind. 488; *Armstrong v. Lawson*, 78 Ind. 498; *Cool v. Lumber Co.*, 87 Ind. 531. See, also, note to *Kingsley v. Holbrook*, 86 Am. Dec. 162. But the death of the licensor before the license is executed effects a revocation of such license. *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174; *De Haro v. U. S.*, 5 Wall. 599; 2 *Lawson, Rights, Rem. & Prac.* § 2674; *Carter v. Page*, 26 N. C. 424. The case of *Rogers v. Cox*, 96 Ind. 157, to which we are referred by counsel for appellant, does not touch the question as to the effect of the death of the licensor or owner of the land before the license has been executed. In that case the contract was in writing. The appellant had purchased from the appellee a building, whether temporary or of permanent character does not appear, situated on appellee's land. Appellant entered on the land for the purpose of removing the building. Both parties to the license were living. In an action for trespass it was held that these facts were sufficient to constitute a defense. We think the demurrer to the third answer was properly sustained.

The remaining error assigned is the overruling of appellant's motion for a new trial. The grounds of that motion are that the finding of the court is contrary to law and that it is not sustained by sufficient evidence. The real question involved is the ownership of the narrow strip of land near the dividing line between sections 11 and 14. The hedge alleged to have been wrongfully cut down by appellant was on this strip. There was evidence, more or less satisfactory, of four different surveys, the object of which was to establish the corners of, and relocate the line between, sections 11 and 14. The correctness of the first, known as the "Webb Survey," made upon proper notice, in 1871, is not seriously questioned. The subsequent surveys, made by Smith in 1881 and by Taylor in 1885, appear to have been informal, and afford little aid in determining the location of the original line. In 1896 a fourth survey was made by

one Gemmer, at the instance of appellee and after notice to appellant. By this survey it appeared that the hedge was upon the lands of appellant. Appellant contends that, because appellee procured this survey to be made, he is conclusively bound by it, and hence that the finding of the court is contrary to law. We do not so interpret the statute. The owner of land who causes a survey to be made agreeably to the provisions of the statute, or who consents to a survey, loses none of his rights by such proceeding or consent. The fact that he has caused a survey to be made, or has consented to one, does not estop him from claiming title to his land, notwithstanding such survey remains unappealed from. By such survey he is deprived of no right of action or defense arising from possession or any other source of title. An official survey is, as the statute declares, *prima facie* evidence in favor of the corners so established and the lines so run, and nothing more. Its legal effect is merely to furnish one species of evidence, which may or may not be material, in the determination of a question of title, and which may be entirely controlled and overcome by evidence of another kind, such as proof of adverse possession under claim of title for 20 years, a valid agreement with the adjoining owner for a different line, and the like. *Herbst v. Smith*, 71 Ind. 44; *Wingler v. Simpson*, 93 Ind. 201; *Riggs v. Riley*, 113 Ind. 208, 15 N. E. 253; *Cleveland v. Obenchain*, 107 Ind. 591, 8 N. E. 624; *Russell v. Senior*, 118 Ind. 520, 21 N. E. 292; *Wood v. Kuper*, 150 Ind. 622, 50 N. E. 755; *Williams v. Atkinson* (at the present term) 52 N. E. 606.

This question being disposed of, the application for a new trial stands entirely upon the ground that the finding is not sustained by sufficient evidence. A great deal of evidence pertinent to the issues was given on both sides. The rule which governs this court will not permit us to weigh it. We find no error in the decision of the trial court overruling the motion for a new trial. Judgment affirmed.

(152 Ind. 104)

STOERMER v. PEOPLE'S SAV. BANK OF EVANSVILLE, IND.

(Supreme Court of Indiana. Jan. 12, 1899.)

MECHANIC'S LIENS—LIMITATIONS—MORTGAGES.

Under *Burns' Rev. St. 1894, § 7259* (Acts 1889, p. 258), making a mechanic's lien void if not enforced within a year of its recording, a mechanic's lien foreclosed within the required time as against the owner, without making a mortgagee of the premises a party, is void as to the latter after one year from its filing.

Appeal from superior court, Vanderburg county; John H. Foster, Judge.

Action by the People's Savings Bank of Evansville, Ind., against Herman Stoermer. There was a judgment for plaintiff, and defendant appeals. Affirmed.

William Reister, for appellant. James T. Walker, for appellee.

MONKS, C. J. In 1890 a mortgage was executed to appellee on certain real estate in Evansville, Ind., to secure a loan made to the mortgagor, which mortgage was duly recorded. Afterwards, in 1894, appellant filed in the office of the recorder of Vanderburg county, Ind., a notice of intention to hold a mechanic's lien on the same real estate for work and labor done and performed and for material furnished in the erection of a building on said real estate. Said notice was filed within 60 days after the last item of labor or material was furnished, and said mechanic's lien was in all respects valid. An action was commenced in the court below within one year from the time said notice was filed, and on March 26, 1896, said mechanic's lien was foreclosed, and said real estate ordered sold to pay the same. Appellee was not made a party to said action. On June 24, 1896, appellee commenced this action against the mortgagor to foreclose said mortgage executed in 1890, making appellant and other junior lienholders defendants. Appellant, for answer to appellee's complaint to foreclose said mortgage, set up said mechanic's lien and the decree foreclosing the same, alleging that said mechanic's lien was for labor and material furnished in the erection of a building upon said real estate after the execution of said mortgage thereon, and that said mechanic's lien on said building so erected was superior to the lien of appellee's said mortgage thereon, under the provisions of *Burns' Rev. St. 1894, § 7256* (Acts 1889, p. 257). The court below held that the lien of said mortgage was superior to the mechanic's lien on said building, and rendered judgment accordingly.

It is provided in section 7256, *supra*, being section 2 of an act approved March 9, 1889 (Acts 1889, p. 257), that when land is incumbered by a mortgage, and a building is erected thereon, the mechanic's lien on said building is superior to the lien of the mortgage thereon, and the building may be sold to satisfy the mechanic's lien, and removed within 90 days by the purchaser. It is insisted by appellant that under said section the mechanic's lien on the building erected on the real estate described in the mortgage and notice of mechanic's lien was superior to the lien of said mortgage, and that he was entitled to a decree for the sale of said building to pay said mechanic's lien, and that the purchaser under such decree would have the right to remove said building within 90 days. It is not necessary for us to determine as to the correctness of this contention of appellant, for the reason that, if such right existed, he has not asserted it within the time required by the statute. The laws of this state require that, to enforce a mechanic's lien, the action must be commenced within one year from the time of the filing of the notice in

the recorder's office, or, if credit be given, within one year from the expiration of such credit, and if not commenced within the time mentioned the same is null and void. Burns' Rev. St. 1894, § 7259 (Acts 1889, p. 258); Association v. Helberg (No. 18,525; last term) 51 N. E. 916; Deming-Colborn Lumber Co. v. Union Nat. Savings & Loan Ass'n (No. 17,959; last term) 51 N. E. 936. In Association v. Helberg, supra, an action to foreclose a mechanic's lien had been commenced within the time fixed by statute, and the same foreclosed. Afterwards said real estate was sold on said decree. After the expiration of the time within which the law requires an action to foreclose a mechanic's lien to be commenced, a person holding a mortgage on said real estate which was junior to said mechanic's lien, but who was not made a party to the action to foreclose said mechanic's lien, commenced an action to foreclose the same, and made the purchaser of said real estate under said decree of foreclosure a party defendant; and this court held that said mechanic's lien was void, as against said mortgage lien, for the reason that no proceeding had been commenced to enforce said mechanic's lien, as against said mortgage, within the year fixed by statute. Deming-Colborn Lumber Co. v. Union Nat. Savings & Loan Ass'n, supra, is to the same effect. In this case appellant claims that the lien of appellee's mortgage on said buildings was junior to the mechanic's lien; but it will be observed that appellee, the owner of said mortgage, was not made a party, defendant or otherwise, in the action to foreclose said mechanic's lien, and that no action was commenced against appellee to enforce said mechanic's lien within the time required by law. Said mechanic's lien was, therefore, null and void, as against appellee's mortgage, under the law as declared in the cases above cited.

Other reasons are urged to sustain the action of the trial court, but, having reached the conclusion that the mechanic's lien is null and void as against said mortgage, it is not necessary that they be considered. Finding no error in the record, the judgment is affirmed.

(152 Ind. 86)

HILLIKER v. CITIZENS' ST. R. CO.

(Supreme Court of Indiana. Jan. 10, 1899.)

PERSONAL INJURIES—ACTION BY ADMINISTRATOR—ABATEMENT—STATUTES—APPEAL.

1. Where the legislature re-enacts a statute of the state, it adopts also the construction given thereto by the courts of the state before the re-enactment.

2. Under Burns' Rev. St. 1894, § 283 (Horner's Rev. St. 1897, § 282), providing that causes of action arising out of an injury to a person die with the person, except actions given for an injury causing the death of any person, an administrator cannot sue for damages for physical pain and suffering of intestate, since the right of action abates.

3. By failing to discuss an assignment of error, appellant waives the error.

Appeal from superior court, Marion county; Vinson Carter, Judge.

Action by Alpha W. Hilliker, administrator, etc., against the Citizens' Street-Railroad Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

George W. Galvin, for appellant. W. H. Latta, for appellee.

MONKS, C. J. The appellant brought this action against appellee. The complaint was in two paragraphs, and appellee's demurrer to each paragraph was sustained, and, appellant refusing to plead further, judgment was rendered against him on demurrer. The errors assigned call in question the action of the court in sustaining said demurrer to each paragraph of the complaint.

The first paragraph seeks to recover damages, not for the death of appellant's intestate, but for physical pain and suffering, and the mental anguish caused thereby, being such damages only as the intestate could have recovered if he had lived. It is not averred in said paragraph that the deceased left surviving him a widow or next of kin, but, on the contrary, it is averred that he left no father or mother or next of kin surviving him. The cause of action set forth in said paragraph is in tort, and the facts alleged would have entitled the decedent to a recovery if he had lived. It is admitted by counsel for appellant that at common law the cause of action set up in the first paragraph of the complaint died with the deceased, and did not survive; but it is insisted that the rule in this respect was changed by section 283, Burns' Rev. St. 1894 (section 282, Horner's Rev. St. 1897), and that under the provisions of said section the right of the deceased to recover damages for his physical pain and suffering, and mental anguish caused thereby, did not die with the deceased, but survived, and the same may be recovered in an action by his administrator. It is settled law that, in the absence of statutory enactments, actions for injuries to the person abate on the death of the person injured, and do not survive to the personal representatives. Burns v. Railroad Co., 113 Ind. 169, 170, 171, 15 N. E. 230. Unless, therefore, some statute revives the common-law right of action for a personal injury, and makes it survive the death of the injured person to his representatives, no cause of action is stated in said first paragraph.

In 1852, the legislature adopted a Code of Civil Procedure, section 782 of which, on page 330, 2 Gav. & H. St., is the same as section 283 (282), supra, except that the last-named section contains, in addition to what is set forth in section 782, supra, the words "malicious prosecution." It was held by this court, in Stout v. Railroad Co., 41 Ind. 149, decided at the November term, 1872, of this court, that a cause of action arising out of injuries

to the person died with the person, and did not survive, under the provisions of section 782, supra. The case in 41 Ind. was cited with approval, and the same doctrine declared, in *Railroad Co. v. Stout*, 53 Ind. 143, 145, decided in 1876. See, also, *Hilker v. Kelley*, 130 Ind. 356, 358, 30 N. E. 304; *Burns v. Railroad Co.*, 113 Ind. 169, 171, 15 N. E. 230. This was the settled judicial construction of said section 782, supra, in 1881 when the present Code of Civil Procedure was enacted by the legislature. Section 6 of said Code, being section 283, Burns' Rev. St. 1894 (section 282, Horner's Rev. St. 1897) was a re-enactment of said section 782, supra, of the Code of 1852, except that the words "malicious prosecution" were added thereto. It is the settled rule that, when a legislature re-enacts a statute of the state, it adopts also the construction given to such statute by the courts of such state before such re-enactment. *End. Interp. St. §§ 368, 371*, and cases cited in notes; *Suth. St. Const. § 256*, on pages 336, 337; *Black, Interp. St. pp. 161, 162*. It follows, therefore, that the legislature, in re-enacting section 782, supra, of the Code of 1852, as section 283 (282), supra, adopted the construction given by this court to section 782, supra, in the cases above cited, and that a cause of action for injuries to the person does not survive, but dies with the person.

In *Burns v. Railroad Co.*, supra, this court, speaking in regard to the statutes on the subject of actions for the death of another, said: "These statutes, while they do not in terms revive the common-law right of action for personal injury, nor make it survive the death of the injured person, create a new right in favor and for the benefit of next of kin or heirs of the person whose death is wrongfully caused." In *Railroad Co. v. Goodykoontz*, 119 Ind. 111, 21 N. E. 472, this court, in speaking on the same subject, at page 113, 119 Ind., and page 472, 21 N. E., said: "The pain and suffering endured, and the permanent injury resulting from the wounding or maiming of the minor, are personal to himself, and damages for such pain and injuries are always recoverable for his benefit. We know of no principle or precedent which sustains a recovery of damages for the death of a human being, no matter how caused, simply for the purpose of enhancing the value of the decedent's estate. The action is given to afford compensation for those who have sustained pecuniary loss by the death, and not for the benefit of the decedent's estate." It is evident that the actions arising out of injuries to the person, other than seduction, false imprisonment, and malicious prosecution, which section 283 (282), supra, provides do not abate on the death of the person, are the actions provided for in sections 267, 285, Burns' Rev. St. 1894 (sections 266, 284, Horner's Rev. St. 1897). Under said sections actions can only be maintained by the father or mother, depending upon the facts of the case, or by the personal representative for the benefit of

the widow and next of kin, and not for the benefit of the decedent's estate. The court did not err, therefore, in sustaining the demurrer to the first paragraph of complaint.

Appellant having failed to discuss the assignment of error calling in question the action of the court in sustaining the demurrer to the second paragraph of the complaint, the same is waived. Judgment affirmed.

(152 Ind. 448)

DE PAUW PLATE-GLASS CO. v. CITY OF ALEXANDRIA.¹

(Supreme Court of Indiana. Jan. 11, 1899.)

MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—TAXATION—REFUNDING—ESTOPPEL—EVIDENCE.

1. 2 Burns' Rev. St. 1894, § 3618 (Rev. St. 1881, § 3157), providing that the common council may at any time order the amounts erroneously assessed against and collected from any taxpayer to be refunded, is mandatory.

2. Where facts stated in a special finding admit of but one conclusion, the deduction therefrom is a conclusion of law, and not an ultimate fact.

3. Where a corporation, with notice that a city by its proper authorities had attempted to annex its property, received benefits from the city for more than three years, allowed the city to sell its property for taxes, which one of its officers bought in without calling in question the right of the city to levy such taxes, and made no objection to being counted in the city limits, it is estopped from asserting its immunity from taxation during such time.

Appeal from superior court, Madison county; W. S. Diven, Judge.

Action by the De Pauw Plate-Glass Company against the city of Alexandria. There was a judgment for defendant, and plaintiff appeals. Affirmed.

John W. Lovett and F. E. Holloway, for appellant. Walker & Foster and James A. May, for appellee.

HADLEY, J. The appellant sued the appellee in two paragraphs of complaint. The first seeks to recover the amount collected by the city of Alexandria (appellee) as city taxes for the years 1893 and 1894, and the second to cancel and annul the taxes assessed by the appellee against the appellant's property for the year 1895 and to enjoin the collection of the same. The first paragraph of the answer admits facts in the complaint which show that the property of the appellant was not legally annexed to appellee, and therefore not subject to assessment for city taxes, but seeks to avoid liability on account of facts therein alleged. Appellant's demurrer to the first paragraph of answer was overruled. The case was submitted to the court for trial, and, upon proper request, the facts were found specially, and conclusions of law stated thereon in favor of appellee, and final judgment entered accordingly.

As set forth in the special finding, the facts important in presenting the question involved are as follows: The appellant is a manufac-

¹ Rehearing denied.

turing corporation under the laws of the state of Indiana, having a factory, plant, and office in Monroe township, Madison county, Ind., located on a tract of unplatted ground containing 32 acres, which ground was conveyed to appellant by metes and bounds by deed of the Alexandria Land & Gas Company on the 28th day of January, 1892. Appellant's only office, factory, and place of business in said county was on said tract of land, and said tract and the property thereon was the property upon which the taxes are assessed by the city of Alexandria. Its principal office was in Floyd county, Ind. Said lands were never annexed to the city of Alexandria by any proceedings before the board of commissioners of said county, nor by any resolution of the common council of said city (appellee), upon the request of the plaintiff or any owner thereof. The appellee caused to be assessed, levied, and placed upon its tax duplicate, against said plant, factory, and personal property, as city taxes for the year 1893, the sum of \$520.36; for the year 1894, the sum of \$1,085.37; and for the year 1895, \$1,211.69. On the 29th day of May, 1895, appellee, through its treasurer, levied upon and sold personal property of the plaintiff for the taxes so assessed for the years 1893 and 1894, to make the sum of \$1,605.25, for the payment of city taxes, which amount of money, with costs of sale, appellee received and retained as the proceeds of said sale, and refused to pay to appellant. Said personal property was bid in by Charles T. Doxey in his individual capacity, he being a director and vice president of the appellant company. On the 13th day of June, 1896, the plaintiff petitioned the common council of the city of Alexandria, setting forth the aforesaid facts, and asking the common council to refund said money received by it, and to certify off of the tax duplicate and cancel the amount of taxes so placed thereon against the property for the year 1895, which petition said common council refused, and refused to pay said sum to the appellant, or to certify said taxes off of said duplicate, and is proposing to collect the same. On the 31st day of January, 1893, Alexandria was a town, and had been for many years before that date, and on said date the town of Alexandria became, by proper proceedings, the city of Alexandria, organized and existing under the general laws of the state of Indiana for the incorporation and government of cities. On the 28th day of January, 1892, the Alexandria Land & Gas Company, a private corporation, was the owner of a large tract of land, consisting of several hundred acres, including the tract conveyed to the appellant, on which said factory is located, and which lands adjoined the corporate limits of the town of Alexandria, and on said date the Alexandria Land & Gas Company conveyed said 32 acres of land to the appellant, which deed was not recorded until the 26th day of January, 1893. Charles T. Doxey was at the time of said conveyance,

and ever since has been, the president and a director of said Alexandria Land & Gas Company, and also vice president and a director of the appellant company. On May 26, 1892, the Alexandria Land & Gas Company laid off into lots and platted a large portion of its said lands adjoining the corporation into an addition to the town of Alexandria, which plat was duly recorded. Said lots, with the streets and alleys, made an addition to the town of Alexandria, and was contiguous thereto, known and designated as the "Plate-Glass Addition." On the plat of said addition the land of appellant was shown and designated as "De Pauw Plate-Glass Works." Lots were laid off and numbered, and streets and alleys designated and dedicated to the public, on three sides of the tract marked "De Pauw Plate-Glass Works," and the fourth side thereof (south) was bounded by the Lake Erie & Western Railroad, which railroad was also the south boundary of said Plate-Glass addition. The tract designated on the plat as "De Pauw Plate-Glass Works" was excepted from the description of the lands platted, as indorsed on said plat and as reported to the town trustees for approval, and on said plat no streets and alleys appeared to traverse said excepted tract. At the time of said plat, and the approval of the same by the town trustees, the title of the platted tract, including the excepted tract, appeared of record in the name of the Alexandria Land & Gas Company, but the town trustees knew that appellant had taken possession of said excepted tract and was erecting its factory thereon. On the 1st day of December, 1892, the board of trustees of the town of Alexandria passed a resolution to extend the corporate limits of said town, so as to include within the corporate limits contiguous plats of ground, taking in, among others, the Plate-Glass addition, and attempting to include the grounds of the De Pauw Plate-Glass Works aforesaid, and by the boundaries of the grounds described in said resolution the lands of the appellant were included. The said resolution was adopted by the board of trustees, and the map and plat thereof showing grounds attempted to be annexed to said town were recorded in the plat book in the recorder's office of the county. The board of trustees of said town, at the time of said proceedings undertaking to take into the corporate limits of said city the said factory site and property of appellant thereon, believed the same to be a platted tract of ground, and, in the passing of resolutions for improvements and expenditures of money, believed that said land of the appellant was liable for taxation for town purposes. The members of the common council, upon the organization of the city, and all members thereof, believed the said tract of appellant to have been the tract platted as such as a part of the Plate-Glass addition, and that the same was a part of the city, and liable to taxation as such. All resolutions for improvements, and for the contracting of

debts, and for the expenditures of money and obligations requiring continuous expenditures of the city, were made upon the faith that said city would derive revenues by taxation of all the property of said city, including the appellant's property; and no member of the common council had notice of any irregularity, except as shown by the record, until the latter part of May, 1896. The assessed value of appellant's property for taxation by the city is \$72,955, and the total value of all property assessed for taxation in the city is \$1,697,955. The appellant had no knowledge or information of the manner of the attempted annexation of its property to the town of Alexandria until April, 1896. None of the improvements made or obligations contracted were for the special benefit of the appellant. There was no electric light in the immediate neighborhood of its factory, but lights on the street leading to the factory. The water works were not near enough to furnish fire protection, but, so far as completed, of double capacity for present needs, and with original purpose of extension to appellant's and other factories later on. The street leading to the factory had some little graveling done on it. The appellant had a good water-works system for fire protection of its own, and always kept up steam to operate it, and a night watchman there when the factory was not running. The fire company of the city was called, and took charge of and control of the fire occurring in plaintiff's factory in 1895, and kept it to one room of the manufacturing plant. The police had been called to the factory, and made arrests therein, and the factory was situate on a regular police beat. Appellant and all its officers, at the time of the attempted annexation, knew that the appellee had taken such action, and, up to April, 1896, believed the plant had been legally taken into the city, but made no investigation of the records, and had no actual knowledge of the character of the proceedings of the city in relation to said annexation. The improvements put in and contracted for by said town and city since the annexation proceedings, besides street improvements under the Barrett law, are the improvement of some streets and contract for electric lighting of streets, the building of a school house, construction of a water-works system double the size now necessary and with the purpose of extending the same to various factories, some small bridges, and a fire alarm system; and in said improvements the city has contracted and has outstanding obligations as follows: On account of school building, \$22,000; water works, \$38,000; has paid on bonds and contracts, \$81,000; general expenditures, \$97,853; on electric light, \$7,266; on streets and alleys, \$14,929; on water-works system, \$15,179; for police protection, \$6,385; for fire department, \$10,828; on bonds and interest, \$16,546. The annual cost of water works will be \$4,400; the annual cost of electric lights will be \$3,150; of the fire de-

partment, \$1,544; of the fire-alarm system, \$1,800; of the police, \$1,300; and the expenditures for the support of schools, in addition to the above, \$14,000.

The errors assigned are: First, that the court erred in overruling appellant's demurrer to the first paragraph of the answer; second, in its conclusions of law.

The assignment upon the action of the court upon the demurrer to the answer presents the same question that arises upon the exceptions to the conclusions of law upon the facts found, and we therefore turn at once to a consideration of the conclusions of law as stated by the court below upon the facts specially found. As applicable to the facts found, the court below declares, as a proposition of law, that the attempted annexation of the real estate of the appellant by the town of Alexandria was ineffectual and void, and it follows that neither the lands of the appellant nor its personal property situate thereon was liable to taxation by the city of Alexandria. The statute provides "that the common council may at any time order the amounts erroneously assessed against and collected from any taxpayer to be refunded to him." 2 Burns' Rev. St. 1894, § 3618 (Rev. St. 1881, § 3157). This provision of the statute is held to be mandatory. *City of Indianapolis v. McAvoy*, 86 Ind. 587; *Same v. Vagen*, 111 Ind. 240, 12 N. E. 311. The appellant, therefore, should have had judgment in the court below, unless the facts found show acts or omissions of duty on the part of the appellant that will preclude it from asserting its immunity from taxation by the appellee. As bearing upon the principle of estoppel, the facts found show that Charles T. Doxey was president and director of the Alexandria Land & Gas Company and also vice president and director of appellant company, through all the proceedings and events in question; that at the time the land and gas company executed and recorded its plat of the Plate-Glass addition, showing in the body of the platted ground the excepted tract designated as the "De Pauw Plate-Glass Works," the title of record to all of said Plate-Glass addition, including appellant's "De Pauw Plate-Glass Works," was in the Alexandria Land & Gas Company, and the town trustees, at the time they adopted the resolution purporting to annex said Plate-Glass addition to the corporation, believed the appellant's ground to be a part of the platted territory, and, in describing the same by metes and bounds, included appellant's ground; that all the proceedings of the trustees were placed of record, and, in adopting resolutions for improvements of the town and for the creation of debts and obligations for the benefit of the municipality, the trustees (and succeeding common council of the city) believed that the land of the appellant was within the corporate limits of the town and city, and liable to taxation therein; that, in ordering public improvements, and providing for the preservation of public order and protection against

fire, and in supplying school accommodations and light and water for the use and comfort of the citizens of the municipality, the trustees and common council relied upon the appearance of things, and upon the validity of the annexation proceedings as they had existed for more than three years, under the constant observation of the appellant's officers, and without objection, or act indicating disapproval of being counted as a corporator; and the appellant and all its officers had, at the time of the attempted annexation of its property, actual knowledge of the same, and believed the same was regularly taken into the city, and made no objection thereto, and acquiesced therein, from December, 1892, to April, 1896, and until after the city had paid out and assumed obligations for municipal betterment and comfort for more than \$325,000, and in the meantime had called the city's paid police to its factory to make arrests, and had accepted the services of the city in extinguishing a destructive fire in its factory, and in establishing and maintaining a police beat along its factory property.

Appellant's knowledge of appellee's purpose and attempt to extend the municipal corporation over its property carried with it notice that appellee would treat the property thus added as subject to taxation for city purposes, and that, in providing for the administrator and general welfare of the inhabitants of the city, the common council would rely upon the appellant's property to contribute its ratable proportion of the revenues. In May, 1895, the city treasurer of appellee seized appellant's property and sold the same to pay the delinquent taxes assessed against it by the city for the years 1893 and 1894, and Charles T. Doxey, vice president and director of appellant, bought the property in, and, though he acted in the purchase in his individual capacity, he could not have been ignorant of the fact that the taxes being collected were assessed by the city against the property as being within the jurisdiction of the city, yet he made no complaint or protest that the taxes had been illegally assessed. The appellant was not in a position to be protected by its silence for want of actual knowledge of the facts. It had notice that action had been taken by the proper authority to annex its property. That action was a public record, and notice of its existence was sufficient to hold the appellant to the consequence of actual knowledge of its character. In this situation, appellant permitted appellee for three years to proceed to make costly improvements and assume heavy obligations, openly and in full view, without objection, and it could not have been unaware that the common council was induced thereto in part by its belief that appellant's property would bear its ratable proportion of the burden. Appellant's conduct at least tended to induce expenditures and the assumption of debts. It accepted the protection of the municipal government, and for three years acquiesced in a state of things,

assisted by itself, that reasonably led the appellee to rely upon its property as taxable for city purposes, and, having accepted benefits at the expense of the city, it cannot now be permitted to invoke the invalidity of the act of annexation to escape taxation. This court, in *Strosser v. City of Ft. Wayne*, 100 Ind. 443, on page 448, says: "We think that where the question is as to the corporate boundary, and where the authorities who attempt to extend the boundaries act in a public capacity, and in good faith assume to make the change in the corporate boundaries in accordance with the provisions of the law upon the subject, and fail in doing this by mistaking a fact, the corporation may successfully assert the efficacy of the change against a taxpayer who has lived in the territory sought to be annexed, who has for a considerable length of time acquiesced in the validity of such proceedings, and who has, without objection, seen large sums of money expended on the faith that such annexation proceedings were valid." An eminent English jurist, in discussing the principle of estoppel by acquiescence, says: "If a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon the right, stands by in such a manner as really to induce the person committing the act, and who may have otherwise abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act." *De Bussche v. Alt*, 8 Ch. Div. 286.

Whether the conduct of appellant amounts to estoppel in pais, or whether it amounts to acquiescence, is not material. It surely amounts to such delay as will disentitle it to relief. *Attorney General v. Railroad Co.*, 24 N. J. Eq. 49; *Traphagen v. Mayor*, etc., 29 N. J. Eq. 206. "High considerations of public policy and of justice require that a taxpayer, who is notified that a public corporation claims to have extended its limits so as to take in his property, should act with promptness and proceed with diligence if he would resist the attempted annexation." *Strosser v. City of Ft. Wayne*, supra. It has been many times held by this court that if a taxpayer stands by, and without objection permits improvements to be made which benefit his property, he will be precluded from denying the authority of the municipality to contract for the improvements. *Powers v. Town of New Haven*, 120 Ind. 185, 21 N. E. 1083; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723. It is a familiar doctrine that one may not occupy two inconsistent positions. He must be confined to one or the other. Hence, during the three years in review, the appellant was within the corporate limits of the city of Alexandria, or without. It could not be within the city to escape burdens imposed by the outlying township, nor within the outlying township to escape burdens imposed by the city. It may not thus find immunity from taxation. It will be held to one jurisdiction

or the other. There is nothing in the case to show that the township ever attempted to exercise authority over appellant's property, nor to show that appellant ever acknowledged any such authority, while the facts clearly show an exercise of authority by the city, and a passive submission thereto by appellant.

Appellant's learned counsel vigorously urge in their brief that the findings of the court below are defective, in that there is a failure to find the ultimate fact of "acquiescence," the insistence being that the facts found are but evidentiary, and links in the proof of the ultimate fact. From our decided cases it may be stated as a rule that, where facts stated in a special finding will admit of but one conclusion and lead to but one result, the deduction therefrom is a conclusion of law, and not an ultimate fact. *Railroad Co. v. Walborn*, 127 Ind. 142, 26 N. E. 207, and cases there cited. The findings sufficiently show that appellant had knowledge of the act of annexation, and that the city had assessed taxes against its property, and an officer of the appellant bought in its property sold by the city for the payment of such taxes, without calling in question the right of the city to levy said taxes. It summoned the city fire department to extinguish a fire at the factory, and the city's police officers to maintain order at its factory, and stood by and received benefits from the city for more than three years, and made no objection to being counted with the corporation; and we think this conduct can lead to but one conclusion, and, hence, a question of law.

The fifth assignment of errors was not discussed, and hence is regarded as waived. Judgment affirmed.

HUDSON v. WOOD.¹

(Appellate Court of Indiana. Jan. 12, 1899.)
APPEAL — PETITION TO EXTEND TIME — DIVIDED COURT—RIGHT OF TRIAL JUDGE TO SIT.

1. A judge of the appellate court, who was trial judge of the cause, cannot vote on a petition to the appellate court to extend the time to appeal.

2. Where, on a petition to extend the time to appeal, the court is evenly divided, the cause must be certified to the supreme court.

Robinson, J., dissenting.

Appeal from circuit court, Jay county; D. W. Comstock, Special Judge.

On petition to extend time to appeal. Certified to supreme court.

J. F. La Follette and Watson & Watson, for appellant. Thompson & Focht, for appellee.

PER CURIAM. This is a petition to extend the time to appeal. The judge who rendered the decision below is a judge of this court, and therefore cannot sit in this cause. The four other judges are equally divided upon the question presented by the petition, and therefore there cannot be a concurrence of three

judges necessary and sufficient to make an order granting or denying the prayer of the petition. As provided by the statute in such case, the cause is hereby certified to the supreme court.

ROBINSON, J., dissents.

ROCHE v. UNION TRUST CO.

(Appellate Court of Indiana. Jan. 13, 1899.)

MARRIED WOMAN — CONTRACT WITH HUSBAND — RIGHT TO PAYMENT FOR SERVICES — MONEY LOANED TO HUSBAND—ACTION ON NOTE—PLEADING.

1. In an action on a note, an answer pleading payment and want of consideration is not demurrable.

2. Under Horner's Rev. St. 1897, § 5115, abolishing all legal disabilities of married women to make contracts, except to convey real estate or enter into a contract of suretyship, and section 5130, providing that the earnings of a married woman, "other than labor for her husband or family, shall be her sole and separate property," a contract of a husband to pay his wife for services as clerk in his store is for a consideration, and valid.

3. Under Horner's Rev. St. 1897, § 5115, abolishing all legal disabilities of married women to make contracts except in certain cases, a married woman may contract with her husband.

4. Where money is paid to a wife by her husband for services performed, and she afterwards loans it to him to be used in his business, she may enforce its payment by her husband's assignee for the benefit of creditors.

Appeal from circuit court, Marion county; Henry Clay Allen, Judge.

Elizabeth Roche filed a claim against the Union Trust Company as assignee of her husband's property, which claim was passed to the issue docket for trial. Judgment for defendant, and plaintiff appeals. Reversed.

Frank H. Blackledge and W. W. Thornton, for appellant. Pickens, Cox & Kahn, for appellee.

WILEY, J. On the joint petition of the parties, this cause has been advanced. Patrick J. Roche was in the dry-goods business in the city of Indianapolis, and made an assignment of all of his property to the appellee for the benefit of his creditors. Appellee accepted the trust, and proceeded towards the settlement of the trust estate. Appellant is the wife of Patrick Roche, the assignor, and held a number of notes executed to her by him, and these several notes constitute the basis of this action. Appellant filed said notes in the clerk's office of the Marion circuit court as a claim against said trust estate, which claim was duly verified. The claim consisted of six notes, as follows: One for \$300, dated January 2, 1890, payable on demand; one for \$350, dated January 2, 1892; one for \$200, dated October 14, 1893; one for \$275, dated January 11, 1894; one for \$83.50, dated January 22, 1894; and one for \$966.35, dated February 15, 1898. All of these notes, except the last-described

¹ Superseded by opinion in Supreme Court, 54 N. E. 104.

one, were payable on demand, and that one was payable one day after date. All of the notes provide for 6 per cent. interest, and all of them, except the one for \$83.50, provide for attorney's fees. This claim was passed to the issue docket for trial, where appellee answered in three paragraphs. The first paragraph was a general denial, the second a plea of payment, and the third that the notes were executed without any consideration. Appellant demurred to the second and third paragraphs of answer, which demurrer was overruled, and she excepted. A reply in general denial put the cause at issue, and upon a trial by the court a finding and judgment were made and entered for appellee. Appellant moved the court for a new trial, and assigned seven reasons therefor, as follows: (1) That the decision of the court was not sustained by sufficient evidence; (2) that the finding was not sustained by sufficient evidence; (3) that the decision was contrary to law; (4) that the finding was contrary to law; (5) that the court erred in refusing certain evidence offered by appellant; (6) that the decision was contrary to the evidence; and (7) that the finding was contrary to the evidence. This motion the court overruled, and appellant's assignment of error properly presents for review the overruling of the demurrer to the second and third paragraphs of answer, and overruling the motion for a new trial.

We can dispose of the first specification of the assignment of errors by saying that there was no error in overruling the demurrer to the answer. The second paragraph of answer was a simple plea of payment, and the third that there was no consideration for the execution of the notes. No authorities are necessary to support this holding.

The real question upon which the decision of the case rests is this: Appellant clerked in the store of her husband, at an agreed salary per week. Her wages thus earned were paid to her from time to time, and, as they would accumulate, she would deposit them in bank or invest them in building associations. It is claimed by appellant that the first five of the notes involved in this action represent the money so earned by her, which was reduced to her actual possession by payment to her by her husband, then deposited by her in bank, and invested by her in building and loan associations, and subsequently loaned to her husband to use in his business. It is further claimed by appellant that the note for \$966.35 represents in part money so earned by her, reduced to her possession, and then loaned to her husband, and in part wages she had earned, but which had not been paid to her. It is urged by appellant that the entire amount represented by the notes is due her, under a contract with her husband, whereby she worked or clerked for him in his store, and which she actually earned by her services. It is the contention of the appellee that Patrick J. Roche, as the

husband of appellant, could not bind himself by contract to pay his wife for such services, on the theory that the husband is entitled to the earnings of his wife, and that, therefore, the notes are without consideration and cannot be enforced against the trust. It is evident that the court below took this view of the law, and rested its decision upon it; for it is undisputed that there was an agreement between appellant and her husband that he was to pay her \$7.50 per week for her services as clerk in his store for a part of the time, and \$6.50 per week for the residue of the time. It is also undisputed that he did in fact pay her these respective amounts from time to time; that she invested a part of the money so paid to her in building and loan associations; that she deposited a part of it in a bank; that she loaned to her husband the several amounts represented by the notes in suit, except about \$478, which he owed her for services, but which he had never paid her. It is also shown by the evidence, without contradiction, that the money she invested in building and loan associations, together with the accumulations thereon, she withdrew from such associations, and loaned to him, and which he used in his business. It is also an uncontradicted fact that much of the money he paid her, and which she deposited in bank in her own name, she checked out to him when she would loan him money. With a statement of these facts, to which we must apply the law in determining the rights of the parties, we will now consider the real question at issue.

At common law, contracts between husband and wife were absolutely void, for the want of parties and the wife's power to consent. 9 Am. & Eng. Enc. Law (1st Ed.) p. 791, and authorities there cited. This rule was doubtless founded on the legal fiction of the unity of husband and wife. At common law, also, the earnings of a wife, from whatever source derived, belonged to the husband. Her earnings were as much his as his own earnings, and he had absolute dominion and control over them. As is said in Id. p. 817: "At common law, however, a husband has an absolute right to his wife's time, wages, and earnings, and the products of her labor, skill, and industry." See, also, *Jenkins v. Flinn*, 37 Ind. 249; *Baxter v. Prickett's Adm'r*, 27 Ind. 490; *Seltz v. Mitchell*, 94 U. S. 580; *Glenn v. Johnson*, 18 Wall. 476; *Todd v. Todd*, 15 Ala. 743. So, if we could determine the question by the common-law rule, it would be one of easy solution.

The strictness and rigidity of that rule, however, have been greatly relaxed and modified by legislative enactments, and by a liberal construction of such enactments by the courts, to the end that married women may be better protected in their rights. Under the statutory law of this state, a married woman may enter into any contract binding upon herself and property, except such contracts as she is prohibited from making by

express statutory enactment. In the case before us, appellant could have made a valid contract with her husband to clerk in his store, if she could have made such a contract with a third person, unless she was inhibited by statute from making such contract with her husband. As is said by the text in 9 Am. & Eng. Enc. Law (1st Ed.) p. 798: "A statute authorizing contracts between husband and wife generally includes all contracts each could make with a third party, but, if it specifies certain contracts, the capacity it gives is confined to these. If annexed to a general statute empowering a married woman to contract, there is a clause excepting certain specified contracts with her husband. Such statute gives her the power to make all contracts with her husband, but those excepted, which it enables her to make with third parties." *Jenne v. Marble*, 37 Mich. 319; *Sturmfelsz v. Frickey*, 43 Md. 569; *Goree v. Walthell*, 44 Ala. 161; *Trader v. Lowe*, 45 Md. 1, 14; *Gregory v. Dodds*, 60 Miss. 549. In this state we have had much legislation relative to and defining the rights of married women. It would not be profitable to review that legislation here, but it is enough to say that the legislature has, from time to time, extended the rights of married women, and conferred powers upon them, which were unknown to the common law. There are two statutes which bear directly upon the question here for decision, and they are the following: *Horner's Rev. St. 1897*, § 5115: "All legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided." Also *Id.* § 5130: "A married woman may carry on any trade or business and perform any labor or service on her sole and separate account. The earnings and profits of any married woman, accruing from her trade, business, services or labor, other than labor for her husband or family, shall be her sole and separate property." By section 5115, *supra*, it will be observed that all legal disabilities of married women to make contracts are abolished, except as otherwise provided. The section quoted is section 1 of the act of 1881, entitled "An act concerning husband and wife." As, under the first section of the act, a married woman can enter into any contract, except such as are prohibited, we must look to the succeeding sections to ascertain what contracts she is prohibited from making. By the second section, we find, she can take, acquire, and hold property, both real and personal; she can purchase the same with her own separate means, and the rents, issues, income, and profits thereof become hers; she can sell, barter, exchange, and convey her personal property, and contract with reference to it, but she cannot enter into any executory contract to sell, convey, or mortgage her real estate, nor can she convey or mortgage the same, unless her husband join in such contract, conveyance, or mortgage. By section 4 of the act, a married woman is prohibited

from entering into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and any such contract so made by her shall be void. These are the only provisions in the statute prohibiting a married woman from entering into contracts, and it is to be observed that none of these inhibitions can be construed to prevent her from entering into contracts with her husband, other than those which are expressly forbidden. It certainly cannot be contended but that there are many contracts which a married woman may make with her husband, which will be binding on her, and which the courts will enforce, since the removal of her disabilities by statute. Thus, she can contract with him to sell to him her separate personal property, and she can loan him money for which he may give his note, and the contract can be enforced. We might specify other instances, but it is unnecessary. So, if the contract between appellant and her husband was void, we must look to some statute, other than the sections we have just been considering, upon which to base its invalidity, and, if there is any, it is the latter clause of section 5130, *supra*, wherein it is provided that "the earnings and profits of any married woman, accruing from her trade, business, services, or labor, other than labor for her husband or family, shall be her sole and separate property." It is strongly urged by appellee that a husband cannot make a valid contract with his wife that she shall be paid for services rendered him, and counsel for appellee base their contention on three grounds: (1) That there is no consideration; (2) that the wife has no power to contract with her husband because of the unity of the two; and (3) that such contract is void because contrary to the contractual obligation embodied in the contract of marriage. We will apply these objections to the facts in the case before us. It must be conceded that, if the contract between appellant and her husband related to services performed by her in the discharge of her household duties, and the duties incumbent upon her to perform by reason of her marital relations, then there would be no consideration to support the contract. The law imposes upon her the discharge of such duties, and a contract between them, whereby he was to pay her for such services, would be without consideration, and could not be upheld, as being void and against public policy. But here appellant performed services for her husband which the marital relations did not enjoin upon her. Such services were entirely outside of the circle of her marital obligations, and hence we are unable to see why the contract is not supported by a good and sufficient consideration, unless it is forbidden by the statute last cited. True, the statute says a married woman shall be entitled to the earnings and profits accruing from her trade, business, services, or labor, other than labor for her husband or family. While this lan-

guage has not been construed by our courts, it seems plain to us that there is but one construction to be placed upon it, and that is that any labor which a married woman performs for her husband or family, in the discharge of her household or marital duties, must be performed without financial compensation from the husband, for the reciprocal relations that exist between them. But the labor performed by appellant was not of that character. She was under no obligations to leave her home and its surroundings, and spend many years of her life clerking in a store for her husband, and yet she did this under a contract that she was to be paid for it. The consideration was sufficient to support the contract.

The second objection urged by appellee is not tenable. The statute itself removes her disability, and empowers her to make contracts. Hence, as we have seen, she can make contracts with her husband, except where she is prohibited from so doing by statute. In *Young v. McFadden*, 125 Ind. 254, 25 N. E. 284, the supreme court had occasion to refer to and discuss the act of 1881, supra. Speaking of the exceptions in the statute, it was said: "The only exceptions to the wide rule thus declared (section 5115, supra) are that a married woman shall not incur her real property, except by deed in which her husband joins, and that she shall not enter into any contract of suretyship. * * * As to all other contracts, her capacity is as great and unrestricted as that of an unmarried woman." And in *Arnold v. Engleman*, 103 Ind. 512, 3 N. E. 238, it was said: "This [statute of 1881] confers a general power to make executory contracts, except such as are prohibited by the statute." See, also, *Miller v. Shields*, 124 Ind. 106, 24 N. E. 670; *Security Co. v. Arbuckle*, 119 Ind. 69, 21 N. E. 469; *Elliott v. Gregory*, 115 Ind. 98, 17 N. E. 196; *Bennett v. Mattingly*, 110 Ind. 197, 10 N. E. 299, and 11 N. E. 792; *Chandler v. Spencer*, 109 Ind. 553, 10 N. E. 577.

The third objection urged by appellee has been fully covered by what we have said as to the first. If our courts have not decided the exact question before us, they have indicated a strong tendency towards the theory contended for by appellant. In *Railway Co. v. Twine*, 121 Ind. 375, 23 N. E. 159, the wife of appellee was injured while riding on one of appellant's cars. Prior to her injury, she had been managing a millinery business owned by appellee. Appellee's action was to recover damages for loss of his wife's services, etc. After citing and commenting on section 5130, supra, the court, by Olds, J., said: "The wife has the same right to give to her husband her services, either in the household or in his business, as she had before the passage of the statute, and the same obligation rests upon her to discharge her duty to her husband, and upon the husband to discharge his duties and obligation to his

wife, as it did before its passage. * * *

The husband was engaged in the millinery business, and his wife, by reason of the marital relations, devoted her energy and services to the business for the benefit of the husband, without any contract or expectation of pay for her services, and she sustained an injury on account of the negligence of the defendant, and by reason of which the husband was deprived of her services in his business, which the wife was accustomed to perform, but was prevented from performing by reason of the injury." By the language here used there is a strong indication that, if there had been a contract between appellee and his wife for a money compensation for her services, such contract could be enforced. In that case there was no contract for compensation, and the wife had no expectation of pay for her services. That was quite different from the case before us. Here there was a contract, and that contract had been executed by the actual payment to appellant by her husband for the labor performed under the contract. In *Stanley v. Stanley*, 14 Ind. App. 398, 42 N. E. 1031, the parties were husband and wife. The appellee sued appellant, and he answered in two paragraphs, the second of which was a set-off, based upon alleged work and labor done on appellee's farm and for taxes paid thereon. The court, by Lotz, J., said: "It is sufficient for the purposes of this case to say that the second paragraph of the answer is insufficient in law. It declares upon an implied contract only. In the case of *Harrell v. Harrell*, 117 Ind. 94, 19 N. E. 621, this language is used: 'The relationship between the parties does, however, exert an important influence upon the contracts of the wife. It is doubtless incumbent upon the husband to show an express contract and its consideration, as well as good faith and voluntary action. We very much doubt whether he could recover without alleging and proving an express contract and its consideration, in any case.'" The pleading in this case does not aver an express contract between husband and wife, where one performs extraordinary services for the other. In *Powers v. Fletcher*, 84 Ind. 154, appellant and the husband of appellee were partners. They employed appellee to perform certain services for them, the contract of employment being in writing, and in it was specified that she should have all money earned by her labor for them. After this contract had been made, and appellee had performed the labor, the firm was dissolved, and in the dissolution appellant assumed and agreed to pay all the debts of the firm. He refused to pay appellee for her services, and she brought suit for their collection. In deciding the case, the court said: "The arrangement itself was made by the husband, a member of the firm, and for like services, rendered prior to the time these services were rendered, the firm had frequently paid the appellee. This was sufficient evidence upon this point to justify

the finding. It is insisted, however, that this instrument did not bind the husband, and, as it did not bind him, it did not bind the firm, and therefore the claim did not constitute a debt of the firm, and, of course, his agreement to pay the debts of the firm did not obligate him to pay for these services. Without deciding whether the appellee could or could not have maintained an action against the firm for these services, we think that their rendition, under the circumstances stated, equitably entitled her to the compensation, and that the claim constituted a debt against the firm, for which appellant, under his agreement, was liable,"—citing *Farman v. Chamberlain*, 74 Ind. 82.

As we understand the rule, the liability of partners for partnership debts is a personal liability, and one partner is not bound unless the other is, unless it be under a special promise. In the case from which we have just quoted, each of the partners was personally liable for all of the debts of the firm, and the agreement of the appellant to pay such debts did not release the other member of the firm from liability, but any creditor of the firm could have proceeded against them jointly and recovered any amount due. While the court did not decide whether appellee could have maintained an action against the firm, yet it was held that she had an equitable right to be compensated for the services rendered. In Minnesota it has been held, where a husband agreed with his wife that she should have the money paid by a boarder in the family, that it was a valid contract, and could be enforced. *Riley v. Mitchell*, 36 Minn. 3, 29 N. W. 588. And so, in Iowa, where the husband was the sheriff of a county, and as such was to board the prisoners, for which he was to receive 50 cents per day for each prisoner, and he agreed with his wife that if she would move into the jail building with him, and take charge of the boarding of the prisoners, she should have all the money he would receive for such services, it was held she could recover. The court said: "That it is the duty of the wife, as a helpmeet, to attend, without compensation, to all ordinary household duties, and labor faithfully to advance her husband's interest, is true; yet it is certainly not her duty, unless she desires to incur it, to undertake the boarding of a large number of prisoners who may for the time being come under the charge of her husband. These defendants have the undoubted right to contract with each other with reference to the board to be furnished the inmates of the jail, the same as if the marital relation did not exist. J. M. Reticker [the husband] had the contract with the county, and could sublet to whomsoever he wished,—even to his wife, if she saw fit to engage in the work. If there had been no relinquishment by the husband of the earnings of the wife accumulated while engaged in a separate business for herself, the rule might be different; but here, as we have seen, the husband expressly and completely

abandoned all the claim thereto." *Carse v. Reticker*, 95 Iowa, 25, 63 N. W. 461. This case is strongly in point, and goes far in support of appellant's right to recover. In New Jersey it was held that where a wife gathered and sold berries, and took in boarders, when her husband was away from home, and on his return she paid off a mortgage on his farm, and took an assignment of it to herself, that at his death she could enforce the mortgage against his estate, and that it was paramount to the claims of creditors. *Peterson v. Mulford*, 36 N. J. Law, 481. In the body of the opinion there is an able and exhaustive discussion of the respective rights of the husband and wife, as to earnings of the wife by her own labor, and we content ourselves by merely referring to it without quoting. In Vermont, where a husband permitted his wife to retain money for boarding her father in their household, it was held that it was a gift to her, and that neither he nor his creditors could recover it from her. *Potter v. Potter*, 64 Vt. 299, 23 Atl. 856. In Illinois, where a wife rented a farm from her husband, and raised crops thereon, it was held that such crops belonged to her. *Woodyatt v. Connell*, 38 Ill. App. 480. This court, in *Hensley v. Tuttle*, 17 Ind. App. 253, 46 N. E. 594, hewed close to the line of this case. There appellee filed a claim against appellant estate for services rendered the decedent during her last illness. The decedent, for six years prior to her death, had been a member of appellee's household. In the care, etc., of the decedent, appellee's wife assisted him, and it was urged that the work and assistance of the wife in that behalf created a separate cause of action in her favor, and that appellee could not recover in his own name for the joint services rendered the decedent. *Robinson, J.*, speaking for the court, said: "The fact that the wife assisted her husband in nursing and caring for decedent does not necessarily give her a separate cause of action for such services. The services she rendered were for her husband, and were in the line of household duties. The statute which gives the wife the right to recover for her own services does not change the relation between husband and wife, nor does it exonerate the wife from the performance of any services for the benefit of the husband. We do not mean to hold that the wife could not enter into a contract for the value of her services in such a case, and maintain an action therefor, but, in the case at bar, the law implies a promise to pay the reasonable value of his services, and any assistance rendered by the wife was for the benefit of the husband. The wife has the same right to give her husband her services in the household that she had before the passage of the statute."

The facts in the case at bar are materially different from those in any of the cases to which we have referred. Appellant not only bottoms her right of recovery upon the contract between her husband and herself, where-

by she was to be paid for the extraordinary services rendered her husband, which were no part of her duties imposed upon her by her marital relations, but on the additional fact that the contract between them was actually performed by the payment to her of the entire sum represented in the notes sued on, except about \$480. The several amounts thus paid to her were reduced to her possession, the title of the money vested in her, and it became her own property. After obtaining title, and after it became her separate property, she loaned it to her husband, and, as an evidence of such indebtedness, he executed to her the notes which constitute the several contracts between them and the basis of this action. The earnings of appellant thus acquired were a species of property, and, the possession having passed to her, her right to enjoy it, or to dispose of it, or to invest it, was, in our judgment, absolute, and, by loaning the money thus earned to her husband, created a liability against him, which he cannot avoid, and which equity and good conscience will enforce against his trust estate. If this action had been against the husband of the appellee upon the notes which are the foundation of the claim against his estate in the hands of an assignee for the benefit of his creditors, instead of a claim against the trust, we do not know upon what theory, in law or equity, he could have successfully defended. By his agreement to pay her a compensation for the extraordinary services rendered him in his business, he thereby relinquished to her her earnings thus acquired, and abandoned all claim thereto by paying the same to her. As was said in the Vermont cases cited, the husband had no right or interest in and to such earnings, and neither he nor his creditors could reclaim them. It cannot be said, with any show of reason, that it would be a fraud upon the creditors of appellant's husband to enforce her claim against the trust. It does not appear from the record, when all this money was paid to her, that her husband had any creditors, but, on the contrary, it does appear that, when she loaned to him the money that she had earned under her contract, he used it in his business. This would be a benefit to creditors, and hence they could not complain. In the present case, we must presume, in the absence of any showing to the contrary, that the services performed by appellant were valuable and necessary services; that she discharged the duties of her position, which, had it not been for her, would have to have been discharged by some one else. Everything that could be done by her husband was done to enable her, by her personal services, to acquire for herself the reward of that service, and no rights of his; independent of contract, are in the way of her recovery. In Pennsylvania it has been held that a husband may contract with his wife for extra

and useful services in the course of his business, outside of the family relation, and such contract will be deemed a waiver by him of all claim to her wages, and she will be entitled to be paid for such services out of the proceeds of a sale of her husband's property. *Nuding v. Ulrich*, 169 Pa. St. 289, 32 Atl. 409. This doctrine, as announced by the supreme court of Pennsylvania, was based upon a statute very similar to ours, relating to the rights of married women, and is of controlling influence here. In Georgia a husband permitted his wife to sell cakes and pies, and keep the proceeds thereof as her separate property. With such proceeds she purchased a negro slave, and it was held that such slave was hers. *Oglesby v. Hall*, 30 Ga. 386. The English case of *Slanning v. Style*, 3 P. Wms. 334, is one which supports appellant's claim. In that case it appeared that husband and wife lived together, and raised some fowls, pigs, etc. When any person came to buy them, the husband would say that he had nothing to do with such things, and that they were his wife's. She thus disposed of them, and kept the proceeds as her own. Before the husband's death, he confessed that he at one time borrowed of his wife £1,001 from the fund which she had accumulated from the sales of fowls, small produce, etc. Upon his death she filed a claim against his estate for the amount borrowed of her. It was contended that the borrowing from the wife was only the husband borrowing his own money, and that there was no express agreement in writing to create a separate right in the wife. But Lord Chancellor Talbot held that she was a creditor, and entitled to have her claim allowed. He said "that the courts of equity have taken notice of and allowed *femes covert* to have separate interests by their husband's agreements; and this £1,001 being the wife's savings, and there being evidence that the husband agreed thereto, it seemed but a reasonable encouragement to the wife's frugality, and such agreement would be of little avail were it to determine by the husband's death." Thus, we find that the courts, as far back, at least, as 1734, in England, to the present time, have protected, in so far as they could, the separate estate, savings, and earnings of married women. There are many cases in line with those we have cited, but we do not see that it would be profitable to extend this opinion by referring to them. In the case before us, the money which was paid to appellant under a contract with her husband, which was reduced to her possession, and which she loaned to him, is such an obligation, based upon sound equitable reasons, that it will be enforced. The court erred in overruling appellant's motion for a new trial, and the judgment is reversed, with instructions to the court below to grant appellant a new trial.

(21 Ind. App. 429)

RICHARDSON et al. v. LEAGUE.

(Appellate Court of Indiana. Jan. 13, 1899.)

MARRIED WOMEN—HUSBAND'S LIABILITY—LANDLORD AND TENANT—PLEADING—VARIANCE—APPEAL—RECORD.

1. Under Horner's Rev. St. 1897, §§ 5120, 5122, providing that the husband shall not be liable for the contracts of the wife, nor for any debts contracted by her in carrying on her separate business, nor for improvements or repairs made by her order on her separate realty, a complaint against a wife and her husband, who was her agent, for failing to make certain improvements on demised realty as he agreed for her, is bad as to him.

2. Instructions are not presented for review where the bill of exceptions was not filed with the clerk after being signed, and the record and the clerk's certificate to the transcript failed to show that it was ever filed.

3. A verdict for plaintiff, based on evidence of a breach of an oral agreement, made in December, by defendant lessor with plaintiff, at the time a written lease was executed, to dig a well on the premises, cannot be sustained under a complaint declaring on an agreement for a lease and for such well made in October.

Appeal from circuit court, Howard county; C. N. Pollard, Judge.

Action by Thomas H. League against Honora L. Richardson and another. From a judgment for plaintiff, defendants appeal. Reversed.

Oglebay & Oglebay, for appellants. Flippen & Furvis, for appellee.

HENLEY, J. Action by appellee against appellants, one Honora L. Richardson and John W. Richardson, her husband. The allegations of the complaint were, in substance, as follows: That appellant Honora L. Richardson is the owner of 80 acres of land in Tipton county, Ind., and that appellant John W. Richardson is her husband, and her agent for said land; that in October, 1898, appellee rented from said agent said 80 acres of land for a term of one year, to begin on the 1st day of March, 1899, and, among other things contained in said rental contract, appellants were to drill or cause to be drilled or dug a well upon said farm, which would furnish sufficient pure and wholesome water to the appellee while upon said farm, all of which appellants have failed and refused to do. It is further averred that no water was furnished appellee under said contract for his use as tenant on said farm, and that he proceeded to and did cause a well to be drilled upon said farm for the purpose of furnishing water for his family use, and for the use of the stock upon said farm, which well was of the value of \$150. It is further averred that appellee sustained damage by reason of appellants' failure to keep their contract with plaintiff in the sum of \$100, for which damage an itemized bill is filed with the complaint, covering the cost of the well, and the amount claimed as damage for failure to drill the same. Appellants separately demurred to this complaint, which demurrers were overruled by the lower court, and this ruling,

so far as the same applies to the separate demurrer of John W. Richardson, the husband, is assigned as one of the errors to this court. Appellee answered in general denial and answered in set-off. There was a trial by jury, and a finding in favor of appellee in the sum of \$170.70. Appellants moved for a new trial, which was overruled, and judgment was rendered against both of said appellants for said sum. It is assigned as error to this court: (1) That the court erred in overruling the demurrer to the complaint; (2) that the court erred in sustaining the demurrer to the second paragraph of defendants' answer; (3) that the court erred in overruling the motion for a new trial; (4) that the court erred in overruling the motion of appellant Honora L. Richardson in arrest of judgment; (5) that the court erred in overruling the motion of appellant John W. Richardson in arrest of judgment; (6) that the court erred in overruling the motion of defendants in arrest of judgment.

The first question discussed by appellants relates to the sufficiency of the complaint as to appellant John W. Richardson. It is provided by statute in this state (Horner's Rev. St. 1897, § 5115) as follows: "All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided." It is further provided, by section 5120, supra, "Husbands shall not be liable for the contracts or the torts of their wives;" and by section 5122, supra, that "a husband shall not be liable for any debts contracted by the wife in carrying on any trade, labor, or business on her sole and separate account, or when she is in partnership with any other person other than himself, nor for improvements or repairs made by her order or authority on her separate real property." It will thus be seen that the complaint in this action wholly failed to state a cause of action against appellant John W. Richardson, and the lower court erred in overruling his demurrer thereto. The action of the lower court in overruling the demurrer of appellant John W. Richardson resulted in a judgment against him for an amount for which, if any one was liable, it was his co-appellant. It is distinctly averred in the complaint that he was the agent of his wife when the contract detailed therein was entered into. As such agent he bound his wife, but did not bind himself for the payment of any debt contracted on her behalf, or in and about the management or rental of her separate real property, nor did he become liable upon any contract under the allegations of the complaint.

The third specification of the assignment of errors calls in question the overruling of appellants' motion for a new trial. It is argued at length by counsel for appellants that the lower court erred in giving to the jury certain instructions and in refusing to give to the jury certain other instructions, but the instructions are not properly before the court.

Appellants have attempted to bring the instructions into the record by bill of exceptions, but this bill of exceptions was not filed with the clerk after having been signed by the trial judge, and it does not appear from the record, or from the certificate of the clerk to the transcript, that it was ever filed in his office. For this reason the court will not review the instructions. The thirteenth and fourteenth reasons assigned for a new trial are as follows: "(13) That the verdict of the jury is not sustained by the evidence. (14) That the verdict of the jury is contrary to the evidence." These will be considered together. The complaint proceeds upon the theory that appellants have failed to perform that part of a verbal rental contract entered into between appellee and appellant Honora L. Richardson, through her agent John W. Richardson, in the month of October, 1893, in which it was agreed that the owner of the leased land was to drill or cause to be drilled or dug a well upon said land which would furnish pure and wholesome water for appellee's use while such tenancy existed. Thus it will be seen that by the averments of the complaint the agreement on the part of the lessor to furnish pure, wholesome water upon said leased premises was an inducement which entered into and was a part of the consideration of the rental contract as declared upon in the complaint. We have most carefully read all of the evidence in this cause, and fail to find any evidence which supports the verdict and judgment upon the theory of appellee's complaint. The evidence is to the effect that appellee's rental contract with the owner of the land was a written contract, in which nothing was said about drilling or digging a well or furnishing water, and that said written contract was not entered into until some time in December, 1893. There is not a word or syllable of evidence of any contract made in October, 1893, to furnish a well of water to appellee, or of any rental contract at any other time than the written contract above referred to executed December 4, 1893, in which, as we have said, no mention was made of wells or water. There is evidence in the record tending to prove that, immediately after the execution of the written rental contract,—about 10 minutes afterwards, according to the testimony of appellee,—appellant agreed to furnish the well and water upon the leased land, and, as a consideration for such promise, it is attempted to be shown by the evidence that appellee was to move upon the leased premises and occupy the dwelling house. The court permitted appellee to prove a different contract, at a different time, and upon a different consideration than the one declared upon in his complaint. The evidence adduced upon the trial was wholly outside the issues tendered by the complaint and denial. That a party must recover, if at all, on the theory of at least one paragraph of his complaint, is good rea-

son and sound law. Our supreme court, in the case of *Paris v. Strong*, 51 Ind. 339, say: "No rule of law can possibly be better settled, and none is more necessary to the administration of justice, than that the plaintiff must recover upon his allegations or not at all. If this were not so, it would be a mockery to require him to state a sufficient case in his complaint. Having thus stated his case, his proofs ought to be confined to it, and if he has proved a different case, however meritorious, he should be defeated." See, also, *Milburn v. Phillips*, 136 Ind. 695, 34 N. E. 983, 36 N. E. 360; *Boardman v. Griffin*, 52 Ind. 101; *Terry v. Shively*, 64 Ind. 106; *McConnell v. Bank*, 130 Ind. 127, 27 N. E. 616. And in the recent case of *Sanders v. Hartge*, 17 Ind. App. 243, 46 N. E. 604, speaking of the above rule as laid down by the supreme court, it was said: "It is of the highest importance to the administration of the law that courts should adhere most tenaciously and strictly to this rule of pleading which requires the pleader to be bound by his cause of action as stated by him. Otherwise his adversary could have no assurance of the facts he would have to controvert to meet his attacks, and be taken unaware in the forensic encounter at the bar." In the case of *Railway Co. v. Levy*, 127 Ind. 168, 28 N. E. 773, the supreme court, speaking by Coffey, J., said: "A complaint cannot be made elastic so as to bend to the changing views of counsel, as the case proceeds. It must proceed to the end upon the theory upon which it is constructed." We must thus conclude that there is no evidence in the record in this cause which sustains the material allegations of appellee's complaint, and that the lower court erred in refusing to grant appellants' motion for a new trial. The judgment is therefore reversed, with instructions to the lower court to sustain the motion for a new trial.

(21 Ind. App. 416)

McCONAHEY'S ESTATE v. FOSTER.

(Appellate Court of Indiana. Jan. 12, 1899.)

ASSIGNMENT OF ERRORS — FORMAL DEFECTS — AMENDMENT — NEW TRIAL — CAUSE DISCOVERED AFTER TERM — ASSIGNMENT OF CAUSE.

1. Where an assignment of error is defective under rule 3 of the appellate court, requiring a cause to be properly entitled in the assignment of errors, and rule 6, providing that the assignment of errors shall contain the full names of the parties, in that it is entitled "The Estate of M., Deceased, vs. F.," instead of "F., Administratrix of the Estate of M., Deceased, vs. F.," and the appellant has asked for leave to amend, the appellate court will consider the case, without requiring a formal amendment.

2. *Horner's Rev. St. 1897, § 563 (Burns' Rev. St. § 572)*, allowing an application for a new trial for cause discovered after the term at which the decision was rendered, applies to proceedings upon claims against decedents' estates.

3. An application for a new trial for cause discovered after the term, in proceedings on a claim against a decedent's estate, is an independent action, in which a motion for a new trial may be made.

4. An assignment of cause in a motion for a new trial, that the judgment is not supported by the evidence, and is contrary to the law and evidence, is not sufficient, as it must state some specific cause.

Appeal from circuit court, Whitley county; J. W. Adair, Judge.

Complaint by the estate of Mary McConahay for a new trial for a cause discovered after the term at which verdict was rendered for claimant on the claim of Emma A. Foster against Emma A. Foster, administratrix. Judgment for defendant, and from an order overruling a motion for a new trial plaintiff appeals. Affirmed.

John Q. Oline, James O. Branyan, and Marshall, McNagney & Clugston, for appellant. Kenner & Lesh and Eph. Strong, for appellee.

BLACK, C. J. It appears from the record before us that on the 16th day of December, 1893, judgment of allowance of a claim was rendered in the Huntington circuit court in favor of Emma A. Foster against Emma A. Foster, administratrix of the estate of Mary McConahay, deceased, the claim being upon a note purporting to be made by Mary McConahay, payable to Emma A. Foster; an attorney having been appointed by the court to defend on behalf of the estate. On the 11th of April, 1894, there was filed in said court a complaint which is not in the transcript, an amended complaint having been filed after the venue had been changed to the court below. The amended complaint was entitled "Estate of Mary McConahay vs. Emma A. Foster," the entry of record relating to the amendment being entitled "Emma A. Foster, Admrx. of the Estate of Mary McConahay, Deceased, vs. Emma A. Foster." It was a complaint for a new trial for cause discovered after the term at which the verdict was rendered. An issue having been formed by answer in denial, the cause was tried by the court. It appears from an entry of record entitled "Emma A. Foster, Admrx. of the Estate of Mary McConahay, Deceased, vs. Emma A. Foster," that the court found for the defendant and against the plaintiff upon the issue joined. The entry then proceeds: "It is therefore ordered, decreed, and adjudged by the court that the plaintiff take nothing by her suit, and that defendant recover her costs," etc. There was a motion entitled "Emma A. Foster, Administratrix of the Estate of Mary McConahay, Deceased, vs. Emma A. Foster," in which the "plaintiff, Emma A. Foster, administratrix of the estate of Mary McConahay, deceased," moved for "a new trial and a new hearing" for the following reasons: "(1) The finding and judgment of the court is not supported by sufficient evidence; (2) the finding and judgment of the court is contrary to law; (3) the finding and judgment of the court is contrary to the evidence." The only alleged error assigned by the appellant is the overruling of the appellant's motion for a new trial, the assignment

being entitled "The Estate of Mary McConahay, Deceased, Appellant, vs. Emma A. Foster, Appellee." The appellee has moved to dismiss the appeal, for the reason that Emma A. Foster, administratrix of the estate of the decedent, is not, but should have been, made a party to the appeal.

Rule 3 of the rules of this court (27 N. E. iv.) requires the appellant to properly entitle the cause in the assignment of errors, and rule 6 (Id.) provides that the assignment of errors shall contain the full names of the parties. The assignment in this case is plainly defective. See *Peden's Estate v. Noland*, 45 Ind. 354; *Thomas' Estate v. Service*, 90 Ind. 128. The reports of the supreme court and of this court contain cases in which the appellant or the appellee has been designated as the estate of a decedent named, and in which such defect has been ignored or expressly treated as waived. In *Wells' Estate v. Wells*, 71 Ind. 509, the court said: "The estate of a dead man cannot be a party to a suit without some representative, and the suit should be carried on in the name of the representative as such. It would have been more formal if the plaintiff had filed his claim in his individual capacity against himself in his representative capacity. No objection, however, is made in this respect." The court, having thus adverted to the defect in the title of the cause, proceeded to reverse the judgment of the trial court. See, also, *Goodbub v. Hornung's Estate*, 127 Ind. 181, 28 N. E. 770; *Reeves' Estate v. Moore*, 4 Ind. App. 402, 31 N. E. 44; *Henzler's Estate v. Bossard*, 6 Ind. App. 701, 33 N. E. 217; *Crumrine v. Crumrine's Estate*, 14 Ind. App. 641, 43 N. E. 322. Here it appears from the record, and, indeed, also in the motion to dismiss, that there was an administratrix. It also appears from the record that she, as administratrix, was the party plaintiff, and that the judgment from which the appeal is taken was rendered against her in such representative character. So it can be seen by us that the defect in question is a formal one.

The appellant, responding to the motion to dismiss, has proposed, upon leave granted, to amend the assignment. It plainly appears who will be affected by either an affirmance or reversal of the judgment, and that the affirmance or reversal will have the same effect as if the assignment were perfect. We think, therefore, we may, without formal amendment, examine and decide as if the assignment were properly entitled, and, accordingly, we overrule the motion to dismiss.

It is suggested on behalf of the appellee that an application for a new trial for cause discovered after the term at which the verdict or decision was rendered, provided for by the Civil Code (section 563, Horner's Rev. St. 1897; section 572, Burns' Rev. St. 1894), is not allowable in a proceeding upon a claim against a decedent's estate. Where no mode of procedure is specially provided in probate matters, the rules of procedure in civil causes

may be followed. *Goodbub v. Hornung's Estate*, supra. No sufficient reason occurs to us for denying the right in such a case to apply for a new trial, as provided in the Code, for cause discovered after the term, where the cause assigned in the complaint is one for which, if discovered within the term, a new trial should be granted upon motion made as provided in the Code, at the term at which the verdict was rendered. Such an application by complaint for a new trial for cause discovered after the term is an independent action, in which issues may be formed and tried, and in which a motion for a new trial may be made. See *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935. The motion for a new trial must be for some specific cause, as provided by the statute. It is not a sufficient assignment of cause in a motion for a new trial to state that the judgment is not supported by sufficient evidence, or that the judgment is contrary to law, or that the judgment is contrary to the law and the evidence. *Rodefer v. Fletcher*, 80 Ind. 563; *Rosenzweig v. Frazer*, 82 Ind. 342. The motion for a new trial before us did not state any statutory cause for a new trial. The judgment is affirmed.

(21 Ind. App. 408)

ELWOOD PLANING-MILL CO. v. HARTING.

(Appellate Court of Indiana. Jan. 11, 1899.)

APPEAL—OBJECTIONS TO PLEADINGS—SALES—DAMAGES FOR FURNISHING INFERIOR ARTICLES—EVIDENCE.

1. The question of the sufficiency of part of an answer cannot be raised for the first time by assignment of error on appeal.

2. Where one who had contracted to furnish material of a certain quality to be used in the construction of a house, furnished an inferior quality, which became known to the owner after the house was finished, the owner had the right to keep the house in its inferior condition, and recover from the contractor the difference between its actual value and its value had the proper material been furnished, since the parties must be deemed to have contracted with reference to the value of the house with the proper materials furnished.

3. Where the measure of damages is the difference between the value of a house and its value had a contractor furnished such material as he agreed to, it is error to permit a witness to state the difference in value merely without giving its actual value and its value had the proper material been furnished, since thereby the witness is permitted to estimate the amount of damages, which should be assessed by the jury.

Appeal from circuit court, Madison county; John F. McClure, Judge.

Action by Elwood Planing-Mill Company against Harman C. Harting. There was a judgment for defendant, and plaintiff appeals. Reversed.

Kittinger & Reardon and Griffin & Broadbent, for appellant. Greenlee & Call, for appellee.

BLACK, C. J. The appellant brought its action against the appellee, the complaint

consisting of two paragraphs, the first being upon an account for goods and merchandise, the bill of particulars filed therewith showing a balance of \$100.26; and the second paragraph declaring upon an account stated for that amount. The appellee answered in four paragraphs, the first a general denial. The appellant replied by general denial to all the paragraphs of answer except the first. Upon trial of the cause by jury, a general verdict for the appellee was returned, and, appellant's motion for a new trial having been overruled, judgment was rendered in accordance with the verdict.

None of the pleadings were tested by demurrers. The appellant's assignment of errors contains seven specifications. The first six assail the second, third, and fourth paragraphs of answer severally, as not stating facts sufficient to constitute a defense to the appellant's cause of action as stated in the complaint, or as stated in a specified paragraph of the appellant's complaint. These specifications do not present any question for the consideration of this court. The question as to the sufficiency as a defense of a paragraph of answer cannot be raised for the first time by assigning here its insufficiency as error. *City of Evansville v. Martin*, 103 Ind. 206, 2 N. E. 596, and cases there cited; *State v. Curry*, 134 Ind. 133, 33 N. E. 685.

It appeared upon the trial and in one of the paragraphs of answer that the articles sold by the appellant to the appellee were for the most part furnished by the appellant for use by the appellee in the construction of a certain expensive dwelling house, and the dispute related to the question whether certain portions of the materials so furnished and used were well seasoned and first-class materials, and in proper condition for such purpose as contracted for by the parties, or were of inferior and unsuitable quality, unseasoned, or seasoned in different degrees of dryness, so that, after being so used, they shrank, and warped, and failed to fit together properly, to the injury of the house, and the consequent damage of the appellee; the condition of the materials being known by the appellant, but such defectiveness of the materials not being ascertained by the appellee before they had been used in the construction of the building. Upon the examination of the appellee as a witness in his own behalf he was asked by his attorney to state what, in the opinion of the witness, "the difference in the value of your house is in its present condition, and would have been if the woodwork and doors had remained in the condition they were when they were first put there." The appellant's objection to this question having been overruled, the witness answered, "Seven hundred dollars." It was alleged in the answer, and there had been evidence tending to prove, that it was expressly agreed that the articles to be furnished for the construction of the house should be first-class, well-seasoned, and suitable for such purpose.

The witness had testified to various imperfections in the house, occasioned by the want of proper seasoning of the articles for finishing, which had been furnished by the appellant, but he had not testified to the value of the house. No objection was made on the ground that the witness had not been shown to be qualified to express an opinion as to the value of the house, but the question was objected to as not being the proper way to prove damages. It is contended on behalf of the appellant that, if the articles furnished were not of the quality stipulated in the alleged contract, the only proper measure of damages would be the difference between the market value of the doors, window frames, and other articles at the time they were received by the appellee, and the contract price. The measure of relief for a breach of warranty is the difference between the actual value and the value that the article would have had if it had been as warranted, the price paid being evidence of this value. *Street v. Chapman*, 29 Ind. 142; *Ferguson v. Hosler*, 58 Ind. 438; *Hege v. Newsom*, 96 Ind. 426; *Blacker v. Slown*, 114 Ind. 322, 16 N. E. 621; *Bushman v. Taylor*, 2 Ind. App. 12, 28 N. E. 97; *Green v. Witte*, 5 Ind. App. 343, 32 N. E. 214. This general rule of damages is applicable to those ordinary cases where it will afford full compensation for the loss suffered. But the special value to the vendee of the purchased article will be taken into account where it was known to the seller at the time of the sale that the article was being purchased for a special use, and he expressly or impliedly contracted to furnish an article suitable for the special purpose, the controlling principle being to give compensation commensurate with the loss or injury, confining the recovery to damages for such loss or injury as may reasonably be regarded as arising from the breach, or as within the contemplation of the parties when they made the contract as a probable result of a breach thereof. In *Page v. Ford*, 12 Ind. 46, where a boiler, warranted to be suitable for a particular purpose, proved upon use for such purpose to be unsound, and in consequence thereof the purchaser suffered damage by reason of the destruction of his property situated near the boiler when in use, it was held that such injury should be regarded as a natural and legitimate result of the breach of warranty. Where a manufacturer sold barrels to be used for the purpose of storing whisky therein, with warranty of fitness for that purpose, and the purchaser, believing them to be fit for the purpose, so used them, he could recover for the loss of the whisky by leakage. *Poland v. Miller*, 95 Ind. 387. Where articles for a particular use, known to the seller, were furnished by him, and accepted by the buyer, after the time stipulated in the contract, the buyer, it was held, could recover the loss suffered by him through the delay; that loss being such as might fairly be con-

sidered to have been contemplated by the parties when they made the contract. *Furniture Co. v. Hascall*, 123 Ind. 502, 24 N. E. 336. In *Wait v. Borne*, 123 N. Y. 592, 25 N. E. 1053, the opinion was expressed that in case of a sale of oil to be used in the manufacture of carpets, with warranty, the proper rule of damages would generally be the difference between the market value of the carpets as they would have been if the oil had been equal to the warranty and their value as they actually were. Where coal dust was sold to be used in the manufacture of brick, with a warranty that it was free from soft coal dust, the buyer stating to the seller that it would damage the brick to be manufactured, the seller, it was held, was liable for the amount of damage suffered by the buyer through injury to the brick caused by an intermixture of soft coal dust. *Milburn v. Belloni*, 39 N. Y. 53. See, also, *Bagley v. Mill Co.*, 21 Fed. 159; *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696; *Swain v. Schieffelin*, 134 N. Y. 471, 31 N. E. 1025. If the appellee, when, through the shrinking and warping of the articles and materials furnished by the appellant, their inferior quality had become known to him, had caused such unsuitable parts of the house to be replaced with others made of first-class materials, he perhaps might have recovered from the appellant the expense thus occasioned. But he was not bound to do this in order to have his action against the appellant. He had a right to keep his house in its damaged or inferior condition, and to sue for the breach of the contract, by which he was damaged to the extent of the difference between the actual value of the house and the value of such a house as must be regarded as in contemplation of the parties when they made the contract. The appellant's failure to comply with the contract had occasioned injury to that extent.

A witness will not be allowed ordinarily to give his opinion of the amount of damages a party has sustained from an act or omission in controversy. It is for the jury to assess the damages by applying the law as given by the court to facts in evidence. *Railroad Co. v. Fitzpatrick*, 10 Ind. 120; *Railroad Co. v. Nickless*, 71 Ind. 271; *Bissell v. Wert*, 35 Ind. 54; *City of Logansport v. McMullen*, 49 Ind. 493; *Railroad Co. v. Ellox*, 79 Ind. 111; *Yost v. Conroy*, 92 Ind. 464. A witness shown to be properly qualified may be permitted to testify as to the value of anything whose value enters into the measure of damages. The rule as established by the case last cited, and as followed in many subsequent cases, seems to be that a qualified witness may testify as to the value of land or other thing before an act or event which it is claimed affects its value, and as to its value thereafter. This is, in effect, the form in which the rule has been stated. *Hire v. Kniseley*, 130 Ind. 295, 29 N. E. 1132; *Railroad Co. v. Fettig*, 130 Ind. 61, 29 N. E. 407;

Goodwine v. Evans, 134 Ind. 262, 33 N. E. 1031; *City of Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. 1; *Railroad Co. v. Peck*, 99 Ind. 68. It would seem that, whatever the particular form of eliciting the testimony, it should amount to a statement of the value before and after. *Yost v. Conroy*, supra. A question is not proper which, in effect, calls upon the witness to estimate the amount of the damages which should be assessed by the jury because of the act or omission for which damages are claimed in the action. This was the character of the question to which the appellant objected, and the answer elicited was the opinion of the witness as to the amount which should be allowed by the jury for the alleged breach of contract. The judgment is reversed, and the cause is remanded for a new trial.

(21 Ind. App. 397)

CITY OF DECATUR v. STOOPS.

(Appellate Court of Indiana. Jan. 10, 1899.)

CITIES—STREETS—NEGLIGENCE—PLEADING—APPEAL—BILL OF EXCEPTIONS—REVIEW—WAIVER—DAMAGES.

1. Plaintiff averred that he was slowly driving a gentle horse hitched to a spring wagon in good repair, when he met another team, and, not knowing of a defect in the street, turned to drive across to the other side, and drove almost squarely across a ridge 15 inches high, caused by laying water mains, and the left front wheel of his wagon dropped from the top of the ridge to the bottom of a hole 12 inches deep on the further side; the ridge and hole having been permitted to be there by the city for more than two months. *Held*, that contributory negligence was not shown.

2. *Horne's Rev. St. § 5087*, requiring persons driving vehicles to turn to the right on meeting, relates to highways, and not to streets in incorporated towns; the forfeit fixed being recoverable by the road supervisor, in the name of the township trustee, for the benefit of the highways of the district.

3. Under Act March 8, 1897, providing that, to make evidence part of the record, it is sufficient if the transcript contain the original bill of exceptions embracing such evidence, if it appear from the record that such bill was presented to and signed by the judge, and filed with the trial clerk or in open court, the record need not show affirmatively that the longhand manuscript of the evidence was filed in the clerk's office before incorporation in the bill of exceptions.

4. Where there is evidence from which the jury could find every material fact essential to a verdict, and which tends to support the answers to special interrogations, the verdict will not be disturbed.

5. Error in giving and refusing instructions is waived by failure to argue the assignments on appeal.

6. A minister was severely and permanently injured, one of the bones of his left arm being dislocated, and another broken, and he was kept from engaging in his profession for a considerable time. The arm would always be shorter than the other, and it was crooked, and would remain so. *Held*, that a verdict of \$1,300 was not so excessive as to show that the jury acted with prejudice, partiality, or corruption.

Appeal from circuit court, Jay county; J. W. Headington, Judge.

Action by Joseph E. Stoops against the city

of Decatur. From a judgment for plaintiff, defendant appeals. Affirmed.

J. Frank Mann, R. P. Beatty, R. S. Peterson, and La Follette & Adair, for appellant; France & Merryman, Peterson & Lutz, and J. J. La Follette, for appellee.

WILEY, J. Appellee sued appellant to recover damages for injuries received while traveling upon a street in appellant city, which injuries, it is averred, resulted from a defect in such street. It is charged in the complaint that in said city there are two streets,—Second street, which runs north and south, and Jefferson street, which runs east and west,—which said streets cross each other at right angles; that Second street is one of the principal thoroughfares in said city; that in 1895 appellant caused a water-works plant to be constructed; that one of the main lines for carrying water was constructed along and in said Second street; that, at a point where said two streets intersected, the ditch in which said water main was laid ran from the northeast to the southwest; that when said main was laid said ditch was refilled, and the dirt piled up 15 inches or more above the general surface of the street; that, by reason of continual travel upon said Second street where said filling had been made, the wagons and vehicles had cut up the same, and at a point on the southeast side of said ridge, about 50 feet north of the south side of Jefferson street, where the two streets intersected, there was a large hole or deep cut in the street near the southeast side of said ridge, 12 inches or more below the surface, making a distance from the top of said ridge to the bottom of said hole of from 20 to 24 inches; that said ridge of dirt and cut had been allowed to remain in said condition for more than two months, and that appellant had notice thereof, and failed to improve or repair said defect; that in April, 1896, while said street was in said condition, appellee was driving southward thereon; that he was driving a horse of ordinary gentleness, hitched to a spring wagon; that at the above-described point he met another team of horses, driven by another person, traveling northward on said Second street, and on the west side thereof, and appellee, being on the west side of said street, turned to drive across the same to the east side thereof, and in doing so drove almost "squarely and directly" over said ridge, and in doing so the left front wheel of his spring wagon dropped down from the top of said ridge into said cut or hole, and with such force that appellee, and the seat upon which he was sitting, were thrown out of said wagon, whereby he was injured, etc. The complaint also avers that he was traveling on said street where he had a right to be; that he was traveling in an "ordinary, slow, and quiet manner"; that said injury resulted to him without his fault; that he did not know of said hole or cut; that when he attempted to cross said street he believed, in good faith,

that it was ordinarily safe; that he did not know there was any defect in said street but said ridge; that, if it had not been for said hole or cut, he "would have landed safely over said ridge," etc. To this complaint appellant demurred for want of facts, which demurrer was overruled. The case was put at issue by a general denial, and trial by jury, resulting in a general verdict for appellee for \$2,000. The court submitted to the jury interrogatories, which they answered and returned with their general verdict. Appellant moved for a new trial, and, pending the same, appellee filed a remittitur of \$700. Appellant's motion for a new trial was then overruled, and judgment rendered for \$1,300. The overruling of the demurrer to the complaint and the motion for a new trial are assigned as errors.

It is argued by appellant that the complaint is defective, in that it does not show that appellee was free from contributory negligence. It is apparent from the complaint that appellee was not content to rest the question of his freedom from fault or negligence by the averment alone that the injury resulted without fault or negligence on his part, for he has pleaded specially the facts relied upon to show his freedom from negligence. The ordinary rule of pleading in this state, in actions to recover damages resulting from the negligence of the defendant, is to specifically plead the facts relied upon, and aver that the injury resulted without negligence on the part of the plaintiff contributing thereto; and, when this is done, it has been repeatedly held that it is sufficient. But where the plaintiff specially pleads the facts upon which he relies to show his freedom from negligence, and such facts are not sufficient for that purpose, but, on the contrary, show contributory negligence, an averment, following such facts, that he was free from fault, will be disregarded. Or, to state it differently, an allegation that the plaintiff was free from fault must yield to, and be controlled by, facts which, specially pleaded, show to the contrary. In 5 Enc. Pl. & Prac. p. 8, the rule is stated as follows: "If, however, the declaration stating the facts show a clear case of contributory negligence, an allegation that the plaintiff was in the exercise of due care, and that he was injured without fault on his part, will not avail him, to overcome the facts." The rule as just stated has been adhered to in this state in many cases. In *Railway Co. v. Wilson*, 134 Ind. 95, 33 N. E. 793, it was held that a complaint which alleges that a nine year old child crossed a railroad track after waiting for an engine to pass without observing that a train detached from the engine followed the engine, and that the child was struck by the detached train, was bad, as it showed contributory negligence, in failing to take time to observe the train, and an allegation of the child's freedom from fault was of no avail. See, also, *Railroad Co. v. Griffin*, 100 Ind. 221; *Railroad Co. v. Goldsmith*, 47 Ind. 43; *City of Ft. Wayne v. De*

Witt, Id. 391; *Riest v. City of Goshen*, 42 Ind. 339; *Ream v. Railroad Co.*, 49 Ind. 93; *Reynolds v. Copeland*, 71 Ind. 422; *Stone Co. v. Johnson*, 6 Ind. App. 550, 33 N. E. 1000; *Railroad Co. v. Wingate*, 58 Am. & Eng. R. R. Cas. 232. With these authorities in view, and the principles therein declared before us, let us examine the complaint, and see if its general averments relating to the conduct of the appellee are sufficient to overcome the averment that he was without fault, so as to bring it within the rule established by the authorities. It is charged that appellee was driving southward on Second street; that he was driving an "ordinary gentle horse," hitched to a spring wagon; that the wagon was in good repair; that he met another team, traveling in the opposite direction; that appellee turned to drive across to the east side of the street; that he drove almost squarely across said ridge; that in driving across the ridge the left front wheel of his wagon dropped from the top of the ridge to the bottom of the hole immediately on the east side thereof; that he was driving in a slow and quiet manner; that the accident happened without any fault on his part; that he did not know that said hole was there; that he attempted to cross the street in good faith, believing that there were no other obstructions therein, except the ridge; and that he used due care and caution, etc. We do not think that the facts as to appellee's conduct which are specially pleaded are sufficient to show him guilty of contributory negligence. Appellant was an incorporated city, and as such it had exclusive control of the streets, crossings, and sidewalks within its municipal boundaries. It was the duty of appellant to keep its streets in a reasonably safe condition for travel, and free from unnecessary and dangerous obstructions, holes, and pitfalls. Here appellant suffered a deep and dangerous hole to be and remain in almost the center of one of its principal thoroughfares, which was dangerous to travelers, and which, as appears from the complaint, was the proximate cause of the injury to appellee. The complaint is not subject to the objections argued. See *Glantz v. City of South Bend*, 106 Ind. 305, 6 N. E. 632, and cases there cited, and *City of Aurora v. Bitner*, 100 Ind. 396.

Another objection urged to the complaint is that it shows that appellee was negligent for leaving the side of the street which "the law of the road" granted him, and for driving over a ridge, etc. Second street in appellant city runs north and south. Appellee was driving on the west side of the ridge, which would take him along the west side of the street, and while so driving he met a team of horses coming towards him; and, desiring to cross to the east side of the street, he turned to the left, instead of keeping to the right, as appellant says was his duty, under the "law of the road." The "law of the road," as it is designated by the appellant, is found in section 5087, *Horner's Rev. St.* 1897, wherein it is provided that "who shall

when driving any vehicle, fall to pass to the right, when meeting another vehicle, so as to allow it to pass without injury, for every such offense, such person shall forfeit the sum of five dollars," etc. This statute relates to highways, and was passed to prevent their obstruction. It is evident from the language of the statute that it has no application to streets in an incorporated city; for the forfeit fixed by the statute is to be recovered by the supervisor of the road district, in the name of the township trustee, and the sum recovered shall be paid to the trustee of the township for the benefit of the highways of such district. A township trustee or a road supervisor has no control, management, or dominion over streets in an incorporated city. The statute we have cited is not a criminal statute, but one which provides a civil remedy for the recovery of a forfeit for the benefit of the road fund of the proper district. *Harvey v. State*, 5 Ind. App. 422, 31 N. E. 835. See, also, *Railroad Co. v. Stephenson*, 131 Ind. 203, 30 N. E. 1082. There is good reason why the statute is not applicable to streets and cities. The authorities in control of highways or roads are only required to keep the traveled way reasonably safe for travel, and it is a part of the common history of the state, and of everyday observation, that, while public highways are often 50 feet or more in width, yet the traveled way therein may not be over 12 or 15 feet wide. The statute we have cited was doubtless to establish a universal custom or rule, to make passage along such traveled ways as safe as possible, by requiring persons meeting in vehicles to give half the road, by turning to the right, so as to avoid injury. And it is to be remarked that the "forfeit" is only recoverable where a failure to turn to the right results in injury. In cities it is the duty of the authorities to keep the entire street, from sidewalk to sidewalk, or from curb to curb, in a reasonably safe condition for travel, so that persons desiring, or having occasion to, may use all portions of the street without injury resulting from obstructions or defects. In the case before us, appellee had the right to travel over and upon any part of the street, from curb to curb, so long as he did not interfere with the right of other travelers. Crossing from the right to the left side of the street, he did not violate any criminal or other statute of the state, and in doing so did not commit any unlawful act. It follows, therefore, that appellant's argument, that one who violates the law, and in consequence thereof is injured, has no right of recovery, is not tenable, as applied to the facts pleaded.

The complaint stated a good cause of action, and there was no error in overruling the demurrer to it. This leaves for discussion the second specification of the assignment of errors, which challenges the action of the court in overruling appellant's motion for a new trial. There are 22 reasons assigned

in support of appellant's motion for a new trial. The first does not present any question. The second is that the damages are excessive. The third is that the verdict is contrary to law, and the fourth is that the verdict is not sustained by sufficient evidence. The fifth to the thirteenth, inclusive, relate to the alleged insufficiency of the evidence to sustain the answers to divers interrogatories. The fourteenth to the twenty-second inclusive call in question the giving and refusing to give certain instructions.

The determination of the third and fourth reasons for a new trial depend upon the evidence. Appellee insists that the evidence is not in the record, because it does not appear that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions and signed by the judge. In this, however, appellee is in error; for the clerk certifies that the longhand manuscript of the evidence was filed in his office November 9, 1897, "and that afterward the said evidence was incorporated in said bill, etc., and signed by the judge." But it may be suggested that this appeal is prosecuted under the act of March 8, 1897, and it is unnecessary in such case that the record show affirmatively that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in a bill of exceptions. It is sufficient if the record show that it contains the original bill of exceptions, embracing the evidence, and that such bill was presented to and signed by the judge, and filed either in open court or in the clerk's office. *Store Co. v. Hammond*, decided by this court October 25, 1898, and reported in 51 N. E. 506, and cases there cited. All the requisites of the statute cited have been complied with, to bring the evidence in the record, and it is properly before us.

It is strongly argued by appellant that the evidence is insufficient to support the verdict. From what we have said in connection with the allegation of the complaint, the negligence of appellant consisted in suffering the dangerous hole to be and remain in the street, and the proximate cause of the injury to appellee was his driving into the hole, throwing him out of his wagon. To establish appellant's negligence, it was necessary for the appellee to prove, and for the jury to find, that the hole was in the street. We have examined the evidence with care, and we find that there is an abundance of evidence in the record from which the jury could have found that such a hole existed. True, some witnesses testified that on the morning before the accident occurred the hole had been filled with crushed stone; but other witnesses testified that the hole was there at the time of the accident, and had not been filled. In answer to Interrogatory 5, the jury found as a fact that the holes in the street at and near the place of the accident had not been filled, and in answer to Interrogatory 6 it was found that the holes were there. It was also found as a fact that

the hole into which appellee drove could not have been seen by a person driving along the street from the direction in which appellee was driving. Our conclusion is that the general verdict and the answers to the interrogatories are supported by the evidence. In any event, there is evidence in the record from which the jury might have found every material fact essential to appellee's recovery, and which tends to support all the answers to the interrogatories; and hence, under the rule that this court will not weigh the evidence, the verdict must stand, unless there is some other reversible error in the record.

Eight of the reasons assigned by appellant for a new trial were based on the giving and refusing to give certain instructions, but, if there was any error in this, it is waived by failing to discuss it. This leaves but one other question for decision, viz. is the judgment excessive? We have examined the record with very great care, and, from the facts established by the evidence, we cannot say that the amount of the recovery is excessive. As was said in *Courtney v. Clinton*, 18 Ind. App. 620, 48 N. E. 799: "The rule prevails in this state that the appellate tribunal will not interfere with the verdict of a jury, unless the amount of recovery is so clearly excessive as to indicate that the jury acted from prejudice, partiality, or corruption, or were misled as to the measure of the damages." See, also, *Wolf v. Trinkle*, 103 Ind. 355, 3 N. E. 110; *Railroad Co. v. Acres*, 108 Ind. 548, 9 N. E. 453; *Railroad Co. v. Pedigo*, 108 Ind. 481, 8 N. E. 627. In the case before us, appellee was a minister of the gospel. He was severely injured. He was kept from engaging in his profession for some considerable length of time. It appears from the evidence that his injury is permanent; that one of the bones of the left arm was dislocated, and another broken; that the arm would always be shorter than the other; that it was crooked, and would remain so; and that it never would be a perfect arm. Appellee also received other injuries. Under these facts, we cannot say that the jury, in assessing the damages, acted with prejudice, partiality, or corruption, and hence we cannot disturb the verdict as being excessive. We find no error in the record. The judgment is affirmed.

(21 Ind. App. 392)

CITY OF NEW ALBANY v. SLIDER.

(Appellate Court of Indiana. Jan. 10, 1899.)

NUISANCE—MUNICIPAL CORPORATIONS—PLEADING—SPECIAL INJURY—GOVERNMENTAL AGENCY—CONTRIBUTING NUISANCE—DAMAGES—SEVERAL LIABILITY—TRIAL—INSTRUCTIONS—APPEAL—REVIEW.

1. A city, in cleaning streets and depositing garbage, may create an actionable nuisance, if it thereby violates a private right.

2. A complaint for a nuisance consisting in the dumping of street cleanings by a city near plaintiff's house, so as to annoy him by the noxious and unhealthy odors and vapors arising,

whereby he and his family were made sick, and his property depreciated, states a special injury to plaintiff.

3. A city is not absolved, as a governmental agency, from liability for a nuisance caused in cleaning streets by dumping unhealthy refuse near plaintiff's house, on the theory that street cleaning is a duty, and a public benefit in which plaintiff shared.

4. A householder who himself deposited garbage and filth near his house, which aided in causing bad and noxious odors and vapors, which were calculated to produce sickness, did not contribute to sickness and annoyance chiefly caused by the maintenance of a similar nuisance at another near-by place by a city; it not having been shown that his acts did, in fact, interfere with his enjoyment or use of his premises.

5. The refusal to submit instructions which are covered by an instruction given without objection is not error.

6. An exception to the refusal of several instructions is not well taken if either of them was incorrect.

7. Even if a nuisance was abated by a city, which committed it, it is still liable for the injury done to property while the nuisance continued.

8. Either of two persons who contribute to a nuisance may be held liable.

9. Alleged errors in giving and refusing instructions must be stated as causes for new trial, and not assigned as independent errors.

Appeal from circuit court, Floyd county; Jacob Herter, Judge.

Action by Morris M. Slider against the city of New Albany. From a judgment for plaintiff, defendant appealed. Affirmed.

George H. Hester, for appellant. Kelso & Kelso, for appellee.

ROBINSON, J. In appellee's complaint he alleges that he is the owner, and, with his family, is in possession, of a house and lot in the city of New Albany as a residence; that said city has caused to be deposited large quantities of garbage, rubbish, and filth, gathered off its public ways, near to the premises of appellee, thereby creating a nuisance consisting of a huge pile of decomposed and decaying vegetable and animal matter, from which noxious vapors, and disagreeable and unhealthy odors are generated and emitted, whereby the air in and about said premises of appellee was impregnated, injuring appellee's health, and causing him and his family to become diseased and sick, destroying the comfortable enjoyment of said premises, and greatly depreciating the value thereof, to appellee's damage. The sufficiency of the complaint is questioned by the first and second assignments of error. It is argued that in the collection of garbage and removing it from its streets and alleys the city was exercising the authority conferred upon it by the legislature; that in exercising such powers the city stood in the place of the state; and that, as the state assumes no responsibility in the discharge of its governmental duties, the city, as a branch department of the state, likewise assumes no liability in the discharge of such duties. This argument resolves itself into the question whether a city can create an actionable nuisance. Our statute de-

fining special causes of action says: "Whatever is injurious to health or indecent or offensive to the senses so as to essentially interfere with the comfortable enjoyment of life or property, is a nuisance, and subject to an action." Rev. St. 1894, § 290 (Horner's Rev. St. 1897, § 289). "Such action may be brought by any person where property is injuriously affected, or where personal enjoyment is lessened by the nuisance." Rev. St. 1894, § 291 (Horner's Rev. St. 1897, § 290). The rule seems to be well recognized that a municipal corporation is liable for torts, the same as an individual, in certain classes of cases, among which are included nuisances. Thus, in 2 *Add. Torts* (Dud. & B. Ed.) p. 1315, it is said: "A municipal corporation has no more right to maintain a nuisance than an individual would have, and for a nuisance maintained upon its property the same liability attaches against a city as to an individual." This rule was recognized as correct in *Haag v. Board*, 60 Ind. 511. See 2 *Hill Torts* (4th Ed.) 387, 388; *Stein v. City of Lafayette*, 6 Ind. App. 414, 33 N. E. 912; *City of Valparaiso v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909.

It is further argued that the complaint is defective, because it seeks private redress for a public nuisance. It may be true, the complaint describes a public nuisance, but it also contains allegations showing special injury to appellee. The statute in such cases gives any one where property is injuriously affected, or where personal enjoyment is lessened, a right of action. The averments of the complaint as set out above are sufficiently full to show an injury personal to appellee. A public nuisance may become a private nuisance by inflicting upon a particular individual some special or peculiar damage.

The third error assigned is overruling appellant's motion for judgment on the interrogatories notwithstanding the general verdict. The fact that, as shown by the answers to the interrogatories, the city committed the acts complained of in an effort to keep its streets clean for the benefit of the public, does not destroy appellee's right to redress because he is one of the public for whose benefit the work was done. Cleaning the city's streets may have been a proper exercise of power delegated by the state to the municipality, but, under the authorities above cited, this did not give it the right to create a nuisance. A city has exclusive power over streets within the corporate limits, and the cleaning of its streets, when duly exercised, cannot be controlled by the courts. In such work, if unavoidable injury results, no liability ensues, because the doing of what the law authorizes cannot be a nuisance so as to give a right of action. But collecting garbage and filth from the streets, and depositing it in a mass upon some other street, may create a nuisance; and, if it does, the city must respond in damages.

It is further argued that the answers to the

interrogatories show that appellee was guilty of such contributory negligence as would bar his recovery. There is nothing in the answers which shows that appellee in any way contributed to establishing and maintaining the particular nuisance complained of. It is true, the jury find that appellee deposited garbage and filth upon another street and another place, and that this filth aided in causing and creating bad odors and noxious vapors in and around said street, and that such odors were of such a nature as to produce sickness, but that it was not the chief cause of the sickness of appellee and family. It is not shown that these deposits by appellee interfered with the comfortable enjoyment by appellee and his family of his home and premises, or lessened its rental value, but that the odors from the deposits by the city did. The general verdict of the jury for \$50 may have been based upon these alone. Besides, where a person contributes to a nuisance, and his acts alone might not amount to a nuisance, he may be chargeable therewith, although others contribute thereto. In such cases, if the combined effect is to produce an actionable injury, an action may be maintained against each of the parties contributing. It is always competent to show that others contributed to the wrong, not for the purpose of defeating the action, but in mitigation of damages. The commission of a wrongful act is not excused by the fact that others contributed to it. Taking all the answers to the interrogatories, and construing them together, we do not find such an irreconcilable conflict with the general verdict as would warrant a judgment on the interrogatories notwithstanding the general verdict.

The fourth error assigned is overruling appellant's motion for a new trial. The third cause for a new trial is, "The court erred in refusing instructions numbered 7, 8, and 9, asked by defendant." It is argued that these instructions should have been given, because they correctly state the law relative to the measure of damages. The court fully instructed the jury upon that question in the instruction given, to which appellant has offered no objections in his brief. Besides, when the action of the court in refusing to give instructions is presented as above, if it appears that either one of the instructions asked was properly refused, no error was committed. *Railway Co. v. McCartney*, 121 Ind. 385, 23 N. E. 256; *Douglass v. State*, 18 Ind. App. 289, 48 N. E. 9; *Mock v. City of Muncie*, 9 Ind. App. 536, 37 N. E. 281; *Sutherland v. State*, 108 Ind. 389, 9 N. E. 298; *Grant v. Westfall*, 57 Ind. 121.

There was no error in refusing to give the eighth instruction requested, which told the jury, in substance, that, if the evidence showed that appellant created the nuisance, and that appellee did not contribute to the same, and that the nuisance had been removed, and does not now exist, then the jury could not consider the effect it had on the value of ap-

pellee's property while it existed, and he could not recover.

The fourth cause for a new trial was modifying the eleventh instruction requested by appellant, and giving the same as modified. The modification made by the court was adding to the instruction a statement, the legal effect of which is that, where two persons contribute to a wrong, either may be held liable. Under the authorities above cited, this modification was not error.

The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth errors assigned question the action of the court in giving certain instructions and refusing to give certain instructions requested by appellant. The rule is well settled that these assignments present no question for review. They should be stated as causes in a motion for a new trial, but cannot be assigned as independent errors. *Baecher v. State*, 19 Ind. App. 100, 49 N. E. 42, and cases there cited.

The fifteenth and sixteenth errors assigned question the court's action in sustaining the demurrer to the third and fourth paragraphs of answer. It is stated by appellant's counsel, in his brief, that these answers set up the fact that the acts resulting in a nuisance were done by the city under its statutory and police power, for which appellant is not liable. What we have already said in discussing the complaint applies to these answers, and it is not necessary to repeat what was there said. There is no error in the record, and the judgment is affirmed.

(21 Ind. App. 414)

TOWN OF WILLIAMSPORT v. LISK.

(Appellate Court of Indiana. Jan. 11, 1899.)

DEFECTIVE SIDEWALK — LIABILITY OF TOWN — KNOWN DANGER—RECOVERY—DEGREE OF CARE—REVIEW.

1. Incorporated towns are liable for injuries occurring from defective streets and sidewalks.

2. One injured by a defective city sidewalk is not precluded from recovering therefor because he knew of the defect, provided he used care commensurate with the known danger.

3. A judgment on a verdict based on conflicting evidence will not be reversed on appeal.

Appeal from circuit court, Warren county; J. M. Rabb, Judge.

Action by Ada L. Lisk against the town of Williamsport. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Stansbury & Stephens, for appellant. W. L. Raburn and J. W. Sutton, for appellee.

HENLEY, J. This action was commenced by the appellee against the appellant to recover damages on account of an alleged injury received by her in falling upon a sidewalk in the town of Williamsport, it being alleged that the sidewalk at the time and place the injury occurred was in a defective and dangerous condition. It is alleged in the complaint that the place where appellee fell was on the

east side of Monroe street, near the corner of the brick block, which had been erected only a short time prior to the accident. In erecting the building, and in constructing concrete walks around it, it was necessary to cut down the grade of the old sidewalk about 23 inches below the surface of the old walk, in order to conform to the grade of the new walk. By doing this there was left near the end of the new walk an abrupt incline or step of some 25 inches in depth. This was left for a time by the appellant in that condition, except that boards were laid there, so that pedestrians could more easily pass over the sidewalk, and afterwards, on account of the town board having failed to let the contract for the permanent improvement of the street, the marshal of the town, by order of the town board, repaired the walk by cutting down the grade some 9 or 10 feet; making the walk an inclined plane, the upper end of which was about 25 inches higher than the lower end, and 5 feet wide. This was the condition of the walk at the time of the alleged injury. On the 1st day of February, 1897, at the time of the alleged accident, the streets and sidewalks, and the particular place described, in the town of Williamsport, were covered with ice and snow. The appellee, while passing over this inclined plane, fell and received the injury for which damages are claimed in this action. The appellant answered by general denial. There was a trial by jury, and a finding in favor of appellee in the sum of \$150. Appellant moved for a new trial, which was overruled, and judgment rendered in favor of appellee for said amount. The motion for a new trial assigns two reasons why the same should have been granted: (1) That the verdict of the jury is not sustained by sufficient evidence; (2) that the verdict of the jury is contrary to law. The only error assigned in this court is the overruling of appellant's motion for a new trial. The evidence is properly before us.

It is the settled law of this state that incorporated towns are liable for injuries occurring from defective streets or sidewalks. *Town of Kentland v. Hagan*, 17 Ind. App. 1, 46 N. E. 43; *Scudder v. Hinshaw*, 134 Ind. 56, 33 N. E. 791; *Town of Centerville v. Woods*, 57 Ind. 192; *Lowry v. City of Delphi*, 55 Ind. 250; *Cones v. Board*, 137 Ind. 404, 37 N. E. 272. It is also well settled that a person is not necessarily precluded from recovering for injuries resulting from defective streets because he had knowledge of such defects. *City of Columbus v. Strassner*, 124 Ind. 482, 25 N. E. 65; *Town of Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256. The person using a street known to be defective is only bound to use care commensurate with the known danger. Whether appellant was guilty of negligence, and whether appellee was free from fault, and in fact all the questions arising upon the trial of this cause, were controverted questions, and were by the verdict of the jury settled in favor of appellee. The jury re-

turned no findings of fact with their general verdict, and we can only look to the evidence to determine whether or not the judgment should be disturbed. From the evidence the court cannot conclude, as a matter of law, that appellant was free from negligence, nor that appellee did not use such care as an ordinarily prudent person would have used under like circumstances. The undisputed facts are not before the court. The evidence is conflicting, and in such case this court will not disturb the judgment of the lower court. Judgment affirmed.

(21 Ind. App. 420)

SHIRTS v. ROOKER.

(Appellate Court of Indiana. Jan. 12, 1899.)

EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—EVIDENCE—WITNESSES—COMPETENCY OF ADMINISTRATOR—TRIAL—APPEAL AND ERROR.

1. Where it appeared in evidence, in a proceeding for the allowance of a claim against the estate of a decedent, that a law firm of which claimant was a member had been doing the general law business of decedent, and that some of the items in such claim were for services as an attorney, the jury were properly instructed that claimant had the burden of proving that such services were rendered by him in his individual capacity, and not as a member of such firm.

2. In a proceeding to enforce a claim for personal services against the estate of a decedent, where the defense was that such services were rendered by a firm of which claimant was a member, and that they had been paid for in the lifetime of decedent, the admission of certain checks drawn by the latter during the period covered by such transactions, and payable to such firm, was not reversible error.

3. Where, under a plea of payment, certain checks were introduced in evidence which purported to be in full payment for certain services therein named, testimony tending to contradict the terms of such checks was properly excluded.

4. Under Burns' Rev. St. 1894, § 506 (Hornor's Rev. St. 1897, § 498), providing that, where an administrator is a party in an action in which there may be a judgment for or against the estate represented by him, no person who is a necessary party to the record, and whose interest is adverse to such estate, shall be a competent witness as to transactions with decedent, against the estate, the administrator was competent to identify the signature of decedent to a contract in controversy, as a witness on behalf of the estate.

5. Where a part of claimant's account against the estate of a decedent was for renting and looking after certain farms, and it was the theory of the defense that decedent attended to such matters himself, it was not error to admit the leases in evidence, and show that they had been prepared by decedent, though the contents thereof were immaterial.

6. In a proceeding for the enforcement of a claim against the estate of a decedent, a letter written to decedent by the firm of which claimant was a member was admissible in evidence for the purpose of showing that he was in the habit of corresponding with decedent.

7. A check purporting to have been made in payment of a certain note referred to therein, though not indorsed or receipted, except by the mark of a cancellation stamp thereon, was admissible in evidence, on production of such note, indorsed for collection, with evidence of the payment thereof, as such facts would raise the presumption that such check had been paid.

8. Under an issue as to whether claimant's

account against decedent's estate had been settled by decedent in his lifetime, a letter written by claimant to decedent, some time prior to the latter's death, referring to a statement of his account as inclosed, and requesting a settlement by note, was properly admitted in evidence.

9. Where there was no evidence to support some of the items of a claim against the estate of a decedent, and the evidence as to the other items thereof was conflicting, and there was also some proof that claimant and decedent, several years prior to the latter's death, had a settlement of their mutual accounts, and that nothing was due claimant from such estate, a verdict disallowing such claim must be permitted to stand.

Appeal from circuit court, Marion county; Henry Clay Allen, Judge.

Claim filed by Augustus F. Shirts with William V. Rooker, administrator, etc., against the estate of the latter's decedent. From a judgment on a verdict in favor of the administrator, claimant appeals. Affirmed.

Pickens & Cox and Mr. Kahn, for appellant. W. V. Rooker, in pro. per.

ROBINSON, J. Appellant appeals from a judgment in appellee's favor on a claim filed by appellant against the estate of appellee's decedent. Overruling appellant's motion for a new trial is assigned as error. The claim is made up of various items, consisting of renting and looking after a farm from 1888 to 1891, money paid certain parties named for the use and benefit of decedent, feed and care of a horse, pasture, and certain other named services as an attorney. It appears from the evidence that, during the time embraced in the claim, appellant was a member of a firm of lawyers who were more or less engaged in the service of decedent in a professional way. There is some evidence tending to show that there was a final settlement by the parties in February, 1891. Appellee's decedent died in May, 1896. There was no evidence to support a part of the claim, and that part has not been argued by appellant's counsel in their brief.

Complaint is made in this court of that part of instruction 4 given to the jury by the court of its own motion which reads as follows: "If you find that any item charged in the plaintiff's claim herein is the same or any part of any transaction had between the decedent and any firm of which plaintiff was a partner, and that such transaction was part of the firm business, the plaintiff cannot recover for the same in this action." The claim filed is not prosecuted by any firm, nor in the right of any firm. It purports to be personal transactions between the decedent and claimant. The evidence shows that appellant during the time covered by the items in the claim was a member of a firm of practicing attorneys, and that some of the items in the claim are for professional services as an attorney. The instruction does not, in effect, tell the jury, as claimed by counsel, that appellant could not agree with the decedent to do anything in his individual capacity for the decedent concerning any

matter of which appellant's firm had charge, even with the consent of the other members of the firm. It is not to be denied that a member of a firm, with the firm's consent, might contract as an individual in the business in which the firm is engaged. And the instruction does not deny this right. It expressly refers to a transaction with the firm of which the claimant was a member, and to firm business. If appellant was a member of a law firm, and such firm was doing the general law business of the decedent, the presumption would be, in the absence of any express contract to the contrary, that services performed by appellant as a lawyer were on behalf of the firm. And in such case the burden would be upon appellant to show an agreement between him and the decedent that such services were personal to him, and that he, and not the firm, was to be paid therefor. This the court told the jury in the fifth instruction. This was not telling the jury, as argued, that before the value of services can be recovered, there must be an agreement between the parties that the services are to be rendered. Where one is a member of a law firm, his legal services are presumed to be in the firm's behalf; and, if he is acting in his individual capacity, the burden is on him to show that fact. The members of a law firm constitute one person in law, and the act of one in the course of the partnership business is the act of all. It was a question properly left to the jury whether appellant was at the times in question acting individually, or as a member of the firm. See *Green v. Milbank*, 3 Abb. N. C. 138. Thus, it is said in *Bates on Partnership* (section 447): "If the contract is within the scope of the business, the mere fact that a single partner is dealt with is immaterial, where not expressly on his individual credit; and the contract will be deemed to be with the firm, unless the contrary appears."

The fourth, fifth, and sixth reasons for a new trial relate to the admission in evidence of certain checks drawn by decedent in the year 1891, and payable to the firm of which appellant was at the time a member. It appears from the evidence that during the times covered by the items in appellant's claim the law firm of which he was a member had done some legal business for decedent. We think these checks would tend to show the manner in which the parties did business, and, taken in connection with all the other evidence in the case, would give some light on the question whether the services mentioned in the claim were the personal services of appellant, or the services of the firm of which he was at the time a member. The theory of the defense was that appellant had been paid for all services he had rendered the decedent. The evidence showed that as a rule the parties are punctual in making settlements, and it was proper to show the business methods of the parties in other transactions of a similar nature. Even if we should admit that

these checks were immaterial for any purpose, we could not say their admission in evidence was such error as would warrant a reversal of the case.

The seventh reason for a new trial was striking out the testimony of a witness concerning a certain letter introduced in evidence. The letter was written by the firm of which appellant was a member and was addressed to the decedent. It is in no sense ambiguous, and in fact the evidence stricken out was not an attempt to explain the letter, but was simply the statement of the witness' conclusion that the contents of the letter had nothing to do with anything in this action.

The tenth reason for a new trial was the refusal of the court to permit a witness to testify that a certain check introduced in evidence was in payment for services other than those named in the check. The check is not ambiguous, and states that it is in full payment for certain services therein named. The effect of the offered evidence would be to contradict the terms of the instrument itself, and it was properly excluded. For the same reason the offered evidence of the same witness as to certain other checks, as set out in the eleventh reason for a new trial, was properly excluded. Several of these checks were payable to the firm of which the witness was himself a member.

The twelfth reason for a new trial was permitting appellee, the administrator, to identify the signature of James I. Rooker, the decedent, to a certain contract. It is true, this is a proceeding in which an administrator is a party, and involves a matter which occurred during the lifetime of the decedent, and a judgment or allowance may be made or rendered for or against the estate which he represents, and he is a necessary party to the record; but his interest is not adverse to the estate, nor is he an incompetent witness as to such matters in favor of the estate. *Burns' Rev. St. 1894*, § 506 (*Horner's Rev. St. 1897*, § 498). See *Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, and 23 N. E. 271.

The thirteenth and fifteenth reasons for a new trial relate to the admission of certain contracts in evidence. These contracts were leases of decedent's farms, executed by him in his lifetime. A part of appellant's claim was for renting and looking after these farms. There was some evidence that appellant had nothing to do with these leases, but that they were prepared by the decedent. While the contents of the leases themselves were not material, yet we fail to see how their introduction could be harmful to appellant. If it was a fact that the decedent looked after the leases himself, it would tend to support appellee's theory, that decedent gave his farms his personal attention.

The fourteenth reason for a new trial was the admission of a letter written to decedent by the law firm of which appellant was a member. The letter was read in evidence, and was afterwards all stricken out, except

the first sentence. That sentence referred to the fact that appellant had written decedent on some matter before a letter from decedent on the same matter was received. The court, in admitting the letter, stated that it was admitted for the sole purpose of showing that appellant was in the habit of corresponding with decedent. It was proper for that purpose, and it might have some bearing on the question whether in these various transactions the decedent was dealing with the firm, or with appellant individually.

The sixteenth and seventeenth reasons for a new trial were the admission in evidence of a check drawn on the Indianapolis National Bank by James I. Rooker, and payable to appellant's law firm, Shirts & Vestal, and the admission of a note executed by decedent, and payable to the same firm. The check contained a stamp mark: "Indianapolis National Bank. Paid May 21, 1891." The objections urged to the admission of the check were that it had no indorsement, and no receipt, excepting the stamp mark; that there was no evidence as to whose stamp that was, or who put it on the check, and no evidence that it was presented for payment or paid. This check was dated May 21, 1891, for \$267.91, and was payable "to note of Shirts & V., or bearer." A note signed by the decedent, dated February 19, 1891, for \$262.50, due 90 days after date, and payable at the Indianapolis National Bank, to Shirts & Vestal, was introduced in evidence. The note had been indorsed by the payees for collection to a Noblesville bank, and indorsed by that bank for collection to the Indianapolis National Bank. There was evidence that this note had been paid. There is no evidence that the bank held any other note executed by those parties, and, taking all the facts disclosed by the check and the note, and the fact that the note had been paid, we do not think it a violent presumption, in the light of all the evidence in the case, that the check was given in payment of the note. The fact that the check was marked "Paid," and was found among the papers of the decedent, who drew it, would raise the presumption that the check had been paid.

The next three reasons for a new trial relate to the admission in evidence of certain checks drawn by the decedent. As has been before said, these checks were competent as tending to show the manner of dealing between the parties, and we are unable to see now their introduction could prejudice the jury against appellant.

The twenty-first reason for a new trial was the admission in evidence of a letter written by appellant to decedent. The body of the letter has nothing to do with any of the matters in controversy. It tends neither to prove nor disprove any item of appellant's claim. It does not appear for what purpose it was admitted. It could have been excluded, and probably should have been; but its admission in evidence is not reversible error, because it

contains nothing that could possibly have prejudiced the rights of appellant. A postscript to the letter refers to a statement of decedent's account inclosed, and says to the decedent that, if he has any items of account against appellant or son, to deduct the same from the amount of the account sent, and to send his note for the balance, payable at any time between the date of the letter, January 28, 1890, and the next 25th December. We think this part of the letter was clearly competent, under the issues formed.

The last three reasons for a new trial relate to the exclusion of certain letters written by the decedent to appellant, and offered in evidence. Each of these three letters relates to matters not embraced in any of the items of appellant's claim. They had reference to a transaction, as appears from other evidence in the case, between the decedent and the firm of attorneys of which appellant was a member.

It is further argued that the verdict is not sustained by sufficient evidence, and is contrary to law. We have carefully read all the evidence, and can but conclude that there is evidence in the record upon which to base the jury's verdict. There was no evidence to support some of the items of appellant's claim, and as to the other items the evidence is conflicting. The record further discloses some evidence from which the jury could have concluded that, some years prior to decedent's death, he and appellant had a settlement of their mutual accounts, and that at the time this claim was filed nothing was due appellant from the estate of the decedent. Some of the evidence introduced on each side of the case may have been immaterial, but, from the whole record, we believe a correct conclusion has been reached, and that the verdict of the jury should stand. We have examined all the questions presented by appellant's counsel, and find no error warranting a reversal of the case. Judgment affirmed.

(172 Mass. 476)

COOLEY v. COOLEY et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 9, 1899.)

RESULTING TRUSTS — PAYMENT OF CONSIDERATION FOR CONVEYANCE IN NAME OF ANOTHER.

Where a widow, with funds belonging to her separate estate, purchased real property in the name of her minor children, with no intention of making a gift or advancement to them, but under a misapprehension as to the effect of such transaction on her legal rights, a trust resulted in her favor.

Report from superior court, Suffolk county; Henry K. Braley, Judge.

Bill in equity by Katherine F. Cooley against George Henry Cooley and another to declare and enforce a resulting trust. The bill alleged that plaintiff, who was a widow, purchased certain real property in Dorchester, January 17, 1898, paying therefor \$5,000 in cash, belonging to her separate estate,

and, under the misapprehension that her right to control and dispose of the property would not be prejudiced thereby, had it conveyed to defendants, who are her infant children, but retained the deed, which had never been delivered to them, in her own possession. Submitted on report. Decree for plaintiff.

Louis C. Southard, for plaintiff. John F. Kilton, for defendants.

HAMMOND, J. The general rule is that where, upon a purchase of property, the conveyance is taken in the name of one person, while the purchase money is paid by another, the parties being strangers to each other, a resulting trust immediately is presumed in favor of the party paying the money. *Perry, Trusts*, § 126, and cases cited. But in some cases, where the parties are not strangers to each other,—as in the case of a purchase by the husband in the name of his wife, or a father in the name of his child,—the presumption is that there is no resulting trust, but that the transaction is in the nature of a gift or advancement. *Id.* § 143, and cases cited. The authorities are somewhat in conflict as to whether, in the case of a purchase by a widow in the name of her minor child, the presumption is in favor of a resulting trust in favor of the mother, or a gift or advancement to the child. *Bennet v. Bennet*, 10 Ch. Div. 478; *Sayre v. Hughes*, L. R. 5 Eq. 376; *Lewin, Trusts*, p. 187; *Batstone v. Salter*, 10 Ch. App. 431; *Murphy v. Nathans*, 46 Pa. St. 508. But, whatever may be the presumption, it is liable to be rebutted by evidence. We have examined the evidence in this case, and are of the opinion that the plaintiff, at the time the deed was taken in the name of her children, did not intend to make a gift or advancement to them, but intended that the beneficiary interest should be exclusively hers, and that she was very much surprised when she was told that the effect of what she had done might be to the contrary. The deed was not intended as a gift or advancement, and there is a resulting trust in favor of the plaintiff. Decree for the plaintiff.

(172 Mass. 462)

WHITE v. NEW BEDFORD COTTON-WASTE CORP. et al.

(Supreme Judicial Court of Massachusetts. Bristol. Jan. 9, 1899.)

INFANTS—RESCISSION OF CONTRACT.

A minor bought shares in a corporation about to be organized. Thereafter, before any business was entered into, the officers and subscribers formed a new corporation, and agreed to sell all of the property of the first corporation to the new corporation, and wind up its affairs; and the new corporation, in consideration of the purchase, issued to the stockholders of the old corporation an equal part of shares in the new. *Held*, that the minor could not rescind as against the new corporation, his contract being with the old one.

Appeal from superior court, Bristol county; Henry K. Braley, Judge.

Action by Henry K. White against the New Bedford Cotton-Waste Corporation and another. There was a judgment for defendants, and plaintiff appeals. Affirmed.

T. F. Desmond, for appellant. M. R. Hitch, for appellees.

KNOWLTON, J. This is an action to recover \$1,000 for money had and received to the plaintiff's use. At the trial the plaintiff discontinued against the New Bedford Cotton-Waste Corporation, and elected to proceed against the Mt. Pleasant Mills Corporation alone. The first-mentioned corporation was organized under the general laws, and the plaintiff subscribed for 10 shares of its capital stock, of \$100 each, and paid to the treasurer \$1,000, the amount of his subscription. On account of difficulties and misunderstandings affecting its prospects, the officers and subscribers to the stock of this corporation voted to form a new corporation to be called the Mt. Pleasant Mills Corporation, with the same amount of capital stock as the original corporation. At a meeting of the first-mentioned corporation, votes were unanimously passed to sell all of its property to the new corporation, and to wind up its affairs, and to take legal steps to procure its dissolution. It was agreed between the two corporations that the Mt. Pleasant Mills Corporation should pay to the New Bedford Cotton-Waste Corporation \$11,300 for all its property, and that the cotton-waste corporation should pay back, of the \$11,300 received by it, \$11,000, in consideration of which the Mt. Pleasant Mills Corporation agreed to issue at par certificates of its stock to the amount of \$11,000 to the subscribers of the cotton-waste corporation who had paid in their subscriptions in full; each subscriber for stock in the cotton-waste corporation to have a certificate of stock in the Mt. Pleasant Mills Corporation for the same number of shares paid for by such subscriber to the cotton-waste corporation. The amount of capital stock paid in in full to the cotton-waste corporation was \$11,000, which \$11,000 included the amount of the plaintiff's subscription and payment. These agreements were fully carried out by the two corporations, and thereafter the Mt. Pleasant Mills Corporation issued to the plaintiff a certificate for 10 shares of the stock of the Mt. Pleasant Mills Corporation, representing \$1,000. The cotton-waste corporation never carried on the business for which it was organized, and never issued any certificates of stock, but gave the plaintiff a receipt entitling him to 10 shares of its capital stock.

At the time of all these transactions the plaintiff was a minor under the age of 21 years. He had knowledge of all these agreements, and consented to them so far as he was legally capable of consenting. He has tendered back to the Mt. Pleasant Mills Cor-

poration his certificate of stock, and has demanded \$1,000. The only ground on which he seeks to maintain his action is that his agreements were not binding upon him, and that, as a minor, he ought to be permitted to recover back the money that he paid. His first difficulty is that the defendant made no contract with him. The only contract under which it acted in issuing to him the certificate was made with the cotton-waste corporation for a consideration received from it. Secondly, the defendant fully performed according to its terms the only contract that it made. For the sum of \$11,000 paid by the cotton-waste corporation, it agreed to issue certificates to certain stockholders of that corporation who had paid for their stock, and who were willing to receive stock in the new corporation instead of the stock in the old. Assuming that the plaintiff might demand back his money, and maintain an action against the cotton-waste corporation, he has no such right against the new corporation. He paid no money to the new corporation, but his only payment was to the old. His money was mingled with the other money of the cotton-waste corporation, and it cannot be followed, as a separate payment or a distinct fund, into the hands of the present defendant. The finding for the defendant was correct. See *Bank v. Rice*, 107 Mass. 37-43; *Marston v. Bigelow*, 150 Mass. 45-51, 22 N. E. 71; *Borden v. Boardman*, 157 Mass. 410, 32 N. E. 469, and cases cited. Judgment affirmed.

(172 Mass. 460)

SPECIALTY GLASS CO. v. DALEY.

(Supreme Judicial Court of Massachusetts. Bristol. Jan. 9, 1899.)

PAYMENT—RIGHTS OF CREDITOR—ACCORD AND SATISFACTION.

1. Where one assuming to be attorney of a debtor makes payment to the creditor of money in fact furnished by the debtor's wife, the creditor has a right to treat it as the money of the debtor.

2. A liquidated debt was not discharged in full by the creditor retaining as a payment on account a sum less than the full claim sent him by the debtor's attorney, with a letter stating that it was sent in full settlement.

Case reserved from superior court, Bristol county; Justin Dewey, Judge.

Action by the Specialty Glass Company against Michael R. Daley. Finding for plaintiff, and reserved for consideration of this court by request of the parties. Judgment for plaintiff.

F. A. Pease, for plaintiff. J. W. Cummings, for defendant.

KNOWLTON, J. The defendant owed the plaintiff \$48.83 for goods sold and delivered. On receipt of a bill demanding payment, he referred the matter to his attorney, who wrote the plaintiff a letter, purporting to be written by him as the attorney of the defendant, offering to pay 10 per cent. of the

debt in full settlement. This offer the plaintiff refused by letter, and, in a later letter directed to the "Assignee of M. R. Daley," sent the account, with proof of the indebtedness. This account the defendant's attorney returned in a letter, the last sentence of which is as follows: "If you will send your bill to him [the defendant], he will pay you a dividend of ten per cent." About a fortnight later the attorney inclosed his own check for \$4.83 in a letter to the plaintiff, in which he said that he sent it in full settlement of the bill. All of these letters to the plaintiff were written in such a way as to indicate that the writer was acting throughout as the attorney for the defendant. The plaintiff acknowledged receipt of the check as a dividend on account, but declined to accept it as a settlement. It obtained cash on the check, and gave the defendant credit for it on account. The money against which the check was drawn was furnished by the defendant's wife, but the plaintiff had no knowledge of this.

As between the parties, the case stands as if the money had belonged to the defendant. *Spaulding v. Kendrick* (Mass.) 51 N. E. 453.

Even if it could be found that the plaintiff's conduct amounted to an agreement to accept the check in settlement of the debt,—which we do not intimate,—the case would come within the rule, which is well established in Massachusetts, that an agreement to accept a part of a debt in payment for the whole is not binding, unless it is made by an instrument under seal. *Lathrop v. Page*, 129 Mass. 19; *Harriman v. Harriman*, 12 Gray, 341; *Potter v. Green*, 6 Allen, 442; *Jennings v. Chase*, 10 Allen, 526; *Slade v. Mutrie*, 156 Mass. 19, 30 N. E. 168.

There was no dispute or uncertainty about the amount of the debt, and the rule in regard to the compromise of disputed claims, and the settlement of unliquidated and doubtful claims, does not apply. *Tompkins v. Hill*, 145 Mass. 379, 14 N. E. 177. Judgment for the plaintiff on the finding.

(172 Mass. 427)

REED v. POLICE COURT OF LOWELL et al.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 7, 1899.)

BAIL DEPOSIT—JUDGMENT OF FORFEITURE—ANNULLMENT—RECOGNIZANCE—SUFFICIENCY.

1. After a default on a recognizance to a police court and a judgment forfeiting the bail deposit, the prisoner was captured, and, on pleading not guilty and waiving examination, was committed for trial before the superior court, by which he was convicted. *Held*, that the judgment of forfeiture was not nullified.

2. A recognizance to a police court unauthorized to sentence the prisoner followed Pub. St. c. 212, § 53, relating to conditions of recognizances, without distinguishing between cases where the court could impose sentence and those where it could only hold the accused for trial before the superior court. *Held*, in view of section 63, providing that an action on a

recognizance shall not be defeated for a defect of form, where it shows to what court appearance is required, and the magistrate's authority to take it, that the words inapplicable to the case should be rejected as surplusage, or "term" be construed to mean "time," and "sentence" to mean "order," so as to compel an appearance at the "time" expressed therein to await the "order" of the police court.

Case reserved from supreme judicial court, Middlesex county; James M. Barber, Judge.

Petition for writ of certiorari by John Reed against the police court of Lowell and the county of Middlesex. Reserved on complaint and demurrer. Demurrer sustained, and petition dismissed.

The recognizance is as follows, viz.: "Commonwealth of Massachusetts, Middlesex—ss.: Be it remembered, that on the 28th day of December, in the year of our Lord one thousand eight hundred and ninety-seven, John Greenhalge, otherwise called John Reed, of Lowell, personally appeared before the subscriber, a master in chancery within and for the county of Middlesex, and acknowledged himself to be indebted to the commonwealth of Massachusetts in the sums following, to wit: The said John Greenhalge, alias John Reed, as principal, in the sum of seven thousand dollars, this day deposited with me in lieu of giving surety to be levied on his goods or chattels, lands or tenements, and in want thereof upon his body, to the use of said commonwealth, if default be made in the performance of the condition here underwritten. The condition of this recognizance is such that whereas, at police court holden at Lowell on the 24th day of December, in the year of our Lord one thousand eight hundred and ninety-seven, the said John Greenhalge, alias John Reed, was brought before said court by virtue of a warrant, issued in due form of law, to answer to the commonwealth of Massachusetts on the complaint under oath of Charles Sweetser, of Chelmsford, charging him with the crime of larceny from said Charles Sweetser, and said court having ordered said Greenhalge, otherwise Reed, to recognize with sureties in the sum of seven thousand dollars for his personal appearance at the said police court next to be holden at Lowell, within the county of Middlesex, on the 31st day of December current, at ten o'clock in the forenoon, to answer to said complaint, and to whatever else shall then and there be objected against him in behalf of said commonwealth, and abide the order and the sentence of the court thereon, and also in like manner personally appear at any subsequent term of said police court to which the proceedings in the premises may be continued, if not previously surrendered and discharged, and so from term to term until the final decree, sentence, or order of the court thereon, and to abide such final sentence, order, or decree of the court, and not depart without leave; and whereas, for noncompliance with said order, the said

Greenhalge, otherwise Reed, now stands committed to the jail in Cambridge; and whereas, said Greenhalge, otherwise called Reed, has deposited with me the sum of seven thousand dollars in lieu of giving sureties: Now, if the said Greenhalge, alias Reed, according to the above-mentioned order of said court, shall personally appear before the said police court next to be holden at said Lowell, within and for the county of Middlesex, on the 31st day of December current, and then and there answer to said complaint, and to whatever else shall then and there be objected against him in behalf of said commonwealth, and abide the order and sentence of the court thereon, and also in like manner personally appear at any subsequent term of said court to which the proceedings in the premises may be continued, if not previously surrendered or discharged, and so from term to term until the final decree, sentence, or order of the court thereon, and abide such final sentence, order, or decree of the court thereon, and not depart without leave, then this recognizance to be void; otherwise to be and abide in full force, power, and virtue. Attest: Wm. V. Thompson, Master in Chancery."

W. A. Gile, for petitioner. Fred N. Weir, for respondents.

FIELD, C. J. This is a petition for a writ of certiorari to be addressed to the police court of Lowell for the purpose of quashing or annulling an order or judgment of that court whereby the sum of \$7,000, which the petitioner had deposited on giving his personal recognizance in a criminal complaint against him before that court, was adjudged to be forfeited, and was ordered to be paid to the treasurer of the county of Middlesex, and was so paid. Pub. St. c. 212, § 68. The point has not been taken that certiorari is not the proper remedy. See *Lynch v. Crosby*, 134 Mass. 313. The proceedings on the criminal complaint appear to have been in accordance with the statutes. Pub. St. c. 212, §§ 26, 46, 53, 68-71; St. 1882, c. 134. The fact that after default on his recognizance, and after the money had been adjudged forfeited, and had been paid to the treasurer of the county of Middlesex, the prisoner was recaptured on a capias issued by the police court, and was brought before that court, where he pleaded not guilty, and waived an examination, and was ordered by the police court to be committed for trial before the superior court, where, upon indictment found, he was afterwards tried, convicted, and sentenced, does not make void the judgment of the police court declaring the \$7,000 forfeited. That the police court did not have jurisdiction to impose sentence upon the petitioner, and that the recognizance contains the words "sentence" and "final sentence" and "term," does not render the recognizance void. The recognizance

substantially follows the provisions of Pub. St. c. 212, § 53, without distinguishing between the cases in which the police court has jurisdiction to impose sentence and those in which it has jurisdiction only to hold the accused for trial before the superior court. The words in the recognizance which have no application to the case before the police court may be rejected as surplusage, or "term" may be construed to mean "time," and "sentence" to mean "order." The recognizance cannot be construed so as to require the appearance of the petitioner before the supreme court. See Pub. St. c. 212, § 63; *State v. Crowley*, 60 Me. 103. If this recognizance had been certified upon default to the superior court, pursuant to Pub. St. c. 212, § 27, and a suit had been brought upon it in that court, the petitioner might have availed himself of the provisions of Pub. St. c. 212, §§ 62-66; but no suit has been brought on the recognizance. By Pub. St. c. 212, § 71, he had a remedy if he had surrendered himself, but that section contains no provisions concerning the effect of a recapture. In the present proceeding the judgment of the police court adjudging the money to be forfeited cannot be annulled or quashed, because it is a judgment which that court had a right to render upon the default of the defendant in the criminal complaint then pending before that court. Petition dismissed.

(59 Ohio St. 248)

OHIO FARMERS' INS. CO. v. HARD,
Treasurer.

(Supreme Court of Ohio. Dec. 13, 1898.)

COUNTY AUDITORS—REVISION OF TAX RETURNS—
EXTENT OF AUTHORITY—FALSE RETURNS.

1. Section 2744, Rev. St., confers on county auditors authority to revise and correct the tax returns of such corporations as under its provisions must make their returns directly to him. Domestic fire insurance companies belong to this class. The authority thus conferred continues throughout the current year, or until the taxes on the property so returned have been paid, but does not extend to returns made for former years.

2. Section 2781, Rev. St., confers on the several county auditors of the state the same jurisdiction over the tax returns made by such corporations for the five preceding years that it confers on them in respect to the returns made by natural persons during that period.

3. A willful undervaluation of property returned for taxation is alone sufficient to constitute a "false return," within the meaning of that term as found in section 2781, Rev. St.

(Syllabus by the Court.)

Error to circuit court, Medina county.

Action by the Ohio Farmers' Insurance Company against Hard, state treasurer, to restrain him from collecting taxes assessed against it by the auditor of Medina county under the provisions of Rev. St. § 2781. Judgment for defendant, and plaintiff brings error. Affirmed.

Lee Elliott, G. W. Lewis, J. Andrew, and Boynton & Horr, for plaintiff in error. J. B.

Jones, J. M. Henderson, and Frank Spellman, for defendant in error.

BRADBURY, J. The questions to be determined arise on the pleadings. The plaintiff in error was plaintiff below, and interposed in the court of common pleas a demurrer to the answer to the amended petition. The court of common pleas sustained the demurrer on the ground that the answer contained no defense to the action, and rendered a judgment perpetually restraining the treasurer from collecting the taxes complained of. This judgment the circuit court reversed, and thereupon the cause was brought into this court to reverse the judgment of the circuit court and to reinstate that of the court of common pleas.

The first question that confronts us relates to the particular action of the county auditor of which complaint is made. Was it such as the law authorized or not? To determine this it is necessary to learn what his action was. Did he add to the returns made by the plaintiff in error certain property omitted from those returns, or, being satisfied that all of its taxable property had been returned, but at too low a valuation, did he simply increase that valuation? Or did he both add omitted property and also increase the valuation of that which had been returned; and when did he act? The amended petition discloses that the county auditor on the 9th day of April, 1892, added to the returns made by plaintiff in error for the years 1880, 1887, 1888, 1889, 1890, and 1891, including a penalty of 50 per cent., the following amounts: For the year 1886, \$938,972; for the year 1887, \$1,005,111; for the year 1888, \$1,136,866; for the year 1889, \$1,151,779; for the year 1890, \$1,235,468; for the year 1891, \$524,318,—and that the taxes resulting from these additions aggregated \$60,490.04. The validity of the greater part of this addition depends upon the power or jurisdiction of the county auditor to proceed under section 2781, Rev. St. The specific acts of the county auditor upon which these additions rest do not clearly appear in the record. The amended petition, however, states in respect to this matter as follows: "The plaintiff further says that the real estate, with the improvements thereon, and all the moneys, credits, and movable property of this plaintiff added thereto, were duly listed for taxation as required by section 2744 of the Revised Statutes, and the return thereof made to the auditor of the county for the years 1886, 1887, 1888, 1889, 1890, and 1891, and was in said year 1886 duly valued for taxation at \$880,864.00, and for the year 1887 said property, moneys, and credits were valued for taxation at \$930,861.00, and for the year 1888 at \$932,186.67, and for the year 1889 at \$1,010,171.08, and for the year 1890 at \$1,066,444.92, and for the year 1891 at \$1,118,198.30. The said valuation so fixed for said respective years was the fair and full valuation of said property; and taxes

for each of said years were duly assessed thereon for state, county, township, and school purposes, and which the plaintiff has fully paid for each and all of said years." These averments clearly state two things: First, that the plaintiff in error returned to the auditor for the years named all its property; and, second, that it fixed upon such property a full and fair valuation. By reference to the answer to the amended petition the following paragraph is found: "And said defendant says that the valuations fixed and returned by said plaintiff for said respective years were not fair and full valuations of said property, for the reason that all the credits owned and held by said plaintiff were returnable at their full face value, and in like manner all moneys held by said plaintiff were returnable for the full amount so held; and this defendant says that said plaintiff did not return to exceed 50 to 66 per centum of its credits, moneys, and investments in stock and bonds; that under the law it was required to list all such personal property as above mentioned at its full 100 per centum valuation." The answer contains no other matter that bears materially on this question. We think a fair and reasonable construction of the amended petition and answer to it shows that the plaintiff in error had in fact returned to the county auditor for taxation all its property, but that in the opinion of that officer it was valued too low, and that the addition he made to the returns of plaintiff in error for the years mentioned simply increased that valuation, without bringing any other property whatever on the tax list.

Plaintiff in error contends that the only authority granted to county auditors to correct tax returns made by corporations of its class is found in section 2744, Rev. St. That section, in as far as concerns the question before us, reads as follows: "The president, secretary, and principal accounting officer of every * * * insurance company, telegraph company, or other joint stock company, except banking or other corporations whose taxation is specifically provided for * * * shall list for taxation, verified by the oath of the person so listing, all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the actual value in money, in manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated. * * * If the county auditor to whom returns are made is of the opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or in cases where no return has been made to the county auditor, he is hereby required to proceed to

have the same valued and assessed; provided, that nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the state." The plaintiff in error is an insurance company, created under the laws of this state, and therefore falls within the class required to make its tax returns under the above section (2744). That section clothes a county auditor with general power to correct, among other matters, any undervaluation of property found by him in returns for taxation made by such corporations under its provisions. The section does not prescribe any period of time within which the correction must be made, but doubtless the authority of a county auditor for that purpose continues during the current year; but, as that section contains no language extending its operation beyond the current year, his authority to act under it should be confined to the taxes of the current year. Because of this authority vested in a county auditor under section 2744, supra, defendant in error contends that, even if it should be conceded that the county auditor in the case under consideration has no jurisdiction over plaintiff in error under section 2781, Rev. St., nevertheless, as he in this instance had before him and passed upon, among earlier returns, the return for the current year (i. e. the year during which his action was had), and increased the valuation of the plaintiff in error's property for that year, and as the answer set forth, among other matters, this action of the auditor, it disclosed a valid defense to this extent, and the demurrer to it should have been overruled. As to this claim, it should be said that the action of the auditor was had on April 9, 1892. He had before him the tax returns made by the plaintiff in error for the years 1886, 1887, 1888, 1889, 1890, and 1891. Section 2744 does not expressly prescribe any particular period of time within which a corporation therein mentioned shall make its return to a county auditor. In this respect it is doubtless governed by the provisions of section 2747, Rev. St., which requires generally that returns shall be made between the second Monday of April and the third Monday of May annually; but, as the provisions of section 2744, Id., require county auditors, on or before the first Monday of May annually, to furnish blanks to corporations of the class to which plaintiff in error belongs, on which to make their returns, it follows that the period within which such returns should be made for 1892, if begun, had not expired, at the time action complained of was had by the auditor, April 9, 1892, nor had the last half of the taxes for 1891 become due. Therefore, in respect of the taxes of 1891, the current year had not expired, so that any question relating to the valuation of 1891 concerned the taxes for the current year, and therefore the county auditor had jurisdiction thereof by virtue of section 2744, Id., and it necessarily follows that additions made by

him for that year were prima facie valid, and that an answer setting forth such additions disclosed a defense pro tanto, which could not be successfully attacked by a general demurrer. As the court of common pleas sustained a demurrer to this answer, and the circuit court reversed the judgment, the foregoing considerations are, alone, sufficient to sustain the action of the circuit court.

The plaintiff in error seeks to restrain the county treasurer from collecting the sum of \$60,490.04, on the ground that the county auditor had, without authority of law, added that amount to the taxes legally assessable against it. Only a small fraction of this sum could have been lawfully imposed by the county auditor under the power which we have seen is conferred on him by section 2744, Rev. St.; so that the balance, probably exceeding \$55,000 of the above sum added by him, depends for its validity on his authority to act under section 2781, Id. If he was not authorized by that section to make the additions, then plaintiff in error is entitled to relief against the imposition of this large balance. It becomes necessary, therefore, to ascertain the authority vested by this section (2781) in county auditors over the tax returns of the corporations of the class to which plaintiff in error belongs. It is true not only that a county auditor, under section 2744, Id., may increase the valuation placed upon its property by a corporation of this class, but that the annual boards of equalization may also pass upon that question, under section 2804, Id. The authority granted by the first of these sections to the county auditor, and that conferred by the other on annual boards of equalization, relate, however, only to returns for the current year. The remedy against individuals for false returns made by them in preceding years is provided by section 2781. If one exists against corporations of the class to which plaintiff in error belongs, for false returns made by them in preceding years, it must also be found in this section (2781), for none is provided under any other statute. This section reads as follows: "If any person whose duty it is to list property or make a return thereof for taxation, either to the assessor or county auditor, shall in any year or years make a false return or statement, or shall evade making a return or statement, the county auditor shall for each year, ascertain as near as practicable, the true amount of personal property, moneys, credits and investments that such persons ought to have returned or listed for not exceeding the five years next prior to the year in which the inquiries and corrections provided for in this and the next section are made; and to the amount so ascertained as omitted, for each year he shall add fifty per centum, multiply the omitted sum or sums and (as) increased by said penalty by the rate of taxation belonging to said year or years, and accordingly enter the same on the tax lists in his office, giving a certificate therefor to the county

treasurer who shall collect the same as other taxes." The language is, "If any person * * * shall make a false return or statement." These words, "any person," plaintiff in error contends, do not include a corporation, but refer exclusively to natural persons. If, notwithstanding the object sought by our statutes that relate to listing property for taxation and the correction of errors in connection therewith, any serious doubt should arise as to whether this language "any persons" applied to artificial as well as natural persons or companies, it would be laid at rest by reference to section 2730, Rev. St. This last section is the first section found under title 13, to which title section 2781 also belongs. This section (2730) expressly declares that in this title "words importing the masculine gender shall apply to females also, and the word 'person' or 'party' * * * shall be held to include firms, companies, associations, and corporations." We hold, therefore, that section 2781, Rev. St., confers upon county auditors the same jurisdiction over the returns of corporations of the class to which plaintiff belongs that it confers over the returns of individuals. The case of *Miller v. Bank*, 46 Ohio St. 424, 21 N. E. 860, does not conflict with this view. That case relates to tax returns made by banking institutions, for which provision is made by section 2761, Rev. St., the terms of which widely differ from those of section 2744, and are sufficient in themselves to confer on county auditors ample authority for dealing with the entire subject. If, under section 2781, supra, the county auditor had jurisdiction over the returns of the plaintiff in error for the five preceding years, is the fact alone that the corporate property had been returned at too low a valuation sufficient to authorize the imposition of the penalty provided by that section? That is, can an undervaluation be made the predicate of a "false return"? The words of the statute, in as far as they bear upon this question, are as follows: "If any person whose duty it is to list property or make a return thereof for taxation, either to the assessor or county auditor, shall in any year or years make a false return or statement or shall evade making a return or statement, the county auditor shall for each year, ascertain as near as practicable, the true amount of personal property, moneys, credits and investments that such person ought to have returned or listed for not exceeding the five years next prior to the year in which the inquiries and corrections provided for in this and the next section are made." There was no attempt made by the plaintiff in error during any of the years covered by this controversy to evade making a return. Nor does it appear that any of its property was omitted from the returns it in fact made. In this respect its returns could not have been false. If false at all, within the meaning of the statute, it was because the property returned was undervalued. The object of the statute is to dis-

tribute the burden of taxation as equally as practicable. A severe penalty is inflicted, extending backward for a period of five years, for returns falsely made. Doubtless the purpose of this is not so much to recover a penalty as to secure fair and honest returns of property subject to taxation, and thus impose the burden of supporting the government equally upon all property. It is quite possible, however, that this burden can be as readily cast off by willfully and knowingly undervaluing property as by concealing its existence. Doubtless, when an owner in fact returns for taxation all his property, much latitude must be allowed for honest differences of opinion as to its value. According to the doctrine announced by this court in *Ratterman v. Ingalls*, 48 Ohio St. 468, 28 N. E. 168, to constitute a "false return" within the meaning of section 2781, supra, "there must appear, if not a design to mislead or deceive on the part of the taxpayer, at least culpable negligence." In this connection it is appropriate to say that where one has returned all his property for taxation, but is charged with undervaluing it, it should be remembered by those charged with the duty of determining it to be false or not within the meaning of this section (2781), that the matter is not only one about which honest differences may arise, but that the valuation placed upon the property by its owner is, by virtue of other statutory provisions, subject to revision by the auditor and annual boards of equalization. However, notwithstanding these considerations that may intervene and render the duties of a county auditor in this regard both delicate and difficult, we think a willful undervaluation placed by an owner on property returned by him for taxation, when fairly established, should be held to constitute a "false return" within the meaning of section 2781, Rev. St., but that a mistake not "culpable" in respect of its value would not constitute such "false return." Judgment affirmed.

(59 Ohio St. 278)

SMITH v. STATE.

(Supreme Court of Ohio. Dec. 13, 1898.)

ADVERSE LANDS TAKEN FOR CANAL PURPOSES — COMPENSATION — DEMAND FOR APPRAISAL — NATURE OF OCCUPANCY BY STATE — BASIN ADJACENT TO CANAL — USE OF WATERS OF CANAL — RIGHTS OF STATE AND OWNER.

1. It is the purpose of the act of February 4, 1825 (23 Ohio Laws, p. 57), to award compensation to owners for private lands taken for canal purposes, where they have not been donated, and where the loss or damage exceeds the benefits, and to afford opportunity to such owners to make demand for appraisal of such damages. Hence, in order to the acquisition of title to lands for canal purposes by the state under the above act, by occupancy and use, it is necessary that the occupancy by the state be exclusive, and that it be so open and notorious as to put the owner on notice that the property has been taken by the state for its own, with the purpose of incorporating it as part of its canal system.

2. Where a basin has been constructed by a private owner of lands adjoining a canal, for the

purpose of enhancing the value of his adjacent property, the basin to be used by persons navigating boats on the canal in lading, unlading, passing, and turning, and no purpose to donate the land of the basin to the state is shown, the facts that the water of the canal is permitted to flow in and constitute the water of the basin, and that occasionally boats used by the board of public works in making repairs used the basin for lading, unlading, and turning, and that occasionally, many years after the completion of the basin, engineers employed by the board of public works caused the basin to be cleaned out, do not constitute notice to the owner of the basin lands that the state has taken possession of the same as its own for canal purposes, nor such exclusive occupancy as to imply an appropriation. (Syllabus by the Court.)

Error to circuit court, Shelby county.

The state commenced its action in the court of common pleas to recover a small parcel of land in Sidney, Shelby county, alleging that it had a legal estate in and was entitled to possession, and that plaintiff in error, Philip Smith, keeps it out of possession. Smith answered, admitting possession in himself, denying title in the state, denying that the state had ever appropriated or otherwise acquired title, and alleging ownership in himself by mesne conveyances from the original owner. In the common pleas, judgment was given for defendant. On error to the circuit court this judgment was reversed, and final judgment given for the state, and plaintiff brings error. Reversed.

John F. Wilson and Andrew J. Hess, for plaintiff in error. John L. Lott, Asst. Atty. Gen., and Davies & Hoskins, for the State.

SPEAR, C. J. The land in controversy is that on which was located a basin connected with the Miami & Erie Canal, which basin was constructed by one George W. Dickson, who is the common source of title. The canal was completed through the village of Sidney in the year 1840. In the year 1844, Dickson, who owned lands in the village, platted them as an addition, and marked off a tract called "Basin," and the basin was soon after constructed by him. It adjoined the canal, and nine lots of the addition abutted upon the basin. When completed, the bank which divided it from the canal was taken away by Dickson, and the water from the canal flowed into the basin, and supplied it from that time so long as used. It was constructed wholly at Dickson's expense, and for the purpose of forming a stopping place for boats navigating the canal, for loading and unloading, and for turning; the ultimate purpose being to add value to Dickson's adjacent lots. Soon after the basin was completed, Dickson sold the lots. The basin was so used for 35 to 40 years, and until the canal lost much of its importance as a water way, and fell into gradual disuse, since which time the purchasers of the basin lands from Dickson, including the plaintiff in error, have been in occupancy of it. It is now nearly filled up. About the year 1853, one W. J. Jackson, employed in the engineering serv-

ice on the canal, and connected with the public works, and in charge of the portion of the canal with which the basin connected, caused the basin to be cleaned out. He also, when in the employ of the lessees from the state, caused it to be cleaned out. Some years after, this engineer, seeing some persons in the act of filling a portion of the basin, or putting up a wall for the purpose of building a house, stopped them, claiming the property as belonging to the state. He considered it as part of the canal, and so treated it. These persons were strangers to Jackson, and their identity is not disclosed. The contention on the part of the state is that the turning in of the water which belonged to the state, and the state's use of the basin for many years in connection with the canal, constituted an appropriation, and that, therefore, the state has title to the land in fee simple. The ultimate question, therefore, is, was there an appropriation? The state's claim is believed by its counsel to be supported by the cases of *Malone v. City of Toledo*, 28 Ohio St. 643; *Id.*, 34 Ohio St. 541; *State v. Pittsburg, C. & St. L. Ry. Co.*, 53 Ohio St. 189, 41 N. E. 205; *State v. Snook*, 53 Ohio St. 521, 42 N. E. 544.

It is not doubted that, if this basin was actually appropriated, a fee-simple title vests in the state. We are not, therefore, aided in the inquiry as to whether the acts shown amounted to an appropriation by the case of *Malone v. City of Toledo*, because the fact of appropriation was not in that case contested; nor by *State v. Snook*, because that case deals with lands of which, admittedly, the state acquired possession under the act of February 4, 1825 (23 Ohio Laws, p. 57), and the act of February 7, 1826, and used in the construction of the canal, which implies an appropriation. Are we aided by the case of *State v. Pittsburg, C. & St. L. Ry. Co.*? The third paragraph of the syllabus holds that by force of section 8 of the act of February 4, 1825, "whenever the state actually occupied a parcel of land for canal purposes, a fee-simple title thereto at once, and by virtue alone of such occupancy, vested in the state." It may be remarked in passing that, inasmuch as there was no real contention as to the fact of appropriation by the state of the land in controversy, and its long exclusive use as part of the canal system, this proposition of the syllabus settled no contested point in the case, and may properly be treated as simply a predicate for the proposition which follows. However, the term "actually occupied" imports, *ex vi termini*, exclusive occupancy; so that it would be necessary to show that a claimed occupancy by the state was an exclusive occupancy, in order to bring the case within the letter of the proposition. This, we think, the facts fail to establish in the case at bar. An occasional use, in common with other navigators on the canal, of a private basin, by boats belonging to the state, an occasional dredging out by an engineer

in the employ of the state, and a claim entertained by him that the basin was the property of the state, not communicated to the actual owner of the land upon which the basin was constructed, or his successors in title, cannot, standing alone, be regarded as showing exclusive occupancy by the state. We think, therefore, that the case at bar is not controlled by either of the cases cited.

Much importance seems to be attached in argument to the fact that the waters of the canal filled the basin. Manifestly, this simple fact is not sufficient to authorize the conclusion that exclusive occupancy is thereby shown, or a possession by the state thereby accomplished, else permission to take water which may flood adjoining lands for the purpose of watering stock, or for power,—not an uncommon thing in the history of canals,—would at once vest title in the state to the land over which the water thus flows. Clearly, the act must take its character from the purpose with which it is done, and when this act of flooding is considered in connection with the known purpose of the projector of the enterprise in the construction of the basin, and the uses to which it was to be put,—uses which contemplated at all times regulation by the owner; uses beneficial, it is true, to persons who were at the same time using the state's canal, and in some measure to the state itself, but capable of enjoyment apart from and in addition to such uses, and entirely consistent with continued private ownership by the projector,—it is plain that no exclusive occupancy by the state was intended by the act of flooding the basin. In no view of the case can it be consistently claimed that the construction and maintenance of the basin implied a purpose to devote the land itself to an exclusive public use, or to any joint use, after the object of its construction should be accomplished. Private ownership of places and structures for convenience in mooring and lading boats was common in the use of canals. It is distinctly recognized by the act of March 23, 1840 (38 Ohio Laws, p. 87, § 32). And no reason is apparent why private ownership in lands used for a basin could not continue as well as in places for mooring and for lading and unlading boats.

Nor do the facts warrant the conclusion that the basin was appropriated by the state. The statute under which lands necessary for this canal were acquired is the act of February 4, 1825, before referred to, which is an act to provide for the internal improvement of the state by navigable canals. Section 8 of the act makes it lawful for the canal commissioners, by themselves and any superintendent, agent, or engineer, to take possession of and use any lands, waters, etc., necessary for the prosecution of the improvements intended by the act, and to make all such canals, feeders, etc., as they may think proper for making said improvements, and where such lands, etc., taken and appropriated for any of the purposes aforesaid, have not been given or

granted to the state, then the commissioners, on application of the owners, shall proceed to have an appraisal by five discreet, disinterested persons, and, if damages are found to exceed benefits, shall pay the damages assessed, and the fee-simple shall then vest in the state. It was not the purpose of the act, nor is it the policy of the state, to take land of the citizen for public use without affording the owner an opportunity to make application for an appraisal, and, upon appraisal being made as prescribed by statute, to pay damages, if any are assessed. It is clear, also, that the act contemplates such assertion of exclusive control as would put the owner on notice that the property had been taken by the state for its own, and incorporated as part of its canal system. As already indicated, it is expressly shown by the record in this case that the basin was laid out and constructed by Dickson as a private enterprise, and it is in no way shown that he subsequently intended to donate it to the state, nor is there any pretense that there was any demand by the state, or its proper officers, of the owner, of possession for the purpose of incorporating the basin into the canal system, nor any information given him that the state proposed to take the basin, nor is any attempt shown to acquire the land for the state by any proceeding contemplated by the statute. There was no time when Dickson, or his successors in title, could have had the benefit of the provisions as to appraisal, for, as already found, neither had notice of the intention on the part of the state to acquire the property under the statute. As conclusion, we are of opinion that the record shows no actual appropriation of these lands by the state, and no such exclusive occupancy of them by the state as to raise a presumption of appropriation, and hence that no title vested in the state. Judgment of the circuit court reversed, and that of the common pleas affirmed. Reversed.

(59 Ohio St. 259)

COE v. ERB et al.

(Supreme Court of Ohio. Dec. 13, 1898.)

JUDGMENT—LIEN ON LANDS—ENTRY BY CLERK
AFTER ADJOURNMENT.

1. In order to create a judgment lien upon the lands of the judgment debtor, as of the first day of the term at which a judgment against such debtor is rendered, under favor of section 5375, Rev. St., the judgment must not only be pronounced during the term, but an entry of such judgment must be made on the journal during the term.

2. An entry of judgment on the journal, made in the case by the clerk, by procurement of the counsel for the plaintiff, after the adjournment of the term and in vacation, purporting to have been made at a date during the term, will not, as against the rights of a bona fide purchaser of such lands during the term, have the effect of creating a lien on the lands of the judgment debtor as of the first day of the term, although a judgment was in fact pronounced during the term.

3. In an action brought by such judgment creditor against the purchaser to subject the

lands so purchased to the payment of the judgment, the purchaser may contest, by pleading and proof, the lien sought to be enforced against the land.

(Syllabus by the Court.)

Error to circuit court, Franklin county.

The defendant in error D. S. Erb commenced an action in the court of common pleas against one Hendrickson and others, including the plaintiff in error, Irvin T. Coe. His petition set forth that on the nineteenth of March, 1894, he recovered a judgment against Hendrickson in that court in an action which was pending on and before the first day of the January term, 1894, for \$311.29 and costs, which is wholly unpaid and unsatisfied; that from December 31, 1893, and prior to the first day of the January, 1894, term of the court, and from before, at, and continuously after the said first day of said term, until March 19, 1894, the defendant Hendrickson was the owner in fee simple of lots 21 and 22 in Dennison Place addition to the city of Columbus, on which the judgment from the first day of the January, 1894, term of court became a lien, and now is a lien; that, since the rendition of the judgment, Hendrickson has not had, nor has he now, any real or personal property, whatever, and that on or about March 17, 1894, he conveyed said lots to the defendant Irvin T. Coe, who now holds the legal title. Other defendants claim an interest in the property. The plaintiff asked that defendants set up any claim of title they have, or be forever barred; that the lands be sold, and plaintiff's judgment and all costs be paid in full from the proceeds. Coe answered, denying that the judgment was a lien as of the first day of the January term, 1894, or that it was such lien on the nineteenth of March, 1894, and alleging that the property was conveyed to him by Hendrickson, for a fair and valuable consideration, March 17, 1894, at which time he took possession. The action referred to was upon an account for goods sold and delivered. It was pending at the January term, 1894, but the pendency thereof was wholly unknown to this defendant until long after the purchase and conveyance of the land. At no time during the term, which commenced on the — day of January, 1894, and ended on the thirty-first day of March, 1894, was there spread upon the journals of the court any judgment or finding of the court in respect to the case, nor was there any entry filed in court; and defendant had no notice or knowledge whatever, until after the purchase and conveyance, of the rendition of the judgment. On or about the fourth day of April, 1894, a journal entry was prepared by counsel for plaintiff, setting forth a finding and judgment in said suit, and the same was then entered upon the journal of the court as of the twenty-ninth day of March, 1894, all of which facts were wholly unknown and unsuspected by the defendant until long after said term; and said judgment, so entered as aforesaid,

is the judgment set up in plaintiff's petition. A demurrer to this answer was sustained. The court thereupon found the issues for the plaintiff, and that, by reason of the judgment pleaded in the petition, he has a valid lien upon the real estate for the amount of his judgment and costs, and ordered the land sold to satisfy the same. On error the circuit court affirmed this judgment, and to reverse both judgments this proceeding in error is brought.

J. S. Friesner and G. F. Castle, for plaintiff in error. Thos. E. Steele, for defendants in error.

SPEAR, C. J. (after stating the facts as above). The question argued by counsel for plaintiff in error, as arising upon the record, is whether or not, in an action commenced prior to the beginning of the term, upon a claim for money, a judgment announced, though not placed upon the journal during the term, but entered *nunc pro tunc* after the term, creates a lien upon the real estate of the judgment debtor, as against a bona fide purchaser, who buys during the term, but before the judgment is announced, without knowledge of the pendency of the action. The question thus made involves a consideration of the statutes which deal with the essentials of a judgment, and with its effect upon the real property of the judgment debtor. Section 5374, Rev. St., provides that lands and tenements, and goods and chattels not exempt, "shall be subject to the payment of debts and shall be liable to be taken on execution and sold." Section 5375 provides that "such lands and tenements, within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgments by confession and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered." It has sometimes been contended, and the rationale of the judgments of the courts below in this case appears to imply, that the actual entry of the judgment upon the journal is not essential to the creation of a lien. This implication, it seems to us, is not warranted when all the sections bearing upon the subject are regarded and their evident purpose considered. It is true that the two words "rendered" and "entered," in their strict use, bear a clear difference in meaning and intent. Giving to these words such signification, a judgment may be said to be rendered by a declaration from the bench; but to enter it requires the act of the clerk in writing it upon the journal. It is true, also, that for some purposes a judgment may be regarded as rendered so soon as it is pronounced. But, having in mind that we are dealing with the creation of liens upon real estate, the question is, in what sense is the word "rendered" used in the statute? Section 5331 provides that "all judg-

ments * * * shall be entered on the journals of the court." Why this requirement if the judgment is to be regarded as in full force and effect for all purposes by the mere announcement of it from the bench? It would not be questioned, we suppose, that execution may not properly issue on a judgment until it has been duly entered. From this it would follow that goods and chattels even cannot be seized in execution upon the mere announcement of judgment by the court, and to assume that lands and tenements may be burdened by a lien, good for every purpose except sale, by judicial acts of less formality than are necessary to subject goods and chattels to the payment of the debt, would be an anomaly in the law, in view of the fact that, when execution issues, it must be first satisfied by levy and sale of goods and chattels, if any are found not exempt, and the money can be made out of lands and tenements only for want of goods and chattels. The requirement that all judgments must be entered on the journal carries the implication that, until that is done, the judgment is inchoate only; it is incomplete. Though possessing the character of potentiality, it lacks the character of actuality, and hence is without probative force. Recurring again to section 5375, defining what lands may be bound, and when, we find the expression "within the county where the judgment is entered." Entered when? The words used are in the present tense. It is with what must be done then—with the action which must be had at the term in order to effect a lien—that the section is dealing. What more natural inference than that the phrase quoted means entered at the term? Giving, then, to section 5331 proper effect, and to the phrase respecting the entry of judgment, in section 5375, its proper signification, and its employment in the statute its proper purpose, we conclude that that section requires that both conditions be satisfied, and that, in order to an effective judgment,—one on which execution may issue, as contemplated by section 5374, and which will create a lien upon real estate, as contemplated by section 5375,—it must be entered on the journal as well as pronounced by the court; in other words, that the judgment is not "rendered," within the meaning of the last-cited section, until it is entered on the journal.

This conclusion is strengthened by a consideration of the purpose of our recording acts. These acts rest upon a recognition of the policy that there should somewhere be found a record which will disclose the state of the title of all lands within the county. For conveyances, mortgages, leases, etc., resort is had to the office of the county recorder; for tax liens to the tax duplicates; for judgment liens to the records of the courts. The entry of the judgment of the court of common pleas, in connection with the docket entries, constitutes, prior to the making up of the final record, a record which

shall be notice to the world of the lien of the judgment upon the debtor's lands; and, when so entered, all men must take notice of the lien at their peril. The business public, therefore, has a high interest in the maintenance of such a system as will enable every person, by the ordinary inquiry,—that is, an examination of the records,—to ascertain the condition of titles. The statute in review was enacted for the benefit of the judgment creditor; but it is only reasonable to hold that the obligation rests on him, if he claims the advantage it gives, to comply strictly with its terms, in order that due notice of such claim be given to the world, and that innocent persons shall not suffer. He controls the proceedings. He can take advantage of the statute, or not, at his pleasure. If he does comply, he has given the notice and effected the lien. If, for any cause, he falls short, the consequences should be upon him. In the present case, one tracing the title would have found it in Hendrickson. He would have then found only an action for money pending against the owner, but no judgment entered at the adjournment of the term. The abstractor would then have been justified in concluding that the land was not affected by the pending action. Upon every consideration of justice, and in order to make section 5375 consistent with other laws on the subject of liens upon real estate, we are required to give such construction to the section as will require that, in order to effect a lien upon lands as of the first day of the term, as contemplated by section 5375, the entry of judgment, as well as the announcement thereof, must be made during the term.

If we are to treat this entry of judgment as one ordered *nunc pro tunc*, the law applicable to the case would seem to involve little difficulty. It is entirely settled law that an entry of judgment *nunc pro tunc* will not be ordered where it will prejudice intervening rights of innocent persons. As expressed by Professor Black in his work on Judgments (section 137): "When a judgment is entered *nunc pro tunc*, its effect, so far as it operates by relation back to the earlier date, must be confined to the rights and interests of the original parties; at least, it will not be allowed to work detriment to the rights of innocent third persons acquiring interests without notice of the rendition of any judgment. Thus, a purchaser of real estate takes it charged with the lien of only such judgments as are actually existing at the time of the purchase, and it is not competent for a court to bind by a lien the lands of a third person by the rendition of a *nunc pro tunc* judgment against his grantor." And as held in *Miller v. Wolf*, 63 Iowa, 233, 18 N. W. 889: "A purchaser of real estate takes it charged with the lien of only such judgments as are actually existing at the time he purchases." See, also, *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. 342; *Smith v. Hood*, 25 Pa. St. 218; *Bank v. Seymour*, 14 Johns. 219; *Galpin v. Fishburne*, 3 McCord, 22; *Mc-*

Clannahan v. Smith, 76 Mo. 428; *Koch v. Railroad Co.*, 77 Mo. 354; *Ninde v. Clark*, 62 Mich. 124, 28 N. W. 765; *Graham v. Lynn*, 4 B. Mon. 17; *Acklen v. Acklen*, 45 Ala. 609; *Hays v. Miller*, 1 Wash. T. 143; *Shirley v. Phillips*, 17 Ill. 471; *Church v. English*, 81 Ill. 444; *Wells v. Gieseke*, 27 Minn. 478, 8 N. W. 380. It would seem to follow necessarily that, where the innocent purchaser has had no notice of the application for the order *nunc pro tunc*, the judgment so ordered entered should not be held to preclude him. It is important, however, to a clear understanding of the case, to note that the averment in the answer is not, in words at least, that the judgment was entered *nunc pro tunc*. The averment in that respect is that at no time during the January term was there spread upon the journals any judgment or finding in respect to the case, nor was any entry then filed in said court, but that on the fourth day of April (four days after final adjournment of the term) a journal entry was prepared by counsel for plaintiff setting forth a finding and judgment in the suit, and then placed upon the journal as of the twenty-ninth of March preceding, which was during the term. It thus appears that the action of the clerk in putting the entry on the journal was by procurement of plaintiff's counsel, rather than by order of the court. It is to be concluded, also, we suppose, that, upon its face, the judgment appears to have been rendered and entered on the twenty-ninth day of March, a day within the term; and if this is conclusive, and cannot be contradicted by proof of the alleged facts, then it binds the lands from the first day of the term, by virtue of section 5375, and the demurrer to the answer was well taken, and the judgments below are right.

This brings us to a question not argued by counsel, viz.: Can Irvin T. Coe, plaintiff in error, be heard to question the conclusiveness of this judgment, as it appears upon its face? The subject of when a judgment is open to collateral attack is a vexed one. Upon the one side are found weighty considerations affecting the public convenience and welfare, especially in regard to the maintenance of the integrity of land titles; on the other, the strong desire of courts to avoid results which work out positive injustice to individuals. Thus has arisen a conflict between principles of policy and principles of natural justice; and, as might be expected in cases of such conflict, the decisions of courts have differed. Indeed, the differences have been so frequent and so marked that any attempt to reconcile them would be futile, and a review of them would take more space than probable results would warrant. It is, and has been since the organization of our state, assumed that judgments of courts import absolute verity, and, as a broad proposition, that a judgment of a court of general jurisdiction, having jurisdiction of the cause and the parties, cannot be impeached collaterally. In the great majority of the cases where the question has

arisen, the interests involved have been those acquired under the judgments sought to be attacked, as titles to real estate. or the like, where the effect of allowing the judgment to be overthrown would be to destroy the title of innocent persons who have invested their means in reliance on the judgment. The case at bar is one where the opposite is true, and no case like it is found reported in the books.

The general rule, however, has not been without exceptions. While it is true that the parties must resort, for relief from the judgment, to a direct attack, as by appeal, motion to correct, or proceeding in error, yet strangers to the judgment, not being entitled to impeach it directly, and who, if the judgment were given full faith and effect, would be prejudiced in some pre-existing right, are placed upon a different footing. It is said by Professor Freeman, in his work on Judgments (section 335), that "being neither parties to the action, nor entitled to manage the cause nor appeal from the judgment, they are allowed to impeach it whenever it is attempted to be enforced against them." It is observed by Professor Greenleaf, in his work on Evidence (section 522), that "justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once tried, all litigation of that question and between those parties should be closed forever. It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger." In note to Hargrave's Law Tracts (page 456) it is said: "Fraud was a matter of fact, and, if used in obtaining judgment, was a deceit on the court, and hurtful to strangers, who, as they could not come in to reverse or set aside the judgment, must, of necessity, be admitted to aver it was fraudulent." And by Sutherland, J., in *Griswold v. Stewart*, 4 Cow., at page 458: "The rule that records cannot be impeached in pleading is founded on the consideration that the regular and orderly way of trying their validity is by writ of error, and that it might lead to great abuse to permit the solemn judgment of a court of record to be incidentally called in question in pleading, when a more direct and satisfactory mode of testing their validity exists. The reason of the rule shows its limitation. It is confined to parties or privies, who alone can bring error. It does not apply to strangers." In *Vose v. Morton*, 4 Cush. 27, Shaw, C. J., says: "The demandant claims title under an attachment, followed by a valid judgment in the circuit court of the United States, an execution on that judgment, and a levy of the execution on the premises, as the property of Moses Morton, 2d, the judgment debtor. If this title is well established, it must prevail, although the tenant had a valid deed of prior date, which was good against everybody but creditors, and purchasers without notice. But the demandant must make out his case strictly. He must prove that he was a creditor of Moses Morton, 2d; that he

attached the premises prior to the registration of the tenant's deed; and that such attachment was followed by a good judgment, execution, and levy. The first point relied upon by the demandant is that the judgment of the circuit court is conclusive, and that the tenant cannot aver against it. But we are of opinion that this position cannot be maintained. A judgment is conclusive only against parties and privies. The tenant is in no sense a party*or privy to that judgment. He is, indeed, privy in estate with Moses Morton, 2d, under whom he claims the demanded premises; but no question respecting the title to such estate was embraced or determined in that suit. It was only after that judgment was rendered that, by a distinct and collateral act, the judgment creditor attempted to satisfy his execution upon it, by a levy on the premises claimed by the tenant. * * * Being neither a party nor privy to the judgment, he cannot have a writ of error to reverse it, although it may be erroneous and void; but when such judgment is set up collaterally to defeat the tenant's title, which is otherwise good, and the tenant can show that the judgment is erroneous, either in matter of law or fact, he may do so by proof. It is a general and established rule of law that when a party's right may be collaterally affected by a judgment which for any cause is erroneous and void, but which he cannot bring a writ of error to reverse, he may, without reversing, prove it so erroneous and void, in any suit in which its validity is drawn in question. The cases are numerous, and a few only will be cited, including the first and the last, which have been decided in Massachusetts. *Alexander v. Gould*, 1 Mass. 165; *Smith v. Saxton*, 6 Pick. 483; *Pond v. Makepeace*, 2 Metc. 114; *Leonard v. Bryant*, 11 Metc. 370. In *Leonard v. Bryant*, 11 Metc. 370, the demandant's title was derived from Chester Denison and George G. Denison; and the tenants set up a judgment in their favor against George G. Denison and one McGlinney, recovered before the deed from George G. to the demandant was recorded. To this judgment the tenants objected, because the same was rendered contrary to the provisions of the statute. This objection was overruled, on the ground that the judgment was only voidable by a writ of error, and that the demandant might maintain a writ of error, as a privy in estate, or because the judgment was prejudicial to him by intercepting his title. The court was unanimously of the opinion, after a careful examination of the authorities, that the ruling below could not be sustained, and held, in a writ of entry brought by L. against B. to recover possession of the land, that the said judgment was contrary to law, and erroneous, but that there was no such privity of estate between L. and D. and E. as would authorize L. to maintain a writ of error to reverse the judgment, and therefore he might avoid it by plea and proof."

It has appeared by the authorities cited that

two principal grounds on which collateral attack by strangers has been permitted are fraud and want of jurisdiction. In the case at bar one risk which the purchaser took in buying when he did, although unknown to him, was that during the term a valid judgment might be taken against his grantor. He incurred no other peril by reason of the pending action; and it is difficult to see that he is in any worse plight than he would have been had he examined the records of the court the day after the final adjournment of the January term, and found that no judgment had been taken against his grantor, provided the alleged facts can now be inquired into. As the record stood then, his deed conveyed to him a title clear of any lien. What, then, was the character of the act which sought to impose a burden on his land? It was without the purchaser's knowledge. It was presumably without the knowledge of the judge. Its effect, if sustained, will be to make that appear to be true which in fact is not true; to make the records of the court, in other words, speak an untruth. It is, as to this purchaser, the obtaining of a pecuniary advantage by unfair means. That actual fraud is not alleged nor shown to have been intended is not conclusive. The facts are pleaded. The act itself was intended. Its effect, as we believe, if carried out, would work a constructive fraud. The precise case has, perhaps, not been adjudicated, but analogous questions have arisen in the courts of sister states. In *Downs v. Fuller*, 2 Metc. 135, it is held that, "when a judgment recovered contrary to law is prejudicial to a third party, he may avoid it by plea and proof." And in the opinion it is observed by Wild, J.: "Although the judgment in favor of the plaintiff in the present case was not recovered by collusion with his debtor, or with any fraudulent intention, yet we think the defendant has a right to avoid it in the same manner, because he is neither party nor privy to the plaintiff's judgment, and is not entitled to the rules of law to reverse it by a writ of error. This was so decided in *Warter v. Perry*, 1 Cro. Eliz. 199, and in *Randal's Case*, 2 Mod. 308; and the same principle is laid down in *Com. Dig. 'Error,' D*; and in 5 *Dane, Abr.* 225. This rule of law does not appear in any case to have been controverted, and it seems reasonable and just that where a judgment is recovered contrary to law, and prejudicial to a third party, he should have a right to avoid it."

Hunter v. Stove Co., 31 Minn. 505, 18 N. W. 645, is in point as involving the precise principle. The syllabus is: "The plaintiff, as statutory assignee of certain land for the benefit of creditors, brings this action to determine an adverse claim to the same made by the defendant. The adverse claim, as set up in defendant's answer, is based upon the alleged lien of a judgment confessed by plaintiff's assignor, and appearing upon the records of the district court to have been indorsed

upon the 'statement' for confession, and docketed before the assignment to plaintiff; while in fact, and as the reply alleges, the judgment was not so indorsed, nor entered in the judgment book, until more than six months after the making and filing of the assignment. Held, that in this action the false record may properly be attacked, and plaintiff's title as assignee adjudged paramount to the lien appearing to be thereby created." The opinion, by Berry, J., so well expresses our view that we take space to quote from it at length: "In the case at bar the plaintiff is a stranger to the alleged judgment,—just as much so as would be one of the creditors whom he represents,—and hence he is not estopped or in any way bound by it. 1 *Greenl. Ev.* § 532. Under the statute, as assignee, he takes and holds the assigned property, in trust for the benefit of creditors of the assignor. Hence it is his plain duty to protect and defend it, and, so far as lies in his power, to make it available to the payment of the creditors' claims. If, after he has taken the lands under the assignment, the records of a court are so manipulated as to show a judgment lien upon the assigned property at the time of the assignment, and such records are false, there being no such judgment lien at that time, it is the assignee's duty to protect the property by removing the cloud which the false records raise. He cannot move in the action or quasi action in which the alleged judgment lien was obtained, for he is not a party to it; neither has he succeeded to the rights or liabilities of any party to it. As respects the judgment, there is no privity between him and either party to it. *Mann v. Flower*, 26 Minn. 479, 5 N. W. 365. And see *Bennett v. Whitcomb*, 25 Minn. 148; *Vose v. Morton*, 4 *Cush.* 27; *Freem. Judgm.* § 162. Nevertheless, there must be some way in which he can have it adjudicated that his title to the land is paramount to the lien of the defendant's judgment, notwithstanding the appearance of the record to the contrary, for otherwise his case would be the inadmissible one of a clear legal right without a remedy. He must therefore be able to attack the false record in some way. * * * His concern is that his title be adjudged paramount to the lien apparently created by the false record. We see no reason why this may not be done in the present action. * * * It is an action to determine defendant's adverse claim. The answer sets up the judgment, and the reply the facts which go to show that the record is false. An issue as to the validity of the apparent lien is thus distinctly raised in the pleadings. The facts set up in the answer, and found by the court, also show that, as respects the plaintiff, the record is not only false, but in law fraudulently false, though, as the court finds, there may have been no moral fraud. That fraud vitiates everything is a rule without exception and which applies to a judgment as well as to an ordinary contract. *Steph. Ev. art.* 46. Why may it

not also apply to the false and fraudulent record of a judgment? And why, in an action like the present, may not a party injured by such record have it adjudged to be false and fraudulent as respects him, and thereby secure just and appropriate relief, without disturbing a record with which he has no further concern, save as it clouds his title? We see no good reason to the contrary. It is true that the record of a judgment is stated by high authority to be conclusive evidence of the fact of the rendition of the judgment, and of all the legal consequences resulting from that fact, whoever may be the parties to the suit in which it is offered in evidence. 1 Greenl. Ev. § 538. But, in our opinion, this statement is too broad when sought to be applied to an attack upon the record by a stranger, upon the ground that it is as to him false and fraudulent. Such an attack may, in a case like this at bar, be made in a collateral action. See *McIndoe v. Hazelton*, 19 Wis. 567, and *Edson v. Cummings* (Mich.) 17 N. W. 693, and cases cited."

As to jurisdiction, the court of common pleas acquired jurisdiction of the parties and of the subject-matter. It pronounced a judgment during the term, but did not then enter it. One requisite of a judgment is that it must be given at the right time. As said by 2 Bouv. Law Dict. p. 15: "To be valid, a judicial judgment must be given by competent judge or court, at a time and place appointed by law, and in the form it requires. A judgment would be null if the judge had not jurisdiction of the matter, or, having such jurisdiction, he exercised it when there was no court held." Under our practice, the court retains control of its journals during the term. It may then add to, strike out, or alter that which is on the journals, or incorporate new matter. On the final adjournment, however, that control is lost. This we take to be elementary. Confessedly, the judge cannot, in vacation after the term, render a judgment. How can he make an order affecting a judgment which he had in fact pronounced in term? An order necessary to complete the judgment and make it effective? While it cannot be said that jurisdiction of the case had been lost, nevertheless an attempt to exercise jurisdiction at the time this entry is alleged to have been made would, according to the authorities, have been as futile, at least as regards the rights of persons not parties nor privies, as though jurisdiction had in fact been lost because there was no court then to exercise it. That the court, at a subsequent term, has power to then order the entry of a judgment actually pronounced during a preceding term, is well understood, but that does not cover the case. We have found that such an order will not avail as against the intervening rights of an innocent purchaser. But even such an order cannot be made by the judge in vacation; it can be made only by a court in session, and the court, between terms, is not in

session. How, then, can the counsel and the clerk, by an entry made after the term is over, give to such entry the effect of a judgment of a court, as against strangers, at a time when the judge himself would be powerless to act? We think they cannot. If there was power in the clerk and counsel to cure the omission 4 days after the term, then they might do it 40 days after, or 400. We have not overlooked the practice of making entries on the journal after the term. It is common, and is acquiesced in by counsel and parties. One reason for such acquiescence is that, where judgment has in fact been pronounced, it would be within the power of the court at a subsequent term to order the entry made, and so no substantial advantage would result from objection; and there are other considerations of convenience involved. But it does not follow that because the practice is acquiesced in by litigants and their counsel that it must be held to conclude strangers.

Our conclusions are that section 5375 requires that, in order to create a lien as of the first day of the term, there must be an entry of judgment on the journal during the term; that the entry made in this case after the term was unauthorized, and worked a fraud upon the plaintiff in error; that the judgment, as it appears of record, does not conclude his rights; and that, not being a privy as respects the action then pending, he could not maintain a direct action to review the judgment, and therefore has the right to challenge its effect on his property in the case at bar. The judgments below will be reversed, and the cause remanded, with direction to overrule the demurrer to the answer, and for further proceedings according to law. Reversed.

(156 N. Y. 104)

HUSTED v. VAN NESS et al.

(Court of Appeals of New York. Jan. 17, 1899.)

REFORMATION OF INSTRUMENTS—JUDGMENTS—COSTS—APPEAL.

1. An order of the appellate division taxing costs is not reviewable.

2. A judgment reforming an instrument must have for its support a finding that it does not express the agreement of the parties, occasioned by mutual mistake, or mistake of one party and fraud of the other.

3. A judgment construing an instrument is erroneous where that was not the substantial purpose of the action.

Appeal from supreme court, appellate division, First department.

Action by Gilbert M. Husted against Edward Van Ness and another, trustee of the estate of Benjamin Lord, deceased, to obtain relief from a release. From a judgment of the appellate division (36 N. Y. Supp. 1043), plaintiff appeals. Affirmed.

A. Edward Woodruff, for appellant. Geo. Putnam Smith, for respondents.

PARKER, C. J. The opening sentence of the appellant's brief expresses, as well, probably, as it is possible to do, the object of this action, which he says "was brought by the plaintiff to obtain relief in respect to a certain paper writing which the defendant Edward Van Ness, the then attorney and counsel for Augustus Cruikshank, the then trustee of the Lord estate, prepared and procured the plaintiff to execute in his office." The paper referred to was a release, by which the plaintiff, Husted, undertook to release an undivided one-half of his one-eleventh interest in the estate of said Benjamin Lord, he having previously assigned the other undivided one-half to one Woodruff, in part, at least, for professional services. So much of the release as is necessary to present whatever of question the plaintiff thought there was in this case reads as follows: "Now, therefore, the undersigned, Gilbert M. Husted, devisee of Lavinia Knapp, one of the cestuis que trustent under the will of Benjamin Lord, in consideration of the premises, and the consideration of payment to him of the sum of \$4,757.09 by the defendant, the same being one-half of one-eleventh of said balance, as found due by said judgment, and the several dividends heretofore made by the said trustee of capital and income of said estate, hereby releases and discharges," etc. The plaintiff seems to have been of the opinion that the release was not sufficiently explicit, in that it did not point out definitely that the plaintiff was not attempting to release the interest that he had assigned some time before, and, therefore, might embarrass his assignee when he came to collect of the trustee the other undivided one-half. When the action was commenced, plaintiff appeared to be of the opinion that a fraud had been perpetrated upon him by the defendant Attorney Van Ness, and so he made the latter, as well as the trustee, a defendant, and in his complaint alleged misconduct on his part. When the case came on for trial at special term, it was very soon made to appear that there was no fraud intended on the part of either the attorney or the trustee. Neither of them pretended that the release affected or was intended to affect the interest that had been assigned to Woodruff, as defendants knew of the release at the time of its execution. On the contrary, they insisted that on its face it purported to release only an undivided one-half, and so the special term concluded to grant a dismissal of the complaint as to defendant Van Ness, but without costs. As to the trustee, the learned justice was of the opinion that perhaps the release was not expressed as clearly as it ought to have been, and therefore he decreed that the plaintiff "is entitled to relief in respect to the release * * * by the reformation of said release, so that the same shall read and be construed as being a release of but one-half of the one-eleventh share of the estate of Benjamin

Lord." When the case came before the appellate division, that court modified so much of the judgment of the special term as dismissed the complaint as to the defendant Van Ness, by making it "with," instead of "without," costs of the action as against the plaintiff. The decision in that respect was within the discretion of the court, and is not reviewable here. That court also reversed so much of the judgment as undertook to construe or reform the release. The order of reversal was upon the law, and not upon the facts, and therefore the appellant insists that the findings of fact support the judgment of the trial court, and the order and judgment of the appellate division should be reversed. If the judgment be treated as one reforming the instrument, it must have for its support findings of fact to the effect that the release does not express the agreement of the parties, and the occasion for its failure in that respect was due either to a mutual mistake of the parties, or to mistake by one party and fraud on the part of the other party. We have examined the findings with care, but discover none having that effect, or even tending in that direction. If the judgment be regarded as one construing the instrument, it is erroneous, for that was not the substantial purpose of the action; and, that having failed, the plaintiff was not entitled to a judicial construction of the release holding that, as originally drawn, its meaning is precisely the same as it would have been had it been reformed. *Oakville Co. v. Double-Pointed Tack Co.*, 105 N. Y. 658, 11 N. E. 839. The order should be affirmed, and judgment absolute ordered for the defendant, on the stipulation, with costs. All concur. Order affirmed, etc.

(157 N. Y. 720)

In re STRAUSS.

(Court of Appeals of New York. Jan. 10, 1899.)

APPEAL—ABSTRACT QUESTIONS—DISMISSAL.

Where a foreign court vacated its commission to take testimony pending an appeal from an order granting a subpoena duces tecum thereto, the appeal will be dismissed as having become purely abstract.

Appeal from supreme court, appellate division, First department.

In the matter of the application of Frederick Strauss to vacate a subpoena duces tecum, an order denying it was reversed by the appellate division (52 N. Y. Supp. 392), and respondents appealed. Dismissed.

David McClure, Edwin C. Hoyt, and Frederick B. Van Vorst, for the motion. John W. Hutchinson, Jr., opposed.

BARTLETT, J. We are of opinion that the order of the district court of Arapahoe county, Colo., of November 21, 1898, revoking, vacating, and setting aside the dedimus potestatem or commission of March 26, 1898, has ren-

dered the questions presented by this appeal purely abstract, and consequently of such a character as will not be considered by this court. It follows that the motion to dismiss the appeal should be granted. The usual question of costs below is not presented in this case by appellants, as respondent offers to enter into a stipulation waiving costs heretofore obtained against the appellants, and allowing the judgment for costs to be marked satisfied of record. Motion to dismiss appeal is granted, without costs to either party as against the other, upon the execution of a stipulation by respondent in accordance with this memorandum. All concur. Appeal dismissed.

(153 N. Y. 41)

NEW v. VILLAGE OF NEW ROCHELLE.

(Court of Appeals of New York. Jan. 10, 1899.)

APPEAL—REVERSAL—NEW TRIAL.

Where a judgment is reversed on appeal, a new trial should not be denied, unless under no possible state of proof applicable to the issues would respondent be entitled to judgment.

Appeal from supreme court, general term, Second department.

Action by John New against the village of New Rochelle. A judgment for plaintiff was reversed by the general term (36 N. Y. Supp. 211), and the complaint dismissed, and plaintiff appeals by permission. Modified.

C. H. & J. A. Young & Terry, for appellant.
Michael J. Tierney, for respondent.

PER CURIAM. We are satisfied with the determination of the learned general term that the judgment of the county court should be reversed, and with the reasons given for that conclusion. The court below, however, went further, and dismissed the complaint upon the merits. This, as we think, it had no power to do, under the circumstances, because it is not certain but what further evidence may be produced upon another trial that will so change the essential facts as to warrant the conclusion that the payment in question was not voluntarily made. The general term had power to "reverse or affirm, wholly or partly," or to modify, the judgment of the county court, and, "if necessary or proper," to grant a new trial. Code Civ. Proc. § 1317. The rule seems to be well settled that, in order to justify an appellate court in rendering final judgment against the respondent upon the reversal of a judgment, it is not sufficient that it is improbable that the defeated party can succeed upon a new trial, but it must appear that he certainly cannot. *Guernsey v. Miller*, 80 N. Y. 181; *Foot v. Insurance Co.*, 61 N. Y. 571; *Griffin v. Marquardt*, 17 N. Y. 28; *Edmonston v. McLoud*, 16 N. Y. 543. In *Griffin v. Marquardt*,

supra, Judge Comstock said: "It is proper to say, and to say it with great distinctness, as the opinion of this court, that extreme caution ought to be exercised in refusing new trials where judgments are reversed. The discretion of the appellate court should be exercised in that direction only in cases where it is entirely plain, either from the pleadings, or from the very nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit." In *Foot v. Insurance Co.*, supra, the court said: "It is not sufficient, to refuse a new trial, that it is highly improbable that the party defeated upon the appeal can succeed upon the new trial. It must appear that he certainly cannot." In *Brackett v. Griswold*, 128 N. Y. 644, 28 N. E. 365, there had been six trials, and the last was had on the same evidence given on the previous trials. The action had been pending for nearly 20 years, and the counsel had "substantially conceded by the course of the later trials that all the pertinent evidence available" had been procured. Under these circumstances a judgment of reversal, which also dismissed the complaint on the merits in an action at law, was affirmed, but with the significant suggestion that, "if there are any reasons why the plaintiff should have another trial, they can be presented to the supreme court on an application to modify its order; that being the proper tribunal to consider and determine such an application." A distinction was formerly made in the exercise of the power to order absolute judgment against the respondent upon a reversal, between actions at law and suits in equity, as it was held that in the former it should affirmatively appear of inevitable necessity that the party could not succeed upon a new trial, and in the latter that it was only necessary that the appellate court should be satisfied that a final judgment would not work injustice. *Muldoon v. Pitt*, 54 N. Y. 269. This distinction, even if it were still recognized, would be of no importance in the case before us, for it is an action at law; but the distinction no longer exists, as we have recently held in *Benedict v. Arnoux*, 154 N. Y. 715, 723, 49 N. E. 326, which leaves nothing to be said, either as to the general rule, or the exception that was at one time made. The evidence in the record now presented is so meager as to suggest that the facts were not fully developed. We are unable to say that "no possible state of proof applicable to the issues" would "entitle the respondent to judgment." While it is probable that a second trial will not change the result, as this is not certain we think that the judgment appealed from should be so modified as to grant a new trial, and as thus modified affirmed, without costs in this court to either party. All concur, except MARTIN, J., absent. Judgment accordingly.

(158 N. Y. 65)

CULLIFORD v. WALSER et al.

(Court of Appeals of New York. Jan. 10, 1899.)

BAIL—NATURE OF OBLIGATION — SURETIES ON APPEAL—PRIORITIES.

1. Bail to secure a defendant's discharge from arrest on civil process, and his obedience to any mandate to enforce final judgment, sustain the character of sureties, in same manner as sureties for an appeal.

2. Where defendant gave bail to secure his discharge from arrest in a civil action, and to obey any mandate to enforce the final judgment, and procured sureties to an appeal to the general term, and thereafter to an appeal to the court of appeals, the latter sureties are primarily liable, the sureties to the general term secondarily liable, and the bail lastly liable. Hence, the plaintiff, having obtained satisfaction from the sureties to the general term of the judgment therein affirmed, can only recover from the bail the amount of a judgment for costs in the court of appeals which was unpaid.

Appeal from supreme court, appellate division, Second department.

Action by Elizabeth A. Culliford against Theodore C. Walser and others. A judgment for plaintiff on a trial to the court (35 N. Y. Supp. 475) was affirmed by the appellate division (38 N. Y. Supp. 199), and defendants appealed. Reversed.

John A. Grow, for appellants. F. Spiegelberg, for respondent.

PARKER, C. J. The facts, so far as they need be stated in order to present the point we are to decide, are as follows: Culliford, this plaintiff, in a civil action against Gadd, obtained an order of arrest. To secure the latter's discharge therefrom, Walser and McHugh, these defendants, became bail in the sum of \$1,000 that Gadd would at all times render himself amenable to the process of the court during the pendency of the action, and to any mandate issued to enforce the final judgment against him. The result of the action was a judgment in favor of the plaintiff in the sum of \$1,338.90. From such judgment an appeal was taken to the general term, upon which an undertaking was given for the purpose of staying the judgment, with Ellis and Wands as sureties, whereby they agreed to pay the amount of such judgment and costs in case of the affirmation thereof. The general term affirmed the judgment, with costs, and thereafter executions were duly issued on the judgment against Gadd to the sheriff, and by him returned unsatisfied. Culliford then commenced an action against Ellis and Wands as sureties upon the undertaking given on appeal to the general term. The day following the commencement of such action an appeal to the court of appeals was perfected, upon which an undertaking was given by Gadd, with two sureties, to pay the judgment and costs in the event of an affirmation. Notwithstanding this appeal, judgment was taken by default in the action brought against Ellis and Wands on the undertaking given upon the appeal to the general

term; and an execution was thereafter issued thereon to the sheriff, who levied upon the real property of Ellis situated within the county. Ellis then paid to this plaintiff, Culliford, a sum equal to the amount of the judgment recovered against him; an arrangement being made between them that Culliford should commence an action in her own name, partly for her benefit, but mainly for the benefit of Ellis, against these defendants, the bail of Gadd, and that she should account to Ellis for all moneys received by her in such action for his benefit. Hence this action, which has resulted in a judgment at the trial term in favor of the plaintiff, in the penal sum of the bond, with interest and costs, and an affirmation by the general term.

The plaintiff was entitled to but one satisfaction. She could have collected the entire amount of the judgment from the sureties on appeal to the court of appeals, or from the sureties on the appeal to the general term, with the exception of the judgment for costs entered in the court of appeals, which she might have recovered from the sureties on the bond given to perfect the appeal to that court, or she could have recovered the sum of \$1,000 from the bail, these defendants, on their failure to cause Gadd to render himself amenable to the mandate which the plaintiff caused to be issued against him to enforce final judgment. The plaintiff chose to proceed against Ellis and Wands, the sureties on the general term judgment; and she has received from Ellis all that is her due, except on the judgment for costs in the court of appeals. At the time of the commencement of this action, therefore, the only sum that she was personally entitled to recover against these defendants was the sum due on the judgment for costs in the court of appeals, which at the time of the entry thereof was \$110.34. She has been allowed to recover, however, a judgment in the penal sum of the bond, for the benefit of Ellis, who claims that the primary liability rests upon the bail, and, hence, that he is entitled to all the rights that this plaintiff had as against them when she elected to prosecute Ellis and Wands on their undertaking. These defendants challenge the position taken by the plaintiff and Ellis, and insist that, as between the several sets of sureties, the sureties upon the appeal to the court of appeals were primarily liable, the sureties upon the undertaking to the general term were secondarily liable, and these defendants were liable last of all. So, if the plaintiff had elected to collect of these defendants in the first instance, they would have been entitled to be reimbursed by the sureties on the bond upon the appeal to the court of appeals; and, if a sufficient amount could not have been collected from them, then the defendants could have resorted to the sureties on the bond upon the appeal to the general term for the sum re-

maining unpaid. In *Hinckley v. Kreitz*, 58 N. Y. 583, this court held that, as between the two sets of sureties upon appeals to the general term and to the court of appeals, the primary liability rests upon sureties on appeals to the latter court. In that case a judgment creditor released the sureties upon appeal to the court of appeals, and attempted to collect from the general term sureties the amount of the judgment and costs; but the court held that the effect of the release of the sureties upon the appeal to the court of appeals was to discharge all liability upon the part of the general term sureties upon the undertaking which they had given to pay the judgment. In the course of the opinion the court said: "We think, upon principle and authority, that the later sureties are primarily liable, as between them and the first sureties; and it follows that the release of such later sureties by the creditor discharged the defendants, because it deprived them of a remedy over to which they would otherwise have been entitled." That case has been recognized by the profession as establishing the rule which fixes the liability of different sets of sureties as against each other, and it has not, so far as we have observed, been departed from. In *Chester v. Broderick*, 131 N. Y. 549, 30 N. E. 507, an appeal was taken to the general term from a judgment of foreclosure and sale; the amount of the bond to stay execution of the judgment on appeal being fixed at \$7,000. The judgment was affirmed, and on appeal to the court of appeals the amount of the bond was fixed at \$9,000. The decree was affirmed in this court, and a sale of the property had, which resulted in a deficiency of between \$11,000 and \$12,000. Thereupon the plaintiffs collected from the sureties on the second or court of appeals bond the full amount thereof, and then brought action against the sureties on the first or general term bond for the deficiency, which was about \$2,500. The defense interposed was that, by collecting the full amount of the bond on appeal to the court of appeals, the plaintiffs had exhausted the liability of the sureties who were primarily liable for the debts secured by both bonds, and thereby the sureties on the first bond were discharged. But this position was held by this court not well taken, and the recovery had was sustained.

The rule, then being settled that, as between different sets of sureties who undertake to secure the same debt, although in different stages of legal proceedings, the primary liability rests upon the last set, the inquiry next in order is whether bail are sureties, and therefore within the same rule. In *Rathbone v. Warren*, 10 Johns. 587, after judgment had gone against the principal in a bail bond, his creditor agreed with him not to issue the execution for several months; and it was held that the agreement operated to discharge the bail, who are by act and

operation of law sureties, and entitled to the benefit of the general principles relative to sureties. In that case, as in this, an effort was made to convince the court that bail should not be so regarded; and Mr. A. Van Vechten, the attorney general, insisted that the respondent did not stand precisely in the light of a surety, and he advanced, among other arguments, the proposition that the bail could exonerate himself from liability at any time by surrendering his principal, while in cases of suretyship generally the surety has not the power to relieve himself; but the court held otherwise. In *Melville v. Glendinning*, 7 Taunt. 126, the bail asked the court to be discharged because, as he claimed, the creditor had, for a consideration, extended the time of the principal; and the court asserted as applicable to that case the doctrine that, where a creditor gives time to the original debtor, the sureties will be discharged, and stated that the principle underlying it was that every surety has the right to come into equity and sue in the name of the original creditor, which he cannot do effectively if the creditor gives time to the original debtor. In *Toles v. Adey*, 84 N. Y. 222-238, the court, having under consideration a bond accepted by the sheriff in discharge of the defendant from arrest in a civil action, said, "Bail are sureties with the rights and remedies of sureties in other cases." If authority, then, be needed to establish that bail are sureties, and entitled to the benefit of the general principles applicable to the relation which they bear towards their principal and his creditor, as well as towards other sets of sureties, it is at hand in this state; and thus they are brought necessarily within the rule laid down in *Hinckley v. Kreitz*, supra; and it is well that it is so, for the sake of uniformity, and the necessary avoidance of confusion incident to divergent rules in corresponding relations. No good reason has been presented why bail should constitute an exception to the general rule. An attempt has been made to lay hold of the argument made by the court in support of the rule established in *Hinckley's Case*, to sustain the claim that the rule should not apply to bail, because some of the reasoning that led to its adoption is not applicable. Frequent attempts of this character are made to break down rules established by the courts for the guidance of the profession and the public; but they should not be allowed to succeed, unless a substantial reason exists for the creation of an exception, and no such reason exists in this case. Moreover, an examination of the authorities considered in that case makes it apparent that the court was attempting to ascertain and establish the true rule as to the primary liability of sureties where more than one set is obligated to pay the same debt. Among the cases cited with approval in support of the rule laid down by that case, in so far, at least, as it treats of the superior obligation between two sets of sureties to pay a debt,

was *Parsons v. Briddock*, 2 Vern. 608. Where the principal in a bond, upon which were sureties, was sued and arrested, and then gave bail, the sureties in the original bond having been sued and paid the judgment, it was decreed that they were entitled to an assignment of the judgment against the bail to secure reimbursement for what they had paid. The court next considered certain Pennsylvania cases which arose under a suit authorizing a stay of execution for a year upon giving security; it being there held that the surety for the original debt, upon payment, was entitled to the remedy of the creditor against the surety upon the stay. *Burns v. Bank*, 1 Pen. & W. 395; *Pott v. Nathans*, 1 Watts & S. 155; *Schnitzel's Appeal*, 49 Pa. St. 23. Without further referring to the authorities considered by the learned judge who wrote the opinion of the court, we observe that he was without direct authority establishing the primary liability as between two sets of sureties who have promised to pay the same judgment,—one set on one stay on an appeal to the general term, and the other on another stay on an appeal to the court of appeals. He therefore presented some of the authorities bearing upon the general subject affecting the question of primary liability as between different sets of sureties, to the end that the rule should be clearly pointed out, as well as applied to the case in hand; thus preventing future legal controversy by making it possible for would-be sureties to be correctly advised of the character of their liability as between themselves and prior sureties.

This plaintiff, therefore, is not entitled to a recovery against these defendants for anything more than the amount due on the judgment for costs in the court of appeals; and not even to that, if she has released the sureties on the court of appeals bond, as these defendants claim. So far as we are advised by the present record, we are inclined to the view that this claim is not well founded, though we refrain from passing upon it, as additional facts may perhaps be presented upon a new trial; but, if the amount of the judgment for costs in the court of appeals shall in this action be recovered of these defendants, they in turn will have the right to reimbursement from the sureties on appeal to the court of appeals. The judgment should be reversed, and a new trial granted to the defendants, with costs in this court and the general term. All concur, except GRAY and MARTIN, JJ., absent. Judgment reversed, etc.

(157 N. Y. 437)

HECLA POWDER CO. v. SIGUA IRON CO.
(Court of Appeals of New York. Jan. 10, 1899.)

APPEAL—REVIEW—FOREIGN STATUTES—EVIDENCE
—SALES—FOREIGN SHIPMENTS—MUNICIPAL REGULATIONS.

1. Where no motion to dismiss, or to direct a verdict, or to take any issues from the jury,

was made, the objection that the evidence did not warrant the verdict cannot be considered on appeal.

2. Under Code Civ. Proc. § 942, making a printed copy of a foreign statute, contained in a book purporting to have been published by authority of the state, presumptive evidence thereof, an official book, in general use, containing a copy of customs ordinances of the Spanish government, printed in Spanish, was competent, though not proved to have been published by authority of the government.

3. Where a shipper, knowing that blasting powder could not be landed in a foreign country without permission, and that failure to procure permission would render the consignee liable to a fine for attempting to land it, promised to deliver the powder to the consignee, and to furnish the permission, and he failed to do so, he is liable to the consignee for the fine paid.

Appeal from supreme court, general term, First department.

Action by the Hecla Powder Company against the Sigua Iron Company. From a judgment of the general term (36 N. Y. Supp. 838), affirming a judgment for defendant, plaintiff appeals. Affirmed.

This action was brought upon a draft in the usual form for \$950, dated May 10, 1892, payable two months after date, drawn by the plaintiff, and accepted by the defendant. It was pleaded as a defense that said draft was accepted upon the purchase by the defendant, from the plaintiff, of 5,000 pounds of blasting powder, at the agreed price of \$950, on a credit of two months, and that the plaintiff stipulated to deliver said powder to the defendant, or its agents, "laid down in" Santiago de Cuba, and to give the defendant previous notice of the vessel by which it would deliver said powder, and the time of the sailing of the same. It was alleged, as a breach of said agreement, that the powder was never delivered, and that the notice was not given as agreed. It was pleaded, as a counterclaim, that the plaintiff attempted to deliver the powder to the defendant, but neglected to procure the permits from the Spanish government, which were necessary in order to land the powder in Santiago; that it also failed to notify the defendant, as provided in the contract; and that by reason of such neglect and failure the powder was declared contraband, and seized by the Spanish government, which inflicted a fine upon the defendant's agents of \$3,472.49, and they were obliged to pay it. Judgment was demanded against the plaintiff for that sum. Upon the trial evidence was given tending to show that the parties knew of the difficulties and dangers attending the shipment of high explosives to Santiago de Cuba, and that the defendant ordered the powder upon the express understanding that the plaintiff should make arrangements so that it could be safely landed at said port; that the price of said powder, which was in fact dynamite, an interdicted article in Cuba, except when landed by special permission, delivered in New York, was 17 cents a pound, but when laid down in

Santiago was 19 cents; that the plaintiff agreed to deliver the powder to the agents of the defendant in Santiago, to pay the freight thereon, to notify the defendant of the shipment and of the name of the vessel, and to also notify its agents of the shipment, and forward to them all the papers necessary to lawfully land the powder, so that they would have them on the arrival of the vessel. The plaintiff obtained a permit from the Spanish consul in New York, and a bill of lading from the captain of the vessel upon which the powder was shipped, but did not send them to the defendant's agents in Santiago, except as it delivered them to the captain of the vessel for his own use, and for transmission to the agents of the defendant, who never received them. Upon the arrival of the vessel at Santiago, as the agents of the defendant did not have the necessary permit, the powder was seized and confiscated, and a fine was imposed upon said agents by the Spanish authorities, which they were compelled to pay. The jury rendered a verdict in favor of the defendant for the amount of said fine, \$3,472.49, with interest thereon from the date of payment. Judgment was entered accordingly, and after affirmance by the general term the plaintiff appealed to this court.

Alexander T. Goodwin, for appellant.
Frederick J. Swift and Charles W. Dayton, for respondent.

VANN, J. (after stating the facts). Several interesting questions, ably argued by the learned counsel for the appellant, are not before us, because they were not raised by objection and exception in the trial court. We cannot reverse the judgment appealed from unless the record affirmatively shows the denial of some legal right to the appellant during the progress of the trial, and that such denial was duly excepted to. In a civil action we can only reverse upon exceptions, and are compelled to disregard all errors committed by the trial court, unless they were pointed out by an objection, and saved by an exception, no matter how serious those errors may be. *Wicks v. Thompson*, 129 N. Y. 634, 29 N. E. 301. It is necessary for a party who wishes to preserve a point for the consideration of this court to give the trial court a chance to act advisedly, by interposing a proper objection, which raises the point, and by taking an exception, which saves the point. No objection, not taken upon the trial, can be urged or considered here. *Serviss v. McDonnell*, 107 N. Y. 260, 265, 14 N. E. 314. The position now taken by the appellant, that the evidence does not warrant the verdict, cannot be sustained, because it did not take that position at the trial. *Duryea v. Vosburgh*, 121 N. Y. 57, 24 N. E. 308. No motion was made to direct a verdict, or in the nature of a nonsuit, or to dismiss the counterclaim, or to

take any issue from the jury. So far as appears from the record, which is the only authentic evidence of the proceedings at the trial, the appellant acquiesced in the submission of all the issues to the jury, and it cannot now be heard to claim that this was error. By not making the objection then, it waived its right to make the objection now. We are confined in our review to the objections made during the trial, when fortified by exceptions, and of these, only three in all, we will briefly consider the two presented by counsel.

Mr. Reimer, who was United States consul at Santiago de Cuba from October, 1885, until May, 1892, when the powder was seized, was called as a witness by the defendant, and testified that the entry of dynamite or blasting powder in Cuba was prohibited by a decree of the captain general, except "on permit and appeal to the authorities." He was then shown a book, and stated that it was in Spanish, and contained the general ordinances of the custom house of the island of Cuba, in existence in 1892 "by the force of the law," and that it was the official book generally used. He was thereupon requested by the defendant's counsel to translate a portion of the book, which was offered in evidence. The plaintiff objected, on the ground that no proper foundation had been laid for its introduction, and, the objection having been overruled, it duly excepted. The witness thereupon translated, and read in English, a regulation of the Spanish government as follows: "The consignment of the vessel admitted, the consignee is directly responsible to the *alcanda*, which is the custom house, for the duties and fines which the vessel or the cargo has to pay, no matter what it is, and also all extraordinary expenses which may be occasioned by the necessity of having to re-embark the cargo, or part of it. When the consignee is also the agent for the clearing of the vessel, he will have that subsidiary responsibility for all payments which have been made. The owners of the vessel and cargoes that belong to them are subsidiarily responsible for the duties, fines, and charges which the captain incurs." The witness further testified, without objection, that the Spanish law, upon the failure of a person to pay a fine imposed under the circumstances disclosed by the evidence, not only authorized a levy on his property, but also prevented him from doing business until the fine was paid. He also stated that he tried to have the money restored, but, "unfortunately, as in all these Spanish cases, I was not successful. Once you put anything into the Spanish government, and it is held, and you cannot get it back." The objection made to the introduction of the ordinance in question was very general. If it had been more specific, non constat it would have been obviated on the spot. Under the circumstances, we think that sufficient foundation was laid for this evidence, under section 942 of the Code of Civil Procedure, which pro-

vides that "a printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree, or ordinance, by the executive power thereof, contained in a book or publication, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted, as evidence of the existing law, in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree, or ordinance." The book received in evidence was a copy of an ordinance of the government, "printed in Spanish," in existence by the force of law, and was the official book in general use. While it was not proved, in so many words, to have been published by the authority of the Spanish government, the fact that it was the official book of ordinances in general use was some evidence of publication by the government, as it could only be official through the action of the government. The book itself is not before us, so that we cannot say, from inspection, as the trial court could, whether it purported to have been published by the requisite authority or not; but the facts stated warrant that presumption, in the absence of a more specific objection.

The court charged the jury, in substance, that if the plaintiff agreed to furnish the agents of the defendant in Santiago de Cuba with such documents as would authenticate and legalize the shipment of the powder, and it neglected to do so, and as the direct result of such neglect the powder was seized and confiscated by the Spanish government, and a fine was imposed upon such agents, the plaintiff was liable to the defendant for the amount of the fine. The plaintiff excepted to that part of the charge "respecting the liability for negligence or wrong," and to that part "which refers to any liability being imposed upon the agents by reason of any act or omission of the shippers referred to in the charge." The exception, as we understand it, simply raises the question whether the plaintiff was under "any liability" for neglecting to furnish the defendant's agents with the papers necessary to lawfully land the powder, as it had expressly agreed to do. The plaintiff, with full knowledge of the facts, made a lawful contract, and failed to keep it. It not only knew what documents were necessary in order to lawfully land the powder, but it also knew that the failure to furnish them to the consignees would make them liable for a violation of law in attempting to import an interdicted article. It contracted with reference to this liability in agreeing to furnish those documents to the agents of the defendant in Santiago, and thereby place them in a position where they could lawfully receive the powder. This agreement, if it had been performed by the plaintiff, would have protected the defendant and its agents from any fine for a violation of the laws of the country where the powder was to be

landed. It neglected to keep its agreement, and the direct result of this negligence was to place the defendant and its agents, without any fault on their part, in the position of violating the law, and to subject them to the imposition of a fine, which they were compelled to pay. Having virtually agreed to so ship the powder that the defendant could receive it without liability to a fine, it shipped it in violation of law, and thereby made the defendant responsible for a fine imposed in consequence of such violation. We think, as was held by the learned general term, that the fine imposed was the natural and probable result of the breach of contract, that it was within the contemplation of the parties when they made the contract, and that the loss should be borne by the party who was guilty of the breach. The exception, therefore, was not well taken, and the judgment should be affirmed, with costs. All concur, except GRAY and MARTIN, JJ., absent. Judgment affirmed.

(153 N. Y. 40)

BUTLER v. PRENTISS.

(Court of Appeals of New York. Jan. 10, 1899.)

PARTNERSHIP AGREEMENT—CANCELLATION—
FRAUD—LACHES—DEFENSES.

1. Defendant, in whom plaintiff, his partner, who was inexperienced, had implicit confidence, by reason of long and intimate friendship, secured valuable concessions from him by threatening to withdraw from the business, of which he had entire charge, and by falsely representing that plaintiff had derived an unfair advantage from the partnership agreement. Held that, on the finding that the agreement was procured by fraud, it should be set aside entirely, and not only as to such parts as were found to be fraudulent.

2. Delay in seeking relief from an agreement procured by fraud will not bar the party's rights, so long as he was ignorant of the fraud.

3. Defendant, by threatening to withdraw from a partnership, and by making fraudulent representations, secured an agreement from his partner whereby the latter gave up valuable rights, and defendant continued in the firm, although reserving the right to withdraw at any time. Held, that the fact that defendant had continued in the firm, and therefore would not be completely restored to the position he occupied before the agreement, was no reason for not setting it aside.

Appeal from supreme court, general term. First department.

Action by George H. H. Butler against Frederick C. Prentiss. From a judgment of the general term (36 N. Y. Supp. 301) modifying and affirming judgments entered upon the report of a referee, plaintiff appeals. Reversed, unless remittitur is consented to by defendant.

J. Hampden Dougherty, for appellant.
John L. Hill, for respondent.

VANN, J. This action was brought on the 2d of August, 1890, to dissolve a co-partnership between the plaintiff and defendant, and for an accounting as to all of their partnership dealings and transactions. On the

1st of May, 1880, Edwin T. Butler, the father of the plaintiff, entered into partnership with the defendant to carry on the business of manufacturing woolen yarns, under an oral agreement, whereby said Butler was to rent to the firm a certain building to him belonging, and in which he had been manufacturing woolen yarns and other wares, at a rent reserved of \$3,500 per year. He was to furnish for the use of the firm certain machinery in said building, at an appraised valuation. He was not required to furnish any cash capital, and he was to retain the title to such machinery. The defendant was to furnish a sum of money equal to said appraised value of the machinery, and to have it credited to him in his capital account. The value of the machinery, as appraised, was to be entered in the capital account of said Butler; and each partner was to be credited every year at the rate of 6 per cent. on his capital account, while the profits remaining after that were to be so divided that Butler should receive 45, and the defendant 55, per cent. thereof. In order to offset the wear and tear of machinery, an account, called a "depreciation account," was opened for the benefit of said Butler, which was intended to represent the depreciation in the value of his machinery over and above ordinary repairs; and, pursuant to the agreement of the parties, 5 per cent. on the machinery capital account of Butler was annually debited to that account, and credited to the depreciation account. The effect of this was to convert the wear and tear of machinery into cash capital, by reducing the machinery capital account, and increasing the money capital account, by the same amount, each year. It was understood that Butler was to be credited with 6 per cent. on the book value of his machinery as thus reduced, and also with 6 per cent. on the depreciation account, and that 5 per cent. annually would "fairly represent the average deterioration in the machines despite repairs." It was intended that the 6 per cent. allowed to defendant was for interest on the money put in by him, and that the 6 per cent. allowed to Mr. Butler on his machinery capital account was for the use of his machinery, while the 6 per cent. allowed him on his depreciation account was for interest on his money capital. The evidence to establish this contract was largely derived from the books, as neither party thereto could speak upon the subject. Under this agreement, subsequently changed so that after May 1, 1881, the profits were to be divided equally, Mr. Butler and the defendant did a prosperous business until the death of the former, on the 18th of April, 1884. By his will, he left to his widow, who was appointed sole executrix, and to the plaintiff, their only child, his interest in said business. With no liquidation of the partnership affairs, the business was continued by the widow and the defendant, who were distant-

ly related, on the same terms as it had been carried on during the lifetime of the testator, but for the benefit of the three persons then interested. In consideration, however, of the promise of the defendant to assist the widow in closing up her husband's business with the survivors of another firm, of which he was a member, and of the fact that the defendant was to have the sole management of the manufacturing business thus continued, it was agreed that his share of the profits should be increased to 75 per cent.

The widow died on the 30th of December, 1884, intestate, leaving plaintiff as her only next of kin and heir at law, and he became administrator of both estates. The business of the year 1884 was profitable, and early in 1885, upon the solicitation of the defendant, the plaintiff and he, who were cordial and affectionate friends, agreed to become partners, and to continue the business upon the same terms that existed at the death of the widow. The plaintiff, then about 23 years of age, was not a business man, but had qualified himself as a clergyman; and, during the greater part of the time while he was a partner of the defendant, he was engaged in publishing and printing a work called "The Catholic Faith." It was understood that the responsibility of conducting the business should fall on the defendant, and that the plaintiff should take only such part therein as he chose. "The defendant knew that the plaintiff valued his advice and opinions and was disposed to rely upon them." During the year 1885 the business prospect was so bright that, on the defendant's advice, the mill was enlarged, by the expenditure of over \$50,000, and new machinery was purchased, at an expense of about \$75,000, all of which was to be furnished by the plaintiff. By the aid of the defendant, he procured loans on collateral to a certain amount, which he paid towards these expenditures, and the defendant furnished the remainder, under the agreement that each partner should receive credit on his personal account for the sum furnished by him, and that the amount furnished by the defendant should be a lien on plaintiff's entire property so far as invested or used in the business, including the real estate. The rent of the mill was thereupon increased to the sum of \$6,000 a year. After awhile losses came to the firm, and the defendant became restless over the prospect of sharing them on the same basis as the profits were divided, although there had been no express agreement upon the subject. The plaintiff, upon the suggestion of the defendant, made repeated concessions, by which he yielded some of his rights. The defendant declared that he wished to withdraw from the business, but at the same time represented to the plaintiff that it was important to his interests that the business should be continued. At an interview between them in 1888, the manager of the manufactory, a

cousin of defendant, was present, and stated to plaintiff that his depreciation account was an injustice to the firm, as it resulted in his receiving 11 per cent. on his capital, while the defendant was receiving only 6 per cent. "This statement was incorrect and misleading," as the referee found, "in that the allowance annually made to the plaintiff upon the books of said firm for depreciation did not give plaintiff eleven per cent., but only six per cent., upon the amount to the credit of his capital account and depreciation account." The defendant omitted to contradict or correct said statement of the manager, but contended that plaintiff should bear one-half of the losses. He also threatened to withdraw from the business "unless the losses already accrued, and those that might thereafter accrue, should be borne by the partners equally, and the right to depreciation should be given up for the future, and that the profits should be divided seventy-five per cent. and twenty-five per cent. as before." The plaintiff had an opportunity to learn the facts through the books, but they were unusually complicated and confusing. He had never studied bookkeeping; did not know much about this business, or about any business; and he reposed great confidence in the defendant's experience and integrity, as the latter well knew. He, however, "appreciated the fact that, if the business ceased, his mill and machinery would be thrown back on his hands at a time of great depression in that branch of the business," and he desired to avoid that result. After considerable negotiation between the partners, it was agreed between them, in January, 1889, "that plaintiff should bear one-half the losses of the business, past and future, and waive his right to depreciation for 1887, as well as 1888, and in the future, and that the rent for the use of the mill and real estate should be reduced from \$6,000 to \$5,000 per year, and that the profits of the business, if any, should be divided, seventy-five per cent. to Mr. Prentiss, and twenty-five per cent. to plaintiff, as before." The plaintiff "did not then understand the true relation between his depreciation and capital accounts, so far as it affected the aggregate to which he was entitled, and with which he had been credited on the firm books"; and, in giving his assent to said agreement, he relied upon "previous representations made by said [manager] and the defendant * * * that his depreciation was an injustice to the defendant, and gave him, the plaintiff, eleven per cent. upon his capital," while the defendant had only six per cent. upon his capital. The defendant never explained to him the meaning and purpose of the depreciation account, and never informed him that the capital account was reduced by the amounts credited to depreciation. The plaintiff recognized and fairly understood that the division of losses in the same ratio as profits was unfair to

defendant, and he made the concession to bear one-half of the losses, as well as to reduce the rental of the mill, intelligently. The agreement, as the referee found, "to reduce the rent, and to divide the losses equally, was fair and reasonable; but the agreement that plaintiff should waive his right to depreciation was unfair and unreasonable." The defendant threatened to forthwith withdraw from the business unless the plaintiff made said arrangement of January, 1889; and, while the plaintiff assented to that arrangement, the defendant reserved the right, as before, to terminate the partnership at any time. The referee distinctly found that the plaintiff entered into that agreement in reliance upon the representations, in effect made by the defendant, "that his depreciation was an injustice to the defendant, and gave him, the plaintiff, eleven per cent. upon his capital."

After finding these facts in substance, with many others not now material, the referee corrected various errors upon the books, and otherwise, not before us on this review. Although the defendant alleged in his answer that the errors on the books would not exceed \$100, errors against the plaintiff were found and corrected by the referee amounting to over \$40,000. Among his conclusions of law, he found that "the relation between the plaintiff and the defendant, as managing partner, was such that the defendant was disqualified from accepting from the plaintiff a surrender of the plaintiff's depreciation account without at some time prior thereto putting the plaintiff in possession of all the information which the defendant possessed in respect to the purpose of the depreciation account, the meaning of said account, and its effect upon the capital account; that, in view of the relationship between the parties, no contract between them can be upheld if it was brought about by concealment or unfairness on the part of the defendant"; that "the depreciation account of the plaintiff should be reinstated," but that the plaintiff had "failed on the merits to establish any cause of complaint against" the agreement of January, 1889, "except so far as relates to the surrender of his right to depreciation." Upon the request of the defendant, he found, as a conclusion of law, that "the plaintiff has failed on the merits to establish any fraud, undue influence, or unfairness in the agreement made in January, 1889, so far as it related to division of losses, past and future, and to reduction of rent from \$6,000 to \$5,000 per year." The general term modified the judgment entered upon the report of the referee in a respect not now important, and affirmed it as thus modified.

Although the learned referee, in his main findings for the judgment roll, found that the entire agreement was procured by misrepresentation, he upheld two thirds of it because he thought it was reasonable to that

extent, and set aside the other third because he thought it was unreasonable. Confidential relations existed between the parties, and, in making the contract in question, they did not stand on an equal footing. In addition to the relation of co-partners, there was a general relation of trust and confidence existing between them. They were old and affectionate friends. The plaintiff, without business experience himself, rested upon the large experience of the defendant, confided in him, and trusted him, and the defendant knew it. One was skilled in business; the other a novice, who relied upon the experience, judgment, and integrity of his friend. One knew the subject of the deal thoroughly; the other did not. The one with knowledge, experience, and skill, sought to obtain valuable concessions from his ill-posted and inexperienced friend. While the defendant's lips did not make the false representation, he adopted it when made by a third person in his presence and for his benefit, knowing that it was false, and that the plaintiff believed it and acted on it as true. He not only assented to it by not correcting it, but he followed it up stating that it was virtually taking money out of his own pocket, and giving it to the plaintiff. He knowingly allowed a vital fact to be misrepresented to the plaintiff, and, with no explanation, dealt with him on the strength of it. He knew that the plaintiff was contracting with him in reliance upon that statement; yet he made no attempt to set him right upon the subject. Aided by this statement, he persuaded the plaintiff to give up valuable rights for no consideration, except the continuance of the business, which the defendant reserved the right to terminate at any time. Having obtained these concessions, he could have ended the business the next day. The false statement was of a material fact, and was an inducing cause, if not the sole inducing cause, that secured the plaintiff's assent to the agreement.

As was said in *Mitchell v. Reed*, 61 N. Y. 123, 126: "The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and is bound to act in entire good faith to the other. The functions, rights, and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them." In *Maddeford v. Austwick*, 1 Sim. 89, affirmed in 2 Mylne & K. 279, the court said: "The defendant, being the partner whose business it was to keep the accounts of the concern, could not, in fairness, deal with the plaintiff for his share of the profits of the concern, without putting him into possession of all the information which he himself had with respect to the state of the accounts between them. The defendant knew, from the account in his possession, that the £1,000 was not an adequate consideration for the plain-

tiff's share of profits; and he cannot be permitted, in a court of equity, to maintain advantage which he has gained over the plaintiff's ignorance. * * * The supposed account of the profits of the concern, up to the end of 1817, necessarily formed the basis of the plaintiff's calculation of profits for the ensuing three years; and, being misled in that respect, he is entitled to avoid the whole agreement, and to have an account of the profits of the concern up to the dissolution in 1821. The defendant's argument of confirmation of the agreement by the subsequent conduct of the plaintiff falls altogether, it not being pretended that, at the time of such acts on the part of the plaintiff, he was aware of the advantage which the defendant had gained over him."

A learned author, speaking upon this subject, has recently said: "The partners owe to each other the most scrupulous good faith. Each one has a right to know all that the others know, and their connection is one of great confidence; and the uberrima fides of a fiduciary relation will be the standard of fidelity exacted from them. * * * There is no principle of law that prevents one partner buying out the interest of the other, or selling to him in good faith, provided he acquires no secret benefit for himself at the expense of his co-partner, by suppressing information or concealing facts which the latter was entitled to know. * * * But deception of any kind, or the nondisclosure of material facts, especially by a managing partner, will vitiate the sale." *Bates, Partn.* §§ 303, 309. So, Judge Story, in his valuable work on *Partnership* (section 172), says: "Good faith not only requires that every partner should not make any false representation to his partners, but also that he should abstain from all concealments which may be injurious to the partnership business. If, therefore, any partner is guilty of any such concealment, and derives a private benefit therefrom, he will be compelled in equity to account therefor to the partnership. Upon the like ground, where one partner, who exclusively superintended the accounts of the concern, had agreed to purchase the share of his co-partners in the business for a sum which he knew, from the accounts in his possession, but which he concealed from them, to be for an inadequate consideration, the bargain was set aside in equity, as a constructive fraud, for he could not, in fairness, deal with the other partners for their share of the profits of the concern, without putting them in possession of all the information which he himself had with respect to the state of the accounts and the value of the concern." See, also, *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Lindl. Partn.* 303; *T. Pars. Partn.* 192.

But, in addition to the business relations of the parties, their personal relations were intimate and confidential, and the plaintiff trusted the defendant as an old friend, supe-

rior to himself in business experience and ability. Moreover, the defendant, who knew all about the books and business, encouraged the plaintiff, who knew little about either, to act under a mistake as to a fact of great importance, caused by a misrepresentation made in his presence, not only undenied by him, but made the basis of an argument to persuade the plaintiff to enter into the contract. In *Hammond v. Pennock*, 61 N. Y. 145, 152, this court said: "The case has thus far been considered as though the fraud requisite as a basis for rescinding a contract in equity is the same in nature as that demanded in a court of law in an action for damages for deceit. In equity, the right to relief is derived from the suppression or misrepresentation of a material fact, though there be no intent to defraud. * * *

This doctrine is, substantially, grounded in fraud, since the misrepresentation operates as a surprise and imposition upon the opposite party to the contract. It is inequitable and unconscientious for a party to insist on holding the benefit of a contract which he has obtained through misrepresentations, however innocently made,"—citing *Peek v. Gurney*, L. R. 13 Eq. 79, 113; *Wilcox v. University*, 32 Iowa, 367; *Smith v. Reese River Co.*, L. R. 2 Eq. 264; *Kennedy v. Mail Co.*, L. R. 2 Q. B. 580; 1 Story, Eq. Jur. § 193, and cases cited; *Perry, Trusts*, § 171. In *Brooks v. Martin*, 2 Wall. 70, 82, the supreme court of the United States said that "if the parties are to be regarded in this transaction as holding towards each other no different relations from those which ordinarily attend buyer and seller, and as, therefore, under no special obligation to deal conscientiously with each other, we are satisfied that no such fraud is proven as would justify a court in setting aside an executed contract. But there are relations of trust and confidence which one man may occupy towards another, either personally or in regard to the particular property which is the subject of the contract, which impose upon him a special and peculiar obligation to deal with the other person, towards whom he stands so related, with a candor, a fairness, and a refusal to avail himself of any advantage of superior information, or other favorable circumstances, not required by courts of justice in the usual business transactions of life."

The conclusion of the learned referee that the plaintiff assented to the agreement in reliance upon previous misrepresentations made by the manager "and the defendant" was clearly right, but we think that he did not give to that conclusion the full force required by law, as he granted the plaintiff relief only as to a part of the arrangement. He appears to have proceeded on the theory that the defendant was guilty of "constructive fraud," as distinguished from "moral fraud." Constructive fraud, however, sometimes called "legal fraud," is, nevertheless, fraud, although it rests more upon presumption, and

less upon furtive intent, than moral fraud. *Cowee v. Cornell*, 75 N. Y. 91, 99. Where fiduciary relations exist, and a condition of superiority is held by one of the parties over the other, "in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption." Pom. Eq. Jur. § 956. As was said in *Tate v. Williamson*, 2 Ch. App. 55, 60: "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

Whether the theory of the referee, as indicated in his main findings, which apparently rest on actual fraud, be adopted, or that resting upon the findings made at the request of the defendant, which apparently was constructive fraud, in either event the fraud entitled the plaintiff to relief against the entire contract. *Beach*, Eq. Jur. § 73. The agreement was entire, made upon one occasion, and upon a single consideration, so far as there was any. There was but one assent to all its terms, and the minds of the parties met at the same instant as to all its parts. It is impossible to say that the plaintiff would have assented to any part unless he assented to all. The parties did not make three independent agreements. They made but one, which embraced three points, all relating to the same subject. If the false statement blotted out one, it blotted out all, for the whole arrangement was tainted with the vice of concealment and misrepresentation. An entire contract, although it may cover several different heads, must stand or fall as one indivisible thing. The referee did not find that the false statement affected only that part of the agreement which related to depreciation, but, on the contrary, he found that the entire contract was made by the plaintiff in reliance upon that statement. As was held in *Clermont v. Tasburgh*, 1 Jac. & W. 112: "The effect of partial misrepresentation is not to alter or modify the agreement pro tanto, but to destroy it entirely, and to operate as a personal bar to the party who has practiced it." So, in *Rawlins v. Wickham*, 3 De Gex & J. 304, 322, the court said: "If a contract is obtained by fraud, it is for the party defrauded to elect whether he will be bound. He, perhaps, would not have entered into the contract at all if he had known the real facts. It is therefore impossible with any degree of justice to enforce the contract against him in

any part. * * * It has therefore been rightly settled that the party deceived has a right to have the contract wholly set aside." We think the agreement should stand or fall as a whole, and that one section cannot be set aside, and the remainder enforced.

There was no acquiescence, for there was no delay after discovery of the fraud, and delay will not "prejudice a defrauded party as long as he was ignorant of the fraud." Pom. Eq. Jur. § 965.

It is, however, insisted that the plaintiff is not entitled to relief, because the defendant cannot be completely restored to the position he occupied when the agreement was made; in other words, as he could have ended the partnership before he entered into the agreement, and he did not end after he entered into the agreement, it is claimed that it is too late to relieve the plaintiff from the consequences of the fraud practiced upon him. The weakness of this position is that the defendant was not obliged to continue the business a single day after the agreement was made. He continued it because he wanted to, not because he had to, until the plaintiff himself dissolved the partnership. He reserved the right to terminate it at will, and because he did not exercise that right, and the firm has since sustained losses, the plaintiff is not left without a remedy. The defendant knew all the time, and the plaintiff knew none of the time, that the representation was untrue; and, under these circumstances, the former continued the business at his peril. Bigelow, *Frauds*, 430. "If the wrongdoer has, by his own act, complicated the case so that full restoration cannot be made, he has but himself to blame." *Hammond v. Pennock*, 61 N. Y. 145, 152, citing *Masson v. Bovet*, 1 Denio, 69. When, without fault on the part of the one defrauded, seeking relief in equity on account of advantage taken of fiduciary relations, it is impossible to restore the one guilty of the fraud to his original condition, the general rule of restoration is not strictly applied, because it would become a loophole for the escape of fraud. Equity makes a reasonable application of the rule by requiring whatever fair dealing requires under all the circumstances of the particular case, but it does not permit the rule to become a shield for wrongdoing.

We close the discussion by announcing as our conclusion that, upon the facts as found by the referee, the agreement in question should have been wholly set aside. As we find no other error in the record, and the facts were fully and correctly found, a reversal of the judgment is not essential. We are urged by the learned counsel for the respondent to correct any error that we may find "by modification and reduction, without incurring the vast expense of a new trial and the peril involved in loss of the security on appeal." So, the learned counsel for the appellant asks us to reverse the judgment so far as to correct

the errors of the referee in respect to three questions, two of which we have decided against him, and one in his favor. We think that justice will be promoted by a conditional reversal, and accordingly we adjudge that the judgment should be reversed, and a new trial granted, with costs to abide the event, unless the defendant stipulates to deduct from his judgment an amount equal to the reduction in rent and losses according to the agreement of January, 1889; and in that event the judgment should be modified accordingly, and, as thus modified, affirmed, without costs in this court to either party; the order, if not agreed upon, to be settled by the judge who wrote the opinion. All concur, except PARKER, C. J., not sitting, and O'BRIEN, J., not voting. Judgment accordingly.

(157 N. Y. 445)

JARVIS v. LYNCH et al.

(Court of Appeals of New York. Jan. 10, 1899.)

NAVIGABLE WATERS—EJECTMENT—DESCRIPTION—EVIDENCE OF TITLE.

1. Gov. Nicolls' grant, in 1666, to the inhabitants of Harlem, did not pass lands located between high and low water marks in the Harlem river, the title to which vested in the city of New York by Gov. Dongan's charter, in 1686.

2. Plaintiff in ejectment cannot recover where the later conveyances in his chain of title fail to so describe the premises as to enable the court or jury to locate them as part of the property described in the prior grants.

3. The fact that a city, in assessing the expenses of a street improvement, officially recognized title of another in land not taken, is not evidence to support his title in ejectment.

Appeal from supreme court, general term, First department.

Action by Nathaniel Jarvis, Jr., against Sarah Lynch, executrix, and others. From an order of the general term overruling a motion for new trial on exceptions to an order dismissing the complaint, and a judgment entered thereon (13 N. Y. Supp. 703), plaintiff appeals. Affirmed.

Samuel Untermyer and Anderson Price, for appellant. Charles E. Miller and Henry B. Anderson, for respondents.

PER CURIAM. This was an action of ejectment, brought to recover the possession of a block of land in the city of New York, described in the complaint as bounded by 155th and 156th streets, Eighth avenue, and a street to the eastward, called Exterior street. The plaintiff's complaint was dismissed at the circuit, and upon a motion made for a new trial, which was heard at the general term upon exceptions directed to be heard there in the first instance, they were overruled, and judgment was ordered to be entered for the defendants. There were two grounds taken in opposition to the plaintiff's right to recover, and they are stated in the opinion at the general term as controlling the disposition of the case. One was that the premises in question formerly

lay between high-water mark and low-water mark in the Harlem river, and, therefore, did not pass by Gov. Nicolls' grant, in 1666, to the freeholders and inhabitants of Harlem, through whom the plaintiff claims to trace his title. The other ground was that the deeds in evidence did not locate the property, so as to enable the court or the jury to render judgment upon the complaint.

As to the first of these grounds, a careful review of the evidence must lead to the conclusion that almost, if not quite, all of the premises were within high and low water marks of the Harlem river. That is the effect of the maps and of some of the other documentary evidence, and also of the testimony given by the plaintiff's witnesses. If the oral evidence proves anything with any degree of certainty, it is that the land was covered by the rise of the tide in the river. That being so, the case falls within our decision in *Sage v. City of New York*, 154 N. Y. 61, 47 N. E. 1096, where we held that the title to the lands within the tideway of the Harlem river, between high and low water marks, was vested in the city of New York through Gov. Dongan's charter, in 1686. That case decided that the prior grant of Gov. Nicolls to the inhabitants of Harlem, in 1666, was confined by the western bank of the Harlem river, and did not comprehend within its boundaries the meadows, pastures, and marshes adjoining the bank of the river as a part of the grant; that the eastern limit of the lands granted was high-water mark; and that his grantees took no title to the tideway, or other right in the river in front of the upland, than would consist in those privileges or easements inherent in the riparian title, and which might be held, as against all but the crown as trustee, for the people at large. This constitutes a fatal objection to the plaintiff's case, inasmuch as he relied upon a conveyance made by the inhabitants of Harlem to one Barent Waldron, through whom he claims as a predecessor in title.

But, if there could be any doubt upon this point, the second ground is fatal to the plaintiff's claim. The court below was quite correct in holding that the conveyances, subsequent to Waldron's possession, failed to contain such a description of the premises in question as to make it possible to locate them as a part of the property described in the earlier grants. Two principles should control in an action of ejectment. One is that the plaintiff must recover on the strength of his own title, and cannot rely upon any weakness in that of the defendant. The other is that the evidence as to location must not be of that indefinite character which permits the court, or the jury, to reach a determination only by way of speculation. In this case, the plaintiff's evidence would not support a reasonable inference that the property described in the complaint was comprehended within any of the earlier

grants, which are relied upon as links in the record chain of title.

One other point, only, needs to be referred to in the disposition of this appeal, and that relates to the effect of the proceedings for the opening of Eighth avenue, which were confirmed in 1816. It is urged, on behalf of the plaintiff, that there was therein an official recognition of his title on the part of the city of New York. The importance of this point to the plaintiff would seem to be to meet the claim of the defendant Sarah Lynch, in her answer, that her title was derived through a grant of the premises by the city of New York, as well as to strengthen his claim by such evidence as to title. It would be a violent assumption to hold that any portion of the premises in question was included within the description in the proceedings which is relied upon; but it is a sufficient answer to the argument that such proceedings have no other effect than to vest in the city the title to the lands taken for the purposes of a street. Neither they, nor the incidental proceedings to assess the expenses of the public improvement upon the lands benefited thereby, can have any effect upon the titles to lands outside of those actually appropriated by the public authorities. There is no authority for holding otherwise, and reason would be against it.

The case was tried with exceeding liberality on the part of the trial judge towards the plaintiff, with respect to the introduction of documentary and oral evidence, and his dismissal of the complaint, for failure of the plaintiff to make out a case, was correct. The judgment and order appealed from should be affirmed, with costs. All concur, except PARKER, C. J., not sitting, and MARTIN, J., absent. Judgment and order affirmed.

(157 N. Y. 449)

SNYDER v. SEAMAN.

(Court of Appeals of New York. Jan. 10, 1899.)

APPEAL — REVERSAL — JUDGMENT ENTRY — CONSTRUCTION — COURT OF APPEALS — JURISDICTION — PARTNERSHIP — PARTNER'S TAXES — ACCOUNTING.

1. Under Code Civ. Proc. § 1338, requiring the court of appeals to presume that a reversal of a judgment by the supreme court was not on a question of fact, unless the contrary clearly appears, and sections 1022 and 1317, authorizing the supreme court, on reversal, to award a new trial, or enter the judgment which the undisputed facts, or those found, warrant, a judgment of reversal, reciting: "It is ordered that said judgment is hereby reversed." And, it appearing that the defendant has fully accounted to plaintiff, * * * it is further ordered that judgment be entered for defendant, dismissing the complaint."—is not a reversal on the facts.

2. Personal taxes of a partner are no part of the expenses of the firm, and, when paid from the firm's funds, are to be charged against such partner on an accounting of the firm's assets.

Appeal from supreme court, appellate division, First department.

Action by James H. Snyder against Lloyd I. Seaman. From a judgment of the appellate division (37 N. Y. Supp. 696) reversing a judgment for plaintiff and dismissing his complaint, he appeals. Reversed.

Herbert M. Lloyd, for appellant. John W. Weed, for respondent.

HAIGHT, J. This action was brought for an accounting. On the 1st day of May, 1885, the plaintiff and defendant entered into written articles of co-partnership for the purpose of dealing in butter, cheese, and produce, as commission merchants, which continued until the 30th day of April, 1892. At the time of the dissolution of the co-partnership a dispute arose over the personal taxes assessed against the defendant in the city of New York for the years 1885 to 1891, inclusive, which had been paid out of the co-partnership funds, and charged to store expenses. There were other matters about which the parties differed, but they were finally adjusted, so that this action was prosecuted solely for the purpose of adjusting their differences with reference to the taxes. Upon the trial the referee found that the personal taxes assessed against the defendant for the years named were paid by the firm's money, and charged on the books to store expenses, and that he was of the opinion, as he states in his decision, "that these taxes should not have been charged against the firm as part of the expense of carrying on the firm; that they were no part of such expenses. The defendant might as well have charged his living expenses. They were not within the spirit or the letter of the articles of co-partnership, and in fact there is no evidence that these taxes were assessed solely upon the defendant's capital employed in the business, nor can it be rightly said that the plaintiff ratified the defendant's acts. There is no consideration passing from the defendant to the plaintiff to uphold any claim of ratification. I do not think that the yearly balances that were struck can be considered as an accounting between the parties." For the reasons stated, he ordered judgment in favor of the plaintiff for the sum of \$576.75. Upon an appeal to the appellate division the judgment was reversed, and the complaint dismissed, with costs. The judgment, after containing the usual recital, is as follows: "It is ordered that the said judgment is hereby reversed. And it appearing that the defendant has fully accounted to the plaintiff for all moneys received by him, and has not denied the plaintiff's interest in claims remaining uncollected, it is further ordered that judgment be entered for the defendant, dismissing the complaint," etc.

The respondent claims that this is a reversal upon the facts, and that, consequently, we have no power to review the judgment. We do not so understand the order. Section 1338 of the Code of Civil Procedure requires us

to presume that the judgment was not reversed upon a question of fact, unless the contrary clearly appears in the record body of the judgment or order appealed from. Upon again referring to the judgment by the appellate division, it will be observed that it undertook to deal with two questions: First, whether the judgment should be reversed; and, second, whether a new trial should be granted, or the complaint dismissed. The first question it disposed of by ordering the judgment reversed, without specifying whether the reversal was based upon the law or the facts. Then the court approached the consideration of the second question, and states that it appearing that the defendant has fully accounted to the plaintiff for all moneys received by him, and has not denied the plaintiff's interest in claims remaining uncollected, it is ordered that a judgment be entered for the defendant, dismissing the complaint. The respondent contends that this is an express finding of the facts by the appellate division, directly the reverse of those found by the referee. We do not so construe the provision. In the first place, the appellate division sits as a court of review, and in no sense as a trial court. Under sections 1022 and 1317 of the Code, it has the power, upon reversal, to award a new trial, or grant to either party the judgment which the facts warrant, but this has reference only to the conceded or undisputed facts, or those found by the trial court, so that the court, in determining whether the complaint should be dismissed, or a new trial granted, is called upon to determine the legal liability of the parties upon conceded or found facts, which is, and always has been, a question of law. *Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326. As we understand the provisions in the judgment, the appellate division considered the facts to be undisputed, and that on such facts there was no liability in law on the part of the defendant to account to the plaintiff. We must, therefore, under the provisions of section 1338 of the Code, assume that the reversal was upon the law, and not the facts; and thus it becomes our duty to review the judgment, and, upon the facts as found, we think the conclusion of law was properly disposed of by the referee. The judgment of the appellate division should be reversed, and that entered upon the report of the referee affirmed, with costs in all courts. All concur, except GRAY and MARTIN, JJ., absent. Judgment reversed, etc.

(157 N. Y. 663)

BARRETT v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York. Jan. 10, 1899.)

RAILROADS—INJURIES TO TRESPASSERS—EVIDENCE—DECLARATIONS OF PERSON INJURED.

1. In an action to recover for injuries received through being pushed from a freight train on which plaintiff had no right to ride, defendant

may show a conversation between plaintiff and a third person concerning the circumstances and cause of the accident, including plaintiff's statements in such conversation as to his object in taking the ride.

2. His declaration as to whether he was pushed off the train by the conductor or brakeman is likewise admissible.

Bartlett, J., dissenting.

Appeal from supreme court, general term, Fourth department.

Action by John Darwin Barrett against the New York Central & Hudson River Railroad Company. From a judgment of the general term (36 N. Y. Supp. 1121), affirming a judgment for plaintiff, defendant appeals. Reversed.

C. D. Prescott, for appellant. I. J. Evans and A. D. Kneeland, for respondent.

O'BRIEN, J. The plaintiff recovered a verdict in this action for \$7,500 as damages for a personal injury. The judgment, of course, implies that the defendant is responsible for this injury, and yet it would be difficult, upon the conceded facts, to conceive of a case in which the railroad had so little to do with it, or where the damages which the plaintiff has suffered can be so plainly traced to his own misconduct. On his own statement he was a young man, 24 years old, with a wife and child living in Rome, N. Y. About 8 o'clock in the evening of Saturday, June 3, 1893, he left his house, and went down town, met a companion, and both of them engaged in drinking quite freely. In the course of the evening it seems that they concluded, for some reason, to go to Utica, 15 miles east of Rome; but, as the regular passenger train leaving Rome for the former place at 10:25 had left, they were willing to make the journey on a freight train. The plaintiff says that a freight train came along at the rate of 10 or 12 miles an hour, and he jumped on. His companion thought this performance too dangerous, or, as he expressed it, "too risky," and failed to get on. So the plaintiff, after riding a short distance, and finding that he had left his companion behind, jumped off the train, and went back after him. After some time both of them found another freight train, north of the station, which they supposed was about to go east, and, boarding it, they got upon a coal car. They rode some little distance on this train, when it stopped, for the reason that another freight train was upon the same track just ahead of them. They assumed that, by getting on the train ahead, they would reach Utica sooner. So, leaving the coal car, they proceeded along a highway and through a cattle guard to the forward train, and got onto the platform of the caboose attached to that train. At this point in the railroad there was a complicated system of tracks, at least seven in all, if not more. There was some switching on other tracks, and after a time the conductor came along and ordered both men off the train, which, of course, he had not only the

right to do, but it was his duty. The plaintiff's companion obeyed the order, and got off, sustaining no injury whatever. The plaintiff says that he refused to get off while the train was moving, or until it was stopped, and states that thereupon the conductor took him by the shoulder, and pushed him off, and immediately he came in collision with another train, that was on an adjoining track, and sustained the injury complained of.

The theory of the action is that the conductor either used more force than was necessary to remove the plaintiff from the train, or put him off at such a dangerous place that he was liable to receive, and did receive, personal injuries. It is not denied that the plaintiff, at this late hour in the night, after leaving the platform of the caboose, came in contact in some way with a car on an adjacent track, and was injured. But that he was thrown from the car as claimed, or that the conductor used any unnecessary force or violence, was denied, and the evidence of the conductor, and of other persons present who had any opportunity of knowing the facts, contradicted the plaintiff's version of the transaction. Any misconduct or negligence on the part of the conductor in removing the plaintiff from the train is sustained only by the testimony of the plaintiff himself, and that is far from being clear or consistent with the whole transaction. But, so far as we are concerned with the actual methods employed to remove the plaintiff from the train, we will assume that his evidence was sufficient to carry the case to the jury, and we will assume that the charge of the learned trial judge to the effect that while the defendant's servant had a right to remove the plaintiff from the train, yet he had no right to use unnecessary violence or to expose him to any unnecessary danger, was correct. That is the most favorable view that can be taken of the case upon the plaintiff's own version of the transaction.

It is enacted in section 426 of the Penal Code that "a person who rides on any engine or any freight or wood car of any railway company, without authority or permission of the proper officers of the company, or of the person in charge of the car, or engine, or who gets on any car or train while in motion (for the purpose of obtaining transportation thereon as a passenger), is guilty of a misdemeanor." That the plaintiff and his companion were guilty of a plain violation of this statute is not denied, and yet the plaintiff has succeeded in obtaining from a jury a very large verdict against the defendant. This case, it seems to me, will furnish a precedent for a new class of actions under the law of negligence, since any one, however careless or reckless, may, in defiance of the statute, board a railroad freight train, and when the conductor undertakes to remove him, unless he uses all the circumstances and gentleness possible, the party removed may, upon his own testi-

mony, recover against the railroad. We do not mean to say that this court can always prevent such results, since the questions are, in their nature, questions of fact, to be determined at the trial and by the verdict of a jury. All that we mean to say now is that, when a railroad company attempts to defend itself in a court of justice against such a claim as this, it is entitled to the benefit of every fact and circumstance that can have any legitimate bearing upon the nature of the transaction, and it has the right to be accorded the benefit of every principle or rule of evidence that has any tendency to aid in its defense. In this case, since we have assumed that the plaintiff's testimony could not be ignored by the court, there were three questions of fact before the jury. These were: The negligence of the defendant, depending only upon the proof with respect to the unlawful or improper act of the conductor; the contributory negligence of the plaintiff; and the damages which he was entitled to recover. The defendant was entitled to draw out from the witnesses any fact or circumstance that had any legitimate bearing upon these issues or any of them.

On the trial the defendant called a witness who had a conversation with the plaintiff a short time after the accident, in which the plaintiff stated to him some of the facts and circumstances under which the accident occurred. Of course, the admissions or declarations of the plaintiff to this witness touching the circumstances of the accident were competent evidence against him. Among other things, this witness testified that the plaintiff admitted to him that his wife had tried to prevent his going to Utica, and that if he had gone back with her the accident would not have happened. The defendant's counsel then propounded to the witness this question: "Did he tell you what he was going to Utica for?" This was objected to as immaterial. The objection was sustained, and the defendant's counsel excepted. It must be borne in mind that this witness was testifying to a conversation which he had with the plaintiff himself concerning the circumstances and cause of the accident. The defendant was entitled to all the conversation, and whatever the plaintiff admitted to him concerning the purpose for which he got onto the train was not incompetent. If he was upon the train in pursuit of some urgent errand, brought about by some overruling necessity, or if he was there in consequence of some stress of circumstances, the jury might be disposed to, and could legitimately, look upon his conduct with some leniency. If he was there in pursuit of some amusement, or upon some unnecessary errand, it would naturally change their view of his conduct from the beginning; while, if he was unable to tell the purpose for which he boarded the train, or the end that he had in view, it might well

constrain the jury to doubt whether his mind was in such a condition as to enable him to remember what transpired. With respect to this exception, it is, therefore, quite sufficient to say that the defendant was entitled to place before the jury all that was said by the plaintiff to the witness on that occasion, and the purpose for which the plaintiff violated a statute to get upon this train, and the purpose for which he was upon the platform of the caboose. This testimony might have had some bearing, either upon the issue of contributory negligence or upon the damages which the jury was asked to award him. I think the ruling of the court which denied to the defendant the right to make the inquiry was error.

The defendant's counsel also propounded to the same witness, in various forms, the following question: "Q. Did he, at any time, at any of the conversations or suggestions as to the transaction, say, in words or in substance, that the conductor or brakeman threw him off, or forced him off, of the caboose, or off its platform?" This question was objected to by the plaintiff's counsel as incompetent and immaterial, which objection was sustained by the court, and an exception taken in behalf of the defendant. The defendant's counsel then changed the form of the question, and made it somewhat more simple. He then put it in this form: "Q. Was there anything said by him [meaning the plaintiff] in regard to any one having forced him off any car, as the cause of the accident?" "Q. And, if so, state what it was." The plaintiff's counsel objected to this question as being a compound question, and added, "The first part of it I object to." The court sustained the objection, and the defendant's counsel excepted. The defendant was seeking to prove by this witness the plaintiff's own version of the transaction which, he claimed, resulted in the injury, and this was at a time immediately after the accident, before any suit was commenced, and perhaps when there were not as many temptations to pervert the truth. On the trial the plaintiff attempted to show that the cause of the injury was the violent or improper act of the conductor in removing him from the train. If, before he had commenced the suit, and while the whole transaction was fresh in his mind, he had attempted to describe the occurrence, and had omitted from the description the most important circumstance that he testified to at the trial, and the only circumstance which would enable him to recover, surely this discrepancy in the two statements might have been brought by the defendant to the attention of the jury. 1 Greenl. Ev. §§ 196, 201. When a party to an action before suit attempts to state the facts of the case, and omits to state the only fact upon which a subsequent action could be based, and then at the trial attempts to supply this missing link by his own testimony, surely all this

may be presented to the jury, to enable them to judge whether the party told the truth as a witness upon the trial, or before he became a litigant, when the facts and circumstances were fresh in his memory. So I think the ruling of the court upon the objection made to the questions put to the witness, and which are here referred to, was error, for which the judgment should be reversed, and a new trial granted, with costs to abide the event. All concur (PARKER, C. J., and VANN, J., on second ground stated in opinion), except BARTLETT, J., dissenting, and MARTIN, J., not sitting. Judgment reversed, etc.

(158 N. Y. 24)

STEINBACK v. DIEPENBROCK et al.
(Court of Appeals of New York. Jan. 10, 1899.)

LIFE INSURANCE — RIGHT TO ASSIGN POLICY —
INSURABLE INTEREST.

A valid policy of life insurance may be assigned to one having no insurable interest in the life of the insured.

Appeal from supreme court, appellate division, First department.

Action by Erwin Steinback against Louise Diepenbrock, executrix, and another, to determine the right to the proceeds of a policy. From a judgment of the appellate division (37 N. Y. Supp. 279), affirming a judgment for plaintiff, defendant Diepenbrock appeals. Affirmed.

A. E. Woodruff and William Philippeau, for appellant. J. C. Meyers, for respondent.

PARKER, C. J. The counsel for the appellant, in his argument, insisted with great earnestness and force that the position several times asserted by this court in support of the legality of the assignment of a policy of insurance to a person having no insurable interest in the life of the insured is a mistaken one, and in conflict with the decisions of the United States supreme court and the court of last resort in many of the states. Warnock v. Davis, 104 U. S. 775; Insurance Co. v. Hazzard, 41 Ind. 116; Insurance Co. v. Sturges, 18 Kan. 93; Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626; Basye v. Adams, 81 Ky. 368; and Helmetag's Adm'r v. Miller, 76 Ala. 183,—furnish support for his assertion as to the rule in the United States supreme court and in some of the other states. Supported by these authorities, the counsel challenged the correctness of the rule that concededly has been long acquiesced in in this state by the courts and the profession. Indeed, Mr. Justice Field, in his opinion in Warnock v. Davis, supra, stated the rule in this state to be that a valid assignment of a policy of insurance could be made to a person without interest in the insured. But the appellant contends that, while this may be the rule here, the decisions in other jurisdictions demonstrate that our position is wrong as a matter of sound public policy,

and, therefore, the true rule should be laid down, notwithstanding that expressions inducing the belief that the above rule obtained may have been made by our courts. It is urged that this task will not be a difficult one, for the reason, as the appellant contends, that there have been no cases in this state where the question was necessarily up for decision, and, therefore, all that has been said upon that subject by this court is mere dictum.

In *St. John v. Insurance Co.*, 13 N. Y. 31, a recovery in favor of the plaintiff against an insurance company was sustained where it appeared that one Noyes had effected policies of insurance upon his own life and shortly afterwards assigned them to the plaintiff for a valuable consideration. In the answer the defendant alleged, by way of defense, that the plaintiff was entitled to recover only the amount of money that he had advanced as a consideration of the transfer of the policy to him, and that, if defendant was liable beyond such amount upon the policy, the personal representatives were interested in the excess, and, therefore, necessary parties to the suit. And upon the close of the evidence the counsel for the defendant pressed the point that the plaintiff had no insurable interest in the life of the insured, and, therefore, was not entitled to judgment. The court regarded the question as one necessary to be passed upon in the final disposition of the case, and, after considering it, held that the policies in question were valid in their inception, and that the assignment of them to the plaintiff did not affect the liability of the company, and that to entitle the assignee to a recovery it was not necessary for him to have had an insurable interest in the life of the insured. The next case was *Valton v. Assurance Co.*, 20 N. Y. 32, where Schumacher obtained a policy on his life for \$10,000, and by his articles of co-partnership agreed that the plaintiff and another partner should become the owners of the policy and all due thereon in the event of his death before the termination of the partnership. This contingency happened, and the court held that it operated to vest absolutely the title to the policy in the plaintiff and his other partner, and a recovery could be had thereon as against the defendants. It will be observed that in the cases cited the contest was between the assignee and the company issuing the policy, and the question was not squarely presented whether, as between the assignor and the assignee, the assignee would be entitled to retain more than the sum actually invested by him, which is the rule in some jurisdictions. But it necessarily was decided that the policy was not rendered invalid by the assignment, and, further, that the assignee acquired thereby the right to enforce collection of the full amount of the policy from the company.

In *Olmsted v. Keyes*, 85 N. Y. 593, the plaintiff, having obtained the proceeds of a

policy of life insurance, brought an action for the purpose of ascertaining and determining the conflicting claims of various defendants to the moneys paid on the policy. It appeared that Keyes procured a policy of insurance on his life, payable to the plaintiff as trustee for his wife Huldah; Huldah died intestate a few years later; afterwards Keyes married again, and thereupon the plaintiff, for value, assigned the policy to Keyes' second wife, at his request. Keyes subsequently died intestate, leaving, him surviving, his widow and one child by her and several children by his first wife. It was held that during the life of the first wife the policy was her property, and upon her death the title vested in her husband as survivor, and, he having caused it to be assigned to his second wife, the assignment vested the title in her, and she alone was entitled to the money due thereon. There was a difference of view in the court as to the disposition of the case, and the argument that led to the decision considered with care the assignability of a policy of life insurance like any other contract. In the course of the argument the court referred to and considered many authorities in England and in this country, and reached the conclusion that, while an insurable interest is necessary to enable one to take out a policy of insurance on the life of another, it is not necessary that the assignee of a policy validly issued should have such an interest. After careful examination of that opinion, we find it impossible to reach any other conclusion than that it was intended to put at rest whatever controversy there may have been in this state touching the assignability of a valid policy of insurance. The case at bar is the only one we know of where the rule laid down in the case last referred to has been seriously questioned, although, it is true that some discussion of the principle was had in *Wright v. Association*, 118 N. Y. 237, 23 N. E. 186, where the defendant unsuccessfully challenged the right of the assignee to recover, on the ground, among others, that the plaintiff had not an insurable interest in the life of the insured at the time of the assignment. The court in its opinion cited the case of *Olmsted v. Keyes*, supra.

The result of our further examination persuades us that what has been understood to be the rule in this state is not only in line with the authorities in most jurisdictions upon that subject, but is sound as a matter of public policy. It was formerly the rule in England that, while a policy of insurance could not be assigned at law, it could in equity. By the act of 1867 (30-31 Vict. c. 144) a policy of life insurance was made assignable at law, and in some of the decisions it was said by the court that the object of the statute was to enable the assignee to sue in his own name; but it did not in any other way improve the position of the assignee, who could before that secure the money in equity. *British Equitable Ins. Co. v. Great*

Western Ry. Co., 38 Law J. Ch. 132; *In re Turcan*, 40 Ch. Div. 5. The rule asserted by this court has also been held to be the law in many of our sister states in a number of cases, where the question has been raised either in actions brought by personal representatives of the assignor to recover the money received by the assignee on a policy or in suits brought by the company issuing the policy for the purpose of determining whether the personal representatives or the assignee were entitled to the proceeds, all claimants being made parties defendant. *Insurance Co. v. Allen*, 138 Mass. 24; *Eckel v. Renner*, 41 Ohio St. 232; *Martin v. Stubbings*, 126 Ill. 387, 403, 18 N. E. 657; *Fitzgerald v. Insurance Co.*, 56 Conn. 116, 13 Atl. 673, and 17 Atl. 411; *Clark v. Allen*, 11 R. I. 439; *Murphy v. Red*, 64 Miss. 614, 1 South. 761; *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890. These authorities are, it seems to us, well grounded in principle. They recognize not only the existence of, but the necessity for, the rule that forbids any insurance upon the life of a person in which the person for whose benefit the insurance is made has no interest. Such a policy constitutes what is termed a "wager policy," or a mere speculative contract upon the life of the insured, with a direct interest in favor of its early termination. It is, in terms, forbidden by statute in England (14 Geo. III, c. 48) and in many other jurisdictions, including this state (Laws 1892, c. 690, § 55); and this court held in *Ruse v. Insurance Co.*, 23 N. Y. 516, that such insurance is void at common law, and that the English statute, in so far as it prohibits such insurance, is merely a declaratory act.

But the question we are considering presupposes a valid contract of insurance, the policy being issued either for the benefit of the assured personally, or for the benefit of some one having an insurable interest in the assured at the time of the taking out of the policy. Such a policy constitutes a contract to pay a certain amount of money to the payee on the death of the assured. It is a chose in action, with all the ordinary incidents belonging thereto, and as such may be assigned, either as collateral or absolutely, as the payee may elect. While an insurable interest in the payee is necessary, in the first instance, to the creation of a valid contract, it is not necessary that such interest should continue. The case of a wife divorced from her husband will serve as an illustration. The policy taken out for her benefit during the existence of the married relation is not affected by a subsequent severance of that relation through a decree of a court of competent jurisdiction, by which she ceases to have an insurable interest in his life. *Insurance Co. v. Schaefer*, 94 U. S. 457. The materiality of the value of the interest has relation to the question whether the policy is taken out in good faith, and not as a gambling transaction. If it be taken out in good faith, then a sound public policy, would seem

to require that the payee should be permitted to treat it as he may any other chose in action, and go to the best market he can find, either to sell it or borrow money on it. It would substantially confine him to such terms as the company issuing the policy should choose to make with him, if he should be limited in his choice of a purchaser to the party having an interest in the continuance of the life of the assured.

On the other hand, it is said that, if the payee of a policy be allowed to assign it, a safe and convenient method is provided by which a wagering contract can be safely made. The insured, instead of taking out a policy payable to a person having no insurable interest in his life, can take it out to himself, and at once assign it to such person. But such an attempt would not prove successful, for a policy issued and assigned, under such circumstances, would be none the less a wagering policy because of the form of it. The intention of the parties procuring the policy would determine its character, which the courts would unhesitatingly declare in accordance with the facts, reading the policy and the assignment together, as forming part of one transaction. *Cammack v. Lewis*, 15 Wall. 643, and *Warnock v. Davis*, 104 U. S. 775, were cases where the policies were taken out in order that they might be assigned to the assignees, through their procurement, under circumstances that might well be held to be in evasion of the law prohibiting gaming policies. In *Warnock's Case* the agreement touching the procurement of the policy and the use to be made of it, including the promise to assign it, was in writing, and executed the very day the policy was applied for, and the day following the assured executed an assignment of the policy, which had in the meantime been issued in pursuance of such an agreement. The insurance company paid over the money to the assignee, and the court held that the personal representatives of the assured were entitled to receive from the assignees all the money, except the sums advanced by them under the agreement, plus the sum paid by them to the widow. In the opinion it is said that the assignment of the policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. That remark was clearly true as applied to the facts of that case, for the policy was taken out in pursuance of an agreement to assign it. It was, therefore, in fact, a policy taken out for the benefit of parties having no insurable interest, although in form issued to the assured, and by him assigned to such parties. In such case the court will always declare the fact to be as it is, without regard to the effort of the parties to hide the truth and cheat the law. But the language employed by the court, and evidently advisedly, is broad enough to cover all assignments of policies to parties not having an insurable interest, including as well those taken out in good faith,

and kept up as long as the financial condition of the insured permits, as those deliberately taken out for the purpose of speculation upon a life that the intended beneficiary, whether as payee in the policy or by assignment, has no interest in prolonging. The point of actual separation between the cases asserting the assignability and those asserting the nonassignability of policies of insurance to persons not interested in the continuance of the life of the assured seems to be that those asserting nonassignability proceed on the assumption that the question is one of law, and that, if a policy is not assignable in one case, it cannot be in any case; while in the other line of cases the underlying principle is that all valid contracts are assignable, but that contracts are not necessarily valid and free from the taint of gambling because upon their face they appear to be regularly and properly issued. In order to ascertain the truth, all the facts and circumstances may be proved, and if it then appear that the parties intended by the contract to enable a third and uninterested party to speculate upon the life of another, the court will declare such contract invalid, not because of the assignment, but in spite of it.

Warnock's Case and this one are very wide apart in their facts, and serve very well to illustrate the necessity for the position taken by the courts of this state upon this general subject. In December, 1887, Alois Diepenbrock took out a policy of insurance on his life in the Equitable Life Assurance Society. He paid the premiums regularly down to December, 1892, a period of about five years, at which time the surrender value of the policy was about \$485. He was pressed for money, and finally sold the policy to the defendant *Erdtmann* for \$600, or something like \$115 more than he would have received by the surrender of the policy to the company. He had paid a much larger sum in premiums,—something over \$2,000,—and there seems to be no good reason why a person owning such a policy, and obliged to sell it, should not be permitted to get back as much as possible of the money that he has paid out for insurance. His condition of health may have changed very materially, of which fact the company can take no advantage; for in its contract it made allowance for that possibility. There is no good reason for saying that an insured person should not have the right, whenever his necessities press him, because of a failing condition of health that assures a speedy death, to realize on his policy, and obtain for it something like a fair price, which may, perhaps, be almost equal to its face value.

The personal representatives of the assured contested the assignment, also, on the ground that it was intended as collateral, although in form a valid assignment; but the special term found otherwise, and the appellate division approved that finding, so that question is no longer open for consideration.

Other questions are presented by the appellant, but, after a careful examination of them, we conclude that no error was committed below that will support a reversal of the judgment. The judgment should be affirmed, with costs. All concur, except MARTIN, J., absent. Judgment affirmed.

(158 N. Y. 34)

**JACKSON ARCHITECTURAL IRON
WORKS v. HURLBUT et al.**

(Court of Appeals of New York. Jan. 10, 1899.)

**TRUCKMEN—COMMON CARRIERS—ORDINARY CARE
—CONTRIBUTORY NEGLIGENCE—HARM-
LESS ERROR.**

1. Persons engaged in the business of general truckmen, making a specialty of moving heavy machinery, who keep a large number of trucks and horses, and employ the necessary help, are common carriers.

2. A regular tariff of charges is not essential to create a truckman a common carrier.

3. A truckman, whether or not a common carrier, is liable for failure to use ordinary care in unloading goods moved by him.

4. In an action against truckmen for negligence in unloading machinery which they had moved, the question as to contributory negligence, in that plaintiff ordered the machinery to be unloaded at once, on its delivery after dark, is for the jury.

5. Error, if any, in admitting certain evidence as to damages, is harmless, where the verdict was for less than the amount of damages clearly proven by the evidence.

Appeal from common pleas of New York city and county, general term.

Action by the Jackson Architectural Iron Works against Henry A. Hurlbut, Jr., and another. From a judgment of the general term (36 N. Y. Supp. 808), affirming a judgment for plaintiff, defendants appeal. Affirmed.

Charles A. Collin, for appellants. Jesse Grant Roe, for respondent.

O'BRIEN, J. The question in this case involved the responsibility of the defendants for an injury to property while it was in their custody as bailees for hire or reward. They were employed by the plaintiff in February, 1892, to transport a large planing machine, used for planing iron, over 30 feet long and weighing over 10 tons, from the foot of Twenty-Third street, on the North river, to the plaintiff's factory at East Twenty-Eighth street, in the city of New York. The agreed compensation for the service was \$60. They undertook to perform the work, and while unloading the machine at the factory it was broken and seriously damaged, and hence it is alleged that they failed to perform the service which they undertook to perform, since they did not deliver the property according to the duty imposed upon them by law. The plaintiff recovered a verdict of \$500 as damages for the injury to the machine and for the loss of the use of it while it was being repaired, and the judgment entered on the verdict has been affirmed at the general term.

The principal question discussed in the case concerns the duty or obligation which the law imposed upon the defendants when they undertook to perform the service. The learned counsel for the defendants contends that their responsibility was not that of a common carrier, and that they were not subject to the strict liability which is an incident of that relation; in other words, that they were not insurers for the safe delivery of the machine, as a common carrier is for the delivery of the goods or property which he undertakes to carry and deliver. At the trial the court was requested, in behalf of the defendants, to instruct the jury that they were in this transaction carriers for hire, and not common carriers. This request was refused, and an exception taken. It will be seen hereafter that it is not very important to determine whether the defendants were common carriers, or merely engaged under a contract with the plaintiff to transport the machine for a stipulated compensation. The question with respect to the true legal relation in which the defendants stood to the plaintiff, whether a common carrier or something else, is an abstract one. But, since the defendants complain of the refusal of the learned trial judge to give to the jury the instruction requested, and insist that this error, if it be one, may have prejudiced the defendants on the whole case, it may be proper to examine it briefly, in order to see how much of substance there is in the exception.

The defendants advertised themselves as general truckmen, their particular specialty being the moving of heavy machinery. They kept and maintained for this purpose a large number of trucks and horses, and the necessary help for the prosecution of this business. On this state of facts there was no legal error in the refusal of the learned trial judge to instruct the jury that the defendants were not common carriers. Truckmen, wagoners, cartmen, and porters, who undertake to carry goods for hire as a common employment in a city, or from one town to another, are common carriers. It is not necessary that the exclusive business of the parties shall be carrying. Where a person whose principal pursuit is farming solicits goods to be carried to the market town in his wagon on certain occasions, he makes himself a common carrier for those who employ him. The circumstance that the defendants had no regular tariff of charges for their work, but that a special price was fixed by agreement, does not change the relation. The necessity for a different charge in each case arises, of course, out of the difference in labor in handling articles of great bulk. The charge in each case may be proportioned to the risk assumed, and commensurate with the carrier's responsibility as such. A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property, from one place to another for

all such as may choose to employ him; and every one who undertakes to carry for compensation the goods of all persons indifferently, is, as to liability, to be deemed a common carrier. *Bank v. Brown*, 3 Wend. 158; *Schouler, Ballm. & Carr.* (2d Ed.) 351; *Story, Ballm.* §§ 495, 496; 2 Kent, Comm. (4th Ed.) pp. 598, 599; 2 Pars. Cont. 163, 175; *Ang. Carr.* 870; *Allen v. Sackrider*, 37 N. Y. 341; *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292. While, therefore, the question as to whether the defendants were subject to the responsibility of common carriers was not very material in this case, yet we think it would be difficult to show that there was any legal error in the charge of the learned trial judge in that respect.

This was not an action against the defendants as common carriers. They were not held liable upon the ground that they were insurers of the safety of the property which they undertook to deliver, but on the ground of negligence. It must be, and is, admitted that they were bound by their contract to exercise at least reasonable care in the transportation and delivery of the machine, and that they are liable for damages caused by their negligence in the discharge of the duty which they undertook to perform. The case was tried upon the theory that the defendants failed to use reasonable care in unloading the machine after it had reached its destination, and through this negligence the damage and injury occurred. In the complaint the defendants are charged with negligence in the performance of this duty, and this allegation was sustained by evidence at the trial. At all events, the evidence was sufficient to require its submission to the jury, and, the finding on that question having been in favor of the plaintiff, it is not open to question or review here. All this is, we think, very clear from the charge and requests made in behalf of the defendants. The court was requested by the defendants' counsel to charge that, as carriers for hire, they were not liable for loss or injury which could not have been prevented by the use of ordinary diligence, and that they were not liable for any loss or injury occasioned by unavoidable accident. These propositions were charged as requested, and hence it plainly appears that, although the court refused to charge that the defendants were not common carriers, yet he did charge that they were not liable for any loss or injury which could not have been prevented by ordinary diligence. So the measure of liability which the defendants were held to was that of ordinary diligence and care. This was certainly the most favorable view of the case that the defendants had any right to expect; and, since the jury has found upon sufficient evidence that they were wanting in the exercise of such care in unloading the machine from the truck at the factory, the merits of the controversy are not open to review in this court.

It is also urged that the plaintiff, through its servants or employes, present at the time of the delivery of the machine, was guilty of negligence contributing to the injury. It seems that the truck with this machine arrived at the factory some time after dark, and it is said that the defendants advised against unloading such a heavy machine at that time, but that the plaintiff's superintendent said that it could not remain out doors all night, and that it should be delivered. This is the interference on the part of the plaintiff's agents that is said to constitute contributory negligence. It is quite sufficient to say, with respect to that branch of the defense, that the evidence was of such a character as required the court to submit it to the jury, and it was submitted with instructions that, if it was shown that the negligence of the plaintiff or its agents contributed in any way to the injury, there could be no recovery. So the questions of negligence and contributory negligence have been removed by the verdict of the jury from the domain of controversy in this court.

There remains one other question to be considered, and that arises upon an exception taken to the admission in behalf of the plaintiff of certain evidence on the question of damages. It is urged that the trial court admitted evidence on that subject to show the loss of profits from inability to use the machine after the injury and until repaired. But no evidence as to loss of profits was given. Some proof was given that the plaintiff was compelled, on account of the injury to the machine, to send work out of the shop in order to complete contracts they had on hand at the time of the breaking of the machine, and that for such work they were compelled to pay a sum amounting to \$435. This was not proof of the loss of profits, but of the loss occasioned to the plaintiff by inability to use the machine on account of the defendants' negligence. We are not prepared to say that this evidence was not entirely competent under the circumstances of the case. *Allen v. Fox*, 51 N. Y. 562; *Redmond v. Manufacturing Co.*, 121 N. Y. 418, 24 N. E. 924. But it is not necessary to consider that question, since it appears that the evidence was immaterial, and could not very well have operated to the injury of the defendants, even if not admissible. The verdict of the jury was for \$500. The proof was substantially uncontradicted that a new bed was absolutely necessary to repair the machine and render it fit for use, and that the cost of this was \$855. It is plain that the machine was not an article that the plaintiff could procure in the market at any time, and hence the expense of restoring it to a condition for use was a proper element in the estimation of the damages, and that item of expense alone exceeds the verdict. The defendants' counsel requested the court to charge the jury that the meas-

ure of damage is that compensation which will fit the actual loss sustained, and which was the natural and proximate consequence of the defendants' act; also, that no damages which might fairly be supposed not to have been the natural and necessary consequence of the defendants' act could be recovered. These propositions were charged by the court as requested. The item of the expense of restoring the machine to a condition that would render it fit for use is certainly within the principle of this request. The cost of procuring necessary work to be done outside the factory, in order to enable the plaintiff to fill its contracts, resulting from inability to use the machine, would seem to be within the same principle also. But, since proof of the first item is sufficient to sustain the verdict rendered, the right to recover the other item need not be considered or discussed.

On the whole case it is apparent that the rulings at the trial and in the charge were quite as favorable to the defendants as the law permits, and the amount of the verdict was, under the circumstances, extremely moderate. The judgment is right, and should be affirmed, with costs. All concur (VANN, J., in result), except MARTIN, J., absent. Judgment affirmed.

(153 N. Y. 45)

EISEMAN et al. v. HEINE et al.

(Court of Appeals of New York. Jan. 10, 1899.)

SALE — EVIDENCE OF CONTRACT — QUESTION FOR JURY.

In an action for damages for failure to deliver 300 pieces of silk bought, plaintiff testified that he gave defendant an order for 300 pieces positively, and 200 pieces conditionally. Defendant mailed to plaintiff a copy of an order showing but 300 pieces ordered, whereupon plaintiff wrote defendant that there was another conditional order for 200 pieces, which he desired filled. Defendant denied receiving any such order, and thereafter wrote plaintiff that he could not furnish the silk. *Held* to show such a conflict of evidence as to make the question as to whether there was ever a contract entered into one for the jury.

Appeal from supreme court, appellate division, First department.

Action by Samuel Eiseman and others against Arnold B. Heine and others. There was a judgment for plaintiffs affirmed by the appellate division (37 N. Y. Supp. 861), and defendants appeal. Reversed.

Charles E. Rushmore, for appellants. Blumenstiel & Hirsch, for respondents.

BARTLETT, J. The plaintiffs seek to recover damages for alleged breach of contract to deliver goods purchased of the defendants, to wit, 300 pieces of Kalki silk. The plaintiffs declare upon a contract made by them with the defendants to deliver 300 pieces of the silk in question, and the defendants answer, denying that any such contract was made. The learned trial judge, in

charging the jury, said: "The defense which is set forth in the answer is that there was no contract made, binding upon the defendants. I shall have to charge that the defense has failed. Where the facts are all conceded, and no dispute exists with reference to them, whether the contract is made or not is a question of law,—a matter to be determined by the judge, and not by the jury." The jury were allowed to assess the damages.

The question presented upon this appeal, therefore, is whether the contract was established by undisputed evidence, so as to entitle the judge to take that question from the jury, or whether there is such a conflict of evidence as entitled the defendants to go to the jury on the question whether the minds of the parties had met. The case presented to the jury is substantially this: Samuel Eiseman, one of the plaintiffs, took the stand, and swore that he gave the defendants' agent, Maass, an order "for changeable Kalki silk of three hundred pieces positively, and two hundred pieces conditionally, at thirty-two and one-half cents per yard." It is to be remarked that the witness made no attempt to explain what the alleged condition was as to the 200 pieces, nor was it anywhere explained in the plaintiffs' case; but, on the contrary, the correspondence in evidence tends to contradict plaintiffs' statement as to any condition in the sale. The witness goes on to state that after giving this order he received from the defendants a copy of it, which he produced in court. This order was read in evidence, and called for 300 pieces only, at 32½ cents per yard, and was accompanied by a letter to plaintiffs from the defendants reading: "We beg to hand you herewith copy of your import order on Japanese silks, with which you favored our Mr. Maass. Please examine same carefully, and acknowledge receipt by return mail." This letter was dated September 15, 1892, and two days later the plaintiffs answered as follows: "Your copy of order of three hundred pieces of changeable Kalki is not correct. The order was given for five hundred pieces. The account for two hundred pieces to be given later. Your Mr. Maass will confirm this. In regard to your letter of yesterday, we do not order goods in the manner you suggest. Please send us the additional copy of order for two hundred pieces." It is to be observed that the plaintiffs make no statement about the additional 200 pieces being a conditional sale, but demand a copy of order covering them. The defendants replied to this letter as follows: "Answering your favor of the 17th, we have order from you for three hundred pieces changeable Kalki silk only. We may say that the order as made out by you, which we hold, only calls for three hundred pieces. However, may this be as it will, we will write by Wednesday's mail to our Mr. Maass, who is now on his way to Yokohama,

and shall instruct him to give us his answer by cable, on receipt of which we shall communicate with you. In the meantime you will kindly acknowledge receipt of the copy of the three hundred pieces, if you find the same correct in every particular except as to quantity." It is admitted that this letter was not answered. Defendants put Maass on the stand at the trial, but plaintiffs did not examine him as to the contract. It may be remarked that, so far as the negotiation between the parties is concerned, it seems quite difficult to decide clearly whether the minds of the parties had met or not; the plaintiffs claiming a sale of 500 pieces to them, and the defendants insisting that it was 300 pieces. In the light of this correspondence, the defendants were naturally in doubt as to the quantity of silk they were called upon to deliver, if a contract existed. With this pending dispute as to quantity, it was not competent for plaintiffs to sue for the lesser amount. It was not matter of subsequent election with them. The sole question is, what was the original contract?

The plaintiffs insist that, outside of the direct negotiation leading up to the contract, there are two very significant facts that throw light upon the way the parties regarded the situation. On the 15th day of November, 1892, about two months after the alleged contract was made, and about a month before the first goods under it were to be delivered, the defendants wrote plaintiffs this letter: "We regret to inform you that, according to advice received from Japan, and confirmed by our Mr. Maass, who has just returned from there, it is impossible to produce changeable Kalki silks in colors which would be satisfactory. The reason is that, certain chemicals being used and not boiled out, the goods become spotted (mildewed) while in stock." The plaintiffs argue from this letter that it makes it clear that the defendants considered they rested under a contract obligation as to the delivery of these silks. It is, however, to be said, from defendants' standpoint, that this letter in no wise clears up the doubt as to whether the sale was for 300 or 500 pieces. Two days after the receipt of the last letter, the plaintiffs wrote the defendants as follows: "In answer to yours of the 15th, we beg to say that we originally ordered five hundred changeable Kalki silks, and received copy of order for only three hundred. We ordered these goods of you at the time we could have ordered them from two other Japanese houses. Have sold some of these goods, and shall buy them on the market for your account. Other houses are delivering the goods, and we see no reason why you cannot deliver them, and shall, as before stated, hold you to the contract." It will be observed that the plaintiffs are still insisting that the contract covered 500 pieces of silk, and propose to hold defendants to that contract. The other point that plaintiffs insist

goes to show the way the parties regarded the matter of the existing contract is the fact that the plaintiffs tried to buy similar goods in the market in December, 1892, after being notified by the defendants that they could not fill the order; also, the fact that the defendants sought to make a similar purchase in the open market about the same time. We therefore come back to the question whether these conflicting facts rendered it clear, as matter of law, upon undisputed evidence, that there was a contract on the part of the defendants to deliver 300 pieces. We are unable to reach this conclusion. It was peculiarly a question for the jury to determine whether the minds of the parties actually met as to the number of pieces of silk to be purchased and delivered. The plaintiffs insist throughout the correspondence in evidence that they had purchased 500 pieces, and it is certainly a question for a jury to decide whether any definite number of pieces of silk were purchased by plaintiffs of the defendants.

We express no opinion as to the merits of this case, and rest our decision on the one point that there was a conflict of evidence sufficient to carry the case to the jury. The judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event. All concur, except GRAY, J., absent, and MARTIN, J., not sitting, Judgment reversed, etc.

(157 N. Y. 624)

ROBERTSON et al. v. SULLY.

(Court of Appeals of New York. Jan. 10, 1890.)

CONTRACT—GUARANTY—MATERIAL CHANGES.

Corporation debentures provided that payment was charged on all its uncalled capital. The corporation's articles authorized it to call for unpaid stock subscriptions, and that transfers should be subject to the conditions under which the transferor held; that the directors might refuse to register transfers of stocks if they chose; and that the corporation should have a first lien on all stock for money due from the holder. A contract guarantying a debenture contained a provision that the guarantor should use his influence towards keeping the holder in the position of a director of the corporation, and should purchase such holder's shares at par in case he ceased to be a director. After the guarantor executed it, the corporation, by a supplemental agreement, contracted to procure a purchaser at par for such shares, and to transfer them, in case "either" the guarantor defaulted in his agreement to purchase the shares, or the corporation should refuse to register a transfer. *Held*, that this agreement materially varied the provisions of the contract, in that it bound the corporation to waive its lien on such stock in the latter event.

Appeal from supreme court, appellate division, First department.

Action by William Robertson and others against Alfred Sully. From a judgment of the appellate division (37 N. Y. Supp. 935) affirming a judgment in favor of plaintiffs, defendant appeals. Reversed.

Elihu Root and Frank R. Lawrence, for appellant. S. Hanford, for respondents.

BARTLETT, J. This action was brought to enforce the written guaranty of the defendant to pay the plaintiffs a debt of £7,000 and interest, due them from the Clarendon Land Investment & Agency Company, Limited. Two defenses were interposed, among others: First, that the written contract between the principal parties, of which the contract of guaranty is a part, was materially changed, without the knowledge or consent of the defendant; second, that there was no offer, before action brought, to return to the defendant certain debentures of the company, deposited by him under the contract as collateral security for his guaranty. The plaintiffs reside in England, and the company is an English corporation; the defendant is a resident of this state. The plaintiff Robertson and the defendant were holders of the debentures and stock of the company, and the former was a director, at the time the agreement was executed, to enforce which this action is brought. The agreement bears date the 29th day of October, 1889, and is between the company, of the first part, the defendant, of the second part, and the plaintiffs, of the third part. It recites that on the 29th day of July, 1886, an agreement was made between the defendant and the plaintiff Robertson, whereby the defendant guarantied the payment by the company of the principal sum of £7,000 and interest, in accordance with the tenor of a coupon debenture of the company held by Robertson, and that £14,000 of certain mortgage debentures of the company, then about to be issued to the defendant, should stand charged, by way of collateral security, with the payment of the principal sum and interest. It further recites that all of the plaintiffs, at the request of the company and defendant, had agreed that the date of payment of the principal sum should be enlarged to the 12th day of August, 1892, upon the terms and conditions of the new agreement, which was in consideration of the premises and of the former agreement. The debentures to be charged as collateral were to be deposited with Lloyd's Bank, Limited, at No. 72 Lombard street, in the city of London, so long as any part of the sum of £7,000, or any interest thereon, should remain unpaid, or until it should be necessary to enforce the charge by sale or otherwise. Upon repayment of the said sum and interest, the debentures were to be transferred and delivered to the defendant or his nominees. Some other provisions material to this controversy will be referred to later. It appears that the company, having executed the agreement, sent it to the defendant at the city of New York, and he signed and returned it to the company, its execution by Robertson and its delivery being somewhat delayed by Robertson's absence in Australia,

caused by ill health. When this agreement was delivered to Mr. Robertson to execute, it seems to have contained an addition thereto, which never came to the defendant's knowledge until after the commencement of this action. The agreement, when executed by the defendant, contained a fifth subdivision, which provided that, so long as any part of the £7,000 remained unpaid, the defendant was at all times to exercise his power and influence towards keeping the plaintiff Robertson in the position as a director of the company. If Robertson from any cause ceased to be a director, before payment of the principal sum, the defendant obligated himself to purchase at par the shares of the company then owned by him.

This subdivision of the original agreement was changed, as follows, by a supplemental memorandum dated December 31, 1889: "Memorandum Supplemental to the Within Indenture. Whereas, it was part of the arrangement under which the within written indenture was entered into that the company should enter into the agreement on its part hereinafter contained, but such provision was inadvertently omitted from the said within written indenture, and it is accordingly desired to vary the said indenture in manner hereinafter appearing: Now, it is hereby agreed as follows: (1) There shall be added at the end of clause five of the said indenture the words following, that is to say: 'Provided, always, that if the said Alfred Sully, his executors or administrators, shall make default in purchasing the said shares, and having the same duly transferred to him or them, or if the company shall refuse to register such transfer, then, and in either of such cases, the company will, within seven days after such default or refusal, as the case may be, procure the said shares to be purchased at their par value by, and transferred to, some responsible transferee.'" The original agreement, as thus altered, was in the possession of Robertson at the time of the trial, and produced by him. No evidence was offered to show that this memorandum was attached after delivery to Robertson of the original agreement, and the presumption stands that it was varied by the company before final delivery, by adding the memorandum, based upon the same consideration. The defendant swears that he had no knowledge of the alteration until after this suit was instituted, and no effort was made by the plaintiffs to prove the contrary. The learned appellate division, in considering the effect of this added memorandum upon the rights of the parties, conceded that if this agreement in any way changed the relations of the parties, and at all injuriously affected the surety, he was undoubtedly discharged, whether the supplemental agreement is to be considered as part of the original contract or as an independent agreement. It, however, reached the conclusion that there was no alteration in the contract which the defend-

ant had guarantied to perform, but that there were additional stipulations in respect of what the company would do in case the defendant failed to comply with his contract of guaranty as to the indebtedness mentioned in the agreement; defendant was to do nothing more; his obligation was not changed. It was an additional contract upon the part of the company in case the defendant failed to perform his agreement. If this be the correct construction of the contract, then this judgment should be affirmed, but we are of opinion that the supplemental or independent contract wrought a change in the agreement guarantied, as well as in the contract relations existing between the company and Robertson. It becomes necessary at this point to look into the articles of association of the company, and ascertain the precise relations which existed between the company and its creditor Robertson at the time of the execution of the agreement of October 29, 1889. Section 9 provides: "The directors may, from time to time, make such calls upon the members in respect of all moneys unpaid on their shares as they think fit." This record discloses that the capital stock of the company had not been fully paid in. Section 11 enacts, in substance, that a failure to pay the call subjects the holder of the stock to a rate of interest of 10 per cent. per annum until payment. Section 14 provides: "The instrument of transfer of any share of the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the registry book in respect thereof." Section 15 gives the form of transfer, wherein the holder states that the transfer is "subject to the several conditions on which I held the same immediately before the execution hereof, and I, the said [transferee], do hereby agree to accept and take the said shares, subject to the conditions aforesaid." Section 16 provides: "The directors may decline to register any transfer of shares unaccompanied by sufficient evidence to prove the title of the transferor, or any transfer made by a member who is indebted to the company, or under any liability to the company, or on the ground of such shares not being transferable consistently with any agreement made with the allottees or holders in respect thereof, or in the case of shares not fully paid up, to a transferee of whom they do not approve, without being compelled to state their reasons for such disapproval." Section 24 provides: "The company shall have a first and paramount lien on all the shares of stock of which any person is the holder, or one of the several joint holders, for all moneys due to the company from him, either alone or jointly with any other person, whether a member or not; and, where a share of stock is held by more persons than one, the company shall have a lien thereon in respect of all moneys so due

to them from all or any of the holders thereof, and the directors may refuse to register the transfers of any shares, whether fully paid up or not, or of stock by any holder or joint holders who is or are, or any one of whom is, then indebted to the company, whether solely or jointly, with any other person, or on any account whatever. * * *

Thus it appears that, under these articles of association, the company was authorized to make calls upon its shareholders for amounts unpaid upon the stock, and enabled, by a refusal to transfer shares upon its books, to continue its lien on the stock, and to enforce payment, not only for calls that had been made, but those that might be necessary in the exigencies of the corporate business. In other words, the company was vested with the arbitrary power to prevent any shareholder from avoiding those obligations imposed upon him by reason of the fact that there was a balance still due upon his shares. When we consider that the debentures provided upon their face that payment was charged upon all the uncalled capital of the company, it becomes manifest that every debenture holder was interested in having the company preserve its lien on all stock in the hands of responsible parties. It was one of the sources of corporate revenue to which the debenture holders had the right to look for payment. This was the situation which existed when the defendant guarantied the payment of the debenture for £7,000 and interest held by the plaintiff Robertson.

This brings us to a critical examination of the supplemental or independent agreement, which the courts below have held in no way affected the position of defendant as guarantor. While we are inclined to agree with the appellate division that it is not important whether the added covenant between the company and Robertson be regarded as supplemental or independent, yet we are of opinion that, upon its face and on the facts disclosed, it was supplemental, was to supply an omission in the original agreement, and rested upon the same consideration. The memorandum opens with the recitation: "Whereas, it was part of the arrangement under which the within written indenture was entered into that the company should enter into the agreement on its part hereinafter contained, but such provision was inadvertently omitted from the said within written indenture, and it is accordingly desired to vary the said indenture in manner hereinafter appearing." It is clear from this language that Robertson regarded the omitted covenant as of value to him, and the company recognized the fact that he was entitled to it. The material words of the covenant are that, in case defendant, or his executors or administrators, made default in purchasing Robertson's shares under the conditions named, "and having the same duly transferred to him or them, or if the company shall refuse to register such transfer, then and in either of such cases

the company will, within seven days after such default or refusal, as the case may be, procure such shares to be purchased at their par value by, and transferred to, such responsible transferee." It would seem as if this language was perfectly clear, and deals with an alternative. The decision below proceeds upon the theory that it deals wholly with defendant's default, and provides for an additional security to Robertson by the company in that event. Manifestly, this is giving but partial effect to the covenant, which does, indeed, contain the meaning ascribed to it by the court below, but it also provides for the contingency of the defendant fully performing his agreement with Robertson in the purchase of his stock, and the refusal of the company to transfer notwithstanding that fact. The covenant deals with "either of such cases." What, then, is the effect of this covenant, in case the defendant offered to purchase Robertson's stock, as he was bound to do if the latter from any cause ceased to be a director, but coupled that offer with the lawful demand that the stock should be transferred to him free from all liens of the company? It is obvious that, unless this demand of a clear title was complied with, it was greatly to the interest of defendant, as well as his strict legal right as guarantor of one debenture, and as owner of others, that the company should exercise its power of refusal to transfer the stock, and hold Robertson to his full liability as shareholder. In executing the supplemental covenant the company deprived itself of the power to thus coerce Robertson in the interest of the defendant, as guarantor of its debenture, and agreed that, within seven days after their refusal to transfer Robertson's stock to defendant, it would furnish a responsible purchaser of the stock at par, and transfer it to him. This must be held to mean a transfer upon the books of the company. The company had no right to waive its lien upon Robertson's stock for unpaid calls, and such other liabilities as he rested under as a shareholder, whose stock the company might refuse to transfer upon its books. Unless this covenant meant that the company would furnish a purchaser for Robertson's stock, and register the transfer in its books, the execution of it was an idle ceremony, of no possible benefit to Robertson. Such a registered transfer on the books would vest the title of the stock in the purchaser, discharged of all liens of the company. The consent of the company to this transfer is an act of absolute waiver. The supreme court of the United States (*National Bank v. Watson*, 106 U. S. 217, 222) declared that the "transfer, when thus consummated, destroys the relation of membership between the corporation and old stockholder, with all its incidents, and creates an original relation with the new member, free from all antecedent obligation." See, also, *Hill v. Bank*, 45 N. H. 300, 308; *Stebbins v. Insurance Co.*, 3

Paige, 350; *Mor. Priv. Corp.* § 207; *Jones, Liens*, § 408; *Cook, Stocks & S.* § 531. The effect of the added covenant to the original agreement was, therefore, to materially change the contract guaranteed, and the agreement between the principals as well. It follows that the defendant is discharged from his contract of guaranty. As the conclusion we have reached may render a second trial of this case unnecessary, it is not important to consider the alleged failure of plaintiffs to tender to the defendant the debentures put up as collateral before suit was begun. No such tender was called for, we think, under the provisions of the agreement of 1889, already quoted. These collaterals, if of any value, are presumably in the custody of the *Lloyd's Bank, Limited, London*. The statement of the plaintiff Jupp, when on the stand, that the company was in bankruptcy, and the collaterals had been presented by the plaintiffs in the liquidation proceedings as a claim against the estate, does not necessarily imply that the bank has parted with the custody of them; and, if it has, it would doubtless be liable for their full value on failure to produce upon defendant's demand. The judgment should be reversed, and new trial ordered, with costs to abide the event. All concur, except GRAY, J., absent. Judgment reversed, etc.

(157 N. Y. 633)

UNION INS. CO. OF PHILADELPHIA et
al. v. CENTRAL TRUST CO. OF
NEW YORK et al.

(Court of Appeals of New York. Jan. 10, 1899.)

ARBITRATION—SUBMISSION—REVOCATION—LIABILITY FOR EXPENSE.

Where a submission provided that a deposit should be made by one of two defendants as security for the award, and each party promised not to revoke the submission, but it was revoked by the other defendant before the award was made, expenses incurred in preparing for the arbitration are payable out of the deposit, under Code Civ. Proc. § 2384, providing that, where a party revokes a submission, any other party thereto may recover against him and his sureties on the submission, or any instrument collateral thereto, all expenses in preparing for the arbitration.

O'Brien, J., dissenting.

Appeal from supreme court, general term, First department.

Action by the Union Insurance Company of Philadelphia and the Insurance Company of the State of Pennsylvania against the Central Trust Company of New York, the Continental Insurance Company of the City of New York, impleaded with Kate E. Dimick, as executrix of Lorenzo Dimick, deceased. From a judgment for plaintiffs (32 N. Y. Supp. 838), affirmed at general term (33 N. Y. Supp. 1135), defendants appeal. Affirmed.

On the 10th of October, 1885, a quadripartite agreement was entered into between the Union Insurance Company, party of the first part, the Insurance Company of the State

of Pennsylvania, party of the second part, the Continental Insurance Company, party of the third part, and Lorenzo Dimick, party of the fourth part, which, after reciting the existence of certain controversies between the parties of the first and second parts and the parties of the third and fourth parts, arising chiefly out of the dealings of said Dimick and his firm in the affairs of said parties, and that certain civil actions were pending between the parties of the first and second parts, respectively, and the parties of the third and fourth parts, provided that all the matters embraced in said actions, as well as all other actions or causes of action pending or existing between the parties of the first and second parts, or either of them, and the party of the third part and the party of the fourth part, individually or as a member of the firm of Crosby & Dimick, or either of them, and all claims of the party of the third part and the party of the fourth part, respectively, against the party of the first part and the party of the second part, respectively, and of the party of the third part against the party of the fourth part, and vice versa, should be submitted to three arbitrators, two of whom were named and authorized to appoint the third. It was further agreed that a judgment might be entered in the supreme court upon the award, and that such award should be final and without right of review by appeal or otherwise by either of the parties, who expressly waived "any and all right under the statute or otherwise to apply to the court in any manner or on any ground to stay or prevent entry of an order of confirmation or entry of judgment upon such award." It was further provided that neither of the parties should "have the right to revoke the submission to arbitrators herein provided for, or this agreement, or any part thereof, and such arbitration shall not terminate or be revoked by the dissolution or death of either or any of the parties hereto." In case of the dissolution or death of any party, proceedings under the submission were to continue against the personal representatives or successors, "and any revocation by operation of law, and any and all right of revocation given or permitted by statute or otherwise," was "expressly waived and abandoned." The compensation and expenses of the arbitrators and the expenses of witnesses were to be borne equally by the parties, each paying one-fourth thereof, "the same to be advanced from time to time in the proportion above mentioned, upon the certificate of the arbitrators or a majority of them; the expenses of witnesses to be adjusted and allowed by the arbitrators or a majority of them." The compensation of the arbitrators was fixed at \$50 a day, but was not to exceed the sum of \$5,000 to each, in the aggregate. No part of the costs or expenses of the arbitration or of the witnesses were to be recovered by the prevailing party or parties, or entered in the judgment, and

any limitation by statute as to the rate of such compensation was waived. The agreement further provided "that, at or before the execution and delivery of this agreement, there shall be deposited with the Central Trust Company of the City of New York security satisfactory to the parties of the first and second parts, to the amount of \$50,000, to secure the payment, performance, and satisfaction of any award in favor of said parties of the first and second parts, or either of them, that may be made against said Dimick in said arbitration by said arbitrators, or a majority of them; payment and satisfaction of said award, up to said amount of \$50,000, to be paid upon demand by said Central Trust Company of New York, in accordance with any judgment that may be entered upon such award." The parties of the first and second parts each agreed to discontinue all civil actions pending in their favor, or in favor of either of them, against the parties of the third and fourth parts, or either of them; and it was provided that, if said actions were not thus discontinued, said security might at once be withdrawn. This agreement was executed in quadruplicate, by said Dimick, October 10, 1885; by the Union and State Companies, respectively, October 14, 1885; and by the Continental, October 17, 1885. On the 13th of October, 1885, the Continental Company deposited with the Central Trust Company a certificate for 500 shares of Harlem Railroad stock, which was accepted instead of the \$50,000 in cash required by the agreement, and the trust company gave a receipt to the plaintiffs, dated on the same day, stating that said shares were to be held in accordance with the terms of said agreement. On the 18th of October, 1887, after the arbitration had proceeded for about two years, and before it was closed or the matters in controversy submitted to the arbitrators for decision, said Dimick revoked the arbitration, and such revocation was subsequently adjudged to be in all respects valid and conclusive. *People v. Nash*, 111 N. Y. 310, 18 N. E. 630.

The complaint, after setting forth the foregoing facts in substance, further alleged that the plaintiffs had incurred costs and expenses, and had suffered damages, in preparing for the arbitration, and in conducting the proceedings thereunder to the time of the revocation, exceeding the sum of \$50,000. The wife and executrix of said Dimick was made a party to the action, he having died on the 29th of February, 1888. The Central Trust Company was not a party to the agreement, but is a party to the action. The relief demanded was that the said stock should be sold, the rights and interests of the parties therein determined, and that the plaintiffs be paid, out of the proceeds, "the amount of their costs, expenses, and damages incurred and suffered as aforesaid." Upon the trial of the action at special term, it was held that the plaintiffs' costs, expenses, and

damages incurred in preparing for the arbitration should be allowed to the amount of \$49,178.45; that the shares of stock in question were subject to a charge in favor of the plaintiffs for the payment to them of that sum; that the Central Trust Company should sell the stock, and out of the proceeds pay said sum to the plaintiffs, with leave to the Continental Company, or its assigns, at any time prior to the sale, to redeem said stock by the payment of said sum to the plaintiffs. The judgment entered accordingly was affirmed on appeal to the general term, and the defendants came here.

William Allen Butler, for appellants.
Treadwell Cleveland, for respondents.

VANN, J. (after stating the facts). Each party to the submission agreement, which was quadripartite in character, was bound only to the extent of the promises, express or implied, made by them respectively. *Berry Harvester Co. v. Walter A. Wood Mowing & Reaping Mach. Co.*, 152 N. Y. 540, 46 N. E. 952. While the contract required a deposit to be made in behalf of Dimick for the benefit of the plaintiffs, it did not expressly provide by whom it was to be made. The object of the deposit was to secure performance of any award against Dimick in favor of the plaintiffs, or either of them. It was not to secure performance by him of the arbitration agreement, generally, but simply of that part relating to payment of the award. Every other covenant, by whomsoever made, stood without security. The deposit bore no relation to any part of the agreement other than that pertaining to satisfaction of the award by Dimick, except the provision that, unless the pending actions were discontinued, the security might be withdrawn. In making the deposit, therefore, the Continental Company pledged its property for the purpose of securing payment by Dimick of any award made against him in favor of the Union and State Companies, which thereupon became the pledgees, the Continental Company the pledgor, and the trust company the holder of the pledge, in trust for the purpose aforesaid. As the object of the pledge was to secure performance of a certain act by Dimick, while the subject of the pledge belonged to the Continental Company, the latter became entitled to the rights of a surety with reference to the thing pledged, although it was not subject to the affirmative obligations of a surety; for it made no promise to perform for another, but simply deposited its property to secure fulfillment of a specified act by another upon a contingency named for the benefit of third parties. It was not a surety in the sense of one who had engaged to answer for the debt, default, or miscarriage of another, and it was not sued as a surety. No affirmative relief was asked, and no personal claim made against it. This action, therefore, is, in effect, a proceeding in rem

to foreclose the pledge by securing a sale of the thing pledged for the benefit of the plaintiffs.

It is claimed by the defendants that the submission agreement furnishes no basis for such an action, because the condition of the pledge has not been broken. As the condition of the pledge was the payment of the award, they insist that an actual award was a condition precedent to the right to foreclose; and as there has been no award, and none can now be made, the agreement to pledge in *functus officio*, and the trust company is under an implied obligation to return the thing pledged to its owner. On the other hand, the plaintiffs claim that this action can be maintained under section 2384 of the Code of Civil Procedure, "in connection with well-settled common-law principles, as one based either upon the terms of the submission as a whole," or that part thereof which provided for the deposit. The section referred to is found in that part of the Code relating to arbitrations, and is as follows: "Liability of Party Who Revokes. Where a party expressly revokes a submission, made either as prescribed in this title or otherwise, any other party to the submission may maintain an action against him, and also against his sureties, if any, upon the submission, or any instrument collateral thereto, in which action the plaintiff may recover all the costs and other expenses, and all the damages, which he has incurred in preparing for the arbitration, and in conducting the proceedings to the time of the revocation. Either of the arbitrators may recover, in an action against the revoking party, his reasonable fees and expenses." Section 2384. The next section provides that "a sum, penalty, forfeiture, or damages, shall not be recovered for a revocation of a submission to arbitration, made either as prescribed in this title or otherwise, except as prescribed in the last section; notwithstanding any stipulated damages, penalty, or forfeiture, expressed in the submission, or in any instrument collateral thereto." The first section quoted authorizes an action against one who revokes a submission, and also against his sureties upon the submission, as well as against his sureties upon any instrument collateral to the submission, to recover all the costs and other expenses, and all the damages incurred in preparing for and conducting the proceedings to the time of revocation; and the second section limits the recovery to such costs, expenses, and damages, even if the submission provides for a more extended recovery. These sections reproduce, in substance, similar provisions contained in the Revised Statutes. 2 Rev. St. pp. 544, 545, §§ 23, 25. Before the passage of the Revised Statutes, it had been held in *Allen v. Watson*, 16 Johns. 205, that a party could revoke the powers conferred by an arbitration bond, but the consequence was a forfeiture of the penalty, although the

other party could recover no more than the actual damages sustained. The revisors, in their notes, refer to this case, and state that it was deemed useful to finally settle "the much agitated question respecting stipulated damages which are frequently inserted in submissions to avoid the general rule of law concerning penalties"; otherwise, a resort to equity would have been necessary to obtain relief from the forfeiture. We think this is what the Code accomplishes, and that it does not place a limitation upon the right of action at common law to recover damages for revocation, except by limiting the amount of the recovery. It creates no new or exclusive remedy, but confirms an old one, and fixes the measure of damages. The act of revocation by Dimick made the condition upon which the deposit was made impossible of performance. He thereupon became liable, not for an award, but for the expenses incurred in the effort to secure an award, which were rendered of no effect by his act. He voluntarily disabled himself from performing his covenant to pay the award, and that, according to the authorities, was in itself a breach of the covenant.

The earliest authority upon the subject is the celebrated *Vynlor's Case*, 8 Coke, 81b, where the condition of an arbitration bond was "to stand to, abide by and perform an award." The only breach by the defendant was a revocation of the authority of the arbitrators. It was resolved that the defendant, by his own act, "made the condition of the bond impossible to be performed, and, by consequence, his bond is become single, and without the benefit or help of any condition, because he has disabled himself to perform the condition." This has been followed for many years, and has been made the basis of a multitude of judgments, both in England and in this country. Thus, in *Warburton v. Storr*, 4 Barn. & C. 103, 106, the defendant agreed, under a penalty, to perform an award, and, by revocation of the submission, prevented himself from doing so; but he was held to have broken his agreement, and thereby to have subjected himself to an action for the penalty. *Vynlor's Case* is the only one cited, and the court, relying upon it, said "that if a party covenants to do a certain thing, and afterwards, by his own act, disables himself from performing it, that is in itself a breach of the covenant." So, in *Brown v. Tanner, McClell. & Y.* 464, it was held that the defendant's revocation of his submission, whereby the performance of his agreement to stand to, obey, abide, and fulfill the award, became impossible, was a breach of that agreement. In *Town of Craftsbury v. Hill*, 28 Vt. 763, the condition of an arbitration bond was that, if the principal should "well and truly observe, perform, and keep the award and determination which the said arbitrators shall make and publish," the obligation was to be void. The only breach of the condition al-

leged was a revocation of the submission; and it was held on demurrer that it was a breach of the submission, because the principal had deprived the arbitrators of the power to make an award, as well as himself of the power to observe, perform, and keep it, and that this, in legal effect, was a forfeiture of the bond, and a breach of the condition, rendering both principal and surety liable. Where a defendant, by preventing one of three referees from acting with the others, defeated any valid award, it was held to be a sufficient breach of an agreement for having and perfecting a reference. *Quimby v. Melvin*, 28 N. H. 250. In *Brown v. Leavitt*, 26 Me. 251, 256, the court said: "It is a general rule that any party or any one of a party may revoke his submission before award made, giving notice thereof to the arbitrators, but then he forfeits his obligation he has given to abide the award. 1 Dane, Abr. 277, c. 13, art. 14, § 15; *Milne v. Gratrix*, 7 East, 608; *King v. Joseph*, 5 Taunt. 452. * * * It is a well-established rule of law that if a party covenants to do a certain thing, and afterwards, by his own act, disables himself from doing so, or declines doing it when he was able, it is a breach of the covenant,"—citing *Vynlor's Case* and *Warburton v. Storr*. The principle is not confined to agreements of submission, but is applied to contracts generally; and the rule is universally recognized that where a party, before the time of performance arrives, puts it out of his power to keep his contract, there is an immediate right of action for a breach of that contract by anticipation. *Hochster v. De La Tour*, 2 El. & Bl. 678; *Frost v. Knight*, L. R. 7 Exch. 111, 114; *Synge v. Synge* [1894] 1 Q. B. 466; *Johnstone v. Milling*, 16 Q. B. Div. 460; *Crist v. Armour*, 34 Barb. 378; *Burtis v. Thompson*, 42 N. Y. 246; *Howard v. Daley*, 61 N. Y. 362, 375; *Ferris v. Spooner*, 102 N. Y. 10, 5 N. E. 773; *Nichols v. Steel Co.*, 137 N. Y. 471, 485, 33 N. E. 561. In *Frets v. Frets*, 1 Cow. 335, 341, a bond in fact given for the performance of an award contained no condition. One of the parties revoked, and it was declared that, "by the revocation, the penalty of the bond is forfeited, and an action lies upon it to recover the damages actually sustained." In *Russ. Arb.* p. 100, it is laid down that "every submission contains some words expressing or implying the agreement of the parties to abide by and perform the award of the arbitrator. Preventing the award being made is a breach of this agreement as much as not performing it when made, and, when the submission is by bond, is a forfeiture of the penalty."

In the case before us the pledge was made to secure performance by Dimick, and, as he failed to perform by depriving himself of the power to perform, he broke the condition upon which the pledge was made. As was said in *Ferris v. Spooner*, *supra*, where property was pledged for performance by a party,

"when he repudiated the further performance of the contract, the plaintiff was * * * set at liberty to enforce his securities." If he had furnished sureties for the performance of an award, they would have been liable, because revocation prevented an award, and constituted a breach of the promise to perform. This would be true even if the promise of the sureties was limited to payment of the award, and did not apply to any other part of the agreement of submission, because, by voluntarily preventing an award, he virtually broke the agreement to perform the award. He was "bound to stand to the award," and when he made an award impossible, and disabled himself from performing the condition of the pledge, he thereby broke the condition itself. We have a pledge as security in place of personal sureties. The pledge is to secure performance of an award when made. If there had been no revocation, and an award had been made to the plaintiffs of \$50,000, they could have proceeded against the subject of the pledge by an action to foreclose their lien thereon, to procure a sale thereof, and payment of their claim out of the proceeds. We have not that exact case before us, which would be an actual breach of the condition on which the pledge was made; but we have its equivalent, in an implied breach of that condition, because Dimick intentionally rendered an award impossible. If the 500 shares of stock could have been sold by proceedings in rem founded on an actual award, the same proceedings may be maintained, founded upon that which the authorities regard as having the same effect as a breach of the condition to pay the award. The pledge was to be forfeited upon the making of an award and nonpayment thereof, and the pledge was forfeited by the act of Dimick in making an award impossible. Here the statute comes in and limits the amount of the damages to those caused by the fruitless effort to prepare and try the case, and submit it to the arbitrators, so that they could pass upon it. We base our decision upon the agreement and the pledge made to secure performance of a part thereof, and the legal consequences resulting upon common-law principles from the disabling act of Dimick in preventing an award, giving effect to the statute as both sanctioning the action and limiting the amount of the recovery.

It is, however, insisted that none of the damages claimed are recoverable in any event, because the agreement of submission prevents it. The items of damages were fixed as to amount by the stipulation of the parties, with no admission, however, of any liability; and the defendants duly objected to the allowance of anything for fees of arbitrators, counsel, or witnesses. This position is founded upon the provision of the agreement of submission that the fees of arbitrators and witnesses should be paid equally by the parties, and that no part of the costs of the

arbitration or the expenses of witnesses should be recovered by the prevailing party, or entered in the judgment. This simply settled what should follow an award when made, and what should be included in the judgment to be entered upon the award. It does not deal with the consequences of revocation, nor prevent the recovery of expenses incurred in preparing for the arbitration, as allowed by statute, where an award is prevented by revocation. That wrongful act was not under contemplation by the parties when they provided that costs and expenses should not become part of the judgment, for they had all promised not to revoke in another part of the agreement. They were dealing simply with the award and the judgment to be rendered thereon; and, as was said by one of the learned justices below, "the stipulation relied upon was predicated upon a continuance and completed execution of the agreement. It was, in effect, inconsistent with revocation, and was therefore destroyed by revocation." In covenanting against the recovery of expenses, they proceeded upon the theory that the arbitration agreement was to be performed, and not revoked; and the argument already made as to breach of the condition through a deliberate act rendering performance impossible applies with equal force to the position taken by the appellants with reference to the allowance of these items of damage. The contingency of a revocation was not provided for by the agreement to submit, but the statute and the common law take care of it. The cause of action arises through the submission, the deposit, the act of revocation, and the statute. By revoking, Dimick prevented an award, and thereby broke his promise to pay the award. At common law he would have been liable for all damages resulting from the breach, including the amount for which an award should have been made; but the statute intervening prevents that result, and allows a recovery for the expenses of the arbitration, which it substitutes in the place of all other damages. By preventing an award, Dimick became liable for the expenses incurred in trying the case before the arbitrators, because the pledge made to secure the award was forfeited by the act that made an award impossible. By violating his agreement, he not only made himself liable, but also the property pledged for him. Instead of allowing an absolute forfeiture, however, the statute, which was a part of the contract, and is referred to therein, measures the damages as already mentioned. If an award had been made, the expenses could not have been recovered; but the plaintiffs would have had the value thereof in an award settling all controversies between the parties. The agreement would then have been enforced as made, and any award in favor of the plaintiffs would have been paid out of the proceeds of the pledge, not exceeding the limit named. They incurred legitimate expenses in the

effort to secure an award, but that effort was defeated by the act of a party, which, as the courts hold, was equivalent to a violation of the condition upon which the pledge was made. The pledge secured the award, and Dimick prevented an award, and thereby forfeited the pledge, and made it, under the statute, liable for the expenses incurred in trying to get an award, the same as it would have been liable for an award if made. Non-payment of an award would have violated the condition of the pledge no more than a revocation of the submission violated it, and the pledge is liable for all the direct and natural consequences of such violation except as limited by the statute. Without further discussion, we think the judgment appealed from should be affirmed, with costs.

O'BRIEN, J. (dissenting). The judgment in this case appropriates over \$50,000 of the defendant's property to satisfy a claim for damages by the plaintiff for the breach of an agreement by one Dimick to arbitrate certain claims, and to pay the award. It is admitted that the breach was the act of Dimick, and of him alone, in revoking the submission after the arbitration had been pending over two years. The plaintiff's claim is for the damages sustained by the payment of its expenses of the arbitration while pending, and nothing else. It is not claimed, or even suggested, that the defendant had any power or right to prevent Dimick from revoking the agreement, or that it had any control over his action in that regard. The decision contains another curious, but perfectly correct, admission, and that is that the defendant committed no breach of the agreement itself, and was not the surety of the one who did.

With these facts conceded at the outset, the mind is at once directed to the inquiry whether the judgment has any support in law, reason, or authority, since, if it has not, the decree which transfers such a large portion of the defendant's property to the plaintiff is but an arbitrary edict, and little better than downright confiscation. The discussion of the case up to this time has produced at least five judicial opinions by as many different judges, including the opinion of this court now before us. After reading them all, it is not too much to say that no two of them are at entire agreement upon any clear or definite theory of liability. This discord in opinion and theory is, perhaps, not at all surprising. While the case would be a very simple one, involving no difficulties whatever, if we would only aim to give effect to the plain and clear language of the agreement which the parties made, it becomes very difficult when we attempt to make a new one, based not upon the language which the parties employed, but upon reasoning processes so subtle and artificial that it is difficult for an ordinary mind to grasp them, and quite impossible for any

two persons to state them in the same way. Courts are often astute to defeat fraud and prevent injustice, and sometimes go to the extreme limits of construction in order to compel a party to pay a claim which is just, and which, in the forum of conscience, he ought to pay. With all that, there need be no complaint, but it would require a very acute mind to discover in the plaintiff's claim any such element of equity as would warrant any court in putting a strain upon law, or upon the language in which the parties have carefully expressed their mutual rights and obligations.

It appears upon the face of the agreement that, when it was executed, various suits at law, in behalf of the plaintiff, were pending in the courts, and, by the terms of the submission, these suits were to be discontinued, and the claims involved therein submitted to the arbitrators. When the arbitration was revoked by the sole act of Dimick, the right to prosecute these actions was revived, and it was admitted at the argument that they had been prosecuted, and the claims recovered, as we may assume, with the costs of prosecution. So that, while the plaintiff lost the right to have an award of arbitrators, it gained the right to have the judgment of the courts upon the claims. In legal theory, it could have lost nothing but the expenses of the arbitration, and, in fact, it may have gained more than that in the recovery. But nothing can more clearly reveal the want of any strong equity in the plaintiff's claim than the agreement itself. There the plaintiff expressly stipulates that it will pay all of its own expenses, and that the defendant shall not, under any circumstances, be liable for them, since they could not be made any part of the award, or included in it. The only purpose of this action is to collect from the defendant's property the very expenses which, by the agreement, the plaintiff was to bear itself, and which it is conceded the defendant never agreed to pay. The parties virtually stipulated with each other that, in the event of revocation by one, none of the others not participating in that act should claim damages as against each other, but should pay their own costs. They bound each other, so far as words could do it, not to revoke, and, in any event, to pay their own costs. The railroad stock, which is the subject of this action, was pledged for one purpose, and one only, and that was to pay an award when made, and the expenses which the plaintiff now seeks to have declared a lien upon it could never by any possibility become a part of that award. It is conceded that, had the plaintiff recovered an award of \$10,000, it could not collect a dollar of the expenses of the arbitration from this property, although as large then as now, for the plain reason that it was not pledged for any such purpose. The plaintiff has no more right to appropriate this property for its

expenses now than it had then, unless we are to hold that the agreement under which the pledge was made means one thing in case an award was made and another thing in case it was not made, or one thing before revocation and something else after. We must hold that, although the purpose of the pledge was clearly expressed in writing, yet that purpose was subject to be enlarged and changed without the consent of the owner, by future events and contingencies not within the contemplation of the parties when the writing was made, and in which the owner was in no manner concerned. The plaintiff is seeking to do now, that there is no award, what it could not do if one had been made, thus profiting by the act of Dimick, since by that act it must have acquired some right against the defendant's property that it did not possess before; or, to state it in another way, the plaintiff's claim is and must be that by the act of Dimick it gained the right to demand costs against this property, and the defendant lost the right to object to that demand. When the judgment in this case is carefully analyzed, it virtually declares that, during the two years that the arbitration was pending, the defendant's property was pledged to pay an award, since that is the only purpose expressed in the writing; but at the end of that period, by Dimick's act of revocation, it became pledged for something else,—that is to say, for the plaintiff's costs and expenses, although the plaintiff agreed to bear them itself, and the defendant who owned the pledge never gave its consent in any form that it should be devoted to any such purpose. When the terms of the instrument under which the defendant's property was deposited are placed in contrast with the provisions of the judgment, it will be difficult to resist the conclusion that the court must have made for the parties a new and different contract.

(1) By the terms of the instrument, there was no obligation upon the defendant to deposit its property in pledge for any purpose, but it volunteered to make the deposit for a particular purpose only, and that was to pay any award made against Dimick. There was no award made, and it is said that, at the end of two years, Dimick rendered it impossible by revoking the arbitration. The decision therefor is that the defendant's property pledged to pay an award which was never made is forfeited to the plaintiff for another purpose, namely, to pay the costs of the arbitration. But it is said that the plaintiff lost the right to procure an award, and should be compensated for that loss. The answer to that is that the loss of a prospective award is not, since the statute, a legitimate element in the estimation of damages for the breach of an agreement to arbitrate.

(2) Not only were these costs by the terms of the agreement to be excluded from the

award, but the plaintiff stipulated to bear and pay them itself. The courts have discharged the plaintiff from the obligation of the agreement to pay its own costs, by ordering them to be paid out of the defendant's property.

(3) The most favorable award that the plaintiff could possibly obtain against Dimick was secured by the pledge of the 500 shares of stock, and nothing more. The claims that it had against Dimick, when reduced to the form of an award, were to be paid out of that as far as it would go; but, under the judgment, the plaintiff, without any award whatever, gets the stock or its proceeds, not to pay the claims, but to pay the costs of an arbitration, frustrated by the act of Dimick; and it has the judgments upon the claims and costs besides, or the money collected under them.

No review of this case would be fair or just that does not take careful note of the grounds upon which these conclusions rest, and the reasoning process from which they have been deduced. It has been often said, upon high authority, that law was the perfection of human reason, and that whatever is contrary to reason is generally contrary to law. If, therefore, it can be shown by any fair reasoning process that the defendant's property has been forfeited to the plaintiff by the act or default of Dimick, then any hasty views or impressions concerning the propositions above stated must at once disappear. It is claimed that these conclusions all rest upon sound reason and well-established legal principles.

1. In the first place, it is said that the judgment rests well upon a statute; that is, upon section 2384 of the Code. The section provides that, where a party revokes an arbitration, any other party to the submission may maintain an action against him and his sureties upon the agreement, or any instrument collateral thereto, to recover the costs and damages incurred in preparing for the arbitration. Inasmuch as the defendant owning the stock in question did not revoke the arbitration, and was not surety for Dimick, who did, and since there is not any instrument collateral to the agreement of submission, it is very difficult to perceive how this statute can have any application to the case. Dimick was the only one who revoked, but he gave no sureties or collateral instrument. The plaintiff can doubtless proceed against him for breach of his agreement, and then the statute measures the damages. It is admitted on all sides that Dimick or his estate is liable. But the fact that one who broke his agreement is liable in damages for the breach does not prove that another, who kept the agreement to the letter, is also liable, or that his property can be taken to pay the costs preceding the revocation. It is quite impossible to say from the various opinions in the case how much or how little of a part this statute is sup-

posed to play in the case. None of the learned judges who have discussed the questions have been willing to rest the case upon it, while it is equally apparent that none of them have felt entirely safe without it. But it is quite obvious that it can give the plaintiff no aid. If the stock was not pledged for the damages arising from Dimick's revocation, then the statute cannot and does not enlarge or change the purpose of the pledge. On the other hand, if it was pledged for that purpose by the agreement, then the plaintiff needs no statute, but may stand upon the instrument itself. The theory of the action is that the plaintiff has a lien upon the stock. Of course, it never got any lien except such as arises from the terms of the agreement. That agreement might confer a lien for an award, without costs, when made, but what the plaintiff now claims is a lien for costs alone, without any award whatever. Whatever lien the plaintiff had, attached immediately on the execution and delivery of the agreement; and the purpose of the pledge was specific and definite. The lien now claimed is one arising from the act of Dimick, committed two years afterwards, and which clearly was not within the contemplation of any of the parties. When and how a lien to pay an award without any costs was transmuted into a lien to pay costs alone, as damages for the act of Dimick, is a problem in the case that no one has yet attempted to solve. This is the critical point in the discussion, and, when we reach it, mere assertion and generalization will not answer. We must stop to inquire just how the plaintiff has acquired a lien on this property for the damages arising from Dimick's act in defeating an arbitration that might or might not result in an award against him. No man can get a lien upon or an interest in his neighbor's property except through some contract. Did the defendant ever agree to charge this property with the costs incurred by the plaintiff in the arbitration? If so, how and in what language? When the defendant bound the plaintiff to bear these very costs, and excluded them entirely as an element in the controversy, did it intend or contemplate any such thing as making them a charge on its own property? When the plaintiff covenanted to bear these costs itself, did it then intend or contemplate any such thing as their collection out of the defendant's property? These questions admit of but one answer, and that must prove that the judgment in this case has sought to impress a lien upon the property that the parties never created or intended to create. Obviously, the plaintiff got no lien from any agreement of the defendant, express or implied. It got no lien through Dimick, since he never owned it, or had it in his possession or under his control, or even made the deposit. There is no legal privity or connection of any kind between Dimick's act of revocation and the defend-

ant, or the property in question; and so it seems to me that the plaintiff has no lien at all.

The only object of a bond in a submission to arbitration is to secure some one against damages arising from the exercise of the right of revocation, and there can now be no damages but the costs and expenses incurred. In all such cases there is, of course, a privity of contract between the sureties and the injured party. But here we have a wholly different situation, since the parties intended to make, and supposed they had made, an irrevocable agreement of submission, in which damages would be impossible; and then they proceeded to covenant with each other that the costs—now the only element that can constitute damages—should be eliminated from the submission entirely, and each party should bear and pay its own costs, and, consequently, that neither party should claim damages of the other in case they were mistaken as to the irrevocable character of the contract. It is plain, therefore, that the lien for costs and expenses as damages which the plaintiff claims upon the property in question does not and cannot arise from any contract between the parties. It is a purely artificial development by reasoning processes upon principles derived from what are supposed to be analogous cases, but which really have no application to the special and peculiar agreement under which the defendant pledged its property. When it made the pledge for a single specified purpose, the appropriation of it to another and different purpose is a plain violation of its legal rights.

2. In the opinion of my learned associate now before us it is stated that the plaintiff's stipulation to pay its own costs did not contemplate a revocation of the arbitration, and, since that unexpected event happened, the stipulation is no longer in the plaintiff's way. That is a very candid admission that the stock in question is to be devoted by the judgment to a purpose not within the intention or contemplation of the parties when they made the agreement. It reveals the fundamental error that has pervaded the case from the beginning. It is perfectly true that the contingency of revocation was not contemplated. The parties were pledged and became bound hand and foot against the happening of any such event, and not until this court held that the binding was of no avail did any one attempt to give to the agreement a construction which the parties never intended that it should have. The construction now is that the defendant pledged its property to secure a claim by the plaintiff for damages arising from the act of Dimick in revoking the arbitration,—something that was not within their intention at all. Of course, if that act was not within the contemplation of the plaintiff when it agreed to pay its own costs, neither was it within the contemplation of the defendant

when it pledged its property to pay the award. While the intention of the parties was, of course, the same, yet the decision in the case discharges the plaintiff from its stipulation as to costs, which now mean damages, and at the same time changes and enlarges that of the defendant in regard to the purpose for which it made the pledge, by imposing upon its property a lien for a purpose never contemplated.

3. But it is said that the defendant's stock is surety for Dimick, and can be proceeded against in rem upon breach by him of his agreement. There is nothing whatever in the agreement or the transaction that creates any relations of suretyship for Dimick. There is no legal privity between them, such as must always exist between principal and surety. The defendant voluntarily deposited the stock for a specific purpose, and that was to pay an award when made. When that event happened, the plaintiff could appropriate the stock for that purpose, without any regard to Dimick, and as upon an original promise and pledge by the defendant. But, even if the property stood as surety to pay the award when made, then, surely, the owner may protect it by invoking all the rules of law applicable to the liability of sureties. The surety cannot be held beyond the very terms of his agreement, since it is *strictissimi juris*. His undertaking cannot be enlarged by construction or implication, and, when it is sought to make him answer for the act or default of another, it is sufficient for him to show that he has not expressly agreed to be answerable for such act or default. *Page v. Krekey*, 137 N. Y. 307, 33 N. E. 311; *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669. The plaintiff can point to no agreement by which this property was to be devoted to the payment of damages arising from Dimick's act, but, on the contrary, it is conceded that no such purpose was in contemplation when the agreement was executed.

4. It is asserted that very ancient and some modern authorities sustain this judgment. The oldest case relied on is *Vynior's Case*, 8 Coke, 81b. That contains all that any of the others contains, and is quite as favorable to the plaintiff as any of them. All that case or any of the others holds that has any application to this case is that an agreement to perform an award is broken by a revocation of the arbitration. No one, I think, will question that. The cases are good authority against Dimick, the only one who committed the breach. They were all actions against the party who violated his covenant, and not, as in this case, against an innocent party that has kept it. None of them support or give any color of support to the proposition upon which this judgment rests. The right to maintain an action against the party guilty of a breach of his agreement to arbitrate, and who has rendered an award impossible by revocation, or

against his sureties in legal privity with him, upon written instruments, should not be confounded with the right which the plaintiff asserts in this case. That is nothing less than the right to maintain an action against one who has never revoked, and who is not a surety, or in legal privity with another who did revoke, to appropriate property voluntarily pledged only to pay an award, under an agreement which excludes the right to damages in the form of costs, and casts that burden on the party who complains. Moreover, the decisions in these cases are supported by an element of right and justice conspicuously absent in this case, since it is plain that in all of them the plaintiff lost by the revocation the right to collect his costs by including them in the award, whereas in this case the plaintiff lost no such right, it having been excluded by its own agreement. It is perfectly plain that, in the special and peculiar agreement now under consideration, the parties undertook to protect the property in question from all consequences of a revocation by Dimick. It was for that purpose and to that end that the pledge was restricted to the payment of an award when made; that all parties renounced the right to revoke; that the right to costs, and consequently to damages, was expressly excluded, and the burden of paying its own costs imposed upon the plaintiff. There is but one ground, as it seems to me, upon which this judgment can rest, and that is that it was legally impossible for the defendant, by any stipulation, or by the use of any form of words, to confine the pledge to the payment of an award, or to protect the property from a claim of damages arising out of the conduct of Dimick. If that proposition is not refuted by the bare statement of it, then it is quite evident that no argument, however conclusive, and no reasoning, however persuasive, would avail. I think that the plaintiff has not shown that it has any claim or lien upon the property which is the subject of this action, and that the judgment should be reversed.

All concur with VANN, J., for affirmance, except O'BRIEN, J., who reads for reversal, and PARKER, C. J., not sitting. Judgment affirmed, with costs.

(158 N. Y. 73)

LAIDLAW v. SAGE.

(Court of Appeals of New York. Jan. 10, 1899.)

DYNAMITE EXPLOSION—WRONGFUL ACT—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE—EVIDENCE—WEALTH OF DEFENDANT—COURT OF APPEALS—JURISDICTION.

1. The burden of showing that a judgment of affirmance of the appellate division of the supreme court was unanimous, within Const. art. 6, § 9, and Code Civ. Proc. § 191 (providing that no unanimous decision of the appellate division that there is evidence supporting or tending to sustain a verdict not directed shall be reviewed

by the court of appeals), is on respondent, since Code Civ. Proc. § 190, confers in general terms the right to appeal from a final judgment of the appellate division to the court of appeals, and section 1337 (providing that, where the justices of the appellate division are divided as to whether there is evidence to sustain a finding or verdict, a question for review is presented) is but another way of stating section 191, and in no way relieves respondent from his burden.

2. In an action for personal injuries alleged to have been caused by defendant's placing plaintiff between himself and a dynamite explosion, defendant testified that he did not touch plaintiff, or interfere in any way with his person, which was corroborated by one unbiased witness, and, in some of the details, by other witnesses. Plaintiff's evidence, which was uncorroborated, was that defendant put his hands on plaintiff's left arm and shoulder, and very gently moved him some 18 inches to the left, without his "being conscious" of the use of any force in moving him. Plaintiff's memory was impaired by his injury to such an extent that he was unable to remember from day to day or from hour to hour what he was told to do, and such condition of mind continued up to and through the trial. Missiles were found in defendant's body in front and near the median line, which could not have reached him if plaintiff was in front of him, especially if the explosion followed two straight lines, according to plaintiff's theory. *Held*, that the evidence was insufficient to sustain a verdict for plaintiff.

3. Plaintiff sued for personal injuries alleged to have been caused by defendant's placing plaintiff between himself and a dynamite explosion. At the most, plaintiff was moved by defendant some 18 inches. Plaintiff's contention was that there were two well-defined lines of explosion, and that he was drawn into one of them; but there was no evidence that the lines of explosion did not include the place where plaintiff originally stood, or that a wave of explosion did not pass over that portion of the room, which was as destructive as that passing in any other direction. The evidence as to the existence of two lines of explosion was unsatisfactory. As a matter of fact, the explosion swept with terrific force over all of defendant's rooms, destroying or seriously injuring every person or thing with which it came in contact. *Held*, as a matter of law, that the evidence does not sustain the burden of showing that defendant's act caused substantial injury to plaintiff.

4. A dynamite explosion occurred in defendant's rooms, without his being in any way responsible therefor. The rooms, and everything and everybody therein, were destroyed or seriously injured. Plaintiff, who was in defendant's rooms at the time of the explosion, was pushed some 18 inches to one side by defendant, and seriously injured in the explosion. *Held*, that defendant's act was not the proximate cause.

5. Evidence that defendant had stated something about a protection he had from the explosion, without showing whether by physical matter, Providence, or otherwise, is too uncertain to be admissible in an action to recover for injuries alleged to have been caused by defendant's placing plaintiff between himself and a dynamite explosion.

6. The fact of defendant's want of sympathy or of attention to plaintiff after he was injured by the alleged wrongful act of defendant is inadmissible.

7. Evidence of the amount of property and other details as to defendant's business affairs is inadmissible in an action for personal injuries.

Appeal from supreme court, appellate division, First department.

Action by William R. Laidlaw, Jr., against Russell Sage. From a judgment of the appellate division of the general term (37 N. Y.

Supp. 770) affirming a judgment for plaintiff, and, from an order affirming an order denying a motion for a new trial, defendant appeals. *Reversed*.

The judgment of affirmance was entered March 12, 1896, and contained no provision showing that the appellate division was unanimous in awarding it. Subsequently to its entry, the plaintiff moved for a resettlement of the order of affirmance, so that it should appear in the order that the decision of that court was unanimous; but that motion was denied.

Edward C. James, for appellant. Joseph H. Choate, for respondent.

MARTIN, J. This action was commenced May 26, 1892. Its purpose was to recover for personal injuries sustained by the plaintiff in consequence of an explosion which occurred in the defendant's office, in the city of New York, on the 4th day of December, 1891. There is no allegation in the complaint, nor was there any proof upon the trial, which even tended to show that the defendant was in any way responsible for the explosion which was the cause of the plaintiff's injury. The evidence disclosed that a stranger, whose name was subsequently found to be Norcross, called at the defendant's office December 4, 1891, at about 10 minutes past 12 o'clock, said he desired to see the defendant in relation to some railroad bonds, and had a letter of introduction from Mr. Rockefeller. When asked to send it to the defendant, he stated that he preferred to present it in person, and that he only wanted to say two or three words. Upon receiving this message, the defendant stepped from his private office into the anteroom, went to the window, and looked into the lobby, where he saw Norcross sitting upon a settee. At that time the defendant met the plaintiff, who said he had a message from Mr. Bloodgood, and the defendant thereupon turned the knob of the door, and the plaintiff passed into the anteroom of the office. The former then spoke to Norcross, who instantly arose, took his carpet bag in his left hand, and, approaching him, handed him a letter which was supposed to be from Mr. Rockefeller, which he took, opened, and read. It was a typewritten communication, the substance of which was: "The bag I hold in my hand contains ten pounds of dynamite. If I drop this bag on the floor, the dynamite will explode, and destroy this building in ruins, and kill every human being in the building. I demand \$1,200,000, or I will drop the bag. Will you give it? Yes or no?" The defendant read the letter twice, folded it, handed it back to Norcross, and then commenced parleying with him, stating that he had an engagement with two gentlemen, that he was short of time, and, if it was going to take much time, he wanted him to come later in the day. Norcross, after a second, said

"Then, do I understand you to refuse my offer?" to which the defendant replied, "Oh, no, I don't refuse your offer. I have an appointment with two gentlemen. I think I can get through with them in about two minutes, and then I will see you." Norcross held the bag at the end of his fingers, walked backward towards the door through which he came, and, when he reached the threshold, he stopped, and looked at the defendant. The defendant stepped back a little towards the desk that was in the anteroom, while Norcross was going the other way. As he reached the threshold, he looked at the defendant, and said, "I rather infer from your answers that you refuse my offer," to which the defendant answered, "Is there anything in my appearance that would cause you to think that I would not do as I say I would?" and repeated that he had an appointment with two gentlemen, and that he could get through in about two minutes, and would then see him. Norcross then gave one look, stepped to one side, when the flash came, and it was all over in two seconds. In backing down the room, the defendant came to the desk, and was partially sitting upon the edge of it when the explosion occurred. After the explosion, it was found that everything in the office was wrecked. The partitions, floors, joists, plaster, desks, tables, chairs, and other furniture were destroyed, the window sashes and window frames were blown out, even in the private office. Norcross was blown to pieces, and Norton, one of the clerks in the defendant's office, was hurled through the window to the street below, where he met his death. A steel safe which was locked and stood in an adjoining room was blown open, its contents scattered upon the floor with other debris, and every person who was in the room was either killed or seriously injured. Indeed, the explosion was so violent, so general, and so destructive in its effect that it seems little less than miraculous that any person who was present should have escaped with his life. This portion of the transaction is undisputed in any essential or material particular.

The plaintiff claims that, upon entering the office, he passed the defendant and Norcross, who were conversing in the lobby near the door of the anteroom; that he entered the anteroom, which was about 8 by 16 feet, went to a table or desk near the center of the room, where he stood waiting for the defendant, with his back to the door, looking towards Mr. Norton, who stood by the ticker at the window, looking out on Rector street; that, while he stood there, he once or twice glanced over his shoulder, saw that the defendant was inside the anteroom door, and that Norcross was just outside; that he heard nothing said, said nothing himself, and saw no paper in the defendant's hand; that he turned, and looked towards the window, with his back to the defendant, when the latter suddenly came in range of his vis-

ion on his left side, came over, and placed his hand on his shoulder; that afterwards he dropped his left hand, and took the plaintiff's right hand in his, and gently moved him over towards the direction in which he stood, which was from the plaintiff's right to his left, and that he gently moved him about the width of his body, about 15 inches, or probably more. He then testified: "I changed my position towards Mr. Sage about fifteen inches. I changed my position in his general direction, but in front of us. I still kept my position as far as Rector street was concerned and the door of the entry. I had my back to the door all the time. I was in a line between Mr. Sage and Mr. Norcross. * * * Mr. Sage rested one thigh on the corner of this table, and then said over my shoulder, to this stranger, 'If I trust you, why can you not trust me?' or, 'If you cannot trust me, I cannot trust you,' or words in that general line and to that effect, and then the explosion immediately followed." Upon cross-examination he testified: "I saw him [Mr. Sage] come within the range of my vision to my left. I can safely say that without looking at me he put his hand on my left shoulder, put his left hand on my left arm, and took my left hand in his left hand. It was not quite at that moment that he sat down on the corner of the desk. He did not let go of my left hand with his left hand after taking my left hand. He did not take my left hand in both hands at that moment. He did a moment later, and then he sat down on the corner of the desk with my left hand in both his hands. My hand was not held specially tight. It was covered by both his hands. At that time my position was changed from where I stood when he put his left hand on my shoulder. I was conscious at the time of force being used upon me sufficient to move me. I was conscious of force being used upon me to a certain extent. In a sense it was imperceptible, and in a sense it was not. I spoke of it as being a very gentle movement. I don't think I said it was so gentle as to be imperceptible. I didn't say that. I said it was gentle. It was not violent. I don't think I said it was imperceptible. The whole change of my position was about the width of my body; should think eighteen inches towards my left." He also gave evidence to the effect that he had previously testified that the defendant did not use any force upon him, and he never thought of such a thing as that until after the explosion; that he did not think he was conscious that the defendant was pulling him at the time, and he could not say that he was exactly conscious of any force of Mr. Sage's hands in moving him; that he was moved easily and without resistance; that he moved voluntarily, because he offered no resistance; that he did not think he was conscious of being pulled at the time; and that that testimony was true.

As to this part of the transaction, the defendant testified that, when he reached the

corner of the table, the plaintiff was about four feet from him towards the partition, and that they were in that position when the explosion occurred. He denied that he ever had his hands upon the person of the plaintiff in any manner whatever until after the explosion; testified that at the time the plaintiff was not between him and Norcross for an instant, and that he did not at any time intend or design interposing the body of the plaintiff between himself and Norcross; that he did not put himself behind the plaintiff, and that no portion of his body was behind the plaintiff; that he did not touch him at all, and made no such statement to Norcross as was testified to by the plaintiff; that, after the explosion, they were found thrown together, and that he lifted the plaintiff, which was the first time he had his hand upon him. The evidence of the defendant was corroborated in most of its essential particulars by the testimony of Frank Robertson, who was in the office at the time. There was also other proof which tended to corroborate him, and which was in conflict with the theory and testimony of the plaintiff.

This case has been tried four times, and passed upon three times by the intermediate appellate tribunal. The history of this litigation has shown an evolution in the law held to be applicable to it which is somewhat unusual. Upon the first trial, the complaint was dismissed by the trial court upon the ground that the plaintiff had failed to establish any proper connection between the act of the defendant and the independent act of Norcross which caused the injury. In other words, it held that, under the principles of law applicable to the subject, the acts of the defendant were not shown to be the proximate cause of the plaintiff's injury. That judgment was reversed by the general term of the supreme court, which in effect held that no question of proximate cause was involved; that if the defendant put his hand upon or touched the plaintiff, and caused him to change his position with an intent to shield himself, he was guilty of a wrongful act towards him; that, if the plaintiff was injured by the happening of the catastrophe, the burden of proof was upon the defendant to establish the fact that his wrongful act did not in the slightest degree contribute to any part of the injury which the plaintiff sustained by reason of the explosion; and that it was not necessary for the plaintiff to show that he would not have been so severely injured if he had been left standing in his original position. Upon the second trial the plaintiff had a verdict. The court seems to have charged the jury in accordance with the principles laid down by the general term upon the first appeal. Upon that trial, however, the defendant's counsel requested the court to charge: "If the jury find from the evidence that the defendant did take the plaintiff, and use him as a shield, but that this action was involuntary, or such as would instinctively result from a sudden and

irresistible impulse in the presence of a terrible danger, he is not liable to the plaintiff for the consequences of it." That request the court refused, but added: "I will charge it; that the essence of the liability must be a voluntary act." Upon the second appeal, that question having been thus sharply presented, the general term again reversed the judgment, upon the ground that the court erred in refusing to charge that request. Upon the third trial the jury disagreed. Upon the last trial, which is now under review, the trial court disregarded the former decisions of the general term, and charged that the measure of the plaintiff's damages was the difference between those he actually sustained, and such as he would have received if he had not been interfered with, and that the burden of proving such damages was upon the plaintiff. It also charged that if the defendant involuntarily put his hands upon the plaintiff in a moment of great excitement, confronted with immediate and serious danger, without meaning to interfere with him, he would not be responsible. But it submitted the question whether the act of the defendant was deliberate and intentional to the jury, calling its attention to the fact that the defendant testified that "he was in perfect possession of his senses, recollected everything that was done, that everything he did there was done intentionally," and then charged that if, under those circumstances, he voluntarily put out his hand, and touched the plaintiff, a cause of action was made out, and the plaintiff was entitled to a verdict. In this portion of its charge, the court assumed, and stated to the jury, that the defendant testified that everything he did was done intentionally, as proof of his having intentionally interfered with the person of the plaintiff. The propriety of this portion of the charge will be subsequently considered.

On the trial, George Ballard was called as a witness, and testified to having seen some one in O'Connell's drug store whom he believed to be the defendant; that some one stepped up to him, and asked if he was injured very much; that he answered that he was not; that he understood him to say something about being protected, or a protection that he had had from the explosion. This evidence was objected to; the objection was overruled; and the defendant excepted. At the conclusion of the plaintiff's case, and again when the entire evidence was closed, the defendant moved that this testimony be stricken out. He also asked that the jury be instructed to disregard it. These motions were denied, and the defendant excepted. When the plaintiff's evidence was closed, the defendant moved for a nonsuit. Again, at the close of all the testimony, he moved for a nonsuit, that the plaintiff's complaint be dismissed, and that a verdict be directed in his favor upon sufficient grounds; so that the exceptions of the defendant to the denial of those motions fully raise all the questions

which are involved or have been discussed upon this appeal. At the conclusion of the charge, the defendant excepted to portions of it, requested the court to charge certain propositions which were refused, and by exceptions to those rulings again raised the questions involved. Therefore, in the consideration of the legal questions presented, it must be assumed that they were properly raised, not only by a motion to nonsuit and to dismiss the complaint, but also by motions to direct a verdict for the defendant, and by exceptions to the charge and the refusal of the court to charge as requested.

Upon an appeal from the judgment entered upon the verdict rendered at the last trial, the appellate division obviously intended to follow the previous decisions of the general term so far as they related to the plaintiff's right of recovery, to the end that the question of the liability of the defendant, under the facts and circumstances proved, might be properly presented to this court, and did not assume the responsibility of passing upon the correctness of the previous decisions in that respect. It, however, discussed many of the questions raised by the defendant's counsel, and, among other things, attempted to show that there was sufficient evidence to justify a jury in finding that there were two ascertained lines of direction which the explosion followed, and that one of them was in the direction where the plaintiff claims that he and the defendant stood. But when we refer to the evidence bearing upon that question, and which is said to justify that conclusion, we are unable to discover its existence in the record. Indeed, in the discussion following, which involved the improbability of the plaintiff's theory that the defendant drew him in front of himself as a shield, when examined in the light of the injuries to the defendant and their location upon his person, the learned judge delivering the opinion advanced as an argument that it was not impossible that, "in the titanic whirlwind of the explosion," those injuries might have occurred. He said that there was nothing more extraordinary in that incident than in the circumstance that the force of the explosion blew open a large steel safe, and scattered its contents about the room, adding: "No one can account for the eccentricities of such an occurrence. If there were known and provable unvarying incidents of such phenomenal events, some ascertained physical law acting uniformly and equally on all such occasions, we might be able to say what was or what was not impossible within the operation of such law, but we have no such guides or criteria." We think the last suggestions made by the learned judge are entitled to much more weight, and are much more probable, than the theory which precedes them, and with which the latter are utterly inconsistent. Indeed, the whole discussion seems to be based upon the idea that the defendant was bound to establish the impossibility of the theory upon which

the plaintiff relied; and in its argument that court did not seem to consider that any burden rested upon the plaintiff to prove his theory with any certainty, notwithstanding the lack of substantial proof to show its correctness or existence. That opinion can hardly be read without reaching the conclusion that the learned judge was wrestling with inconsistencies impossible to harmonize, and yet that the purpose of the court was to place the case in a position where the questions of law relating to the right of the plaintiff to a recovery in this action should be presented to, and determined by, the court of appeals.

There are certain questions of law involved, which were discussed upon the argument, that we are called upon to decide. We have deemed it necessary to state the facts and history of this protracted litigation somewhat fully, to the end that the legal questions may be plainly presented and clearly understood in their connection with them.

The first question of law presented relates to our jurisdiction to hear and determine this appeal. The respondent contends that, inasmuch as the record does not show affirmatively that the justices of the appellate division were divided upon the question as to whether there was evidence supporting or tending to sustain the verdict, that question, at least, cannot be considered by this court, and relies upon section 1337 of the Code of Civil Procedure as sustaining his position. In examining the question of the appealability of this case, and the questions which may be determined upon this appeal, it becomes necessary to consider the provisions of the constitution and statutes, as well as the decisions of this court relating to the subject. Section 9 of article 6 of the constitution declares: "No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals." After the adoption of that provision, the legislature amended section 190 of the Code of Civil Procedure so as to provide: "From and after the last day of December, eighteen hundred and ninety-five, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the appellate division of the supreme court in either of the following cases and no others: (1) Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them." The second subdivision of that section provides for the certification by the appellate division of questions of law for determination by

the court of appeals. Then follows section 191, which contains certain limitations, exceptions, and conditions to the provisions of section 190; and in that section is found a provision in which the same language is employed as in the provision of the constitution above cited. It also provides that no appeal shall be taken from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, when the decision of the appellate division is unanimous, unless that court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or unless, in case of its refusal to so certify, an appeal is allowed by a judge of the court of appeals. It likewise provides that the jurisdiction of the court is limited to the review of questions of law.

Here, then, we find that both the constitution and the statutes provide that no unanimous decision of the appellate division that there is evidence supporting or tending to sustain a finding or verdict not directed shall be reviewed by this court. But the provisions of section 190 are general, and declare that appeals may be taken as of right to this court from judgments or orders finally determining actions or special proceedings. This confers upon a party the absolute right to appeal in those cases, unless it falls within some of the limitations contained in the subsequent section. The question here presented is how or in what manner the fact that the case falls within some limitation, if it does, is to be made to appear. Inasmuch as section 190 in general terms confers the right of appeal, the question is, if it is limited by some other provision of the statute, upon whom is the burden of showing that fact? It would seem that, inasmuch as the appellant in this case was given the right of appeal in express terms, he might rely upon that general provision, and if it fell within any of the limitations of the statute, and the respondent claimed that the appeal was not well taken, the burden of showing that fact rested upon him. In *Kaplan v. Biscuit Co.*, 151 N. Y. 171, 45 N. E. 353, this court held that the burden of showing that a judgment of affirmance in an action for a personal injury was by a unanimous decision of the appellate division rested upon the party asserting it, and that, in order to deprive the court of appeals of the power to review the case under section 191 of the Code of Civil Procedure, the fact should be established by the party claiming it, either by the judgment or by a certificate of the court appearing in the record. It is true that question arose under the amendment of section 191, made in 1896, and not under subdivision 4. Nor were the provisions of section 1337 passed upon in determining that case. Still, we think the principle of that decision is applicable here; that we should hold now, as we held

there, that the judgment is reviewable in this court, unless the affirmance was by the unanimous decision of the appellate division; and that the burden of showing that fact rests upon the party asserting it, and should appear in the record. We think that section 1337 does not in any way interfere with the principle of the decision in that case, but that the provision that, where the justices of the appellate division from which the appeal is taken are divided as to whether there is evidence supporting or tending to sustain a finding or verdict not directed by the court, a question for review is presented, is but another way of stating what is contained in subdivision 4 of section 191 of the Code, and in no way relieves the party who asserts it from the burden of establishing the unanimity of the decision. Hence we are of the opinion that the contention of the respondent in this respect cannot be sustained, and that the question whether there is evidence supporting or tending to sustain the verdict may be reviewed upon this appeal. We think we should so hold, especially when we consider the fact that the appellate division refused to certify that its decision was unanimous, and has so plainly indicated a desire and purpose to have the questions involved decided by this court. Manifestly, the amendment to section 191, passed in 1896, limiting appeals in cases of personal injury, has no application, because the judgment appealed from was rendered March 12, 1896, before the passage of that act. *Croveno v. Railroad Co.*, 150 N. Y. 225, 44 N. E. 968.

As bearing upon the contention of the respondent as to the appealability of this case, it may be properly added that here every point or question upon which the appellant relies was raised by an exception to the denial of a proper motion to direct a verdict for the defendant, by an exception to the charge of the court, to its refusal to charge as requested, or by some other ruling upon the trial to which a proper exception was taken. Therefore, in its further examination, all the questions of law which are presented by the appellant must be regarded as properly before us for consideration.

The primary question which lies at the foundation of the respondent's right of recovery is whether there was sufficient evidence to justify the court in refusing to direct a verdict for the defendant, or in submitting to the jury the question of the defendant's liability. This general question seems to depend for its solution upon several subordinate ones. These questions are: First. Was there sufficient evidence that the defendant performed any act or was guilty of any omission which rendered him even technically liable to the plaintiff? Second. If so, was the proof sufficient to justify the court in submitting to the jury the question of substantial damages. And, third, were the al-

leged acts of the defendant the proximate cause of the plaintiff's injury? A consideration of these questions in the order in which they are stated seems necessary to a proper determination of the original one.

1. That, at the time of the occurrence which was the subject of this action, the defendant suddenly and unexpectedly found himself confronted by a terrible and impending danger, which would naturally, if not necessarily, terrify and appall the most intrepid, is shown by the undisputed evidence. If, with this awful peril before him, he maintained any great degree of self-control, it indicated a strength of nerve and personal bravery quite rare, indeed. That the duties and responsibilities of a person confronted with such a danger are different and unlike those which follow his actions in performing the ordinary duties of life under other conditions is a well-established principle of law. The rule applicable to such a condition is stated in *Moak's Underhill on Torts* (page 14), as follows: "The law presumes that an act or omission done or neglected under the influence of pressing danger was done or neglected involuntarily." It is there said that this rule seems to be founded upon the maxim that self-preservation is the first law of nature, and that, where it is a question whether one of two men shall suffer, each is justified in doing the best he can for himself. This principle of pressing danger, and an act or omission in its presence, was discussed in the *Squib Case* (*Scott v. Shepherd*, 2 W. Bl. 894), and in the *Wine Case* (*Vandenburgh v. Truax*, 4 Denio, 464). That principle has been many times affirmed by the decisions of the courts of this state as well as others. Indeed, the trial court recognized this doctrine in its charge, but submitted to the jury the question whether the act of the defendant was involuntary, and induced by impending danger, adding that the testimony of the defendant that everything he did, he did intentionally, was sufficient to justify it in finding that he voluntarily moved the plaintiff in the manner claimed by him. But, when we examine the defendant's evidence, we find he testified that he never had his hands on the person of the plaintiff in any manner whatever until after the explosion, and that he did not at any time have any intent or design of interposing the body of the plaintiff between himself and the stranger. The testimony of the defendant, to which the court referred in its charge, seems to have been substantially that he was as cool and collected as any man could well be with the intimation made by Norcross; that he exercised his best judgment under the circumstances; that he did nothing unconsciously, spontaneously, or without deliberation, but did the best he could, and exercised the best judgment he could, to avoid any accident; that he did nothing by impulse; and that what he did he did as deliberately as he could under the circumstances. This evi-

dence seems to fall short of justifying the statement of the court that he testified he was in perfect possession of his senses, recollected everything that was done, and that everything he did there was intentional, as it very materially differed from and essentially modified the statement contained in the charge. The statement of the court as to the admission of the defendant can hardly be said to be a fair deduction from his evidence. Nor is the justice of eliminating from its statement to the jury the fact that the admissions he did make were accompanied by evidence that he in no way touched the plaintiff, and had no intention of doing so, quite appreciated. If the court desired to use the admission of the defendant as evidence of such a fact, the evidence should have been correctly stated, and the attention of the jury called to the entire admission, and not to a part alone. Here, as where there is an introduction of any other conversation or admission by a party, the remainder which tends to qualify or explain the portion relied upon should be considered as a part of it, especially where it is a qualification of the other, and rebuts or destroys the inference to be drawn or the use to be made of the portion put in evidence or relied upon. While it is doubtless true that a portion of the testimony of a witness may be credited by a jury, and a portion discredited, still, when a part of the evidence is modified or qualified by another portion, it is far from clear that one portion may be rejected, and the other given credit. But, be that as it may, it is extremely difficult, upon a consideration of all the evidence in the record relating to this subject, to see how a jury was justified in finding that the defendant voluntarily interfered with the person of the plaintiff.

The only witness whose testimony is relied upon to show any interference with the plaintiff by the defendant was the plaintiff himself. He not only had all the interest of a party to the action, but the undisputed proof disclosed that his memory had been very seriously impaired, and to such an extent that he was unable to remember from day to day or hour to hour what he was told to do, and that this condition of his mind continued from the time of the accident until the last trial of this case. Upon the other hand, the defendant clearly and positively denied that he interfered with his person at all, and he is corroborated by at least one unblased witness upon that subject, and in many of the details of the transaction by the witnesses Osborne, James, and Hummel, whose evidence was in direct conflict with that given by the plaintiff. Moreover, when the testimony of the plaintiff is read, it is quite manifest that it does not clearly disclose any movement of his body, if any occurred, that was not his own voluntary act, uncontrolled by any force upon the part of the defendant. There were also certain physical facts established by the proof, and uncontradicted, which tend to show that the plaintiff's

theory that he was in front of the defendant was impossible. If, as is claimed by the plaintiff, the defendant employed his body as a shield, and it was between him and the place of the explosion, it is quite difficult to comprehend how the missiles which were found in the defendant's body in front, and near the median line could have reached him, especially if, as is the plaintiff's theory, the explosion followed two straight lines. Nor can we quite understand how, if, when the explosion occurred, the plaintiff's left hand was in both of the defendant's, resting upon the defendant's left thigh, the defendant's hands could have been so seriously injured and wounded by flying substances, as the proof shows they were. With this condition of the proof, it is quite difficult to say that there was any such evidence of the defendant's intentional interference with the plaintiff as would entitle him to recover in this action, or have the question submitted to a jury. The evidence which appears to be in conflict with the position of the defendant, to say the most, is nothing more than a mere scintilla, and was met, not only by the positive testimony of disinterested witnesses, but also by well-known and recognized physical facts, about which there is no conflict. Therefore it would seem that the plaintiff was not entitled to even nominal damages, and that it was the duty of the court to have directed a verdict for the defendant.

2. Was there sufficient evidence to justify the court in submitting to the jury the question of substantial damages? If, for the purpose of this discussion, it be admitted that the plaintiff was moved as testified to by him, and that the act of the defendant was voluntary and intentional, yet we are unable to find any sufficient evidence in the record to justify the court in submitting to the jury the question whether the plaintiff's injuries arose in consequence of the act of the defendant in moving him. The court in effect charged the jury that if the defendant interfered with the body of the plaintiff, and his injuries were inflicted because of a change in his position, then it might allow the plaintiff for the injuries which he sustained in consequence of the wounds which it found were caused by his change of position; and the jury was permitted to pass upon the question whether he sustained more or different injuries than he would if he had not been moved. The contention of the respondent is that the evidence disclosed that there were two straight and well-defined lines of explosion, and that it tended to show that the plaintiff was drawn into one of them. But we find no proof either that the lines of explosion claimed did not include the place where the plaintiff originally stood, or that a wave of explosion did not pass over that portion of the room, which was as forceful and destructive as that passing in any other direction.

The evidence relied upon by the plaintiff to show that there were these two defined lines

was the location of the wounds upon the body of the plaintiff and the testimony of the witness Reeves. When we examine the evidence bearing upon the character and location of the plaintiff's wounds, it falls far short of establishing any well-defined line of explosion. Nor do we think any such inference can be drawn from the situation as described by the plaintiff and other witnesses. And, when we examine the evidence of the witness Reeves, we find in it nothing to sustain the contention of the plaintiff. He testified that there were 35 to 40 joists or beams, which ran north and south, which were injured, and that the breakage ran through the joists in a northeasterly direction. He was then asked whether there were fractures in any other direction in the beams or joists from that hole, to which he answered that he had put in new beams on the Rector street side of the partition leading into Mr. Sage's office; that he put in about 28 or 30 new ones; and that the balance were not so badly fractured, so that they were reinforced without taking the old beams out. We find nothing in this evidence to indicate that there was any distinct line of explosion in any other direction than northeasterly. That the splitting of the joists, if it occurred, would naturally extend lengthwise of them, there can be little doubt. But the plaintiff's claim that there is anything in this evidence which shows a second distinct line of explosion within which he was drawn, even if he was moved as he testified, surely cannot be sustained. Consequently, there was nothing but the merest conjecture upon which the jury could base any finding that he was more severely injured by being moved. That he was bound to establish some wrongful act upon the part of the defendant, and that that act was the cause of the injury for which he sought to recover, there can be no doubt. Nor is there any doubt that the burden of proof upon both of those questions rested upon him. The courts below have so held, but, notwithstanding their view of the law, they have submitted those questions to the jury.

In *Baulee v. Railroad Co.*, 59 N. Y. 356, 366, Judge Allen said: "It is not enough to authorize the submission of a question, as one of fact, to a jury, that there is some evidence. A scintilla of evidence, or a mere surmise, * * * would not justify the judge in leaving the case to the jury." And in that case it was held that as, "at most, the jury could only conjecture that the defendant might have been wanting in the care and caution proper to be exercised in such a case. * * * the case was properly withheld from the jury." In *Pollock v. Pollock*, 71 N. Y. 137, 153, Folger, J., said: "Insufficient evidence is, in the eye of the law, no evidence;" and then cited the language of Maule, J., in *Jewell v. Parr*, 13 C. B. 916, where he said: "When we say that there is no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury that

the fact sought to be proved is established." Again, in *Bond v. Smith*, 113 N. Y. 378, 385, 21 N. E. 128, Earl, J., stated the duties of the court in considering such a question as follows: "We have no right to guess that he was free from fault. It was incumbent upon the plaintiff to show it by a preponderance of evidence. She furnished the jury with nothing from which they could infer the freedom of the intestate from fault. She simply furnished them food for speculation, and that will not do for the basis of a verdict. The law demands proof, and not mere surmises. The authorities are ample to show in such a case the plaintiff should have been nonsuited,"—citing *Cordell v. Railroad Co.*, 75 N. Y. 330; *Dubois v. City of Kingston*, 102 N. Y. 219, 6 N. E. 273. In *Pauley v. Lantern Co.*, 131 N. Y. 90, 98, 29 N. E. 999, which was an action for negligence by which it was claimed that the plaintiff's intestate lost his life, Judge Finch, in delivering the opinion of the court, said: "But the respondent and the general term insist that some other theory may be adopted, and, in order to do so, enter upon the realm of conjecture, and ask that a jury, in the utter absence of proof, may be allowed to guess that there was some negligence on the part of the defendant which might have tended to cause the death of the intestate. * * * What is claimed is that there is proof that some of the operatives fled to this escape, but could not use it on account of the blinds; and we are asked to permit a jury to guess or conjecture that Pauley was one of these, without any proof of the fact, and in the face of the evidence that no one who did use it or approach it saw him at all,"—and then adds: "We think the duty imposed by the statute was fairly and fully performed, and, even if it was not, that we are not to resort to conjecture, and permit a verdict to be based on bare possibilities alone. * * * A mere conjecture, built upon a bare possibility, will not suffice to transfer the money or property of one man to the possession and profit of another. As we said in *Bond v. Smith*, 113 N. Y. 378, 21 N. E. 128, food for speculation will not serve as the basis of a verdict." Again, in discussing this question in *Linkauf v. Lombard*, 137 N. Y. 417, 425, 33 N. E. 472, Judge Gray, writing for this court, declared: "To permit a jury to speculate and surmise upon a question of responsibility is to withdraw from the litigant a safeguard intended for the protection of his rights. He is entitled to the judgment of the court upon questions to which the character of the evidence admits of but one answer. No such possibilities of a failure of justice should be countenanced,"—and then quotes from the opinion of Justice Clifford in *Improvement Co. v. Munson*, 14 Wall. 442, the following: "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such

a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that, if there was what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule; that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof rests,"—and adds: "The rule should be regarded as settled, under all the authorities, as well by the decisions of the courts of this state as by those of England, that where there is no evidence upon an issue before the jury, or the weight of the evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit, or to direct the verdict, as the case may require." In the case of *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342, this court again asserted the doctrine so clearly stated in the *Linkauf Case*. In discussing that question in *Hudson v. Railroad Co.*, 145 N. Y. 408, 412, 40 N. E. 8, Haight, J., said: "But where the evidence, which appears to be in conflict, is nothing more than a mere scintilla, or where it is met by well-known and recognized scientific facts, about which there is no conflict, this court will still exercise jurisdiction to review and reverse if justice requires,"—citing *People v. Martin*, 142 N. Y. 352, 37 N. E. 117; *Hemmens v. Nelson* and *Linkauf v. Lombard*, *supra*. See, also, *Cadwell v. Arnheim*, 152 N. Y. 182, 46 N. E. 310; *Hannigan v. Railway Co.*, 157 N. Y. 244, 51 N. E. 992.

Thus, we see that this court has, in a long line of decisions, uniformly held that, to justify the submission to the jury of any issue, there must be sufficient proof to sustain the claim of the party upon whom the onus rests, and that mere conjecture, surmise, speculation, bare possibility, or a mere scintilla of evidence is not enough. When the principle of these cases is applied, it becomes obvious that the court was not justified in submitting to the jury the question whether the plaintiff suffered any substantial damages by reason of his having been moved in the manner claimed, even though it should find that the defendant moved him. No one can read the evidence in the record as to the nature, power, and effect of the explosion, and the results that followed, without reaching the conclusion that it utterly failed to show that the plaintiff was more seriously injured than he would have been if he had remained where he claims to have first stood. Indeed, we can find no proof sufficient to justify the conclusion that there was any place of safety, or comparative safety, in any of the rooms occupied by the defendant. The explosion swept with terrific force over them

all, destroying or seriously injuring every person or thing with which it came in contact. Under such circumstances, to permit a jury to guess or conjecture that the plaintiff's injuries were more serious or severe than they would have been if his position had not been changed, is, in the language of Judge Gray, "to withdraw from the litigant a safeguard intended for the protection of his rights." We think the court erred in not directing a verdict for the defendant, at least so far as substantial damages were concerned, upon the ground that there was no sufficient proof that the plaintiff sustained any injury in consequence of the alleged conduct of the defendant.

3. We are next brought to the consideration of the question whether the alleged acts of the defendant were the proximate cause of the plaintiff's injury. As has already been suggested, there is no allegation or proof which tends to show that the defendant was in any way responsible for the explosion, or that there was any connection whatever between the defendant's acts and the explosion which followed. Indeed, the counsel for the respondent frankly states in his brief: "It has never been claimed, either in the pleadings or in the argument, that Mr. Sage's liability can be predicated on the fact that any act of his caused or invited a catastrophe, or that he used defiant or injudicious language." Nor does the respondent claim that the defendant was in any way responsible, directly or indirectly, for the explosion itself. Therefore, if the explosion was the proximate cause of the plaintiff's injury, the defendant cannot be held responsible. While the learned general term stated that there was no question of proximate cause in this case, we are unable to indorse that statement, or to understand the basis for it. The doctrine of proximate cause is a fundamental rule of the law of damages, to the effect that damages are to be allowed in general only for the proximate consequences of the wrong, although sometimes the question of proximate cause is applied to consequential damages for the breach of a contract, as well as to damages for negligence or tort. That the principle of proximate cause is applicable in an action for tort seems to be established by all the authorities, and we find none holding a contrary doctrine. While there may be a degree of uncertainty as to the plain signification of the term "proximate cause," or rather in its application to various cases, still in this case there can be no question as to what was the proximate and immediate cause of the plaintiff's injury. Bishop, in his work on Noncontract Law (section 42), in discussing this question, after remarking as to the uncertainty with which the term "proximate cause" may have been used and applied, and after defining the terms "proximate" and "remote" cause, says: "If, after the cause in question has been in operation, some independent force comes in, and produces an injury not its natural or prob-

able effect, the author of the cause is not responsible." In *Shear. & R. Neg.* § 26, it is said: "The breach of duty upon which an action is brought must be not only the cause, but the proximate cause, of the damage to the plaintiff. * * * The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." Wharton thus discusses the question: "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter, as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured." *Whart. Neg.* § 134.

As has been said in an anonymous article in the *American Law Review*: "A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible. It is one which can be used as a term by which a proposition can be demonstrated: that is, one which can be reasoned from conclusively. A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words, a remote cause is a cause the connection between which and the effect is uncertain, vague, or indeterminate. It does not contain in itself the element of necessity between it and its effect. From the remote cause the effect does not necessarily flow. * * * This idea of necessity—the necessary connection between the cause and the effect—is the prime distinction between a proximate and a remote cause. The proximate cause being given, the effect must follow. But, although the existence of the remote cause is necessary for the existence of the effect (for, unless there has been a remote cause, there can be no effect), still the existence of the remote cause does not necessarily imply the existence of the effect. The remote cause being given, the effect may or may not follow." 4 *Am. Law Rev.* 201, 205. In *Marble v. City of Worcester*, 4 Gray, 396, Chief Justice Shaw said: "On account of the difficulty in unraveling a combination of causes, and of tracing each result, as a matter of fact, to its true, real, and efficient cause, the law has adopted the rule before stated, of regarding the prox-

imate, and not the remote, cause of the occurrence which is the subject of inquiry." In *Crain v. Petrie*, 6 Hill, 522, 524, the question of special damages was involved, and, consequently, the question of proximate cause; that is, whether the special damages were the legal and natural consequences of the wrong complained of. Nelson, C. J., in that case said: "To maintain a claim for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party remotely induced thereby; in other words, the damages must proceed wholly and exclusively from the injury complained of." In *Railway Co. v. Kellogg*, 94 U. S. 475, it was said: "The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." In *Hofnagle v. Railroad Co.*, 55 N. Y. 612, it was held that the act of one person cannot be said to be the proximate cause of an injury when the act of another person has intervened and directly inflicted it.

Another principle of proximate cause which seems to be well established is that an accident or injury cannot be attributed to a cause unless, without its operation, it would not have happened. *Ring v. City of Cohoes*, 77 N. Y. 83; *Taylor v. City of Yonkers*, 105 N. Y. 202, 11 N. E. 642; *Ayres v. Village of Hammondsport*, 130 N. Y. 665, 29 N. E. 285; *Grant v. Railroad Co.*, 133 N. Y. 637, 31 N. E. 220. When damages claimed in an action are occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which he is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause; and the jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence of the act of the defendant is not sufficient. *Searles v. Railway Co.*, 101 N. Y. 662, 5 N. E. 66. The plaintiff must fail if the evidence does not show that the injury was the result of some cause for which the defendant is responsible; and, where the proof is by circumstances, the circumstances themselves must be shown, and not left to rest in conjecture; and, when shown, it must appear that the inference sought is the only one which can fairly and reasonably be drawn from the facts. *Rupert v. Railroad Co.*, 154 N. Y. 94, 47 N. E. 971.

When we apply to the undisputed facts of this case these rules relating to proximate cause, it becomes quite manifest that the judgment in this action cannot be upheld. All the injuries which the plaintiff sustained were caused directly and immediately by the act of Norcross in exploding the dynamite. That was clearly the proximate, and we think the only, cause of the plaintiff's injury. It was the only efficient cause, as, confessedly, without the explosion the plaintiff would not have been injured; and under no circumstances can it be properly said that the act of

the defendant in changing the plaintiff's position a few inches to the left of where he previously stood caused the explosion or occasioned the catastrophe. Surely, that was not an act without which the explosion would not have occurred, nor can it be held to have been the proximate cause of the explosion. The most that can be said is that it produced a situation which existed at the moment it occurred. Obviously, the explosion would have occurred if the defendant had moved the plaintiff in an opposite direction, or had not moved him at all. Nothing which the defendant did could have produced the injury sustained by the plaintiff without another independent intervening cause. There was no evidence in the case of any necessary relation of cause and effect between the act of which the plaintiff complains and the explosion which caused his injury. Under the proof, we think the question whether the defendant's act was the proximate cause of the plaintiff's injury was a question of law, and that the court erred in not directing a verdict for the defendant on that ground.

Another ground upon which the defendant seeks to sustain this appeal is that the court erred in refusing to strike out, and in not instructing the jury to disregard, the evidence of George Baillard, to which we have already referred. While it is possible that there was sufficient proof to justify the jury in finding that the "elderly stranger" to whom the witness referred was the defendant, still, it is obvious that the evidence admitted was so general and inconclusive as to render it only conjectural as to whether it related to the subject at issue at all. It was that the witness understood this "elderly stranger" to say something about being protected,—about a protection he had had from the explosion. As to the nature of the protection, its extent, whether by physical matter or an overruling Providence, or a protection of some other character, nothing was attempted to be shown. It seems to us quite clear that no such uncertain statement should have been submitted to a jury or permitted to become the basis of a verdict involving the rights of parties. It was too uncertain, indefinite, and vague to be permitted to serve any such purpose.

Our attention is also called to various rulings of the trial court which arose upon the cross-examination of the defendant. His cross-examination was a severe and rigorous one. While, perhaps, it was not objectionable upon that ground alone, we think the plaintiff's counsel was permitted to go beyond the legitimate bounds of a proper cross-examination in several respects, to which we cannot call attention in detail within the proper limits of this opinion. Counsel was permitted to prove upon the cross-examination of the defendant, or at least to attempt to do so, that the defendant had not shown proper sympathy or paid proper attention to the plaintiff after he was injured. How that evidence could prop-

erly bear upon the legal rights of the parties it is extremely difficult to understand. The only purpose it could serve was to prejudice and excite the passions of the jury.

Again, we find rulings which were made on the cross-examination of the defendant in regard to the article in the *New York World*, which we think cannot be upheld.

It has ever been the theory of our government, and a cardinal principle of our jurisprudence, that the rich and poor stand alike in courts of justice, and that neither the wealth of the one nor the poverty of the other shall be permitted to affect the administration of the law. Evidence of the wealth of a party is never admissible, directly or otherwise, unless in those exceptional cases, where position or wealth is necessarily involved in determining the damages sustained. As to this general proposition there can be no doubt, and no authorities need be cited. Notwithstanding this well-established principle, the plaintiff was permitted to show by the defendant, upon his cross-examination, substantially, or at least to a great extent, the amount of property possessed by him, its character, and his business. He was permitted to show the number of railroads the defendant operated, the banks in which he was a director, that he dealt in stocks, that he loaned money, and other details of his affairs. We think much of this evidence was improperly received, and that the exceptions were valid. But we deem it both unnecessary and unwise to extend this necessarily protracted opinion by either discussing those questions or considering the various other exceptions contained in the record which present questions that are serious, if not fatal, to this judgment. No good purpose could be served by such a course, as the judgment must be reversed upon the more substantial grounds which have been fully discussed.

It is impossible to consider the plaintiff's injuries without a feeling of profound sympathy. His misfortune was a severe one, but sympathy, although one of the noblest sentiments of our nature, which brings its reward to both the subject and actor, has no proper place in the administration of the law. It is properly based upon moral or charitable considerations alone, and neither courts nor juries are justified in yielding to its influence in the discharge of their important and responsible duties. If permitted to make it the basis of transferring the property of one party to another, great injustice would be done, the foundation of the law disturbed, and anarchy result. Hence, every proper consideration requires us to disregard our sympathy, and decide the questions of law presented according to the well-established rules governing them. The judgments of the appellate division and of the trial court should be reversed, and a new trial granted, with costs to abide the event. All concur, except PARKER, C. J., not voting, and GRAY, J., absent. Judgments reversed, etc.

(157 N. Y. 657)

ORVIS v. CURTISS.

(Court of Appeals of New York. Jan. 10, 1899.)

USURY—WHAT CONSTITUTES.

An agreement between two parties to enter into a joint venture in the purchase or sale of stocks, whereby one party is to furnish the capital to carry on the business, is to share equally in the profits, and, in case of loss, is guaranteed not only the return of his investment, but a large sum in excess of legal interest thereon, though unconscionable, is not usurious, where it is not shown to be a mere device to conceal a loan of money.

Gray, J., dissenting.

Appeal from common pleas of New York city and county, general term.

Action by Charles E. Orvis against William H. Curtiss. From a judgment of the general term (33 N. Y. Supp. 589) reversing a judgment in favor of plaintiff, he appeals. Reversed.

Herman Aaron, for appellant. Abram I. Elkus, for respondent.

O'BRIEN, J. This action was originally brought in a district court of the city of New York, to recover \$100, being six months' interest upon a promissory note of \$4,000, made by the defendant on the 3d day of January, 1893, and payable to the order of the plaintiff three years after date, with semiannual interest at 5 per cent. While the action nominally involves only the interest on this note for six months, yet it in effect, from the nature of the defense, involves the right of the plaintiff to recover the principal sum, as well as the interest. The pleadings in the trial court were oral, and, consequently, quite informal. The defense was, in substance, a general denial, want of consideration, and usury.

The origin of the note was as follows: On the 3d of January, 1887, the plaintiff, who is a member of a firm of stockholders, and defendant, entered into a written agreement for the purpose of purchasing in the market and carrying 500 shares of the capital stock of the American Cotton-Oil Trust. By this instrument it was agreed: (1) That a joint account should be opened with the firm of brokers of which the plaintiff was a member, in which the plaintiff and defendant should be equally interested; that upon their joint order, or the order of the defendant, the account might purchase or sell at any time any portion of 500 shares of the stock, but at no time in excess of that amount. The defendant agreed to furnish at once to the plaintiff's firm such sums of money as might represent the difference between the price paid for the stock and 45 per cent. of the par value. (2) The plaintiff guaranteed that the account should be carried for the period of six months from date, and agreed to furnish \$4,500 for each 100 shares, the account to be closed up and settled in full on or before July 3, 1887. The plaintiff also agreed to set aside with his firm the necessary money to pay for the stock whenever called upon for that purpose, the

account to pay to plaintiff's firm interest at 6 per cent. from the date of the agreement, besides broker's commissions on each transaction. (3) It was also stipulated between the parties that such net profits as might accrue to the account by reason of the transaction should be equally divided, but the defendant guarantied that the share of the profits of the plaintiff should not be less than \$5,000, and agreed, further, that, when the account was closed, he would pay over and make good to the plaintiff any deficiency in the account for that purpose, so that the plaintiff should, within the period of six months from the date of the agreement, receive either from the account or from the defendant, as guarantor, the sum of not less than \$5,000.

It will be seen that the plaintiff was, by the terms of this instrument, secured from all loss; and not only that, but the defendant expressly guarantied that his profits should not be less than \$5,000. There was, in fact, a large loss in the transaction, amounting to about \$11,000, which, it is conceded, the defendant paid. The account remained unsettled until about the time of the execution of the note in controversy, and then there appeared to be due to the plaintiff, under the terms of the contract, \$7,800. The parties agreed to settle and compromise this claim by the execution and delivery of the note in question; and that it was given to settle and adjust the plaintiff's claim, originating as above stated, is not disputed.

Waiving the question whether the note in controversy was not executed and delivered in pursuance of an accord and satisfaction between the parties, based upon a disputed claim, the defense of usury, which constituted the ground upon which the learned court below reversed the judgment, must be considered. It is proper to observe at the outset that there is no proof in the record of any preliminary negotiations to show that the agreement was not intended for the purpose indicated upon its face, but as a mere device or subterfuge to conceal a loan of money. A transaction of this character may be assailed as a device to cover a usurious loan; and, when facts and circumstances are established to warrant a finding that such was its purpose, it is quite possible that the defense of usury could be sustained. But in this case, not only is the testimony to support such a theory absent, but it appears that, since the trial court rendered judgment in favor of the plaintiff, the existence of such facts was expressly negatived. The order of the general term reversing the judgment does not appear to have been founded upon the facts, and hence we must presume that it was upon the law. Therefore the only question that is before us for review is whether the agreement referred to, and out of which the claim compromised and represented by the note grew, was, as matter of law, usurious.

It is a fundamental doctrine governing the law of usury that the defense must be founded upon a loan or forbearance of money. If neither of these elements exists, there can be no usury, however unconscionable the contract may be. The law declares that no one shall loan money, exacting for its use more than legal interest, or, having loaned money, he shall not exact a greater rate as a condition of postponing payment. *Meaker v. Fiero*, 145 N. Y. 165, 39 N. E. 714. There must exist, in fact or in law, a corrupt purpose or intent on the part of the person who takes the security to secure an illegal rate of interest for the loan or forbearance of money. There must be a lender and a borrower; and it must appear that the real purpose of the negotiations and transactions was, on the one side, to loan money at usurious interest reserved in some form by the contract, and, on the other side, to borrow upon the usurious terms dictated by the lender. These principles governing the law of usury are so well settled that it is unnecessary to cite authorities in support of them. I think it is impossible to find these conditions in the transaction in question. It is plain that the defendant's purpose was not to borrow money, but to deal in stocks. There is no proof or claim in the record that he ever applied to the plaintiff for a loan. He did apply to him for the purpose of entering into a joint transaction to speculate in property. There is nothing in the case to warrant the assertion that the plaintiff intended, by entering into the transaction, to loan money to the defendant, in the sense in which such transactions are commonly understood. The plaintiff's purpose was to buy stocks at the defendant's risk, securing to his firm the brokerage commissions and the interest on the investment. He took care also to make such an agreement with the defendant as would exempt him from all possible loss, and not only that, but should secure to him a large profit. He may have made a hard and unconscionable bargain with the defendant, but it is evident that both parties dealt with each other at arm's length; and, whatever else may be said about the transaction, the usury statute has no application whatever to it. It was a joint venture or partnership between two persons to deal in property in order to make profit. One of them was more cautious than the other, and not only protected himself by the terms of the contract against the uncertain fluctuations of the stock market, but stipulated that, whether the stock went up or down, he should be guarantied a profit in the transaction. The defendant relied entirely upon the fluctuations of the market, and he not only lost by these fluctuations, but, by his confidence that the stock would have a large advance (which was no doubt his reason for so doing), guarantied to the broker a profit of at least \$5,000. If there had been a large profit in the transac-

tion, instead of a loss, no one, I think, could then assert that the parties were not entitled to share in these profits equally. Certainly, the plaintiff could not then allege that the defendant was not entitled to share in the profits for the reason that the transaction was a simple loan of money. An agreement between two parties to enter into a joint venture in the purchase or sale of stocks or other property is a very common transaction. The fact that one of them may have advanced the capital, and the other has agreed that, in consideration of such advance, he should participate more largely in the profits, does not convert such an agreement into a loan of money, or conflict with the statute against usury. The contract is still one of partnership. *Cliff v. Barrow*, 108 N. Y. 187, 15 N. E. 327; *Hackett v. Stanley*, 115 N. Y. 629, 22 N. E. 745; *Curry v. Fowler*, 87 N. Y. 38; *Richardson v. Hughtitt*, 76 N. Y. 55; *Leggett v. Hyde*, 58 N. Y. 272; *Reid v. Hollinshead*, 4 Barn. & C. 867; *Richards v. Grinnell*, 63 Iowa, 44, 18 N. W. 668; *Musler v. Trumpbour*, 5 Wend. 275. The defense of usury, involving crime and forfeiture, is not applicable to such transactions. For these reasons, the order of the general term should be reversed, and the judgment of the trial court affirmed, with costs. All concur, except GRAY, J., dissenting, and HAIGHT, J., not voting. Order reversed, and judgment accordingly.

(158 N. Y. 1)

GRIGGS v. DAY et al.

(Court of Appeals of New York. Jan. 10, 1899.)

APPEAL—REVIEW—QUESTION OF LAW—PLEDGES—ACCOUNTING—CONVERSION BY PLEDGEE—ESTOPPEL—MEASURE OF DAMAGES—INTEREST.

1. The court of appeals may review the record, to determine whether a question of fact is involved, although the supreme court in its order may recite that it is on the law and the facts.

2. The court of appeals has no power to review a question of fact on appeal from the supreme court, but where the facts are uncontroverted a question of law arises as to the judgment that should be given thereunder.

3. Plaintiff contracted to construct a railroad. The company failed to perform its part of the agreement, and plaintiff procured defendant, with its consent, to furnish money for the construction; the company executing its notes to plaintiff, who indorsed them to defendant to secure such advances. Defendant subsequently presented his claim to the company for advances, and received in exchange its bonds; turning over to it the notes. He credited plaintiff on his books with the face value of the notes surrendered. *Held* that, as the money was advanced to meet the obligations of the company, the notes issued in payment thereof equitably were defendant's, and in receiving the bonds in payment there was no conversion.

4. Defendant furnished money to plaintiff, who had a contract for the construction of a railroad. The plaintiff transferred to defendant certain of the company's stock as security for the advances. By a settlement between defendant and the company, plaintiff's indebtedness to defendant was paid; and the stock was retained in the latter's possession, and after his death came to his executors. Under a reorgani-

zation of the company by such executors, who held most of the stock, the holders of stock of the old company were allowed to surrender it and obtain new stock, by paying \$35 a share. Reorganization was effected. Plaintiff claimed that, by the executors' failure to surrender him the old stock before reorganization, he was prevented from participating therein, and lost the difference between the \$35 per share and the highest price at which the new stock had been sold thereafter. *Held*, that the executors, having converted the stock and prevented plaintiff from entering the reorganization, were estopped from claiming that he would not have done so.

5. Plaintiff's right to recover damages is limited to those which he actually sustained by being deprived of the stock.

6. Defendant converted certain stock of plaintiff. Under a plan of reorganization, holders of such stock were allowed to surrender it and obtain stock in a new company by paying \$35 a share. Reorganization was effected. A referee found that plaintiff's damage was the difference between \$35 per share and the highest price at which such new stock sold after the reorganization. *Held* error, since, if plaintiff had paid the \$35 per share, he would have lost the interest thereon, which ought to have been deducted.

7. Where a pledgee of corporate stock, acting in good faith, converts it, it is the duty of the owner to replace it within a reasonable time after notice, and the measure of damages is the highest market price for which such stock sells during such reasonable time.

8. Where the facts are undisputed in such a case, what is a reasonable time is a question of law.

9. Where plaintiff knows that defendant has converted his stock, four years is more than a reasonable time in which to select the highest market price at which such stock sells, on which to base a claim for damages.

Appeal from supreme court, appellate division, First department.

Action of Clark Robinson Griggs against Melville C. Day and another, as surviving executors of the will of Cornelius K. Garrison, deceased. From a judgment of the appellate division (47 N. Y. Supp. 609) reversing a judgment entered on the report of a referee, and dismissing plaintiff's complaint, with costs, he appeals. Reversed.

David B. Hill and Joseph H. Choate, for appellant. Elihu Root, for respondents.

HAIGHT, J. This action was commenced in the late superior court of the city of New York on the 15th day of January, 1884, against Cornelius K. Garrison, who died on the 1st day of May, 1885, during the first trial; and the present defendants were substituted as defendants in his place. It was brought for an accounting between the plaintiff and Cornelius K. Garrison, the defendants' testator, with respect to their transactions in the construction of the Wheeling & Lake Erie Railroad, in the state of Ohio, and in the sale and hypothecation of the securities issued by the company. The action has been tried three times. The first trial took place before Mr. Odell, as referee, who rendered judgment against the plaintiff for \$2,191,131.54. This judgment was reversed in the general term, and a new trial ordered. 58 N. Y. Super. Ct. 385, 11 N. Y. Supp. 885. The second trial took place before William B. Hornblower, as ref-

eree, who found in favor of the plaintiff, and ordered judgment against the defendants for \$188,089.73. Both parties appealed from this judgment, but it was affirmed in the general term without modification. 61 N. Y. Super. Ct. 124, 19 N. Y. Supp. 1019. The defendants then appealed to this court, where the judgment was reversed, and a new trial ordered. 136 N. Y. 152, 32 N. E. 612. The third trial took place before Austin Abbott, referee; and, upon his report, judgment was entered in favor of the plaintiff for \$670,116.30, together with costs and disbursements. From this judgment an appeal was taken to the appellate division by the defendants, in which court the judgment was reversed both upon the facts and the law, and the complaint dismissed upon the merits, with costs. 21 App. Div. 442, 47 N. Y. Supp. 609. From the judgment entered upon that decision an appeal has been taken to this court.

On the 24th day of September, 1879, the plaintiff entered into a contract with the Wheeling & Lake Erie Railroad Company for the construction and equipment of its projected railroad from Martins Ferry, opposite Wheeling, on the Ohio river, to Huron and Toledo, on Lake Erie, a distance of 233½ miles. The road was divided into three divisions. The first was to extend from Martins Ferry to Bowerstown, the second division from Bowerstown to Huron, and the third division from Norwalk to Toledo. In consideration of the agreement of the plaintiff to construct and equip the road according to the requirements of the contract, the company undertook to issue first mortgage bonds to the amount of \$3,500,000, and paid-up stock to the same amount, and to deliver to the plaintiff \$15,000 of the bonds and \$15,000 of the stock for each mile of the main track constructed by him; such bonds and stock to be delivered to him upon construction of 5-mile sections. The company reserved \$84,000 of the bonds, which were to be disposed of by the trustees of the company in payment for the construction of 14 miles of road between Huron and Norwalk; and it also reserved \$7,500 per mile of its stock to pay for right of way, grading, bridging, and tying the railroad, and other necessary expenses incident to the enterprise. The company further agreed to furnish the contractor available subscriptions, or the proceeds thereof, and aid to the amount of \$4,000 per mile of main track, branches, and sidings, or so much as might be necessary to furnish right of way, grade, bridge, and tie the railroad between Huron and Martins Ferry, and also to use its best endeavors to secure for the contractor available subscriptions and aid to the same extent per mile for the same purposes upon the third division of the contemplated road. The contract was subsequently modified in several particulars, some of which we will allude to hereafter. After the execution of the contract the company delivered to the Farmers' Loan & Trust Company \$3,500,000 of its shares of stock, and 3,500 of its

first mortgage bonds, of \$1,000 each, to secure the payments provided for by the contract. In November, 1880, the plaintiff borrowed of Garrison the sum of \$15,000, and on December 17, 1880, he borrowed the further sum of \$25,000, for which he gave his note, payable on demand, for \$40,000, the amount of the two loans, and executed and delivered to Garrison the following paper: "New York, December 17, 1880. In consideration of a loan of \$40,000 this day made to me by C. K. Garrison, I, C. Robinson Griggs, do hereby transfer to said Garrison all the first mortgage bonds of the Wheeling and Lake Erie Railroad now in the Farmers' Loan and Trust Company, amounting to \$3,307,000; making, with \$193,000 held by W. W. Phelps and others, an entire issue of \$3,500,000. I further assign to said Garrison my construction contract with said company, and all stock to which I now am, and may hereafter be, entitled under said contract. I further authorize the sale of all or any of said bonds at 85 per cent., net; and, for every \$15,000 of bonds sold by said Garrison for myself or any other person, I agree to transfer to said Garrison, and authorize him to retain from any stock to be received under said construction contract, \$7,000 of fully-paid stock of said railroad company. All sums received from sales of bonds, over the amount of loan and interest, to be paid to me on my order. [Signed] C. Robinson Griggs." The bonds mentioned in this instrument were soon afterwards turned over to Garrison, and thereupon he continued to make advances to the plaintiff to aid in the construction of the road, which eventually amounted to the sum of \$4,414.156.10. A portion of this indebtedness was liquidated by Garrison exercising the option contained in the agreement of December 17th, by crediting to the plaintiff bonds received by him, at 85 cents on the dollar. As to the balance, the referee has charged Garrison, as of May 1, 1883, with \$2,062,648.13, the amount of the promissory notes issued by the railroad company to the plaintiff, and by him turned over to Garrison as collateral security for the advances made by him, and also by charging Garrison, under date of April 16, 1887, with the further sum of \$348,394.87 on account of the stock of the company belonging to the plaintiff, which was held as collateral by Garrison, and which his executors refused to turn over to the plaintiff. The controversy in this court arises over the charging of the defendants with these amounts. The appellate division has held that neither of them should have been charged, and that they should be expunged from the account; thus leaving, as is said in the opinion, an apparent balance in favor of the defendants on account of over \$2,000,000.

The first question arising for our consideration is whether we have jurisdiction to review the order of the appellate division reversing the judgment entered upon the report of the referee. As we have seen, it is stated in the order that the reversal was upon the facts as

well as upon the law. In the case of *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, we have recently held that such a certificate does not preclude us from looking into the case for the purpose of determining whether there are controverted facts, or inferences to be drawn from conceded facts, upon which a reversal upon the facts could be based; following the case of *Otten v. Railway Co.*, 150 N. Y. 395, 401, 44 N. E. 1033. In the *Hirshfeld Case* we found that there was no conflict with reference to the facts, and consequently a reversal upon the facts was unauthorized. The constitution has now limited our power to review cases to questions of law, except where the judgment is of death. Formerly, where the facts was upon the facts, and it so appeared in the order of reversal, we had the power to review the facts, under section 1338 of the Code. But after the adoption of our present constitution this section was amended by striking out the clause authorizing us to review the facts, and we are thus left with the power only to review the law. Where the facts are controverted, and they must be determined from conflicting testimony or inferences drawn from the surrounding facts, the question becomes one of fact, and not of law, and this court has no power to review. But where the facts are conceded, or are not controverted, a question of law arises, as to the judgment that should be given thereunder. In this case it is contended by both parties that the facts are uncontroverted. The respondents' counsel, in his brief, says: "The respondents contend that the decision of the appellate division, so far as it relates to the vital and controlling propositions in this case, namely, that relating to the notes of the railroad company and that relating to the railroad company's stock, was founded upon and warranted by the conceded or uncontroverted facts before the referee; that the only difference between the appellate division and the referee upon these two items was that the appellate division drew a legal conclusion from these conceded or uncontroverted facts directly the reverse of that drawn by the referee." We have, accordingly, looked into the record for the purpose of ascertaining for ourselves whether the facts were controverted, and whether the certificate of the appellate division should be disregarded, and, after a careful examination of the testimony, have reached the conclusion that the facts, so far as these claims are concerned, are uncontroverted, and that upon the facts a conclusion of law arises as to the judgment that should be entered thereon.

The history of the claim growing out of the notes is, in brief, as follows: Early in the construction of the road the company failed to perform its part of the agreement with reference to the procuring of its rights of way, and to the furnishing the requisite means to pay for the grading, tying, bridging, or to furnishing the \$4,000 subscription, which it had undertaken to do. The matter was

brought to the attention of Garrison, and a consultation was had, in which the plaintiff was authorized to, and did, proceed, with the consent of the company, to procure the right of way, and to grade and complete the road; Garrison furnishing the moneys, which amounted to the sum of \$1,949,710.72, for which amount the company issued its promissory notes, amounting on May 1, 1883, with interest, to \$2,062,643.13. These notes were indorsed over to Garrison as collateral to secure the advances so made to him. On the 19th day of April, 1883, there was a meeting of the board of directors, at which both the plaintiff and Garrison were present. At this meeting the plaintiff presented a letter, addressed to the president and directors, in which he proposed to turn over to the company the road, so far as completed, and asked for a settlement; stating the amount of his claim. In connection with this letter he presented a certificate of the chief engineer of the company, in which the latter certified that he had examined most thoroughly the portion of the road constructed by the contractor, and that he found it to be constructed in accordance with the detailed provisions of the contract. Thereupon it was unanimously resolved, that "the president of the company is hereby authorized to settle with C. Robinson Griggs, contractor, in accordance with the terms of the proposition for settlement by him presented." A written communication was then presented from Garrison, in which he addressed the president and directors, saying: "Gentlemen: As the contractor intends to turn over the road to the company on the first of May, 1883, I have to ask you to settle with me for the cash advances which I have made for your company, viz. [here are inserted certain items not involved in this controversy, following which appears:] For notes of the company, \$1,949,710.72; interest, \$112,932.41." An informal discussion then took place among the directors with reference to Garrison's claim, and he then made a verbal proposal to take the second mortgage bonds of the company, as executed and held by him in trust, at the rate of 75 cents on the dollar, in partial liquidation of his claim, as set forth and presented at the meeting, after which Mr. Wickham, one of the directors, moved that the president of the company "be authorized to sell and deliver to C. K. Garrison second mortgage bonds to the amount of \$2,280,000, at the rate of seventy-five cents on the dollar, and interest accrued from March 1, 1883; the same to be delivered to C. K. Garrison in part payment of his claim against this company, amounting to \$2,449,912.63, as this day specified in his communication to this company." This resolution was carried without dissent, and thereupon a settlement was effected with him in accordance with the terms of the resolution on the 1st day of May, 1883. Garrison took the bonds, and credited the company with the amount thereof at 75 cents on the dollar, making \$1,736,600, and at the same time turned over to

the company that amount of the promissory notes. Some time thereafter he surrendered to the company the remaining notes, amounting to \$326,043.13, and had them canceled; charging that amount up against the company in his open account.

It is claimed on behalf of the defendants that the notes were transferred by the plaintiff to Garrison as collateral for the advances made by him, and that the bonds were delivered to Garrison to take the place of the notes; that he subsequently held the bonds during his lifetime, and that his executors still hold them as collateral security for the advances made to the plaintiff; that, as to the remaining notes, amounting to \$326,043.13, which he surrendered to the company and had canceled, he was liable as for a conversion, and, inasmuch as there was no evidence showing the value of the notes at that time, there could be no recovery, and consequently the plaintiff was entitled to no credit therefor in the accounting. On behalf of the plaintiff it is claimed that Garrison treated the notes as his own; that he purchased the second mortgage bonds at 75 cents on the dollar, paying therefor with the notes; that the balance he surrendered to the company, charging it for the amount, accepting its indebtedness as his own; and that consequently the plaintiff is entitled to a credit for the full amount of the notes. If the claim of the defendants is to be sustained, then, as the appellate division has stated, the plaintiff is still indebted to the defendants in an amount exceeding \$2,000,000, and at the same time he has been deprived of his promissory notes, and of any opportunity of collecting them of the company or of its stockholders. It is said that the company was insolvent at that time. Possibly it was, in the light of what has since been disclosed. But it is evident that it was not so regarded at the time by the defendants' testator. A new railroad had just been completed and turned over to the company by the contractor. Its value depended upon its future earnings, which at that time were uncertain, and could only be determined by actual test thereafter. But, even assuming the company to have been then insolvent, under the constitution and statute of the state of Ohio the stockholders were liable for the debts of the corporation to an amount equal to their stock, and Garrison at that time was the owner of a majority of the stock. So that we think it cannot be held that the notes at that time were of no value.

The plaintiff at the time of making the contract to construct the road was possessed of but little means; he having, as he confesses, recently been discharged in bankruptcy. The company had failed to perform its part of the contract, in procuring the right of way, and the means it had undertaken to supply, and the plaintiff was left without the power to proceed with his contract. In the meantime Garrison had become interested in the road, and had assumed, in a large degree, its su-

pervision and management. He had given directions for a superior construction to that required by the contract. The embankments and cuts were to be wider, the bridges were to be constructed of iron, instead of wood, and the rails were to be of steel, instead of iron. He had already supplied a large sum of money, and had taken the bonds and stock of the company, and an assignment of the plaintiff's contract. There was no way in which he could be reimbursed for his expenditures, except through the bonds and stock of the company, which would be of no value, unless the road was completed. Under these circumstances he concluded to advance the money. In form, he advanced it to the plaintiff, and charged him therefor; but in effect, and in equity, it was an advancement to the company, to enable it to meet its obligations with the plaintiff, and it is evident that Garrison so regarded it. As early as 1881 we find Garrison in consultation with his attorney, Mr. Swayne,—discussing the matter in the presence of Griggs,—as to how these advances should be settled with the company. It appears that second mortgage bonds had been suggested. Garrison apparently approved of this scheme for finally settling the account, but he did not want to wait for the bonds, and Swayne tells us that he suggested promissory notes. It appears that at that time the advances amounted to \$1,234,177.83, and thereafter the advances continued for that purpose until they reached the amount of \$1,949,710.72. Garrison wanted the notes for the purpose of having a stated account, until the mortgage could be issued. It was going to take time to engrave the bonds and get the mortgage, and the taking of the notes was a mere temporary expedient. Shortly afterwards a meeting of the directors was held, and a committee was appointed to pass upon the accounts, and the notes were given; the first batch being for the amount of the advances that had then been made, and the last batch for the amount of the advances thereafter made. The directors also passed a resolution authorizing a second mortgage and bonds to the amount of \$2,800,000 to be issued. This was done, and the bonds were turned over to Garrison, to be held by him in trust for the company. They were so held by him until the meeting of the 19th of April, 1883, together with the notes that had been issued for these advances. At this meeting, as we have seen, he asked the president and directors, in writing, to settle with him "for cash advances which I have made to your company." He then states the items of his cash advances, among which is the \$1,949,710.72, the amount of the promissory notes in question. By this letter he not only treats the advances as made by him to the company, but he treats the notes as his, demanding payment. Then follows the discussion between himself and the directors, in which he offers to take the second mortgage bonds at 75 cents on the dollar, and thereupon the resolution

was passed, in which the president was authorized to sell—not substitute—the bonds to Garrison at the rate of 75 cents on the dollar. This resolution is in writing, appearing upon the minutes of the meeting of the directors, and, to our minds, when considered in connection with the settlement finally effected on the 1st of May, 1883, is capable of but one interpretation; and that is, Garrison purchased the bonds of the company for 75 cents on the dollar, paying therefor with the notes of the company, which it had issued to the plaintiff, as we have already shown, but which were intended to cover the advances that Garrison had made on behalf of the company. The bonds so purchased were not the plaintiff's, and Garrison never claimed or pretended that they were, or that he held them as collateral. On the contrary, he repeatedly, in conversation with others, declared that he had purchased the bonds, and subsequently, when he made an assignment, reported the bonds as his, in his schedule of assets. Shortly afterwards he delivered over to the company the remaining notes in his hands, and charged the company with the amount in his open account; again treating the notes as his, and dealing with them as his own. His executors insisted that in doing this he became guilty of a conversion. We do not so view the transaction. In the first place, it is not the usual practice, in a court of equity, to allow a party to avail himself of his own wrongful acts for the purpose of evading liability. Suppose Garrison had brought an action against Griggs to recover the amount of these advances; could he recover without accounting for the notes? Suppose, further, that Griggs should come into court with a tender of the amount of the claim upon the return to him of the notes which Garrison held as collateral; could Garrison be excused from returning the notes, upon the plea that he had converted them, and that he had received nothing therefor? We think not. In the second place, the notes were, as we have shown, equitably Garrison's. While in form he had advanced the money to the plaintiff, and had charged him on his books, and the notes had been issued to the plaintiff, and by him indorsed over to Garrison as collateral security, still the money was advanced to meet the obligations of the company, and the notes were issued in payment of those obligations. They thus equitably, and in effect, became Garrison's notes, and he proceeded to deal with them as such. This appears from his letters and subsequent conduct, to which we have already referred. His transaction with reference to the notes was approved of by the plaintiff. Immediately after the meeting of April 19th, in a conversation with one of the directors, the plaintiff approved of the sale of the bonds to Garrison, to be paid for with the notes, saying that it was a good thing; and upon the trial of this action he testified that he now ratified Garrison's action with reference thereto. True, he did not ap-

prove of or ratify the failure to give him credit for the notes, or the credit that was given for less than their face value.

There is still another reason for which we think no conversion was intended. After Garrison had disposed of the notes, he credited the plaintiff upon his books with the sum of \$1,546,982.35. This was 75 per cent. of the face value of the notes. Subsequently there was credited upon the same account the sum of \$515,660.78, which was the remaining 25 per cent. of the notes. This last item has drawn over it a line in red ink. Had this last credit been allowed to remain upon the books, no controversy would have arisen with reference to these notes. It would then appear that Garrison had collected or disposed of the notes according to his own inclination, and had given the plaintiff credit for their amount. The fact that credit was given indicates that at that time no conversion had in fact been made or intended. Whatever induced the subsequent cancellation of this credit, it is not necessary to now consider.

It is not apparent that Garrison's action in surrendering up the notes and causing them to be canceled, charging the company with the amount in his open account, substantially altered his situation. Had the notes been returned to the plaintiff, Garrison, as stockholder, might have been called upon to pay them; thus reaching the same result in the end as that accomplished by the surrender of the notes, the charging of the company therefor, and the crediting of the plaintiff with the amount. This view renders it unnecessary to consider at this time the question as to whether negotiable paper is presumed to be of its face value, and whether the burden of showing that it was not rested upon the defendants.

We are aware that the conclusion which we have reached differs from that adopted by this court on the former review of this case. 136 N. Y. 152, 32 N. E. 612. At that time the transaction was treated as a conversion of the notes on the part of Garrison, and it was held that the plaintiff could not recover without showing the value of the notes. It is claimed on behalf of the respondents that the evidence is the same now as it was then. We do not propose to enter upon a comparison of the two records, further than to state that a new volume, containing upwards of 700 pages, now appears as a part of the record for the first time. Our conclusions are based upon the new record, which contains the finding of the referee that there was no conversion. We perhaps should consider ourselves concluded by the former decision of this court, in so far as it has expressly determined a question of law, but we do not regard ourselves as bound to adopt its view of the facts as then disclosed. If we are, a new trial was hardly necessary. We consequently are now at liberty to determine upon our own consciences the judgment that should be awarded upon the now undisputed and conceded facts.

Our view of the transaction, so far as the second mortgage bonds are concerned, is that it is the same, in effect, as if Garrison had purchased the bonds, and paid cash therefor, and had then gone to the treasurer of the company and collected the notes; that Garrison elected to treat the notes as his own, and accept the obligations of the company in place of any liability that may have existed on the part of the plaintiff; and that his action in this particular was with the consent and approval of the plaintiff. Accordingly, when Garrison purchased the bonds of the company, and paid therefor with the notes, and when he surrendered the remaining notes to the company and caused them to be canceled, charging it with the amount, he did only what he had the right to do. By the latter act he relieved himself from liability as a stockholder upon the notes, but the legal effect of the transaction was to accept the company's liability to pay his claim, and to relieve the plaintiff of any further liability to him growing out of the advances for which the notes were given. We therefore conclude that the credit given by the referee should be approved.

With reference to the credit for stock the history of the transaction is equally complicated. During the course of the transaction between the plaintiff and Garrison, the former acquired, under the provisions of the contract and otherwise, a large amount of the company's stock, which he transferred to Garrison. Of this stock Garrison held 24,342 shares, of the par value of \$50 each, as collateral security. After the transaction of May 1, 1883, this stock remained in the possession of Garrison until he made an assignment, and after his death was transferred by the assignee to his executors, who ever since have continued to hold it. Subsequently the trustee under the first mortgage instituted an action for its foreclosure, which proceeded to final judgment and a sale of the property to the executors, which took place on the 23d of April, 1886. Pending the foreclosure of the mortgage the defendants devised a plan for a reorganization, and they individually acted as a committee upon the reorganization. The plan adopted by them was, in substance, an offer to every holder of the first mortgage bonds who should deliver his bonds to the committee on or before the 15th of April, 1886, together with the coupons on each bond maturing or payable after May 1, 1884, to deliver 3 of the bonds of the new company for every 4 of the bonds of the old company, and also to deliver to such holder 10 shares of the stock of the new company for each of the present bonds so delivered, in the event, and only in the event, that he should pay to the committee in cash on or before April 15, 1886, \$3 per share on each share of the stock of the new company, and that any person holding the stock of the old company, who should transfer and deliver it to the committee on or before April 23, 1886, should be at

liberty to purchase the stock of the new company to an amount equal to the par value of his stock in the old company, in the event, and only in the event, that he should pay therefor to the committee on or before the 23d of April, 1886, \$35 per share. A reorganization was effected on this basis, and the bonds and stock held by Garrison in his lifetime were surrendered up, and the defendants obtained therefor the bonds and stock of the new company. They continued to hold the stock so received until June, 1887, at which time they sold out to a syndicate for \$45 per share.

The theory of the plaintiff, which has been adopted by the referee, is to the effect that by the credit to the plaintiff of May 1, 1883, of the amount of the promissory notes held by Garrison, the indebtedness of the plaintiff to Garrison was paid, and that he no longer had the right to hold the plaintiff's stock as collateral security; that the stock issued by the new company was of the par value of \$100 per share, while that of the old company was of but \$50; that he had the right, under the reorganization plan, to surrender his old stock and receive the stock in the new company, 12,171 shares, upon payment of \$35 per share; that he was prevented from doing this by reason of the refusal of the defendants to deliver to him his stock in the old company; and that in consequence he lost the difference between \$35 per share and \$63½ per share, the amount that the new stock sold for on the stock exchange on the 16th of April, 1887, making \$348,394.87. On behalf of the defendants it is claimed that the plaintiff was not entitled to a credit of the amount of the promissory notes held by Garrison on May 1, 1883; that there was a balance still owing to Garrison; that he and his executors had the right, and still have the right, to hold the stock as collateral security, and that, consequently, there was no conversion upon their part; that, had the stock in the old company been surrendered to him, there is nothing in the case showing that he would have come into the reorganization and taken the new stock by paying \$35 per share, or that he was financially able to do so, and that it could not be presumed that he would have done so. The right of the plaintiff to a credit on account of the stock depends upon his right to a credit for the notes. If he was not entitled to a credit for the notes, then he remained largely indebted to the defendants, and they had the right to retain his stock as collateral security. But the credit which we have approved relieved him of all indebtedness to Garrison's estate, and the executors no longer had the right to retain his stock and prevent him from making such use of it as he saw fit. He had the right, if he so determined, to enter the new reorganized company, and to make use of his stock for that purpose; and we think we ought not to assume that he would not have done so, but, rather, that the executors, after converting and re-

taining his stock, and thus preventing him from entering the reorganization, ought to be estopped from claiming that he would not have availed himself of the privilege had the stock been returned to him.

Some complaint has been made by the plaintiff with reference to the discrimination made against him in the plan of reorganization. It will be observed that under that plan those holding bonds were permitted to surrender them, and to receive 3 bonds in the new company for every 4 surrendered of the old company, and in addition to receive 10 shares of the new stock with every new bond upon the payment of \$3 per share, and that those having stock could, upon surrendering it, have new stock on paying \$35 per share. The plaintiff held no bonds. It thus appears that he would be required to pay \$32 more per share than those holding bonds. But it must be remembered that the bonds were the superior lien upon the company's property, and were entitled to be paid before any stockholder could share in its assets, and that, under the plan of reorganization, 3 bonds in the new company were to be delivered for 4 in the old company. Thus, \$25 on the 100 were lost to the old bondholders, besides the coupons that had matured upon the old bonds up to the date of reorganization; the stock and the \$3 per share making up the difference. The discrimination, therefore, which existed in the plan, is in requiring the stockholders having no bonds to pay in cash \$35 for their stock. If the assets of the company were insufficient to pay the old bonds and coupons, the defendants would reap a benefit from the cash payments required to be made by the stockholders. Such cash payments would not only give their new bonds a higher standard of value, but would also materially increase the value of their stock in the new company. But it is not apparent that any legal liability arises out of this plan of reorganization. The executors had the right to adopt such a plan as they saw fit. Inasmuch as they were allowed to purchase the property on the sale after the plan of reorganization had been adopted and made public, no complaint with reference thereto can now be entertained as the basis of any right to recover damages. We think, therefore, the plaintiff's right to recover damages is limited to those which he actually sustained in being deprived of his stock. What were those damages? The referee has found that they were the difference between \$35 per share, which he would have been compelled to pay, and the \$63% per share, the amount for which the stock sold on the 16th day of April, 1887; being \$28%, and amounting to the sum of \$348,394.87. In this we think he erred. He evidently overlooked the fact that had the plaintiff paid the \$35 per share on the 23d day of April, 1886, he, of necessity, would have lost his interest on that sum from that time up to the 16th of April, 1887,—being a

year, lacking seven days,—and amounting to upwards of \$25,000. In determining the damages sustained, this item of interest should have been deducted. We are, however, not satisfied with the amount of damages found by the referee, even should the interest be deducted. We are aware that at one time it was thought to be the rule that, where a stockbroker had converted the stock of his customer, he should be held to account in damages at the highest market value which the stock had attained before the trial, and that there were some decisions in this court tending to support that rule. But in the case of *Wright v. Bank*, 110 N. Y. 237, 18 N. E. 79, it was held that where a pledgee of corporate stocks, acting in good faith and under an honest mistake, converts it, it is the duty of the owner to replace it himself within a reasonable time after notice, and the proper measure of damages for the conversion is the highest market price during such reasonable time, and that, where the facts are undisputed, what is a reasonable time is a question of law for the court. The theory upon which this rule is based is that justice and fair dealing imposed upon the party the duty of making his loss as light as possible. In this case the plaintiff knew that the defendants had refused to surrender up his stock; he knew of the foreclosure and reorganization; and yet for four years he took no steps to buy in or replace the stocks of which by the conversion he had been deprived. We think there is nothing in the case indicating bad faith on the part of the defendants, and that four years, or even one year, was more than a reasonable time, and that the plaintiff ought not to have waited that length of time in order to select the highest point at which the stock had been sold on the stock exchange, and make it the basis of his claim for damages. The evidence upon the question of the value of the stock is very meager. A stockbroker was called as a witness, and testified that on the 16th day of April, 1887, the stock sold for 63%. He then tells us that that was the highest price for which it had ever been sold, and that afterwards it had sold down to 35%, which was its lowest price, and that at the time he was giving his testimony it was selling at about 45. The further fact appears, as we have shown, that the defendants sold out their stock in June, 1887, at 45. It will be observed that there is no evidence as to the value of the old stock or of the new stock during the year 1886, or in 1887 until April 16th. We are thus left without any evidence upon which the value of the stock can properly be determined within a reasonable time after its conversion. The rule in such cases is that nominal damages only can be awarded. Ought a new trial to be now granted? This case has been pending for 15 years. It has, as we have seen, been tried three times, with widely varying results. Garrison and his son have died, as

have several of the witnesses who were sworn upon the first trial. If the stock had a value during the period to which we have alluded, the plaintiff ought to have shown it. The fact that he did not leads us to infer that it was of but little or no value above the price required to be paid for it. Under the circumstances, therefore, we think that this litigation should be now terminated. The balance due the plaintiff February 17, 1886, as found by the referee, was \$83,298.21; interest thereon to date of report, February 26, 1896, \$50,102.67; balance, \$133,398.88. The judgment of the appellate division should be reversed, and that entered up upon the report of the referee modified by reducing the recovery to \$133,398.88, and as so modified affirmed, without costs of this appeal to either party. All concur, except BARTLETT and MARTIN, JJ., not voting. Judgment reversed, etc.

(152 Ind. 142)

HELT et al. v. HELT.

(Supreme Court of Indiana. Jan. 26, 1899.)

DESCENT AND DISTRIBUTION — SURVIVING SECOND WIFE.

1. Acts 1889, p. 430, § 1 (Burns' Rev. St. 1894, § 2644; Horner's Rev. St. 1897, § 2487), providing that where a man has children by his first wife, and not by a subsequent wife, the latter's interest in his lands shall only be a life estate, is void, because it attempts to amend Acts 1853, p. 56, § 2, which had been repealed by Acts 1867, p. 204.

2. Under Rev. St. 1881, § 2487, providing that, on the death of a man leaving a second or subsequent wife, without children by her, but having children living by a previous wife, her share of his lands shall, on her death, go to such children, or under Burns' Rev. St. 1894, § 2640 (Horner's Rev. St. 1897, § 2483), giving the surviving widow one-third of her husband's lands in fee, a surviving wife, without children by the marriage existing at the time of the husband's death, but with a child living by a prior marriage between her and her husband, which had been dissolved, the husband also having another child living by a previous marriage, takes one-third of her husband's lands in fee.

Appeal from circuit court, Bartholomew county; Francis T. Hord, Judge.

Action by Christina Helt against Henry P. Helt and another for partition. From the decree, defendants appeal. Affirmed.

Cooper & Cooper, for appellants. M. D. Emig and J. F. Cox, for appellee.

MONKS, C. J. It appears from the record that one Henry Helt, a widower, having children by a former marriage, married appellee; that he had by her one child, the appellant Mollie Helt, her co-appellants being the children of said Henry Helt by his first wife. Afterwards, in 1880, appellee and said Henry Helt were divorced. In 1890, they were again married, but no child was born to them during the last marriage. Afterwards said Henry Helt died intestate, the owner of real estate in Bartholomew county, Ind., leaving surviving him appellee, his widow, and ap-

pellants, his children, one of whom, Mollie Helt, was a child of his first marriage with appellee, and the others his children by his first wife. An action was brought in the court below for partition of said real estate, by appellee against appellants, and the court held that the undivided one-third of the real estate of which said Henry Helt died seised descended in fee simple to appellee, and the other undivided two-thirds descended in fee simple to appellants, and partition was so made and confirmed. Appellants insist that, under the facts found, appellee, having no children born to her during said second marriage, was, at the death of her husband, a subsequent childless wife, within the meaning of section 1 of the Acts of March 11, 1889 (Acts 1889, p. 430), being section 2644, Burns' Rev. St. 1894 (section 2487, Horner's Rev. St. 1897); and that she inherited the undivided one-third of said real estate for life only, and appellants inherited all of said real estate, subject to appellee's estate for life in the undivided one-third thereof.

By section 1 of the Acts of 1889 (Acts 1889, p. 430), being section 2644 (2487), supra, it was attempted to amend section 2 of the act of March 4, 1853 (Acts 1853, p. 56), which last-named section was repealed by the act of March 9, 1867 (Acts 1867, p. 204). Longlois v. Longlois, 48 Ind. 60, 63, and cases cited; Hoffman v. Bacon, 50 Ind. 379, 380. Section 2 of the act of 1853, which section 1 of the act of 1889 sought to amend, was repealed in 1867, and was not, therefore, in force in 1889. It is settled law in this state that an act which attempts to amend a repealed act is void. Smith v. McClain, 146 Ind. 77, 88, 89, 45 N. E. 41; Boring v. State, 141 Ind. 640, 41 N. E. 270, and cases cited. It is evident that when section 1 of the act of 1889, being section 2644 (2487), supra, was passed, section 2 of the act of 1853, which it attempted to amend, was not in existence, having been repealed in 1867, and that said section 1 of the act of 1889, being section 2644 (2487), is void. Smith v. McClain, 146 Ind. 88, 89, 45 N. E. 41. Said section 2644 (2487), supra, being void, it follows that section 2487, Rev. St. 1881, being section 24 of an act approved May 14, 1852 (1 Rev. St. 1852, p. 251), has been in force since the act of 1867, supra, took effect. Longlois v. Longlois, 48 Ind. 62-65, and cases cited; Waugh v. Riley, 68 Ind. 482, 493, 494; Teter v. Clayton, 71 Ind. 237, 239. It is clear, therefore, that the right of appellee in said lands is determined by either section 2487, Rev. St. 1881, being section 24 of an act approved May 14, 1852 (1 Rev. St. 1852, p. 251), or section 2640, Burns' Rev. St. 1894 (section 2483, Horner's Rev. St. 1897), which last-named section expressly gives the wife an estate in fee simple of all the lands of which her husband died seised. Under said section 2487, Rev. St. 1881, being section 24 of an act approved May 14, 1852, "it has been uniformly held by this court, since the case of Utterbach v. Terhune, 75 Ind.

363, decided in 1881, * * * a second or subsequent wife, having no children by her husband living at his death, took a fee in his lands when he died leaving children alive by a previous wife, and that, upon her death, the children of the former wife or wives become her forced heirs," and inherited the land from her which she inherited from her husband. *Byrum v. Henderson* (Ind. Sup.) 51 N. E. 94, and cases cited; *Haskett v. Maxey*, 134 Ind. 182, 187, 33 N. E. 358, and cases cited. Appellee therefore inherited an undivided one-third of the land in controversy in fee simple, regardless of which section determines her rights. If the land descended to her under section 2640, Burns' Rev. St. 1894 (section 2483, Horner's Rev. St. 1897), she may dispose of it as she pleases, by will or otherwise, except as limited by section 2641, Burns' Rev. St. 1894 (section 2484, Horner's Rev. St. 1897), if she marry again. But, if the lands descended to her under section 2487, Rev. St. 1881 (section 24, p. 251, 1 Rev. St. 1852), the same will descend to the children of her deceased husband, or their descendants, if they survive her. *Byrum v. Henderson*, supra. The trial court did not err, therefore, in holding that appellee inherited the undivided one-third of the land in controversy in fee, and in rendering judgment confirming partition of said land when so made. Under the issues in the cause, the trial court was not required to determine, nor did it determine, which of said sections governs the rights of appellee. Neither is said question decided by this court, because the same is not presented by the record. Judgment is affirmed.

(152 Ind. 126)

WHITE et al. v. FATOUT et al.

(Supreme Court of Indiana. Jan. 24, 1899.)

APPEALS—REVIEW.

Error in sustaining a demurrer to the complaint will not be considered where the complaint is not in the record.

Appeal from superior court, Marion county; P. W. Bartholomew, Judge.

Action by Frederick White and others against Joshua Fatout and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Gavin, Coffin & Davis, for appellants. Ayers & Jones and Ittenbach, Ittenbach & Ittenbach, for appellees.

JORDAN, J. This action was commenced in the lower court by appellants to recover damages in the sum of \$5,000 upon an alleged breach of a contractor's bond. The original complaint was filed on the 4th day of June, 1895, but this pleading does not appear in the record. On September 18, 1895, appellees filed a demurrer to the original complaint, which demurrer, as the record discloses, was sustained on November 9, 1895. The cause thereafter seems to have

been continued from time to time in court until June 24, 1896, when judgment was rendered against appellants on demurrer. On July 1, 1896, as the record shows, appellants filed an amended complaint. This is the only one set out in the record. No demurrer appears to have been filed to this complaint. The only error assigned in this appeal is that the court erred in sustaining the demurrer to the complaint. As the complaint to which the demurrer was sustained, and to which the assignment of error applies, is not in the record, this court is certainly not in a position to review the action of the lower court in sustaining the demurrer thereto, and all we can do is to affirm the judgment. Judgment affirmed.

(152 Ind. 121)

CULBERTSON et al. v. KNIGHT et al.

(Supreme Court of Indiana. Jan. 24, 1899.)

DRAINS—COST OF CONSTRUCTION LANDS LIABLE —BENEFITS.

1. Under Burns' Rev. St. 1894, §§ 5655-5658 (Rev. St. 1881, §§ 4285-4288), authorizing the construction of drains whenever conducive to public health or of public benefit, and requiring lands benefited thereby to be assessed for their construction, whether passing through the same or not, lands already sufficiently drained, whose value, for tillage or for residence purposes, or for the market, is enhanced by a drain which does not reach them, are subject to assessment for the cost of its construction.

2. Where the lower end of a drain overflows the adjacent lands with water collected by it from the upper lands, which it sufficiently drains, the cost of enlarging the lower end, or of constructing a new drain, to carry off the waters collected by the old, may be assessed against the upper lands, since their owners had no right to flood the lower lands by artificial drainage.

3. In assessing the cost of a drain to carry off the waters so collected by the old drain, the viewers can consider that the upper land owners are liable to be enjoined from discharging on the lower lands the waters collected by them by artificial drainage.

Appeal from circuit court, Dekalb county; J. W. Adair, Judge.

Petition by William Knight and others for the construction of a public drain. From a judgment of the circuit court establishing the drain as located by the viewers, and confirming assessments made therefor, Robert Culbertson and others, remonstrators, appeal. Affirmed.

Rose & Rose and C. A. O. McClellan, for appellants. E. D. Hartman, for appellees.

HADLEY, J. This action was commenced by the appellees' filing in the commissioners' court a petition asking for the location of a public drain, under section 5656, Burns' Rev. St. 1894 (section 4286, Rev. St. 1881). Viewers were appointed, who made report establishing the drain, and assessing the lands which in their opinion would be benefited thereby, and, among others, assessed benefits to the lands of appellants. To this report of the viewers appellants filed a remonstrance, un-

der section 5665, Burns' Rev. St. 1894 (section 4295, Rev. St. 1881), upon the grounds that (1) their respective assessments were too high, and (2) the assessments of others were too low; and, upon their request, reviewers were appointed, who made report that "we find that the action of the viewers was just and correct, and we sustain and approve the action of the viewers and their report." Thereupon the commissioners approved the report of the viewers, and entered an order establishing the drain. From the decision of the board of commissioners, establishing the drain, the remonstrators appealed to the Dekalb circuit court. The case was there tried, and, upon request, the court found the facts specially, and stated conclusions of law in favor of the petitioners, and, overruling appellants' motion for a new trial, rendered judgment thereon, establishing said drain as located by the viewers, and confirming assessments as made, and remanding the same to the board of commissioners for construction, in the manner, and of the dimensions, prescribed in the report of the viewers. From the judgment, an appeal is taken to this court.

The only error assigned and discussed is the overruling of appellants' motion for a new trial; and the only question presented by the motion, and appellants' brief, is the sufficiency of the evidence to support the judgment. As stated by appellants, the question is "whether or not the lands of the remonstrators will be benefited by the construction of the drain." The record discloses that the proposed drain commences at the junction of two other drains, known as the Leighty and Baker drains, at a point $1\frac{1}{4}$ miles east of the west line of Concord township, and that the watershed, at the west line of Concord township, is 20.43 feet higher than at the point of commencement; and the assessments complained of here are laid upon the highlands of the watershed, drained along the lines of the present Leighty and Baker drains, and continuing over the lines of the proposed drain through a natural water course, known as "Bear Creek," to the St. Joe river. The appellants' contention is that their lands are sufficiently drained by artificial ditches already in successful operation, that they cannot reach the proposed drain without crossing the lands of others, and, hence, are not benefited by its construction. The statute under which the proceeding is had cannot be brought within the narrow limits contended for by appellants; for it is apparent, from the act itself, that the legislature had in view something more than an increase in the productiveness of wet lands. The first section of the act recites that boards of commissioners may cause the construction of drains when the same shall be conducive to the public health, convenience, or welfare, or when the same will be of public benefit or utility. Section 5655, Burns' Rev. St. 1894 (section 4285, Rev. St. 1881). And

section 5658, Burns' Rev. St. 1894 (section 4288, Rev. St. 1881), provides that all lands benefited by a public ditch shall be assessed in proportion to the benefits for the construction thereof, whether it passes through the lands or not. Public health, public convenience, and public utility are fundamental considerations; and these, with all other subjects that affect the value of land, must be counted upon by the viewers in determining the question of benefits. A rule that has received high sanction is stated thus: "The only safe and practical course—the one which will do equal justice to all parties—is to consider what will be the influence of the proposed improvement on the market value of the property." In re William & Anthony Sts., 19 Wend. 678; Cooley, Tax'n, 660; State v. Mayor, etc., of City of Newark, 35 N. J. Law, 166; Lipes v. Hand, 104 Ind. 503, 1 N. E. 871, and 4 N. E. 160. Whatever will come to the land from the drain, to make it more valuable for tillage, or more desirable as a place of residence, or more valuable in the general market, should be reckoned as benefits, and these questions arise without reference to whether the drain actually reaches the land and receives the water directly from it. Indeed, it is provided by section 5658 (section 4288), supra, that the viewers shall regard accruing benefits, whether the drain passes through the land or not. In so far as it affords an outlet for the drainage of the land. The position of appellants that their lands are sufficiently high above the proposed drain to enable them to successfully discharge upon lower lands the water falling and coming upon their grounds, and that consequently they can receive no benefits from the construction of the proposed ditch, cannot be sustained. A fact found by the court, and not challenged, is as follows: "That the lands of the petitioners are frequently overflowed and injured by water that comes upon them through ditches that drain the water from the lands of the other persons, parties hereto, and affected by said ditch." The owner of an upper estate has no right to collect the water falling upon his land into a ditch, and hurl it in a flood upon his neighbor below. The owner of the superior land may suffer the water that falls upon his fields to find its natural way off, even to the descent upon his neighbor to his injury, but when he collects it into a body by a system of artificial drainage, or even cuts a channel that will enable the water to pass away more rapidly or in larger volume, then the law requires him to look beyond his own line, and make provision for the abnormal body of water he has created. He may not thus injure his neighbor by an increased volume of water, and avoid the burden of providing for increased means of escape. Templeton v. Voshloe, 72 Ind. 134; Weddell v. Hapner, 124 Ind. 315, 24 N. E. 368; Wels v. City of Madison, 75 Ind. 241; City of Crawfordsville v. Bond, 96 Ind. 236; City of Ev-

ansville v. Decker, 84 Ind. 325. It was not only the right, but the duty, of the viewers, in their examination of the premises, to regard these things, and, if they found the fact to be, as stated by the court, that the lower lands were frequently overflowed and injured by water that comes upon them through ditches that drain the water from the higher lands, to adjudge benefits to such upper lands, by the creation or enlargement of a channel sufficient to avoid such overflowing and injury. Appellants' position that the viewers could only look at conditions as they existed at the time is unsound. They could consider that the owners of intervening lands had the right to fight "the common enemy," and upon their own premises even to raise embankments, to ward off the water coming upon them by natural surface drainage other than by natural or prescriptive water courses, and thus heap up the surface water upon the appellants' land, without relief to them except through our drainage laws. Railroad Co. v. Stevens, 73 Ind. 278; Hill v. Railway Co., 100 Ind. 511, 10 N. E. 410. The viewers could further consider that appellants were constantly liable to be enjoined by the owners of the lower lands from discharging their collected water upon their properties, and, in determining the question of benefits, they could count only upon conditions that lawfully existed, or could so exist. The burden of proof that their lands were not benefited by the proposed drain rests upon the appellants (remonstrators). Wilson v. Talley, 144 Ind. 74, 42 N. E. 362, 1009. Three disinterested freeholders and householders, not of kin to any party interested, after actual view of the premises, determined the several amounts of benefits assessed against the appellants' lands. The amounts assessed were small. Three reviewers, of like qualifications, re-examined the lands, revised the several assessments, and found them all "just and correct," as stated by the viewers. The circuit court heard the testimony of the viewers, and many other witnesses, pro and con, and, having weighed the evidence, confirmed the assessments of benefits as they had been made by the viewers, with two unimportant exceptions; and, under the rule many times announced, this court will not disturb the finding. Judgment affirmed.

(152 Ind. 135)

NELSON et al. v. COTTINGHAM et al.
(Supreme Court of Indiana. Jan. 25, 1899.)

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE
—JUDGMENTS—EXCESSIVE RELIEF—REVIEW.

1. Where the record contains a special finding, which it does not appear was made at the request of any party to the action, it will be treated as a general finding.

2. Conclusions of law can only be reviewed on assignments of error based on exceptions taken to each conclusion at the proper time.

3. In an action to set aside, as fraudulent, a conveyance by husband to wife, it was not er-

ror to deny the latter's motion for judgment, where part of the property conveyed was subject to plaintiff's debt.

4. Where a judgment gives relief which a party is not entitled to, the remedy is by motion to modify.

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Action by Sarah Cottingham and others against Sarah J. Nelson and others. There was a judgment for plaintiffs, and Sarah J. and Mary Nelson appeal. Affirmed.

Kane & Kane, for appellants. Fertig & Alexander and Roberts & Vestal, for appellees.

MONKS, C. J. Appellees brought this action to set aside, as fraudulent, conveyances of certain real estate made by Alvin S. and Milton H. Nelson, through a trustee, to their wives, the appellants Sarah J. Nelson and Mary Nelson. Final judgment was rendered in favor of appellees, setting aside said conveyances, and ordering that said real estate be sold to pay appellees' judgments against said Alvin S. and Milton H. Nelson. Only Sarah J. Nelson and Mary Nelson appeal, and each separately assigns errors. The errors assigned are: (1) The court erred in its conclusions of law. (2) The court erred in overruling the motions for judgment in her favor on the special finding of facts. The record contains what purports to be a special finding by the court, with conclusions of law thereon; but, as it does not appear that the same was made at the request of any of the parties to the action, we are compelled to treat it as a general and not a special finding. Jacobs v. State, 127 Ind. 77, 78, 26 N. E. 675, and cases cited; Sheets v. Bray, 125 Ind. 33, 35, 24 N. E. 357, and cases cited. No question is therefore presented by the first error assigned. Section 560, 1 Burns' Rev. St. 1894 (section 551, Horner's Rev. St. 1897), requires that in a special finding the court shall first state the facts in writing, and then the conclusions of law upon them, "and judgment shall be rendered accordingly." This is for the purpose of enabling a party to except to the decision of the court upon the questions of law involved in the case. If a judgment rendered in such a case should not conform to the conclusions of law stated, the remedy is by motion to modify the judgment so as to conform to the conclusions of law; but, where the judgment rendered is in accordance with the conclusions of law stated, error, if any, in such conclusions, is not reached by a motion to modify the judgment, but by exceptions to each of such conclusions, and a proper assignment of error thereon in the court having jurisdiction of such case on appeal. Nading v. Elliott, 137 Ind. 261, 265-269, 36 N. E. 695, and cases cited; Smith v. McKean, 99 Ind. 101, 107; Radabaugh v. Silvers, 35 N. E. 694, and cases cited. Therefore, when a motion is made to render judgment on a special finding

which will not be in accordance with the conclusions of law, if rendered, and the same is overruled, and judgment is rendered in conformity with such conclusions, even though they may be erroneous, an assignment of error in this court that the court erred in overruling said motion for judgment will not present any question for decision, and will be unavailable, for the reason that the correctness of the conclusions of law upon the facts found can only be presented in this state by exceptions to each of said conclusions of law at the proper time, and assigning as error that the court erred in said conclusions. In other words, the correctness of the conclusions of law is not reached by a motion for a judgment, nor by a motion to modify or for a new trial. This has been uniformly held by this court. *Royse v. Bourne*, 149 Ind. 187, 47 N. E. 827; *Pfau v. State*, 148 Ind. 539, 548, 47 N. E. 927; *Lewis v. Haas*, 50 Ind. 246, 248; *Lynch v. Jennings*, 43 Ind. 276, 284; *Cruzan v. Smith*, 41 Ind. 288, 293; *Peden v. King*, 30 Ind. 181, 183; *Elliott*, App. Proc. § 793. While the overruling of motions to render judgment on a special finding not in conformity with the conclusions of law, even though they may be erroneous, will not reverse a cause, for the reason that no question can be presented on such ruling, yet if such motion were sustained, and final judgment rendered according to the special finding, and contrary to the conclusions of law, they being erroneous, or if such judgment were rendered by the court of its own accord, without any motion to that effect, such action of the court would render harmless the error in the conclusions of law, and would furnish no grounds for reversal, because such ultimate judgment would be correct upon the facts found. *White v. Railroad Co.*, 122 Ind. 317, 330, 331, 23 N. E. 782; *Sphung v. Moore*, 120 Ind. 352, 354, 22 N. E. 319; *Railway Co. v. Barnes*, 116 Ind. 126, 127, 18 N. E. 459; *Slauter v. Favorite*, 107 Ind. 291, 300, 4 N. E. 880; *Krug v. Davis*, 101 Ind. 75, 77. The finding in this case, however, is, as we have held, to be treated as a general finding, and the motion for judgment in favor of said appellants presents the question whether they were entitled to judgment thereon in their favor. The finding shows that the value of the real estate conveyed to appellant Sarah J. Nelson was \$800, and that her husband was a resident householder of the state, and had no other property at the time of said conveyance, except personal property worth \$183, which he had claimed as exempt, making the entire value of his property real and personal \$983; that the real estate conveyed to Mary Nelson was worth \$800, and that her husband was a resident householder of the state, and had no other property except personal property worth \$267, which he had claimed as exempt, making the total value of his property \$1,067. In all other respects, the finding sustains the allegations of the

complaint. Each of appellants insists that, under said general finding, she is entitled to hold one-third in value of the real estate conveyed to her, and the remainder of the \$800 exemption given by law to her husband, after deducting the value of the personal property claimed by him as exempt, free from the judgments of appellees; citing *Bank v. Bolen*, 121 Ind. 301, 305-307, 23 N. E. 146; *Insurance Co. v. Fielder*, 133 Ind. 557, 33 N. E. 270; *Brigham v. Hubbard*, 115 Ind. 474, 478, 17 N. E. 920; *Taylor v. Duesterberg*, 109 Ind. 165, 169, 170, 9 N. E. 907; *Smith v. Selz*, 114 Ind. 229, 235, 16 N. E. 524. Conceding, without deciding, as to the correctness of this insistence (see, however, *Marmon v. White* [this term] 51 N. E. 930), a calculation upon the basis claimed shows that there was \$149.67 in value of the land conveyed to appellant Sarah J. Nelson that she was not entitled to hold free from appellees' judgments, and \$233.67 in value of the land conveyed to appellant Mary Nelson that she was not entitled to hold free from appellees' judgments. It is clear, therefore, that upon the basis claimed appellants were not entitled to a judgment in their favor, and the court below properly overruled their motions therefor. If the judgment gave appellees more relief than they were entitled to under the finding, the remedy was by motion to modify the judgment. *Jarrell v. Brubaker*, 150 Ind. 260, 49 N. E. 1050; *Evans v. State*, 150 Ind. 651, 655, 656, 50 N. E. 820, and cases cited. No such motion was made. Finding no available error in the record, the judgment is affirmed.

(21 Ind. App. 466)

TERRE HAUTE ELECTRIC RY. CO. v. LAUER.

(Appellate Court of Indiana. Jan. 26, 1899.)
CARRIERS—INJURY TO PASSENGER RIDING ON PLATFORM—CONTRIBUTORY NEGLIGENCE—DIRECTIONS OF CONDUCTOR—DAMAGES—PLEADING—VARIANCE—QUESTIONS FOR JURY—INSTRUCTIONS—DEPOSITIONS—APPEAL.

1. Whether a passenger in a street car is negligent in giving his seat to a woman, and riding on the platform, at the general request of the conductor, is for the jury.

2. There is no variance where the evidence fairly tends to prove the substance of the issue.

3. Where the testimony is conflicting, and there is evidence which fairly tends to support the verdict, the judgment entered thereon cannot be disturbed on appeal.

4. A request by a conductor of a street car for a passenger to ride on the platform amounts to a direction to ride there.

5. Under an allegation that plaintiff rode on the platform of a street car at the request of the conductor, and was injured through the negligence of the company's servants, plaintiff may recover without proving that the conductor requested him to ride on the platform.

6. A refusal of an instruction that plaintiff could not recover for fright, suffering, and nervous shock, unless they were the result of the "bodily injuries" received, is not error, where an instruction was given that there could be no recovery for such injuries, unless they were the result of "personal injuries" received.

7. Where instructions, taken as a whole, state the law correctly, and are not misleading, the case will not be reversed for inaccuracies of expression in some of them.

8. Where a witness whose deposition had been taken testified in person, and the opposite party introduced a portion of his deposition to impeach him, the party taking it might introduce the entire deposition, although it did not all bear on the subject-matter of the impeachment.

Appeal from circuit court, Clay county; S. M. McGregor, Judge.

Action by James W. Lauer against the Terre Haute Electric Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

George A. Knight and McNutt & McNutt, for appellant. Azro Dyer and John Browlee, for appellee.

COMSTOCK, J. This action was commenced in the superior court of Vigo county, and tried in the Clay circuit court upon change of venue. The complaint is in one paragraph, and charges, in substance, that on the 2d day of October, 1895, the defendant was a corporation duly organized under the laws of Indiana, engaged in operating an electric street railroad in the city of Terre Haute; that on the night of said day the plaintiff went into a car of the defendant, occupied a seat therein, and paid defendant's conductor in charge of said car the sum of 5 cents, and was received as a passenger on said car; that, proceeding on its way, said car became crowded with passengers, several of whom were ladies, and said "conductor in charge of said car requested that some of the gentlemen passengers should vacate their seats in favor of such ladies, and stand and ride upon the rear platform of said car, and thereupon, in obedience to said request, this plaintiff gave up his seat, and stood and rode upon the rear platform of said car"; that, while so riding, the defendant carelessly and negligently, with great force and violence, suddenly, at a high rate of speed, ran another of its cars against and into the rear platform of said car upon which plaintiff was standing, and thereby crushed and broke said platform, and caught, mashed, and crushed plaintiff's body between the ends of said cars, thereby injuring, wounding, and bruising plaintiff's side, hips, and thighs; that said injuries were not caused through any fault or negligence on his part, and that by reason of said injuries he has suffered, and still suffers, great mental anguish and physical pain; that he has been compelled to expend a large sum of money for medical attention, etc.; that he has been permanently disabled, and rendered incapable of performing and following his vocation, to wit, that of real-estate broker, receiver, assignee, and trustee; that his health has been impaired; and that by reason of said injuries plaintiff has sustained damages in the sum of \$20,000. The cause was put at issue by general denial, tried by jury, and a

verdict returned in favor of appellee, upon which a judgment was rendered for \$1,500.

The first and second specifications in the assignment of errors question the sufficiency of the complaint; the third, the action of the court in overruling appellant's motion for a new trial.

In questioning the sufficiency of the complaint, appellant's learned counsel do not insist that it is negligence per se for a passenger to ride on the rear platform of a street car, but claim that it was negligence for appellee to leave a place of safety, which he was occupying, for a place obviously more or less dangerous, upon the general request of the conductor; that there is nothing in the complaint to show that when he surrendered his seat he might not have remained standing in the car, instead of on the platform, on the outside; that there is no allegation that there was not room for appellee to stand on the inside of the car. The proposition that it is not negligence per se, but a question of fact for the jury, for a passenger on a street railway to ride upon the platform, has been decided in many decisions. *Railroad Co. v. Shaffer*, 9 Ind. App. 486, 36 N. E. 861; *Nolan v. Railroad Co.*, 87 N. Y. 63; *Maguire v. Railroad Co.*, 115 Mass. 239; *Burns v. Railway Co.*, 50 Mo. 139; *Railroad Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406; *Beal v. Railway Co.*, 157 Mass. 444, 32 N. E. 653. Whether one ride on the platform of his own motion, or upon the request of the conductor, would not be material. The rule would be the same in either instance. We think it clear, too, that it is the duty of the passenger to follow the reasonable instructions, and rely on the judgment, of those in charge of the car, in regard to moving from one part of the car to another, unless it is apparent to the passenger that the movement would be attended with danger. *Prothero v. Railway Co.*, 134 Ind. 431, 33 N. E. 765; *Railroad Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, and 14 N. E. 352; *Railroad Co. v. Kelly*, 92 Ind. 371. The fact that appellee responded to a general request, which appealed to him as directly as to any one else in the car, should not deprive him of any right he would have had, growing out of a compliance with a request addressed to him individually. A further objection made to the complaint is that the request was unreasonable. The request to gentlemen to vacate seats occupied by them in a crowded public conveyance, in favor of ladies, who would otherwise stand, is not, in this country, so regarded.

Under the third specification of the assignment of errors, to wit, the overruling of appellant's motion for a new trial, appellant's counsel discuss together the first and second reasons respectively given for a new trial, viz. that the "verdict of the jury is not sustained by sufficient evidence," and "the verdict of the jury is contrary to law." We

believe it would serve no good purpose to quote largely from the evidence, which is voluminous. We deem it sufficient to say, in passing upon these reasons for a new trial, that, while the testimony is conflicting, there is evidence which fairly tends to support the verdict on every material point. In view of the whole record, the objection urged, that there is a variance between the proof and the allegations of the complaint, is not well taken. It is only required that the evidence fairly tends to prove the substance of the issue tendered by the pleading, and this it does. Under the familiar rule of appellate courts, the judgment cannot, therefore, be disturbed.

Appellant next objects to instruction No. 8 given to the jury, upon the ground that there was no evidence to which it was applicable. Said instruction is as follows: "It is the duty of the passenger on the car to follow the reasonable instructions and directions of those in charge of the car, in regard to moving from one point of the car to another, unless it is apparent to the passenger, in exercising ordinary care, that the movement would be attended with danger; and a passenger may rightfully assume that the servants in charge of the car are familiar with its operations, and that they have a reasonable knowledge of what is safe and prudent for the passenger, in giving such instructions or directions. Therefore if in this case one of the servants of the defendant—the conductor in charge of the car—directed the plaintiff to stand on the platform, where he was standing when the accident occurred, it was the duty of the plaintiff to do so, unless it was known and apparent to him at the time that it would be unsafe for him, in the exercise of ordinary care and prudence, to leave the car and stand upon the platform; and if, while standing upon the platform, you find he was injured without any fault of his, but while standing there at the direction of the servant of the company, then, under these circumstances, even though you should find that his position was an unsafe one, yet this would not defeat plaintiff's right to recover, provided the danger was not apparent to him when he obeyed the instructions given, and took his position on the platform." One criticism made by appellant's learned counsel on this instruction is that "there was no evidence that the conductor in charge of appellant's car directed the plaintiff to stand on the platform." There was evidence that the conductor requested passengers to ride upon the platform. The conductor represents the company in the management of the car, so far as concerns the location of passengers. A request from one clothed with authority is practically equivalent to a direction. There is no substantial difference in the meaning of the words "request" and "direction," in the connection in which they are respectively employed in the complaint and instructions. But counsel contend that, if the request can be construed to be a direction to the plaintiff

to stand on the platform, that it was error for the court to instruct that it was the duty of appellee to do so, as stated in the instruction. What we have heretofore stated, as to the sufficiency of the complaint upon the duty of the passenger to follow the reasonable directions of those in charge of the car, is applicable to this instruction.

Appellant's next objection is to instruction No. 11, which is to the effect that, even though the jury find from the evidence that the conductor did not direct appellee to stand upon the platform, that fact of itself would not necessarily defeat his right to recover in this action; the question still remaining for the jury to determine whether, under the circumstances, plaintiff was guilty of negligence in leaving the inside of the car and standing on the platform, in the absence of any instructions from the conductor. Counsel contend that the complaint proceeds upon the theory that the actionable character of the negligence complained of, as to each of the facts, to wit, the collision, and the riding on the platform by appellee at the request of the conductor, is made by the complaint to depend to some extent on the existence of the other fact. It is not negligence per se for a passenger to ride upon a platform of a street car, going there directly from the street or from the inside of the car, as the authorities cited hold. The theory of the complaint is that appellee was injured by a collision of one car of appellant with another caused by the negligence of appellant's servants. That was the cause of action, and it devolved upon appellee to prove only such facts alleged as amounted to a cause of action, and they need not be proved precisely as alleged. *Railway Co. v. Valirius*, 56 Ind. 517; *Insurance Co. v. Hinesley*, 75 Ind. 8; *Ower v. Phillips*, 73 Ind. 284; *Oil Co. v. Bowker*, 141 Ind. 12, 40 N. E. 128; *Railroad Co. v. McCorkle*, 140 Ind. 614, 40 N. E. 62.

The twelfth instruction, to which appellant objects, is as follows: "If you find from the evidence in the cause that the plaintiff was a passenger on one of defendant's cars, and was occupying a seat inside, in a safe place; and you further find that said car was crowded with passengers, and all the seats were taken, and that the plaintiff arose and vacated his seat to accommodate some lady passengers who had entered the car, and that, on account of the crowded condition of said car, instead of standing therein he voluntarily left it and passed out to the platform, and remained standing on the outside, where the accident occurred,—then as to whether or not in so conducting himself he was guilty of negligence is a question of fact, which I submit to you. If his conduct in this respect, in doing what he did under the circumstances, was the conduct of an ordinarily prudent and cautious man, then he was not guilty of negligence. If, on the other hand, in going out upon the platform, under the circumstances, he did that which a prudent and cautious

person would and ought not to do, then he would be guilty of negligence." We think it fairly states the law applicable to the case.

The thirteenth instruction, also objected to, is to the effect that if the conductor on one of the cars of defendant was so drowsy and sleepy that he was unable to, and did not, give proper attention to the management of his car, and by reason thereof he carelessly and negligently permitted the car to run into and against the car upon which plaintiff was riding, thereby injuring him, the defendant was negligent, and plaintiff would be entitled to recover, provided all other material elements of the complaint had been established. The objection made to this instruction is the statement that the mere fact that the conductor became drowsy and sleepy, so that he was unable to, and did not, give proper attention to the car, whereby plaintiff was injured, constituted actionable negligence. It is claimed that this statement is erroneous, without any statement as to whether his condition was caused by negligence, or whether his condition was known to appellant or any of its agents. This instruction is not unobjectionable, but, considered in connection with those given, we think it could not have misled the jury.

The reasons from 12 to 22 in the motion for a new trial question the rulings of the court in refusing to give to the jury instructions asked by appellant. The second instruction asked by appellant and refused by the court is as follows: "The plaintiff, in order to recover in this cause, must prove his case according to the allegations and theory of his complaint. His complaint proceeds upon the theory that he was instructed by the conductor to ride upon the platform, and that the conductor undertook to carry him safely while so riding. If he fails to sustain this theory, you should find for the defendant, provided you also find that he would not have been injured had he remained inside the car." In this we think there was no error. Appellee had the right to ride upon the platform without the request of the conductor. Appellee was not bound to prove the facts precisely as alleged. What we have said in reference to instruction 11 given by the court makes it unnecessary to say more upon this instruction.

The third, fourth, and fifth instructions refused are as follows: "Third. If the plaintiff left his seat inside the car, and voluntarily went on the platform, without the request of the defendant or its agent, the conductor, while there was ample standing room inside, then the plaintiff is presumed to have assumed increase of risk incident to riding on the platform instead of inside the car. And if you find such is the case, and if you further find plaintiff would not have been injured had he remained inside the car, you should find for the defendant. Fourth. Before the plaintiff can recover in

this case, he must prove either that the car was so crowded that he could not conveniently sit or stand inside of the car, and went onto the platform on account thereof, or he must prove that he was asked or directed by the conductor to stand upon the platform. Fifth. A passenger who rides upon the rear platform of an electric street-railway car, when there is ample room inside of the car, in which there are pendant straps, to which a person may hold while standing, is guilty of contributory negligence; and if an injury result to him which would not have occurred had he been inside the car, he cannot maintain an action against the carrier operating the car." These instructions were correctly refused. The court will not presume that it is dangerous to ride upon the rear platform of a street car, and it is not negligence per se to do so, with or without directions from the conductor.

The sixth and seventh instructions refused present the same legal question heretofore discussed, viz. that it devolved upon the plaintiff to prove his case by a preponderance of the evidence upon the theory of the complaint. They were properly refused. As above stated, it was not necessary for appellee to prove all the allegations of his complaint precisely as alleged.

The ninth instruction asked by appellant is that appellee could not recover for "fright, pain, or suffering, or for nervous shock, unless the same grow out of, or was connected with, bodily injury." The tenth instruction is to the same effect, except that it states that the appellee could not recover, unless the nervous shock, etc., was the result of, or connected with, the bodily injuries described in the complaint. The eleventh is that the plaintiff cannot recover at all, unless he received a bodily injury. The three instructions last named were asked and refused, but the court gave instruction No. 15, which is as follows: "The plaintiff can only recover, if at all, for the injuries described in the complaint, and cannot recover for other or different injuries; nor can he recover for fright or mental suffering or nervous shock, unless they grow out of, and were the result of, the personal injuries received, if you find he received any." The standard dictionaries define the word "bodily" to mean "pertaining to or concerning the body; of or belonging to the body or to the physical constitution; not mental, but corporeal,"—and the word "personal" as pertaining to the person or bodily form. The expression "great personal injury" has been said to be equivalent to the expression "great bodily harm." 2 Abb. Law Dict. p. 273. A personal injury is an injury to the person of an individual, as an assault is distinguished from an injury to one's property. 2 Rap. & L. Law Dict. p. 955. If we admit, as claimed by appellant, that the terms "personal injuries" and "bodily injuries" are not "nec-

essarily equivalent," yet the jury could only have understood from instruction 15 given that the appellee was entitled to recover only for mental suffering growing out of the bodily injuries he received. The instructions, taken together, state the law applicable to the case; and, under the decisions of this state, even if, in some of them, when separately considered, there were inaccuracies of expression, the judgment should not on that account be reversed, if as an entirety they are not calculated to mislead the jury. *Siebert v. State*, 95 Ind. 478; *McCarty v. Watterman*, 96 Ind. 596; *Gallaher v. State*, 101 Ind. 412; *Cline v. Lindsey*, 110 Ind. 343, 11 N. E. 441; *Delg v. Morehead*, 110 Ind. 461, 11 N. E. 458; *Railway Co. v. Watson*, 114 Ind. 22, 14 N. E. 721, and 15 N. E. 824; *Hutchins v. Weldin*, 114 Ind. 80, 15 N. E. 804; *Railway Co. v. Wright*, 115 Ind. 398, 16 N. E. 145, and 17 N. E. 584.

The remaining alleged error discussed is the permitting of appellee to read in evidence to the jury the deposition of one Buchanan. Prior to the trial, appellee had taken the deposition of Buchanan, in the state of Illinois. Buchanan, the witness, was present, and testified fully, at the trial of the cause. On cross-examination the witness was asked respecting the testimony given in the deposition, and for the purpose of impeachment, only, four questions and answers thereto were used in evidence by appellant to the jury, whereupon the court, over the objection of appellant, permitted appellee to introduce in evidence the whole of said deposition. Appellant's learned counsel admit that it would be competent to read such portions of the deposition as would tend to explain or qualify the portions introduced by appellant, but claim that it was not proper to permit appellee to have the benefit of a repetition of all the testimony of the witness. The ruling of the court is sustained by 3 Jones, Ev. § 703, and authorities there cited, and in *Harness v. State*, 57 Ind. 1; *Convers v. Meyer*, 14 Neb. 190, 15 N. W. 340; *Carey v. City of Richmond*, 92 Ind. 200.

We find no error for which the judgment should be reversed. Judgment affirmed.

HENLEY, J., took no part.

(21 Ind. App. 483)

McNAMARA v. BECK et al.

(Appellate Court of Indiana. Jan. 28, 1899.)

IMPUTED NEGLIGENCE — INFANTS — QUESTION FOR COURT — INJURIES FROM ICE WAGON.

1. The doctrine of imputed negligence is not applicable to an action brought by the injured infant for his own benefit.

2. Under Burns' Rev. St. 1894, § 554 (Rev. St. 1881, § 545), providing that a special verdict is that by which the jury find the facts only, leaving judgment thereon to the court, the question of whether plaintiff's injury resulted from defendant's negligence is for the court, on the facts found by the jury.

3. An ice wagon ran over a two year old

child. The driver did not see the child before the injury. It was not shown how the child got under the wagon, or what he was doing. The team on the wagon was gentle, and was going on a slow walk. The driver was inside the wagon, with the lines in easy reach, looking ahead, the sides being closed. If the driver had been on the seat of the wagon, he could not have seen the child when injured. Held not to show actionable negligence.

Appeal from circuit court, St. Joseph county; Lucius Hubbard, Judge.

Action by Thomas McNamara, by next friend, against John W. Beck and others. From an order overruling plaintiff's motion for judgment on a special verdict for him, he appeals. Affirmed.

Joseph G. Orr and George E. Clark, for appellant. Rich, Anderson & Dushane, for appellees.

HENLEY, J. This was an action brought by the appellant against appellee on account of an alleged injury received by appellant, by being run over by an ice wagon driven by a servant of appellee. It is alleged that the wagon was, at the time the injury occurred, being negligently driven. Appellant is a child about two years old. The damage done appellant was slight, and not permanent. The jury returned a special verdict, finding that appellant had been damaged in the sum of \$125. Both parties moved for judgment upon the special verdict. The lower court sustained the motion of appellee, and overruled that of appellant. The only error assigned by appellant is that the lower court erred in overruling appellant's motion for judgment upon the special verdict. Appellant's brief in this cause, excluding the caption, and including a statement of the case, covers less than one page of written manuscript. Counsel for appellant say: "The jury found that the plaintiff, at the time of the injury complained of, was an infant under two years of age; that he was injured by being run over by an ice wagon negligently driven by defendant's servant. They also found that the parent of the infant was negligent in exposing him to danger. See special verdict, pages 15 to 25 of transcript. The trial court reluctantly followed the cases of *Railroad Co. v. Huffman*, 28 Ind. 287, and *Hathaway v. Railway Co.*, 46 Ind. 25, and overruled plaintiff's motion for judgment on the special verdict. This ruling is assigned as error. It is only necessary to refer to the recent case of *City of Evansville v. Senhenn*, decided by the supreme court, and reported in 47 N. E. 634 (wherein the cases holding the doctrine of imputed negligence to be applicable in such a case as this are overruled), in order to substantiate appellant's claim that the trial court, in overruling appellant's motion for judgment on the special verdict, was in error, for which error appellant asks that the decision be reversed." We express a doubt as to the sufficiency of the argument in this brief to prevent a waiver of the questions arising upon the special verdict.

Simons v. Beaver, 16 Ind. App. 492, 43 N. E. 972, and 45 N. E. 673; *Alfred Shrimpton & Sons v. Keyes*, 17 Ind. App. 305, 46 N. E. 651, and cases therein cited. In this cause it is necessary that the verdict should show, not only that the appellant was an infant of such tender age that it would be non sui juris, and hence the court would not predicate negligence upon its own conduct, but it is just as important and material that the verdict also find facts from which the court could, as a matter of law, adjudge appellee guilty of negligence which was the proximate cause of appellant's injury. Appellant, even though non sui juris, cannot recover unless it be shown that the injury was the direct result of the negligence of appellee. This action having been brought by the injured infant for his own benefit, the doctrine of imputed negligence is not applicable. *City of Evansville v. Senhenn*, supra. The special verdict wholly fails to show that appellant's injury was the result of the negligence of appellee. It is true, there is a finding in the verdict, consisting of the following question and answer: "Q. 32. Did said injury to plaintiff result from the negligence of defendant's said servant, Oscar Beck? Ans. Yes." It was for the court to determine, from the facts found, whether or not appellant's injury was caused by the negligence of appellee, and such finding was unauthorized, and will be disregarded. *Conner v. Railway Co.*, 105 Ind. 62, 4 N. E. 441; *Railway Co. v. Roberts*, 18 Ind. App. 538, 47 N. E. 839. It was found by the jury that the team driven by appellee's servant was a gentle team, and was going along in a slow walk; that the lines were in easy command of the driver, and that the team stopped or moved on at the command of the driver; that, if the driver had been on the seat of the wagon, he could not have seen the child when he was injured; that he was inside the wagon, looking in the direction in which he was driving; that the sides of the wagon were closed, so that he could not see to left or right; that there was no evidence as to how appellant's leg got under the wheel, and there was no evidence to show what appellant was doing when he was struck by the ice wagon. The yard back of where appellant lived was not fenced, and, when last seen by any one before he was injured, he was playing in the back yard. Appellee's servant driving the wagon was going slowly through the alley adjoining the back yard where appellant lived, stopping to deliver ice at various places. The jury say that appellee's servant in charge of the team did not see appellant prior to the injury; that the evidence does not show how appellant happened to get under the wagon, nor what he was doing. The lower court correctly rendered judgment for appellee upon the facts found by the jury. No court could, from the facts before it, as found by the special verdict herein, say, as a matter of law, that appellant's injury was proximately caused by the negligent act of appellee. The facts from which negligence

could be found by the court are not stated. There is no error in the record. Judgment affirmed.

(21 Ind. App. 459)

F. C. AUSTIN MFG. CO. v. CLENDENNING et al.

(Appellate Court of Indiana. Jan. 25, 1899.)

APPEAL—RECORD—SALES—DEFECTIVE MACHINE—ACTION FOR DAMAGES—PLEADING.

1. A motion and affidavits cannot be made part of the appeal record by mentioning them in the place in the bill of exceptions where they should have been inserted, in connection with the words, in parentheses, "Here insert," though they were copied elsewhere in the transcript by the clerk.

2. A buyer of a rock crusher, agreeing to return it, if it failed to do certain work as represented, cannot retain it, and sue for damages occasioned by its failure to do such work.

3. A buyer gave his note for the price of a rock crusher, and agreed to return it, if it failed to do certain work as represented; and the seller agreed, on such failure, to receive it, and to cancel the contract of sale. *Held*, that the transfer of the note by the seller to an innocent purchaser, and payment thereof by the buyer, did not enable him to recover damages for the failure of the crusher to do the work, where he had not previously offered to return it, and the seller had not refused to receive it.

4. A buyer cannot recover for defects in the article purchased, on the strength of a subsequent agreement, where his complaint does not show that his action was based on such agreement.

Appeal from circuit court, Jefferson county; P. E. Bear, Judge.

Action by Oliver S. Clendenning and another against the F. C. Austin Manufacturing Company and another. From a judgment in favor of plaintiffs, sustaining the service on defendant company, and overruling its demurrer to the complaint, it appeals. Reversed.

Wm. D. Ward, for appellant. F. M. Griffith, for appellees.

BLACK, C. J. The appellant has assigned as error the overruling of its motion to set aside the service of process upon it. In the bill of exceptions by which it was sought to save the appellant's exception to this ruling, the motion and affidavits in support thereof are not set out. They are mentioned, and at the places where they should have been, but are not, copied into the bill, the words "Here insert" are written in parentheses. That they cannot thus be made a part of the record, though copied elsewhere in the transcript by the clerk, is a matter so often decided that we need only mention it.

The complaint of the appellees, Oliver S. Clendenning and Joseph H. Hart, was against the appellant and one Benjamin L. Blair, spoken of in the complaint as an agent of the appellant. A demurrer of said Blair to the complaint was sustained, and he had judgment in his favor. The demurrer of the appellant to the complaint for want of sufficient facts was overruled, and this is assigned as

error. In the complaint it was shown that said Clendenning & Hart contracted with the appellant for one No. 4 Austin rock crusher, for which said Clendenning & Hart executed their note, payable to said Blair, for \$1,000, due 90 days after date, payable at Vevay Deposit Bank of Vevay, Ind., which note was by said Blair at once transferred to the Merchants' National Bank of Indianapolis; that Clendenning & Hart executed a written order addressed to the appellant. The order is set out in the body of the complaint. It was dated September 25, 1895, at Vevay, Ind.; and by it the appellant, at Chicago, Ill., was requested to ship to Clendenning, at Vevay, about the 1st of October, 1895, one No. 4 Austin rock crusher, for Clendenning & Hart, who, by the terms of the order (which was signed by them), agreed to pay freight charges, and, at their own expense for power, cartage, assistance, etc., give it a fair and thorough trial, under conditions stipulated by the F. C. Austin Manufacturing Company, and under direction of its agent, should it send one. Clendenning & Hart, by the terms of the order, further agreed that, if the crusher should equal the capacity of 15 to 20 tons per hour, they would pay the appellant, or order, \$1,000, with interest at 6 per cent., payable in 90 days; that, if the crusher should not do the work so represented, Clendenning & Hart should notify the appellant, in writing, at Chicago, of such failure, and if, within 30 days from the receipt of said notice, the appellant should fail to make said crusher do the work so represented, then the appellant agreed to refund the freight charges, and receive back the crusher at the railroad station from which it was taken, and cancel said contract. It was stipulated in the order that it embodied the entire understanding, and that it was not subject to countermand, and was not to be affected by any verbal agreements. It was further alleged in the complaint that the crusher would not, with ordinary diligence, and with a sufficient force, break from 15 to 20 tons of rock per hour; that the pitman was not properly adjusted; that there was a defect in the material, by reason of which the same broke; that the elevator frequently broke, and that many other parts were defective; that, acting under the belief that the crusher would work properly, and would be fully up to the warranties and representations made by the defendant, said Clendenning & Hart made all arrangements for the crushing of the stone for $4\frac{1}{2}$ miles of a certain road; that they caused to be hauled 15,000 perch of rock at convenient places along the road, to be crushed by the crusher; that, upon the arrival of the crusher at the wharf boat at Vevay (the date not being stated), they paid all freight and wharfage, and caused the crusher to be conveyed to said road; that they set it up, ready for operation, and secured the proper power, and sufficient hands, at an expense of \$15 per day, to operate it; that it would not

do, and they could not make it do, the work so represented; that in November, 1895, and in February, 1896, Clendenning & Hart notified the defendant, by sending written notice thereof to Benjamin L. Blair, agent of said defendant company at Indianapolis, who forwarded notice thereof to said defendant company at Chicago, in writing, and also by notifying said defendant at Chicago, in writing, that said crusher would not do said work; that said defendant sent three different agents, and experienced workmen, who made some minor changes in the machine, and who made three attempts to make it come up to the requirements, and left without making the crusher come up to said warranties; "that, while endeavoring to operate said crusher, one of the heavy iron jaws of the pitman broke, showing that the crack therein was of long standing, and was defective when sold"; that they at once notified defendant of said breakage; that they were compelled to abandon the effort to break the necessary rock with said crusher to complete said road. Certain damages are alleged as suffered by Clendenning alone, which need not be set forth. It was alleged that, if the crusher had been as warranted and represented, it would have been worth \$1,000, but that, in the condition in which it was delivered, it was worth not more than \$500. It was further alleged that it was agreed specially by the defendant that if, after a fair trial, said crusher would not do the work represented, then the defendant would refund freight charges, and receive the crusher back at the Vevay wharf boat, cancel the contract, and surrender the note given therefor; that the note given in payment for the crusher was executed upon the express agreement, and Clendenning & Hart were induced to hold the crusher by reason of the defendant's agreement, that it would make the crusher come up to said representations; that Clendenning & Hart gave the crusher a fair trial long before the note came due, notified the defendant that it would not do the work represented, and demanded that the contract be canceled, but the defendant immediately upon receiving said note transferred it to an innocent purchaser, and put it out of its power to carry out said agreement; and that Clendenning & Hart had paid the note in full. Damages in the sum of \$1,500 were demanded.

It was necessary, in order to state a cause of action, to show, not only a breach of the written contract on the part of the defendant to the damage of the plaintiffs, but also performance on the part of the plaintiffs of all stipulations, upon the doing of which by them their right of action depended, or to show a subsequent contract, upon a sufficient consideration, and performance thereof on the part of the plaintiffs, with the defendant's failure to perform, to the damage of the plaintiffs. The complaint shows that the crusher would not do the work which under

the contract it was to do. The written contract provided that, if the crusher should not do the work represented (that is, crush from 15 to 20 tons of rock per hour), the plaintiffs were to notify the appellant, in writing, of such failure, and that if, within 30 days from the receipt of said notice, the appellant should fail to make the crusher do the work as represented, the appellant would refund the freight charges, and receive back the crusher at the railroad station from which it was taken, and cancel the contract. The complaint shows that upon notice the appellant sent men, who failed to make the crusher perform as warranted. It is alleged that the plaintiffs paid the freight charges, but the amount thereof is not stated. It is also alleged that the plaintiffs demanded that the contract be canceled, but that the defendant, immediately upon receiving the note, had transferred it to an innocent holder, and that the plaintiffs had paid it. The fact of payment would not necessarily have prevented or excused performance by the plaintiffs of the conditions of the contract. The written contract stipulated that if the crusher should be equal to the capacity of 15 to 20 tons per hour, the plaintiffs should pay the appellant, or order, \$1,000, with interest at 6 per cent., payable in 90 days. It was a condition that such payment should be dependent upon the crusher's having such capacity. To the extent to which it failed, the plaintiffs, who had paid for it in full, are damaged, if they retain the machine. It is stated that the plaintiffs demanded cancellation, but it is not further shown what response the appellant made, if any, or that there was a tender of the crusher at the place mentioned in the contract, or an offer to return the crusher, or a refusal on the part of the appellant to accept it. It would seem that, to entitle the plaintiffs to recover damages upon the written contract, they should show that all had been done by them which by its terms was necessary to place the appellant in default. We cannot arbitrarily determine that any lawful stipulations which parties to a written contract may embrace therein are wholly unimportant. If one agrees that after a trial of a purchased article shall have proved its want of a certain capacity, upon which its price is regulated, it shall be received back by the seller, and the contract shall be canceled, the purchaser cannot of himself determine that this is an immaterial part of the contract, and, without complying with it on his part so far as he can do so, demand damages for the inferiority of the article retained by him. If it be true, as some portions of the argument would seem to indicate, that there was a reliance upon an oral agreement made between the parties after the crusher had been tested, under which the machine was to be retained by the plaintiffs, such agreement should have been made the basis of the complaint. And, if it was the purpose to show such a subsequent agreement in the

pleading, it is not sufficiently stated. The pleading should be drawn with such exactness that a definite theory of the action may be clearly manifested therein. See *Engine Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. 716; *Thresher Co. v. Kennedy*, 7 Ind. App. 502, 34 N. E. 856; *Davis v. Gosser*, 41 Kan. 414, 21 Pac. 240. The judgment is reversed, and the cause is remanded, with instructions to sustain the demurrer to the complaint.

(21 Ind. App. 430)

STOWERS v. CITIZENS' ST. R. CO.

(Appellate Court of Indiana. Jan. 24, 1899.)

STREET RAILROADS—PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

A passenger got off a moving street car before it reached a crossing, and, without stopping to look, walked rapidly behind the car, to cross the street, and walked against the side of a car coming from the opposite direction, on a track five feet distant from the other. This car had its lights lighted, and could have been readily seen, except as the view was obstructed by the other car. *Held*, that he was negligent.

Appeal from superior court, Marion county; John L. McMaster, Judge.

Action by Jesse L. Stowers against the Citizens' Street-Railroad Company. Judgment for defendant, and plaintiff appeals. Transferred from supreme court. Affirmed.

Holtzman & Leathers, for appellant. W. H. Latta and Miller & Elam, for appellee.

COMSTOCK, J. This action was for personal injuries, was tried by a jury, and a special verdict returned, on which, upon motion of appellee, the court rendered judgment in its favor. The only error assigned upon this appeal is the action of the court in sustaining appellee's motion for judgment on the special verdict. Counsel for appellee, before entering upon the discussion of questions discussed in appellant's brief, contend that the record presents no question for this court, because appellant made no motion of any kind in the court below; that this court cannot order a new trial, for none has ever been asked; that it cannot order the court below to render judgment for the appellant, for no such judgment was ever asked. Having examined the record with a view of passing upon the merits of the cause, and reached the conclusion that the judgment of the trial court should be affirmed, we do not deem it necessary to pass upon said preliminary question. We need only to refer to the familiar rule, without citing authorities, that the special verdict must find such facts as entitle the party bearing the burden of proof to a judgment; that in the case before us, to have entitled appellant to a judgment, the facts found by the special verdict should show that appellant received the injuries complained of through the fault of appellee, and without any negligence on his part contributing thereto. The special verdict found many facts, but no inference of negligence

upon the part of either party. The verdict does not find that appellant acted, under the circumstances, as a reasonably prudent person, or that appellee's employes did not act with reasonable prudence. Questions of this character might have been properly submitted to the jury; they were not. *Board v. Bonebrake* (Ind. Sup.) 45 N. E. 470. The question is, therefore, whether the verdict, wanting this inference, finds such facts as required the court to declare appellee guilty and appellant free from negligence. Some of the findings of the jury pertinent to the question of appellant's contributory negligence are palpably in conflict with one another. But the following facts are clearly found: On the 18th day of December, 1894, when appellant was injured, he knew that the appellee had a double line of street-railroad tracks on College avenue, in the city of Indianapolis, and appellant took passage on the south-bound car, at the corner of College avenue and Seventh street, about 12 o'clock and 42 minutes a. m., on said date. Appellant rode on the platform of said car a distance of about six squares, to the vicinity of Cherry street, which street crosses College avenue at right angles, and extends east from College avenue to the Massachusetts Avenue Depot. He was in great haste to reach the railroad depot on Massachusetts avenue to catch a train, and had but very little time to do it. He did not wait for the car on which he was riding to stop, or even to reach the Cherry street crossing. He stepped from it some 15 or 20 feet north of the north crossing, which was the first crossing reached by the car. He stepped off on the west side of the car on which he was riding. The car that he collided with was approaching from the south, on the east track. The car from which he alighted continued its journey, and obstructed the view of the car approaching from the south on the other track. Appellant then walked rapidly to the southeast, looking to the south, and walked into a car coming north, striking it with the left side of his head near the vestibule door. He was not yet upon the street crossing at all, but was going in an angling direction across the street, intending to come out upon a street crossing at the east side of College avenue. He listened, according to the verdict of the jury, but could hear nothing. The noise of the car from which he had just alighted did not make it difficult for him to hear the approaching car, yet he did not hear a car coming in the quiet of midnight, at the rate of at least 15 miles an hour, but walked against it, without knowing that it was in the neighborhood. The car which struck him was lighted with electricity. The headlight was burning. The distance, at the point where appellant was crossing College avenue, between the east rail of the west track and the west rail of the east track, was five feet. The view between the tracks looking to the south was unobstructed, and

he "could see in that direction as far as the eye could see," to use the language of one of the findings of the jury. Without reference to the manner in which appellee's car was operated, the facts found show that appellant was hurrying across the street-car tracks, and walked against the vestibule door at the side of the car, before he got upon the track, and after the motorman and part of the vestibule, with its headlight, had passed him. It was the conclusion of the trial court that the appellant was not entitled, under the facts, in the absence of a direct finding of the jury to that effect, to recover. We cannot, as a matter of law, say that this conduct was that of a reasonably prudent person.

The learned counsel upon both sides have favored the court with numerous citations of authorities. We have not deemed it necessary to set them out in this opinion. The number might easily be multiplied. These reported cases are, as a rule, based upon the peculiar circumstances of the particular case. We are not called upon to approve or to criticize any one of them. The law requires the traveler approaching a street-railway crossing to use the caution of an ordinarily prudent person. When a special verdict is returned, the law requires that it should show, to enable the party upon whom the burden of proof rests to show the exercise of such care, the employment of the natural senses to discover danger; that, with ordinary vision, he must see danger which is plainly in view. In the case before us, we cannot say that the court erred in its ruling, and that appellant was free from negligence contributing to his injury. Judgment affirmed.

(21 Ind. App. 438)

STATE ex rel. CREIGHTON v. CARLISLE.

(Appellate Court of Indiana. Jan. 24, 1899.)

BASTARDY PROCEEDINGS—SATISFACTION—VACATION—FRAUD—RESTORATION OF BENEFITS—PLEADING.

1. A failure to keep a promise of marriage, which was the consideration for an entry of satisfaction in a bastardy proceeding, is not ground for setting aside a judgment entered under Horner's Rev. St. 1897, § 994, providing that prosecutrix may dismiss the suit, if she will enter of record an admission that provision for maintenance of the child has been made to her satisfaction, and that such entry "shall be a bar to all other prosecutions for the same cause and purpose."

2. Under Horner's Rev. St. 1897, § 994, providing that prosecutrix in a bastardy proceeding, if a minor, may dismiss the suit, if it be first shown to the satisfaction of the court that suitable provision has been made for maintenance of the child, and a finding of the court to that effect is entered of record, an allegation that fraudulent representations were made to the witness, who was a minor, to induce her to dismiss the action, is insufficient to set aside the satisfaction, when it is not alleged that the finding of the court was procured by fraud.

3. A satisfaction in a bastardy proceeding, and a judgment of dismissal entered thereon, cannot be set aside for fraud, without an offer to refund the consideration paid therefor.

4. An allegation that, in order to secure an entry of satisfaction and a judgment of dismissal in a bastardy proceeding, defendant falsely represented to the justice of the peace that he had made ample provision for support of the child, and that, relying on such representation, and that of another person, who had conspired with defendant, the justice made an entry of satisfaction, is not sufficient to set aside such entry and judgment, where relatrix was present, and admitted of record that satisfactory provision had been made for the child.

Appeal from circuit court, Pike county; E. A. Ely, Judge.

Proceeding by the state, on the relation of Demmie Creighton, against Charles Carlisle, for bastardy. There was a judgment for defendant, and relatrix appealed to the circuit court. From a judgment sustaining a demurrer to the reply to defendant's plea in bar, relatrix appeals. Affirmed.

Ashby & Caffey and W. E. Cox, for appellant. E. P. Richardson and A. H. Taylor, for appellee.

HENLEY, J. This was an action commenced by appellant before a justice of the peace in Pike county, Ind. The facts and the character of the pleadings can be better shown by stating the substance of the record as it is before us. On the 30th day of April, 1897, the relatrix filed her verified complaint before M. J. Brady, a justice of the peace for Washington township, in Pike county, Ind., charging appellee with being the father of her bastard child, of which she had been delivered on the 22d day of March of said year. A warrant was issued for appellee, and placed in the hands of a constable, who served the same, and brought appellee into said court, where he gave bond in the sum of \$500 for his appearance at the trial. At the time set for the trial all the parties appeared in person and by counsel. Appellee answered, showing a former adjudication of appellant's cause of action. The justice of the peace overruled a demurrer to this answer, and found for appellee. From this judgment appellant appealed to the circuit court of Pike county, where appellee answered in one paragraph, which fully states appellee's defense to this action. The answer, omitting the formal parts, is as follows: "The said defendant, for answer to plaintiff's complaint and affidavit herein, and in bar of her complaint, says that on the 16th day of September, 1896, and before Esq. William J. Thurman, a justice of the peace for Washington township, in Pike county, in the state of Indiana, and in a court of competent jurisdiction, all the matters and things contained in plaintiff's affidavit and complaint herein were fully adjudged and determined, in a case in which the state of Indiana, on relation of Demmie Creighton, was plaintiff, and Charles Carlisle was defendant, in a complaint and affidavit for bastardy which was made by the said Demmie Creighton, and, through the prosecuting attorney, filed before said Thurman on the 9th day of September, 1896, which

said cause is by the same relatrix, and against the same defendant, and for the identical same cause of action, which said cause of action was heard, adjudged, and fully determined before said justice by and between this relatrix and this defendant, and this relatrix did then and there, of her own motion, enter and sign her receipt, and caused the same to be entered of record in open court, that this defendant, Charles Carlisle, had made provision for the maintenance of said bastard child to her satisfaction, and did then and there move the court to dismiss said cause of action; and it being shown to the satisfaction of said court that suitable provision had been made, and properly secured, for the maintenance of said bastard child, the said proceedings were then and there dismissed. That then and there a decision was duly rendered for the dismissal of said proceedings in bastardy, a certified copy of which is filed herewith, and made a part hereof, marked 'Exhibit A.' And the defendant says that by reason of the said former adjudication the relatrix herein is estopped and barred from further prosecuting said action, and he prays judgment accordingly for costs." A demurrer for want of facts was addressed to this answer and overruled. Appellant replied in two paragraphs. The first paragraph of reply alleges that the "proceedings" mentioned in appellee's answer were procured by the fraudulent representation of the defendant; that at the time the order of the justice of the peace was made dismissing the cause, as set out in the answer, appellee promised the relatrix that he would marry her, and provide for her a home, and would furnish her with ample means for her support during her pregnancy and sickness, and would support her child, and by such promises she was induced to "sign the entry mentioned in defendant's answer"; that appellee has wholly failed to keep and fulfill said promises; that at the time said cause was dismissed the state of Indiana was not a party to the proceedings, and the prosecuting attorney was not present, and had no knowledge of the action taken; that the relatrix at the time was an infant under the age of 21 years; that appellee paid the relatrix at the time of said dismissal and entry of satisfaction the sum of \$20, which appellant says is wholly inadequate for the purpose intended. The second paragraph of reply contains the same averments as the first, with the additional averments "that defendant falsely represented to Wm. J. Thurman, the justice of the peace mentioned in defendant's answer, that he, the said defendant, had made ample provision for the support of said child; and solely upon the representations of said defendant, and those of one Josiah Newkirk, with whom said defendant had conspired for the purpose of defeating the rights of said child, and upon the payment of the costs of said proceedings by the defendant, the justice made the entry as set forth in said proceedings." A demurrer was sustained to

each paragraph of the reply. This ruling of the court is the alleged error complained of by appellee.

A proceeding in bastardy is a civil action. *Maker v. State*, 123 Ind. 378, 24 N. E. 128. Justices of the peace have complete jurisdiction to hear and determine such cases, and a judgment rendered by a justice is a bar to all prosecutions for the same cause. *Britton v. State*, 54 Ind. 535; *Gipe v. State*, 40 Ind. 158; *Maker v. State*, supra. It is provided by statute as follows: "The prosecuting witness, if an adult, may, at any time before final judgment, dismiss such suit, if she will first enter of record an admission that provision for the maintenance of the child has been made to her satisfaction; and if such witness be a minor, she may dismiss such suit, if it be first shown to the satisfaction of the court in which the same is pending, that suitable provision has been made and properly secured for the maintenance of the child, and a finding of the court to that effect entered of record. And such entry, in either case, shall be a bar to all other prosecutions for the same cause and purpose." *Horner's Rev. St. 1897*, § 994. The record of the proceeding in bastardy which is made the source of appellee's defense, and which is filed with his answer herein, shows that the justice strictly followed the statute in making his entry of dismissal, which was in the following words:

"Sept. 16th, 1896. Comes now the parties, and comes the relatrix and prosecuting witness, Demmie Creighton, and makes entry of record the following admissions, to wit: 'I, Demmie Creighton, the relatrix and prosecuting witness herein, freely and voluntarily admit of record that provisions for the maintenance of the bastard child named in my affidavit and complaint has been made by the defendant, Charles Carlisle, to my satisfaction. In witness whereof I hereunto set my hand, and move the court that this cause be dismissed. [Signed] Demmie Creighton. Test: W. J. Thurman, Justice of the Peace.' And it appearing and being shown to my satisfaction that suitable provision has been made, and properly secured, for the maintenance of said bastard child, I do hereby so consider and adjudge. I hereby sustain said motion to dismiss, and do hereby dismiss this suit at the costs of the defendant. It is therefore considered and adjudged by me that said defendant, Charles Carlisle, pay all costs of this prosecution. September 16th, 1896. William J. Thurman, J. P. [Seal.]

"Received of Charles Carlisle above judgment for costs, in full. October the 1st, 1896. W. J. Thurman, J. P."

The first paragraph of reply is clearly bad, for several reasons. In the first place, fraudulent representations, to be available, must relate to an existing or past fact. Fraud cannot be predicated upon mere promises to do something in the future, although such promise be fraudulently made, and afterwards broken. The law is too well settled upon this

point to warrant the citation of authorities. In the second place, these fraudulent representations or promises are alleged to have been made to the relatrix, a minor, in order to induce her to "sign up said entry mentioned in defendant's answer." The signing of the docket entry by the relatrix, she being a minor, did not effect a settlement of the action, or release appellee in any way. Under the statute heretofore quoted, it will be seen that the finding and entry of record by the justice that suitable provision has been made and secured for the maintenance of the child were in this case the necessary finding and entry, the relatrix being a minor. And it is not alleged in said answer that such finding and entry were secured from the justice of the peace by fraud. In the third place, this being a civil action, it is well settled that, even though the judgment may have been obtained by fraud, it cannot be set aside without refunding to appellee, or offering to refund to him, the money paid by him to the relatrix to secure the rendition of the judgment of dismissal. The reply shows that an amount was paid relatrix, but no return or offer to return the same is shown. Many authorities upon this question are collected in the case of *Railway Co. v. Horton* (Ind. App.) 48 N. E. 22. Also, see, *Maker v. State*, supra.

The second paragraph of reply is also bad. The facts do not show that any fraud was practiced upon appellant. One Newkirk is charged with being a party to the fraud, but as to what he did the reply is silent. It is not shown that the justice relied solely upon, or was deceived by, the representation of appellee. He may have and probably did base his judgment upon the statement of the relatrix, who was present, and admitted of record that provision to her satisfaction had been made for her child. In deciding this case, we do not concede that such a settlement and judgment as are set up in appellee's answer can be attacked and set aside in a collateral proceeding for fraud, as is attempted to be done by appellant's reply. Our supreme court, in two appeals from judgments rendered in bastardy proceedings, has passed over the question without deciding it, and we refrain from discussing it. *Maker v. State*, supra; *Gresley v. State*, 123 Ind. 73, 24 N. E. 332; *Snelson v. State*, 16 Ind. 32. It follows from what we have said that the judgment of the lower court must be affirmed. Judgment affirmed.

(21 Ind. App. 449)

HUFFMAN v. STATE.

(Appellate Court of Indiana. Jan. 25, 1899.)

APPEAL—TRESPASS—HIGHWAYS—ABUTTING OWNERS
—EASEMENTS—HIGHWAY PURPOSES—
GAS MAINS—ESTOPPEL.

1. An assignment of error in a criminal case is waived by a failure to discuss it.

2. Denial of a motion for a new trial in a criminal case, because the verdict is not sustain-

ed by the evidence, cannot be reviewed on appeal, since it is not a ground for a new trial.

3. The finding of a jury in a criminal case, based on conflicting evidence, is conclusive on appeal.

4. An owner of land abutting a public highway has such a proprietary right to its center that the refusal of a person unlawfully on such part to depart at the owner's direction renders him liable for trespass.

5. An easement over land for highway purposes does not authorize its use for the construction of a pipe line for conveying natural gas.

6. Where an accused was on a highway, directing the removal of a gas pipe, which had been unlawfully placed there, he was unlawfully there, and his failure to depart on notice was a violation of Horner's Rev. St. 1897, § 1941, making it a misdemeanor for any person unlawfully on the land of another to refuse to depart on notice.

7. Where an owner of land did not know of the construction of a gas pipe line on a highway adjacent thereto, he is not estopped from asserting his right to notify a person removing it to leave, because he had not objected to its maintenance after its completion.

Appeal from circuit court, Blackford county; E. O. Vaughn, Judge.

G. Max Huffman was convicted of trespass, and he appeals. Affirmed.

Cantwell, Cantwell & Simmons, for appellant. W. L. Taylor, A. G. Merrill Moores, J. W. Fesler, and E. E. Stevenson, for the State.

WILEY, J. Appellant was prosecuted for trespass under the following provision of the statute: "Whoever, * * * being unlawfully upon the inclosed or uninclosed lands of another, shall be notified to depart therefrom by the occupant or his agent or servant, * * * [and] neglect or refuse to depart therefrom, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five or more than fifty dollars." Horner's Rev. St. 1897, § 1941. While, in the court below, a motion to quash the affidavit (the prosecution having originated before a justice of the peace) was made and overruled, and such ruling is challenged by an assignment of error, there is no necessity of referring to the affidavit further, for the reason that the question of its sufficiency is waived by a failure to discuss it. On a plea of not guilty, the cause was tried by a jury, resulting in a verdict of guilty and a judgment of conviction. Appellant's motion for a new trial was based upon three reasons: (1) The verdict was contrary to law; (2) the verdict was contrary to the evidence; (3) the verdict was not sustained by the evidence. This motion the court overruled, and such ruling is assigned as error, and presents the only question for decision.

Under the statute defining the causes for which a new trial may be granted in criminal cases, the third reason assigned in the motion in this case does not come within the statute, and hence does not present any question for review. The first and second reasons, however, present the question discussed by counsel, and under them the court can decide the question of contention.

The lands described in the affidavit upon which the trespass is charged to have been made were owned by one Samuel Sipe, and occupied by one Andrew Sipe, who was the tenant and in possession. A public highway bounds one side of the lands, and it was in and upon this highway that the trespass, if any, was committed. It is shown by the evidence without contradiction that, some three or four years prior to the date fixed in the affidavit, the Salemonie Mining & Gas Company constructed a two-inch pipe line on the highway in front of the land of said Samuel Sipe; that the Ft. Wayne Gas Company, by purchase, succeeded to the rights of the original company, and owned said line at the date of the commencement of this prosecution; that, at the time said two-inch pipe line was put in, Andrew Sipe owned the land in question, and lived upon it; that said line was put in on the side of the highway next to the Sipe land, and near the fence inclosing said land; that the said Ft. Wayne Gas Company was putting in a larger pipe line on the opposite side of the road, had the trench dug, and the pipe placed and strung along, ready to put in; that, at the date fixed in the indictment, appellant was in the employment of the Ft. Wayne Gas Company, in charge of a force of men who were engaged in taking up the two-inch pipe, and refilling the ditch from which it was removed; that the said Andrew Sipe went to appellant, who was in the highway, but on the side thereof next to the Sipe land, and ordered him off the premises, and told him that he did not want him to trespass upon said lands; that appellant refused to depart therefrom; that said Andrew Sipe also ordered the men engaged in taking up said line to depart; that some of them left the ditch, and appellant ordered them back to work; that, at the time appellant was ordered to depart from said lands, he was in the public highway, and remained therein all the time during the conversation between the said Andrew Sipe and himself, and did not at any time go upon the lands described in the affidavit except to remain in the highway and on the side thereof next to said lands. As to whether the said Andrew Sipe knew at the time that the pipe line was being constructed along and upon said highway in front of said lands, and as to whether he consented thereto, there is a sharp contradiction. On the one hand, he testified that he did not know it was being constructed until after the company had passed beyond said premises, and that he did not consent thereto, nor give his permission to so construct the same; while, on the other hand, other witnesses did testify that he both knew and gave his consent to such construction. It further appears that, after the line was constructed, he knew of it, and knew that it was being used, and made no objection thereto. Hence if it was a material fact that he had or had not knowledge of the construction of the line at the time it was constructed, or that he did or did not give his consent thereto,

we must presume that the jury resolved such facts in favor of the state; and, under the rule that this court will not weigh the evidence where there is a conflict, the question is put at rest by the finding of the jury. It is upon these facts that we are to determine whether or not the verdict is contrary to law, or contrary to the evidence.

The controlling question is simply this: Has the owner of lands abutting upon a public highway such a proprietary right in the highway, to the center thereof, as to notify and direct one who is unlawfully upon such part of the highway to depart, and will the refusal and failure of such person to depart, upon such notice, render him liable to prosecution for trespass under the statute? It is the firmly established rule in this state that the owner of lands abutting upon a public highway owns the fee to the center thereof, subject only to the easement which the public has for highway purposes. *Cooley, Torts*, 318; *People v. Foss*, 80 Mich. 564, 45 N. W. 480. *Trust Co. v. Huntsinger*, 14 Ind. App. 156, 42 N. E. 640. The right of the owner yields only to the greater rights of the public. As we have said, the only right the public has is simply an easement affording a passage over and along the highway. *Trust Co. v. Huntsinger*, 14 Ind. App. 156, 42 N. E. 640; *Haslett v. Railroad Co.*, 7 Ind. App. 603, 34 N. E. 845, and cases there cited. It is likewise settled that such abutting owner has a special proprietary right in the highway, separate and distinct from that of the general public, and that this right cannot be taken or impaired without compensation. *Haslett v. Railroad Co.*, *supra*. It has been held by this court that the easement for road purposes, which grants to the general public the right to pass and re-pass over a man's land, does not carry with it a right to use it for other purposes not legitimately connected with the use of highways. *Trust Co. v. Huntsinger*, *supra*. It cannot be said that the construction of a pipe line for conveying natural gas comes within the uses for which public highways were intended. It has been held that a right may be granted by the board of commissioners to construct a pipe line along a public highway; but it is also the law that constructing such pipe lines is an imposition of an additional burden upon the fee from that embraced in the easement for highway purposes, and that compensation must be made to the owner of the fee. *Kincaid v. Gas Co.*, 124 Ind. 577, 24 N. E. 1066.

It seems to us that when the Salemonie Gas Company entered upon the lands in question, without the consent of the owner of the fee, and without permission of the board of county commissioners, it became a trespasser, and was upon such lands unlawfully. If it was unlawful in the first place to go upon the lands to construct the pipe line, without the consent of the owner, it was likewise unlawful to go upon them to remove the same; and hence when appellant was

upon the lands of the prosecuting witness, in charge of a force of men engaged in removing such pipe line, he was unlawfully there. While appellant was not himself engaged in the manual removing of the pipe, he was directing and overseeing the work of removal. The evidence shows that appellant was not standing or walking in the traveled way, but was on that side of the road adjacent to the land described, some 10 or 12 feet from the center, and part of the time only about 2 feet from the fence inclosing such lands.

Appellant insists that as the owner and occupant of the land stood by and saw the pipe line being constructed, made no objection thereto, and by his long silence acquiesced therein, he is estopped from asserting the right to notify appellant to leave the premises. If the facts upon which appellant relies to work an estoppel were undisputed, there might be such merit in his position; but there is evidence in the record, as we have seen, from which the jury might, and doubtless did, find that the owner and occupant did not know that said line was being constructed in front of his premises, until after it was completed. The appellant urges that the doctrine of estoppel is applicable here in his behalf, on the ground that Sipe stood by, had full knowledge that the pipe line was being constructed, and that he did not, at the time or thereafter, make any objection or offer any protest, etc. Counsel for appellant say: "The evidence shows clearly that no objection was ever made by the prosecuting witness at the time of the construction of the pipe line, nor since that time up to the commission of the alleged trespass, either to the construction or maintenance of said line." In this statement counsel are not supported by the evidence, for, as we have seen, there is evidence from which the jury doubtless did conclude that the prosecuting witness did not know that the pipe line was being constructed along his lands. It is true that the evidence does not show that he made any objection to the work or maintenance of the line after its completion, but this is not enough to create an estoppel by conduct. See *Roberts v. Abbott*, 127 Ind. 83, 26 N. E. 565; *Bigelow, Estop.* (Ed. 1886) 552. It is true, as counsel say, that the courts in this state have repeatedly held that where a landowner stands by and permits a pipe-line company or a railroad company to construct a pipe line or railroad across his land, with a full knowledge that it is being done, and makes no objection until the same is constructed, he is estopped from maintaining an action for possession of the land, or a suit in ejectment, and that in such case his only remedy is an action for damages. *Kincaid v. Gas Co.*, 124 Ind. 577, 24 N. E. 1066; *Railroad Co. v. Nye*, 113 Ind. 223, 15 N. E. 261; *Railway Co. v. Allen*, 113 Ind. 581, 15 N. E. 446; *Railway Co. v. Soltwedde*, 116 Ind. 257, 19 N. E. 111; *Porter v.*

Railway Co., 125 Ind. 476, 25 N. E. 556; Railway Co. v. McBroom, 114 Ind. 198, 15 N. E. 831; Railway Co. v. Beck, 119 Ind. 124, 21 N. E. 471; Bravard v. Railroad Co., 115 Ind. 1, 17 N. E. 183; Sherlock v. Railway Co., 115 Ind. 22, 17 N. E. 171; Strickler v. Railway Co., 125 Ind. 412, 25 N. E. 455. With the doctrine established by the cases cited, we are in full accord, but it is not applicable here, for the facts are not sufficient upon which it can rest.

It is further urged by appellant that he was not guilty of the offense charged, because it does not appear that he was unlawfully upon the premises of the prosecuting witness, and, if he was upon the premises lawfully, he could not be there unlawfully until after notified to depart, and hence, as he was not notified a second time to depart, he did not violate the provisions of the statute under which he was prosecuted. Appellant's reasoning is good, but his premise is unsound, and hence his conclusion not tenable. He assumes that he was not, in the first instance, unlawfully upon the lands of the prosecuting witness, but in this he is in error. As we have seen, he was there without the license or permission of the occupant of the land. He was not using the highway for any of the purposes contemplated by law. He was not even a "traveler" thereon, within the legal meaning of the term. We have already shown that a public highway is not dedicated to the public, and maintained at public expense, for the purpose of allowing pipe-line and other companies to construct and maintain pipe lines in and upon them. Neither a private person nor a corporation has any inherent right to so use a public thoroughfare; and, where the proper steps have not been taken to acquire such right, it is a trespass, within the meaning of the statute, to do so. So, when appellant went upon the premises of the prosecuting witness to take up the pipe line, he was there unlawfully; and when he refused to depart, upon being notified to do so, it was a violation of the statute, for which he must answer. The case of *Manning v. State*, 6 Ind. App. 259, 33 N. E. 253, cited by appellant, is not in point, and has no controlling influence here. In that case the appellant went upon the land of the prosecuting witness upon her invitation. While there he had an altercation with her, and she ordered him to depart. It was held that, as soon as he was ordered to depart, he was there unlawfully; and upon again being notified to depart, and failing to do so, he was guilty of trespass. In the case before us, appellant was unlawfully upon the premises in the first instance, and being notified to depart, and refusing to comply with the notice, he violated the statute. In his work on *Roads and Streets*, Judge Elliott (page 536) says: "As owner of the fee, subject only to the public easement, the abutter has all the ordinary remedies of the

owner of a freehold. He may maintain trespass against one who unlawfully cuts and carries away the grass, trees, or herbage, and even against one who stands upon the sidewalk in front of his premises, and uses abusive language towards him, refusing to depart. And one who destroys and reconstructs a highway is a trespasser, although he makes a new way upon his own premises equally safe and convenient. The abutter may also maintain ejectment against a railroad company which has placed its track upon his side of the street without paying or tendering damages therefor, or against an individual who has wrongfully and unlawfully encroached thereon." In support of the foregoing quotation, the following authorities are cited: 3 Kent, Comm. 432; Ang. Highw. § 319; *Goodtitle v. Alker*, 1 Burrows, 133; *Adams v. Emerson*, 6 Pick. 57; *Robbins v. Borman*, 1 Pick. 122; *Cole v. Drew*, 44 Vt. 49; *Chambers v. Furry*, 1 Yeates, 167; *Cooley, Torts*, 318; *Clark v. Dasso*, 34 Mich. 86; *Baker v. Shephard*, 24 N. H. 208; *Adams v. Rivers*, 11 Barb. 390; *Hunt v. Rich*, 38 Me. 195; *Ruggles v. Lesure*, 24 Pick. 187; *Weathered v. Bray*, 7 Ind. 706; *Railroad Co. v. Rodel*, 89 Ind. 128. Abutting owners have the exclusive right to the soil, subject only to the easement of the right of passage in the public, and the incidental right of properly fitting the way for use. *Elliott, Roads & S. p. 519*, and authorities there cited. Subject only to the public easement, the proprietor has all the usual rights and remedies of the owner of a freehold. As was said by Elliott, J., in *Kincaid v. Gas Co.*, supra: "Subject to the right of the public, the owner of the fee of a rural road retains all rights and interest in it. He remains the owner, and, as such, his rights are very comprehensive,"—citing *Hydraulic Co. v. Butler*, 91 Ind. 134; *Turnpike Co. v. Green*, 99 Ind. 205. Again, in the same case, it was said: "The appropriation of the land for a rural highway did not entitle the local officers to use it for any other than highway purposes, although they did not acquire a right to use it for all purposes legitimately connected with the local system of highways. A use for any other than a legitimate highway purpose is a taking, within meaning of the constitution, inasmuch as it imposes an additional burden upon the land," etc. "The authorities, although not very numerous, are harmonious upon the proposition that laying gas pipes in a suburban road is an imposition of an additional burden," etc. From the authorities we are unable to reach any conclusion other than that appellant was unlawfully upon the lands described in the affidavit, and, under the facts shown by the record, was guilty of trespass. Judgment affirmed.

HENLEY, J., took no part in the decision of this case.

(172 Mass. 436)

WIDERSUM et al. v. BENDER et al.
(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1899.)

TAX SALE—RIGHT TO REDEEM—EQUITY.

1. While St. 1888, c. 390, § 76, conferring equity powers on the supreme judicial court in all cases of sale of real estate for the payment of taxes, if relief is sought in five years, does not extend the time of redemption to five years, it allows the court to decree redemption on a bill filed within five years, if the circumstances render it equitable.

2. Complainants were owners of a remainder in fee of a life estate. The holder of the life estate (whose duty it was to pay the taxes) and another purchased the tax title, keeping the sale a secret in order to cause complainants to lose their right of redemption, and, intending to prevent redemption, wrongfully conspired to defraud complainants. More than two and less than five years after the sale, they joined in a deed to defendant. It was not alleged that defendant purchased without notice of the right to redeem, nor did defendant aver a purchase without notice. *Held* sufficient to show such an equity as entitled complainants to redeem under St. 1888, c. 390, § 76.

Appeal from supreme judicial court, Suffolk county.

Bill by Ludwig Widdersum and others against Anton Bender and others for the redemption of certain real estate from a tax sale. There was a decree for plaintiffs, and defendant Reichardt appeals. Modified.

F. C. Dowd, for appellant. T. F. McDonough and J. M. Minton, for appellees.

BARKER, J. The tax sale from which the plaintiffs seek to redeem took place on October 18, 1893, and this bill was filed on April 10, 1897. Under the provisions of St. 1888, c. 390, § 76, this court has equity powers in all cases of taking or sale of real estate for the payment of taxes assessed thereon, if relief is sought within five years from the taking or sale. While this provision does not in every case extend the time of redemption to five years, it allows the court to decree redemption upon a bill filed within five years from the sale, if the circumstances render it equitable. *O'Day v. Bowker*, 143 Mass. 59, 9 N. E. 16. See, also, *Smith v. Smith*, 150 Mass. 74, 22 N. E. 437; *St. 1849, c. 213, § 2*; *St. 1856, c. 239, § 4*; *Gen. St. c. 12, § 42*; *St. 1878, c. 266, § 14*; *Pub. St. c. 12, §§ 49, 66*; *St. 1888, c. 390, §§ 57, 76*; *Mitchell v. Green*, 10 Metc. (Mass.) 101; *Rand v. Robinson*, 11 Cush. 289; *Parker v. Baxter*, 2 Gray, 190; *Simonds v. Towne*, 4 Gray, 603; *Rogers v. Rutter*, 11 Gray, 410; *Tinslar v. Davis*, 12 Allen, 80; *Faxon v. Wallace*, 98 Mass. 44; *Loud v. City of Charlestown*, 99 Mass. 209; *Gladwin v. French*, 112 Mass. 186, 187; *Dewey v. Donovan*, 126 Mass. 337; *Langley v. Chapin*, 134 Mass. 88; *Sherwin v. Bank*, 137 Mass. 446, 447.

As there is no report of the evidence, or of the facts found by the single justice, the only question brought up by the defendant's appeal is whether the decree is one which could be entered upon the bill. We think that the bill

alleges circumstances which make it equitable to allow the plaintiffs to redeem. They were owners of a remainder in fee, after the life estate of the defendant Bender, whose duty it was to pay the tax. Bender and Hormel, who purchased the tax title a week after the sale, kept the sale secret from the plaintiffs, in order to cause them to lose the right of redemption, and, intending to prevent the plaintiffs from redeeming, wrongfully conspired to defraud them. Bender (owning the life estate) and Hormel (owning the tax title), on December 3, 1896, more than two years and less than five from the tax sale, joined in a deed to the defendant Reichardt, which gave her the fee if the tax title could not be redeemed; and she gave back to Hormel a mortgage, yet outstanding. It is not alleged that Reichardt took with notice of the right to redeem, nor that she was a party to, or chargeable with knowledge of, the fraud or conspiracy of Bender and Hormel. But her answer does not allege that she was a purchaser without notice and in good faith, and such an allegation, if made, might not have been proved. There was nothing to prevent a finding that the appellant took her title under such circumstances as made it equitable to allow the plaintiffs to redeem.

The decree, therefore, cannot be reversed because of the defendant's appeal. It is evident, however, that it does not give the plaintiffs all the relief to which they are entitled. The defendant Hormel should execute and deliver a release of the plaintiffs' remainder from the operation of his mortgage. An inspection of the record shows that the single justice directed a decree for the plaintiffs as against all the defendants except Welch, the original purchaser at the tax sale, who sold out his title immediately after the sale, and who by his answer said that he had no interest in the estate. The result is that the decree is to be affirmed, with costs of the appeal, but with leave to the plaintiffs to apply to a single justice for a modification of the decree as against the defendants Bender and Hormel, and requiring Hormel to release the plaintiffs' remainder from the operation of his mortgage, and that a decree be entered by the single justice dismissing the bill as against the defendant Welch, but without costs. So ordered.

(172 Mass. 417)

ATTORNEY GENERAL v. MACCABE.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1899.)

MUNICIPAL CORPORATIONS—BOARDS OF HEALTH—VALIDITY OF ORDINANCES—CITY PHYSICIANS.

1. Under Gloucester City Charter (St. 1873, c. 246), providing (section 13) that "the city council shall annually * * * elect by joint ballot, in convention, * * * a city physician," etc.; and (section 29) that "all power and authority now vested by law in the board of health of the town of Gloucester, or in the selectmen thereof, shall be transferred to and vested in the city council"; and *Gen. St. c. 26,*

§§ 1, 2 (Pub. St. c. 80, §§ 3, 4), in force when the charter was passed, which provide that "a town respecting which no provision is made by special law for choosing a board of health may, at its annual meeting or at a meeting legally warned for the purpose, choose a board of health, * * * or may choose a health officer," and, "if no such board or officer is chosen, the selectmen shall be the board of health," and that, "except where different provision is made by law, the city council of a city may appoint a board of health," and, "in default of the appointment of a board with full powers, the city council shall have the powers and perform the duties prescribed to boards of health in towns."—Ord. c. 12, § 1 (printed in 1886), providing that "the mayor shall appoint, subject to the approval of the city council, two persons, not members of the city council, who, together with the city physician, shall constitute the board of health," was invalid.

2. St. 1878, c. 21 (Pub. St. c. 80, § 15), providing that, "in cities where the city physician is ex officio a member of the board of health, he shall be appointed by the mayor," etc., has no application to the city of Gloucester, which never accepted St. 1877, c. 133 (Pub. St. c. 80, §§ 7-12), relating to city boards of health, as the section quoted applies only to cities which have accepted the other five sections cited.

3. A city physician, though duly elected by the city council, is not ex officio a member of the board of health, where the ordinance making him such is invalid.

Report from supreme judicial court, Suffolk county; Holmes, Judge.

Information in the nature of quo warranto by the attorney general against one MacCabe, as city physician of the city of Gloucester. Submitted on report. Dismissed.

Edgar S. Taft, for attorney general. H. J. Edwards and R. E. Harding, for respondent.

FIELD, C. J. Section 13, c. 246, St. 1873 (being the charter of the city of Gloucester), is as follows: "The city council shall annually, as soon after their organization as may be convenient, elect by joint ballot in convention, a treasurer, collector of taxes, city clerk, one or more superintendents of highways, and a city physician, and by concurrent vote a city solicitor and city auditor, who shall hold their offices respectively for the term of one year, and until their successors are chosen and qualified: provided, however, that either of the officers named in this section may be removed at any time by the city council, for sufficient cause." Section 29 of said chapter is as follows: "All power and authority now vested by law in the board of health of the town of Gloucester, or in the selectmen thereof, shall be transferred to and vested in the city council, to be by them exercised in such manner as they may deem expedient." The report of this case by the single justice is as follows: "It was admitted that the respondent was elected city physician on January 3, 1898, by city council of Gloucester, by joint ballot in convention, and was sworn in as member of the body acting as board of health on January 4, 1898, subject to the question whether such an election was valid, and whether said board of health was lawfully

appointed, as will be stated. He was elected chairman of said board, and has continued to act as such. At the foregoing dates the respondent was an alien, although he was naturalized on January 15, 1898. By chapter 12, § 1, of the ordinances of Gloucester, printed in 1886, which may be referred to, 'In the month of January the mayor shall appoint, subject to the approval of the city council, two persons, not members of the city council, who together with the city physician, shall constitute the board of health of the city of Gloucester. The persons so appointed shall enter upon the duties of their office forthwith. * * * The board of health above referred to was appointed under this ordinance. The respondent denied the validity of the ordinance, on the ground that by the charter (St. 1873, c. 246, § 29) 'all power and authority now vested by law in the board of health of the town of Gloucester, or in the selectmen thereof, shall be transferred to and vested in the city council, to be by them exercised in such a manner as they may deem expedient.' The respondent also contended that this was a 'different provision made by law,' which excluded the operation of Pub. St. c. 80, § 4, or St. 1895, c. 332. The relator contended that, either by the charter or by the last-cited statutes, the appointment of the board of health was valid, and, if so, it was not denied that the respondent, if duly elected, would be a member of it, ex officio, under the ordinance. The respondent further contended that, if the above proposition should be ruled against him, still his office was open to be held by an alien. The relator maintained the contrary, and also that the election of the respondent was void by St. 1878, c. 21, now embodied in Pub. St. c. 80, § 15, which he contended repealed section 13 of the charter, in pursuance of which the respondent was elected, so far as that section referred to the city physician; the city having continued to elect in the old way since the passage of the act of 1878. The city has appointed a board of health in the mode above stated since 1881, inclusive, and in other ways from an earlier date. The respondent is not entitled to hold his office, unless this report discloses a right on his part to do so. Whether such a right is disclosed. I report for the consideration of the full court."

Gen. St. c. 26, §§ 1, 2, in force when the charter was passed, are as follows:

"Section 1. A town respecting which no provision is made by special law for choosing a board of health may, at its annual meeting or at a meeting legally warned for the purpose, choose a board of health, to consist of not less than three nor more than nine persons; or may choose a health officer. If no board or officer is chosen the selectmen shall be the board of health.

"Sec. 2. Except where different provision is made by law the city council of a city

may appoint a board of health; may constitute either branch of such council, or a joint or separate committee of their body, a board of health, either for general or special purposes, and may prescribe the manner in which the powers and duties of the board shall be exercised and carried into effect. In default of the appointment of the board with full powers the city council shall have the powers and perform the duties prescribed to boards of health in towns." See Pub. St. c. 80, §§ 3, 4.

The ordinance referred to in the report as chapter 12, § 1, of the ordinances of Gloucester, printed in 1886, was plainly not passed in pursuance of any of the statutes we have cited; and we know of no statute in force in the city of Gloucester which authorizes the mayor to appoint the members of the board of health, either with or without the approval of the city council. It does not appear that St. 1877, c. 133, was ever accepted by the legal voters of the city of Gloucester; and, therefore, it does not appear that Pub. St. c. 80, § 15, is in force in that city. St. 1878, c. 21 (now Pub. St. c. 80, § 15), is confined to cities which have accepted St. 1877, c. 133, or the corresponding provisions of the Public Statutes. See Pub. St. c. 80, §§ 7-12; *Com. v. Swasey*, 133 Mass. 538. It, therefore, does not appear that the city council was authorized to pass the ordinance recited in the report. In the absence of statutory authority, the city council could not delegate to the mayor its power to appoint a board of health.

We take judicial notice of the acts incorporating the city of Gloucester, as well as of the General Statutes (Pub. St. c. 169, § 68); but we cannot take notice of the ordinances of the city, unless they were put in evidence. We are, therefore, confined to the ordinances referred to in the report.

The respondent appears to have been duly elected city physician by the city council, but he is not *ex officio* a member of the board of health, as the ordinance making him so does not appear to be valid. It is not contended that an alien is not eligible to the office of the city physician, when the city physician is not a member of the board of health. As the respondent appears to have been duly elected city physician by the city council, the information must be dismissed. So ordered.

(172 Mass. 340)

CHAUNCEY et al. v. TOWN OF LEOMINSTER.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 6, 1890.)

SPECIFIC PERFORMANCE—FAILURE OF TITLE.

Specific performance was asked of an agreement for the purchase of land, whereby a good title was to be furnished by complainant free from all incumbrances. The title to certain shares of heirs was subject to be taken for debts of their decedents, and, while there

was no evidence of any such debts, sufficient time had not elapsed to raise a presumption that administration would not be granted. *Held*, that the failure of defendant to prove that there were such debts was not enough to show that the risk was so small that he ought to be compelled to assume it.

Report from superior court, Worcester county; John Hopkins, Judge.

Bill by Elihu Chauncey and others against the town of Leominster, in Worcester county, for specific performance of an agreement for the sale of real estate. Case reported, and bill dismissed.

E. P. Pierce and J. A. Stiles, for plaintiffs.
Hamilton Mayo, for defendant.

BARKER, J. The chief difficulties in the decision of this case arise from the loose way in which it has been conducted, and the manner in which it has been reserved for the determination of the full court. The bill alleges that the defendant, by an agreement in writing dated August 3, 1896, and set out by copy, agreed to buy of the plaintiffs certain land, for a sum named; that the plaintiffs have always been ready and have offered to perform the agreement on their part, and have asked the defendant to perform it on its part, and that the defendant has refused. One term of the agreement set out is that the land was to be conveyed within two months from the date of the agreement, and that the defendant should pay the price on the delivery of the deeds, if they conveyed a good and clear title to the premises free from all incumbrances. The bill was filed on March 31, 1897. The answer admits the execution of the agreement; states that the defendant denies that the plaintiffs have a good and clear title to the land, free from all incumbrances, and will require the plaintiffs to prove title; and states, further, that there are many defects in the record title which can be cured, if at all, only by a resort to parol evidence, and a long and difficult investigation of facts; that the title is not a marketable one, such as can be sold to a reasonable purchaser or mortgaged to a reasonable mortgagee; and that it would not be equitable to decree specific performance. A supplemental answer alleges that before the filing of the bill the defendant notified the plaintiffs that it would not accept the deeds tendered, and that since the giving of such notice there has been such a change of circumstances as would make a decree for specific performance inequitable; that at the time of the agreement the defendant's high-school building was so overcrowded that it was necessary for the defendant at once to provide additional school accommodations, either by erecting a new building for its high school, or building additional houses for the lower grades, and remodeling its high-school building for the purpose of its high school; that in June, 1896, the town voted to buy the land for a high-school building, and in October, 1896, voted to build a new high-

school building; that, after the plaintiffs failed to furnish a satisfactory title to the land, the defendant took no further action towards erecting a new high school, and on March 1, 1897, voted to build two new school houses, which it had built before the hearing before the master, and had remodeled its high-school building for the purposes of its high school, and no longer desires to build a new high-school building, and has no use for the land. It does not appear when the supplemental answer was filed, but from the reference in it to the hearing before the master it would seem to have been after that hearing. No replication appears to have been made by the plaintiffs to either answer. At some time the case was referred to a special master. The rule to the master is not set out, but it seems from his report, and from the report of the learned justice of the superior court who reserved the case for the determination of the full court, to have been a rule requiring the master to find the facts, although upon the record the parties were not at issue. It appears from the master's report that he heard the parties on October 22, 1897, and that evidence was put in before him. His report was made March 30, 1898. No exceptions were taken to it by the parties. The report states no questions as questions of law. There is no order affirming the master's report. The report, which reserves the case for the full court, says that the case was heard, and so reserved by the court below, upon the pleadings and master's report; but adds that at the hearing the defendant admitted there had been no change in the value, quality, or condition of the land, and no laches on the part of the plaintiffs in clearing the title.

Recurring to the bill, it appears from the agreement that the plaintiffs purported to act in making it, not only for themselves, but as agents of numerous other persons, who, with the plaintiffs, are named in it, and are described in it as the party of the first part. None of these other persons are parties to the cause. While the plaintiffs agree to sell the land, neither the bill nor the agreement alleges that the plaintiffs themselves had title to the land, and the agreement is that it is to be conveyed by deeds from its owners, for which deeds the defendant is to pay the purchase price upon their delivery, if they convey to the defendant a good and clear title, free from all incumbrance. That part of the first answer, therefore, in which the defendant says that it denies that the plaintiffs have a good and clear title to the land, free from incumbrance, and will require the plaintiffs to prove their title thereto, is not a denial of any allegation made in the bill or necessary to the case stated by the bill. If it is to be treated as an allegation of a fact in defense, the fact is not material, under the bill. The answer does not deny the allegations of the bill that the plaintiffs have always been ready and have offered to perform the agreement on their

part, and there is no direct averment by the defendant that the deeds tendered to it by the plaintiffs did not convey a good and clear title to the land. On the other hand, the plaintiffs have not joined issue on the allegation of the answer that there are many defects in the record title to the land, which can only be cured by a resort to parol evidence, and a long and difficult investigation of facts, and that the title is not marketable.

From the master's report it appears that the agreement was duly made, and the necessary appropriation made by the defendant to provide for the payment of the purchase money. The land consisted of some 17¼ acres, in three contiguous parcels. On September 29, 1896, the plaintiffs tendered deeds, which they asserted were sufficient to convey to the defendant a good and clear title to the whole land. At this time the defendant was not in funds to pay the purchase money, and also desired time to make an examination of the title, and it was then agreed that time should be allowed for this purpose, and that in the meantime the deeds should be left with the chairman of the selectmen. In November following, the defendant notified the plaintiffs of certain defects which it asserted existed in the title. The deeds tendered were sufficient in form to satisfy the agreement, and the defendant admitted they were sufficient to convey good title to two of the three lots constituting the land, but asserted that they were not sufficient to convey a good title to the other lot, because the title of the grantors to some fractional interests in this lot came through deceased persons, of whose estates there is no record of settlement in the probate courts. In fact, the plaintiffs, as trustees, owned $\frac{54}{100}$ of this lot, and the defendant admitted the sufficiency of that title and of the deeds tendered to convey it. As to the remaining $\frac{46}{100}$ of the lot, the plaintiffs asserted that the title was in one Nancy Salisbury at the time of her death, in 1865. The defendant admitted that the deeds tendered were sufficient to convey all the title which Nancy Salisbury had at her death, but asserted that her title was defective for want of settlement in probate of the estates of six persons, through whom her title was derived. These persons were (1) Lucretia Farley, who died in Hollis, N. H., in 1819, owning $\frac{1}{32}$ of the lot, and leaving a husband and four children; (2) Lucinda Gardner, who died at Leominster, in 1826, owning $\frac{12}{100}$ of the lot, and leaving as her heirs and next of kin eleven brothers and sisters and the issue of a deceased sister; (3) Francis Gardner, Jr., who died in 1836, owning $\frac{12}{100}$, and leaving a widow and five children; (4) Della L. Gardner, who died at Boston, in 1842, owning $\frac{12}{500}$, and leaving a mother and four brothers and sisters; (5) Henry G. Seaver, who died at Boston, in 1838, owning $\frac{12}{400}$, and leaving three brothers and sisters; (6) Mary Whitcomb, who died at Bolton, in 1862, owning

$\frac{1}{100}$, and leaving two children and the issue of a deceased child. Nancy Salisbury's title to $\frac{1}{100}$ of this lot was from the heirs of John Gardner, who died August 26, 1856. After the deeds were tendered to the defendant, and after the defendant had objected that Nancy Salisbury's title was defective because the estates of the six persons named had not been settled in probate court, and at some time in the same November, the parties ascertained the fact that the deed from John Gardner's heirs to Nancy Salisbury contained no habendum, and operated to convey to her an estate for her life only, so that the title to John Gardner's $\frac{1}{100}$ was then in the persons entitled to claim through his heirs. The master's report does not state that any other agreement for an extension of time was made by the parties except the previous one made on September 29, 1896, when it was agreed by the parties that time should be allowed for the defendant to make an examination of title; nor does the report state that the subsequent efforts of the plaintiffs to cure the defect in the title which came through John Gardner were made at the request or with the knowledge of the defendant; nor does the master's report state that upon the discovery that the deed from the heirs of John Gardner had no habendum, and that $\frac{1}{100}$ of the lot was not conveyed by the deeds tendered to the defendant, the latter considered the bargain off, and would not longer hold itself bound to take and pay for the land, or that it so notified the plaintiffs. The plaintiffs did in fact, in January and February, 1897, procure to one of themselves deeds from 28 persons, who were all the persons who had any interest in the land, by descent or by will, from John Gardner, or those taking under him; and in the latter part of February, 1897, the plaintiffs tendered to the defendant an additional deed, conveying all the interest so acquired. The master's report does not state whether the deeds tendered on September 26, 1896, still remain in the custody of the chairman of the selectmen. Upon the making of the tender of the last deed, in February, 1897, the defendant objected, to the title which the deed purported to convey, that it came by descent from persons deceased of whose estates there is no record of settlement in the probate courts, and that for that reason the title was insufficient.

John Gardner died at Leominster on August 24, 1856, and there is no record of the settlement of his estate in the probate court. There was some evidence before the master that he left a will, but the master finds that he died intestate, leaving as his heirs six children and the issue of a deceased child, to whom his title passed by descent. Between John Gardner and the grantor in the deed tendered to the defendant in February, 1897, there were instances in which the title to undivided interests in the lot passed by descent from persons of whose estates there

is no record of settlement in probate court:

(1) Two children of a daughter of John Gardner, who died before him, inherited from him, in 1856, what would have been their mother's share, or $\frac{1}{700}$ part of the lot. (2) One of these children, William G. Thurston, died at Cincinnati, Ohio, in 1877, and his $\frac{1}{1400}$ part of the lot descended to his two children. (3) William T. Osgood died at Springfield in 1892, owning $\frac{1}{8400}$ of the lot, which descended to his only child. (4) J. D. C. Thurston died in New York City in 1894, owning $\frac{1}{2800}$ of the lot, which descended to his sister. Besides this, $\frac{1}{4200}$ part of the lot passed by will of John G. White, who died at Cambridge, September 7, 1896, the affidavit of notice of the appointment of his executrix having been filed December 1, 1897, or some months after the filing of the plaintiff's bill; and $\frac{1}{700}$ part of the lot passed by will of Francis Gardner, of Boston, who died in 1881, and in whose estate in probate the affidavit of notice of appointment was filed December 10, 1897; but in each of these cases the affidavit filed showed that notice was duly given within three months after the appointment. There was no evidence of any outstanding or unpaid liabilities of any kind against any of the estates of the persons through whom the title came to the plaintiffs. The lot to the title of which the defendant objected was woodland, and no question or claim of title by prescription was raised before the master. It contained seven acres, and was worth \$7,000. The report also finds, in substance, the facts alleged in the defendant's supplemental answer, as to the purpose for which the defendant voted to purchase the land, and its subsequent action in otherwise providing accommodations for its schools.

Assuming that it is our duty, upon the case as it stands, to decide whether the plaintiffs shall have a decree for specific performance, we think that the bill should be dismissed, with costs. Aside from the contention that the last deed was not seasonably tendered, and which we do not consider, most of the defendant's objections are clearly untenable. The agreement did not call for a title every step in which should appear of record. The agreement was for a good and clear title, free from all incumbrances, and it was immaterial how the title had devolved in the past, if the deeds tendered were sufficient to convey to the defendant the full fee in the whole land, free from incumbrances, and free from such clouds as in equity bar a decree for specific performance.

Under our decisions, where the only defense is want of good title, equity will decree specific performance when the title tendered is beyond reasonable doubt, although there are questions in respect to the title which must depend upon circumstantial evidence, and although there may be still the possibility of a defect, and a remote chance that the title may be exposed to litigation, and finally held

to be imperfect. *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400, and cases cited; *Society v. Brown*, 147 Mass. 296, 17 N. E. 549; *Loring v. Whitney*, 167 Mass. 550, 46 N. E. 57; *Conley v. Finn* (Mass.) 50 N. E. 460; *Cushing v. Spalding*, 164 Mass. 287, 41 N. E. 297. In most of the instances in which the title tendered came through persons whose estates had not been settled in the probate courts, more than 20 years have elapsed since the devolution of title by descent, and there was no evidence of the existence of claims of any kind against the estates of the persons from whom the title descended. In the two instances in which small interests in a part of the land passed under comparatively recent wills, the wills were duly probated, and the notices which found the bar of the short statute of limitations were duly given, although the affidavits of the giving of such notices were not filed until after the filing of the bill. There were, however, two instances in which title to a very small interest in a part of the land passed quite recently from persons whose estates have not been brought into probate court for settlement. These were the descent of $\frac{1}{8400}$ of the seven-acre lot from William T. Osgood to his only child in 1892, and the descent of $\frac{1}{2800}$ of the same lot from J. D. C. Thurston to his sister in 1894. The plaintiffs contend that these interests are so minute that the possibility that the title which passed to the heir will be charged with the debts of the ancestor is of no consequence here. We think otherwise. Every tenant in common is seised of the whole land, and may enter upon and use it without committing a trespass. It was the purpose of the defendant in acquiring the land to use it for school purposes, which would make it necessary that the defendant should have the exclusive right of occupation. If the defendant should be compelled to accept the title, it would, as a municipal corporation, be expected to use the land for some public purpose, which would require the exclusive right of occupancy. In advert- ing to that, we do not intimate that we should require any purchaser to accept a deed which failed to convey to him a minute undivided interest when he had bargained for the whole fee. The title to the share of the seven-acre lot which descended, in 1892, from Osgood to his son, and of the share which descended, in 1894, from Thurston to his sister, are both subject to a cloud, in that they may yet be taken for the debts of the decedents, respectively. While there was no evidence before the master that there were any such debts, there has been no administration taken out as yet upon the estates, and sufficient time has not elapsed to raise a presumption that administration will not yet be granted. Without administration, and the giving of the notice of appointment to show that, if there are any claims, they must be presently extinguished by the statute of limitations, we think that the mere failure of the

defendant to produce before the master evidence that there are such debts is not enough to show that the risk is so small that the defendant should be compelled to assume it. Bill dismissed, with costs.

(158 N. Y. 125)

PEOPLE ex rel. STEINSON v. BOARD OF EDUCATION OF CITY OF NEW YORK.

(Court of Appeals of New York. Jan. 24, 1899.)

MANDAMUS—DISCRETION—LACHES.

It is not an abuse of discretion to refuse mandamus to reinstate a teacher unlawfully removed, where he delayed nearly six years in applying for the writ, and persisted in prosecuting the wrong remedy by way of appeals after being advised by the court of his mistake.

Appeal from supreme court, appellate division, First department.

Mandamus by the people, on the relation of George Steinson, against the board of education of the city of New York. From a judgment of the appellate division (46 N. Y. Supp. 782) affirming an order of the special term denying the writ, relator appeals. Affirmed.

Tompkins McIlvaine, for appellant. Theodore Connolly, for respondent.

GRAY, J. The relator applied to the special term for a peremptory writ of mandamus, commanding the respondent to reinstate him in his position as teacher in the public schools in the city of New York. The application was denied, and the order thereupon entered was affirmed at the appellate division.

It appears that in 1886 the relator received a certificate from the state superintendent of public instruction authorizing him to teach in any public school within this state. Subsequently there was issued to him by the city superintendent of schools in the city of New York a provisional license to teach in the public schools of that city for a period of six months, and thereafter he was appointed to be an assistant teacher in one of the grammar schools of the city. Renewals of the license were granted to him from time to time for periods of six months, until March, 1890, at which time a further renewal was refused. An appeal being taken by the relator to the state superintendent of public instruction, he obtained a decision from that officer declaring the action of the city superintendent, in refusing a renewal, to be unlawful. Thereupon, and in January, 1891, he applied for a peremptory writ of mandamus requiring the defendant to pay to him the amount of his salary. The application was denied, and the denial was affirmed at the general term (15 N. Y. Supp. 308); the latter court pointing out in its opinion that mandamus was not the proper remedy, as the relator had an adequate remedy at law to recover his salary, if legally entitled to it.

This latter decision was made in June, 1891. An appeal was taken to the court of appeals, but the same was not brought on for hearing until 1896, when the order appealed from was affirmed upon the opinion of the general term. 43 N. E. 989. A few months later the present proceeding was begun to secure the relator's reinstatement in his former position of teacher.

Upon these facts, showing a delay of about six years in instituting the present proceeding, the relator was chargeable with a laches which was not shown to be excusable. He had been advised in the prior proceeding as to his mistake in the remedy selected. It was incumbent upon him, if he desired to avail himself of the present remedy, to proceed without unreasonable delay; and, not having done so, but having persisted in prosecuting the other remedy by way of two appeals, it was quite competent for the court below, in the exercise of its discretion, to deny the application for this writ because of the delay of the relator in applying for it. The right to a mandamus was not at all clear; but, even assuming that a case was made out in which a peremptory writ might have been issued, the court had a discretionary power upon the facts to refuse it, in which case we should not be at liberty to review the order. *People v. Jeroloman*, 139 N. Y. 14, 34 N. E. 726; *People v. Wendell*, 71 N. Y. 172. If we look at the opinion of the appellate division, which we may do in order to discover the grounds upon which the affirmance of the order was placed, we have confirmation of our view that the relator's laches was deemed such as to justify the court in denying his application, inasmuch as that is the only proposition there discussed. The order should be affirmed, with costs. All concur, except PARKER, C. J., not sitting. Order affirmed.

(158 N. Y. 130)

In re NORTON.

(Court of Appeals of New York. Jan. 24, 1899.)

APPEAL—MOOT CASES—DECISION.

A question under the election law as to filing nominations will not be considered on appeal, after the election, where costs are not involved, and where it cannot reasonably be expected to frequently arise.

Appeal from supreme court, appellate division, Second department.

Mandamus by James Norton to compel the county clerk of Queens county to receive and file a certificate of nomination of the petitioner as a candidate for state senator. From an order of the appellate division of the supreme court (53 N. Y. Supp. 1093) reversing an order at special term denying the application, respondent appeals. Dismissed.

F. H. Van Vechten, for appellant. Henry A. Monfort, for respondent.

PER CURIAM. The question presented by this appeal involves the regularity of the filing of a certificate of nomination for the office of senator in the Second senatorial district, consisting of Queens county, with the county clerk of that county in the month of October, 1898. It is claimed that the certificate was filed on the last day of the period allowed by statute for that purpose, but after the county clerk's office had been closed for the day. As the election at which candidates for said office were to be voted for has passed, the question involved has become abstract by the lapse of time. Not even the question of costs remains, for no costs have thus far been allowed, and none are asked for upon this appeal. It is conceded that no question of practical importance to the parties is presented, but the county clerk, who alone appeals, asks us to entertain the appeal, and decide it, because a question of importance to the public is involved. The general practice of the court is to refuse to decide abstract questions, although in rare instances we have departed from the rule, in order to settle doubtful propositions, liable to often arise under our new election law, which, if left undecided, might result in serious embarrassment throughout the entire state. In *re Madden*, 148 N. Y. 136, 42 N. E. 534; In *re Fairchild*, 151 N. Y. 359, 45 N. E. 943. The question presented by the appeal now before us, however, is not one that can reasonably be expected to arise frequently, and is not of such general interest or importance as to warrant us in devoting time to it that should be spent in the determination of living controversies. While a single case would make little difference, the precedent might bring a multitude upon us, and seriously interfere with the disposition of cases of the utmost importance to the parties interested. The appeal should be dismissed, but without costs. All concur. Appeal dismissed.

(158 N. Y. 128)

In re SMALL.

(Court of Appeals of New York. Jan. 24, 1899.)

APPEALABLE ORDERS—SPECIAL PROCEEDINGS.

An order denying an application to open a decree of the final judicial settlement of the accounts of an executor is not an order "finally determining" such special proceeding, so as to be appealable to the court of appeals, under Code Civ. Proc. § 190, since the decree itself is the final order.

Appeal from supreme court, appellate division, Third department.

Application by Anthony T. Small, individually and as executor of the will of Grace A. Small, deceased, to open the decree settling the accounts of Samuel Bolton, Jr., as executor of the will of Mary Dugdale, deceased, and for a further accounting. From a judgment of the supreme court (50 N. Y. Supp. 341) affirming a decree denying the application, Small appeals. Dismissed.

Michael D. Nolan, for appellant. Charles F. Doyle, for respondent. Samuel Foster, special guardian for William B. Dugdale, a minor.

PARKER, C. J. After the entry of a decree in the matter of the final judicial settlement of the accounts of an executor, a petition was filed, alleging that the executor had not accounted for all the moneys received by him, and praying the surrogate's court to open the decree and to compel a further accounting. Objection thereto was made by the executor, and thereafter testimony was offered and received in support of the petition and answer, and the result was an order by the surrogate denying the application to open the decree and to require a further accounting. On a review by the appellate division there was a difference of opinion in the court whether the application should have been granted, but the outcome was an affirmance of the order appealed from. It was a special proceeding (Code, § 3334; *In re Smith*, 95 N. Y. 526), and resulted in the decree to open which this proceeding was instituted, and such decree was a final order in that special proceeding, within the meaning of section 190 of the Code of Civil Procedure. Orders, subsequently made, denying motions to set aside the decree, or to open it, for the purpose of correcting errors or to compel further accounting, while later in point of time, are not orders "finally determining" such special proceedings. *Van Arsdale v. King*, 155 N. Y. 325, 49 N. E. 866; *City of Johnstown v. Wade*, 157 N. Y. 50, 51 N. E. 397. The appeal should be dismissed, with costs. All concur. Appeal dismissed.

(158 N. Y. 109)

BUCHANAN v. TILDEN.

(Court of Appeals of New York. Jan. 24, 1899.)

CONTRACTS—PARTIES—CONSIDERATION — HUSBAND WIFE.

The duty of a husband to provide for his wife's future, coupled with her equitable and moral claim as niece by adoption to a testator, are a sufficient consideration for a contract by the next of kin with the husband to pay the wife a certain sum in return for services rendered by the husband in defeating the will, whereby a large sum inures to the heirs and next of kin; and hence the wife may enforce the contract, though she be not a party to it.

Parker, C. J., and O'Brien and Gray, JJ., dissenting.

Appeal from supreme court, appellate division, First department.

Action by Adelaide E. T. Buchanan against George H. Tilden. From an order of the appellate division (39 N. Y. Supp. 228) reversing a judgment for plaintiff, she appeals. Reversed.

Louis S. Phillips, for appellant. Delos McCurdy, for respondent.

BARTLETT, J. At the close of plaintiff's case both parties moved for a directed verdict,

and neither asked to go to the jury on any question. The trial judge thereupon directed a verdict for the plaintiff. The appellate division, with a divided court, reversed the judgment in plaintiff's favor entered upon the verdict, and ordered a new trial. The plaintiff has appealed from that order, stipulating for judgment absolute in case of affirmance, and presents for our determination a single question of law arising upon undisputed facts. Before stating that question, reference will be made to the material facts:

The plaintiff is the adopted daughter of Moses Y. Tilden, a brother of the late Samuel J. Tilden. The defendant is an heir at law and next of kin of Samuel J. Tilden. On the 20th day of October, 1886, the defendant began an action against the executors of the estate of Samuel J. Tilden and others, praying judgment that the thirty-fifth article of Mr. Tilden's will be adjudged void, and that the property therein mentioned be declared undisposed of by any provision thereof. The defendant, being without means to prosecute this action, applied to Robert D. Buchanan, the husband of the plaintiff, for assistance in raising the funds necessary to carry on the litigation. Buchanan expressed his willingness to aid defendant, if certain arrangements were made, and said that his uncle, Robert G. Dun, might be willing to advance the money required. The defendant expressed himself as willing "to do anything in the world to raise the money,—to make any arrangement that was reasonable,"—and said to Buchanan that, if the contest was successful, Mrs. Buchanan "should come in, share alike, with the rest of them." It was evidently within the contemplation of the parties that, if this action of the defendant was successful, the result would be that, as to a very large part of his estate, Mr. Tilden died intestate, and that, while the plaintiff, as an adopted child of Moses Y. Tilden, and not of Samuel J. Tilden's blood, might take no part thereof, yet there were the strongest moral and family reasons why she should be regarded as an heir at law and next of kin. Buchanan induced Dun to make certain necessary advances, to the extent of \$5,000, and Dun consented to do so solely on the ground that plaintiff was to share the fruits of a successful contest, he being unacquainted with the defendant. This portion of the money was advanced by Dun about the time defendant began his action, and he was then presented to Dun, and repeated to him the promise, in regard to plaintiff sharing alike with the rest of the heirs, that he had made to her husband.

In February, 1887, the defendant asked Buchanan if he could raise more money. Buchanan testified that, in response to this application, "I told him that I thought, before any more money was talked about, that the arrangement that had been talked about had better be whipped into line, * * * and he said they were all perfectly willing to share

and share alike in that matter. I said, "That does not satisfy me; that is not what I want; I want some positive agreement." After considerable further talk, he said that his brothers and sisters were scattered; that he could not get it into shape just then, but that he had to have some more money, and had to have it right away, and, in order to get the money, and have it right away, he, on his own personal behalf, having nothing to do with his brothers or sisters in any sense, would obligate himself to pay personally fifty thousand dollars." Thereupon defendant and Buchanan went to the office of counsel, where the following letter was drawn up, signed by defendant, and delivered by Buchanan to Dun: "New York, February 19th, 1887. Robert G. Dun, Esq., No. 314 B'way, N. Y. City—My Dear Sir: It is understood between Mr. R. D. Buchanan and myself that, in the event of the success of the proceedings now pending, or any which may be taken, to practically set aside the thirty-fifth section of the will of my late uncle, Samuel J. Tilden, in view of the assistance, looking to that end, which has been and may be rendered by Mr. Buchanan, as well as by yourself, that I will, and hereby do, become responsible for the payment to Mrs. Adelaide E. Buchanan, or her order, of the sum of fifty thousand dollars. It is further understood between us that, while I am not strictly authorized to speak in behalf of my brothers and sisters in that respect, from what has already transpired between me and them, in the event of such success, they will be disposed to act generously with Mrs. Buchanan in the premises. Yours, very resp'y, George H. Tilden."

It will be observed that this letter, while charging defendant in a fixed sum, leaves open the general adjustment between plaintiff and defendant's brothers and sisters. After receiving this written declaration of the defendant, Dun continued his advances, until they aggregated over \$20,000. A long contest followed in the courts. Defendant succeeded in his action, and he and others became entitled to a very large sum of money that the late Samuel J. Tilden supposed he had dedicated to public uses under the thirty-fifth article of his will. Dun testified that the defendant had repaid his advances; that they were collected through his attorney, but he thought an action was brought against him. Defendant paid plaintiff \$8,150, on account of the \$50,000, under the letter of February 19, 1887. As nothing more was paid, and plaintiff received no recognition from the heirs at law and next of kin of Mr. Tilden, she brought this action to recover the balance of the \$50,000 and interest.

One of the learned judges of the appellate division thus states the question of law presented in this case: "Can a wife enforce payment in her own name, where the husband renders valuable services, and stipulates with the person to whom the same are rendered that compensation therefor shall be made, not

to him, but to her?" In answering this question in the negative, the main positions of the court below may be briefly stated: While admitting that there is a distinct class of cases where promises have been made to a father, or other near relative, for the benefit of a child, or other dependent relative, in which the person for whose benefit the promise was made has been permitted to maintain an action for the breach of it, and further admitting, for argument's sake, that the duty and obligation of the husband to the wife is, as a consideration, quite equal to the duty and obligation of the father to the child, yet the fact still remains, in the case at bar, that this is not a contract looking towards the discharge of the obligation which the husband owed to support the wife, and must, therefore, be supported, if at all, upon the mere relation of husband and wife. The learned court then states that it has found no authority for holding that a promise made to the husband by a third person for the benefit of his wife, which was not intended to provide for her support, or to discharge the husband's duty in that regard, could be enforced by the wife. It is also intimated that there is no disposition to extend the principle of some of the cases relating to father and child to any other relationship. As to this latter suggestion, we do not think it will be seriously questioned, on principle, that the relation of husband and wife is fully equal to that of parent and child as a consideration to support a promise.

Before discussing this appeal in the light of the authorities, we have to say that, in our judgment, the learned appellate division have failed to give due weight to certain controlling features of this case. In the first place, the question formulated by the court below does not contain what we regard as one of the most important points disclosed by the evidence, to wit, the large equitable interest the plaintiff had in this scheme to attack the will, under the provisions of the agreement made to carry it out. This is not the case, simply, of a husband rendering valuable services to a third party upon the latter's promise to pay the compensation, not to him, but to his wife. While this case embraces that feature, it involves the further element of the wife's joint interest in the scheme to attack the will. It may fairly be inferred, from this record, that the defendant was powerless to conduct the action attacking the will unless some one furnished him the funds. This assistance was rendered by Buchanan and Dun, upon the express agreement and understanding that the plaintiff should receive, in case of success, \$50,000 from defendant as part of her share of the estate, and generous treatment from his brothers and sisters. Plaintiff, in equity and good conscience, as an adopted child of Moses Y. Tilden, was entitled to come in and share with the other heirs and next of kin the large fund that had been freed from the provisions of the will. When this equitable

right or interest is coupled with the relation of husband and wife, we have presented a situation that affords ample consideration for the contract sued upon,—a situation that distinguishes this case from any of the cases where the party suing upon a promise rests exclusively upon a debt or duty owed him by the promisee.

Another general feature of this case, to which we think the court below has failed to give due prominence, is the extent of the legal and moral obligation resting upon a husband to support and provide for his wife. A brief quotation from one of the opinions below will make this point clear: The court says: "It is quite true that the husband is under an obligation to support the wife, and it may be that any contract which he makes with a third party, having for its object the carrying out of that obligation, would be enforced in the courts." Then, coming to the case at bar, the court continues: "There is no obligation, legal or equitable, here, on the part of the husband towards the wife, to entitle her to the performance of this contract. This was not a contract for her support, nor was it one to do anything which, under any circumstances, the husband could be compelled to do. It was simply an obligation on the part of the defendant to pay the plaintiff a sum of money, as an independent fortune for her separate estate, in case the husband rendered some service to him. So far as the plaintiff and her husband were concerned, as to this contract, there were no legal relations between them. They occupied no different relations from that of any other man and woman," etc. It seems to us that this is an entire misconception of the duties and relations existing between man and wife. It is, in effect, said that it is only the duty of bare maintenance that is a consideration sufficient to support the promise of a third party. We are of opinion that a husband rests under other, and far higher, moral and legal obligations that the law will recognize as a sufficient consideration to support a covenant in favor of the wife. There is no evidence in this case to bear out the statement that this was not a contract for the wife's support; but, assuming that she had food, raiment, and shelter,—the necessities of life,—can it be said that these represent the full measure of the moral and legal obligations imposed upon a husband by the common law? Is it not his bounden duty, if opportunity offers, to provide for his wife against that day when he may be incapacitated by disease or removed by death? If, as in the case at bar, the husband seeks to provide for his wife, beyond the duty of furnishing food and shelter, by securing a fund to which she is equitably entitled, that may perpetuate his protecting care after he has departed this life, shall it be said that this is not an obligation that a court can recognize as a sufficient consideration to support a covenant on her behalf? We are of opinion that this broader

view of the duties and obligations of a husband is to be invoked in determining the rights of this plaintiff.

We come, then, to a consideration of this case in the light of precedent. The court below recognized the strong equities of the plaintiff's case, and expressed regret that the action is not sustainable in her behalf. Our full discussion of the facts and the position of the court below discloses, we think, a very strong case in favor of the plaintiff maintaining this action. While it is true that for more than 200 years the courts of England and this country have been discussing the vexed question of when a party may sue upon a promise made for his benefit to a third party, yet we are of opinion that, under the peculiar facts of this case, the plaintiff can recover by invoking legal principles that are well established by authority. In order to maintain the plaintiff's cause of action, it is not necessary to invoke the principle established by *Lawrence v. Fox*, 20 N. Y. 268, and the cases that have followed it in this state, to the effect that an action lies on a promise made by the defendant upon valid consideration to a third person for the benefit of the plaintiff, although the latter was not privy to it. It will be recalled in that case one Holly loaned the defendant, Fox, money, stating at the same time that he owed the amount to the plaintiff, Lawrence, for money borrowed, which he had agreed to pay the then next day. The defendant, in consideration of the loan to him, agreed to pay plaintiff the then next day. This court, in holding that the plaintiff, Lawrence, could enforce that promise in an action at law, established a legal principle that the courts of England have never recognized. The plaintiff in the case at bar, if driven to it, might doubtless derive aid and comfort from the doctrine laid down in *Lawrence v. Fox* by parity of reasoning; but we think her case rests upon very different principles.

The first case to be considered is *Dutton v. Poole*, 1 Vent. 318, 332, decided in England in the reign of Charles II. The plaintiff declared in assumpsit that his wife's father, being seised of certain lands now descended to the defendant, and being about to cut £1,000 worth of timber to raise a portion for his daughter, the defendant promised to the father, in consideration that he would forbear to fell the timber, that he would pay the daughter £1,000. After verdict for the plaintiff on nonassumpsit, it was moved in arrest of judgment that the father ought to have brought the action, and not the husband and wife. The court said: "It might have been another case if the money had been to have been paid to a stranger; but there is such a nearness of relation between the father and the child, and 'tis a kind of debt to the child to be provided for, that the plaintiff is plainly concerned." The judgment was affirmed in the exchequer. 2 Lev. 212, T. Raym. 303.

In one of the opinions of the appellate division in the case at bar, it is stated that *Dutton v. Poole* has been repudiated by the English courts in *Tweddell v. Atkins*, 101 E. C. L. 383. A careful examination of this latter case shows that Justice Blackburn, while attacking *Dutton v. Poole*, says: "We cannot overrule a decision of the exchequer chamber." Lord Mansfield said of *Dutton v. Poole*, 100 years later, that it was difficult to conceive how a doubt could have been entertained about the case. *Martyn v. Hind*, Cowp. 443, 1 Doug. 142. It has also been repeatedly followed in this state.

The learned counsel for the defendant, in an able and comprehensive brief, complains that *Dutton v. Poole* has, on several occasions, been cited to sustain the broad doctrine that a stranger to the consideration and to the promise may maintain an action on a contract. He points out that such an alleged erroneous citation appears in *Schermerhorn v. Vanderheyden*, 1 Johns. 139, and that it has led to confusion in subsequent cases. We are not concerned at this time whether this is a just criticism or not, as there can be no doubt that *Dutton v. Poole* rests upon the nearness of the relation between father and child, and to this extent is undoubted authority.

In *Shepard v. Shepard*, 7 Johns. Ch. 57, *Dutton v. Poole* is approved and followed, and Chancellor Kent also recognizes the principle, contended for in this case, that the consideration of natural affection, and to make sure the maintenance of a wife in case she survived her husband, is "very meritorious." There were two principal points decided by Chancellor Kent in this case; the first being that, although a deed from a husband directly to his wife is void in law, yet, where the conveyance of the husband is for the purpose of making a suitable provision for the wife "in case she should survive him," equity will lend its aid to enforce its provisions. The second point held that, where a husband conveyed land to his son, for a nominal sum, on his covenanting to pay an annuity to his mother during her widowhood, the wife could sue on this covenant so made for her benefit, and that an attempted release of the son from the covenant by the husband, in his lifetime, was fraudulent and void. The learned chancellor said: "But, if the deed of 1808 was out of the question, I should then have no difficulty in declaring that the defendant was bound to pay her the stipulated annuity, or the gross sum of four hundred dollars, in lieu of it, on her releasing," etc. "The relationship between husband and wife was sufficient to entitle the plaintiff to her action upon the covenant to her husband, and which was made for her benefit. The consideration inured from the husband and arose from the obligations of that relation," etc. The chancellor then comments approvingly and at length upon *Dutton v. Poole*, points out the subsequent commendation of it by Lord

Mansfield, and concludes by saying: "The same doctrine appears in the more early case of *Starkey v. Mill*, Style, 296, and it has had the sanction, also, of Mr. Justice Buller in *Marchington v. Vernon*, 1 Bos. & P. 101, in notes; but it is quite unnecessary to dwell longer on this second point." While the chancellor allowed relief to the plaintiff by enforcing her deed in equity, yet he distinctly held that she had the additional remedy of an action on the covenant between her husband and the son, if there were no deed, by reason of the relations and obligations of husband and wife, resting his decision squarely on the case of *Dutton v. Poole*.

With this case approved by Lord Mansfield, Justice Buller, and Chancellor Kent, and followed in this state, it is not of controlling importance that the doctrine of this and other early cases is said to be questioned in England at the present day. In a jurisdiction where the doctrine of *Lawrence v. Fox* is the settled law, there is no difficulty in sustaining, both in law and equity, the kindred principle announced in *Dutton v. Poole*.

It is quite impossible to follow the learned counsel on both sides of this case in the exceedingly interesting and exhaustive discussion of the questions involved, as the limits of an ordinary opinion forbid it. We shall content ourselves with the citation of but one more case. In *Todd v. Weber*, 93 N. Y. 181, this court held that the relation of parent and child, even between a father and his illegitimate daughter, was a sufficient consideration for a contract made by him with the relatives of his unfortunate child to pay for her support and maintenance, and that she could enforce it by action. The learned judge writing for the court in that case, in an opinion that does honor to his heart as well as his intellect, quotes with approval *Dutton v. Poole*. We see no valid distinction, in principle, between the relation of parent and child and husband and wife, as affording an ample consideration for covenants inuring to the benefit of the child or wife. The relation of husband and wife has been twice recognized in this state, in cases just cited, as a sufficient consideration for supporting a covenant in the wife's favor, and amply sustains the plaintiff's cause of action in the case at bar. This court has recently held that, while the common-law rule that husband and wife are one has been to some extent abrogated by special legislation, yet there are situations where that unity still exists. *Wetmore v. Wetmore*, 149 N. Y. 520, 529, 44 N. E. 169; *Bertles v. Nunan*, 92 N. Y. 152. The case before us illustrates a situation where that unity survives for the purpose of aiding the wife to enforce a covenant for her benefit made by her husband, and which equity and good conscience approve.

The appellate division refer to *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49, as "a case, while not directly in point is in its controlling principles, adverse to the plaintiff's right to

maintain this action." We think that case has no application to the one before us. The husband of plaintiff conveyed to the defendant certain premises, the latter covenanting to pay all incumbrances on the premises "by mortgage or otherwise." The deed declared that the wife (the plaintiff) reserved her right of dower. By the foreclosure of mortgages on the premises, existing at the time of the conveyance and in which the wife joined, her dower interest was extinguished. The wife sued on the defendant's covenant in the deed to pay all incumbrances, and sought to recover the value of her dower interest cut off by the foreclosure. This court held that the covenant was with the husband alone, as the wife was not bound to pay the mortgages, and that the joinder of the wife in the mortgages was a voluntary surrender of her right of dower for the benefit of the husband, and bound her interest to the extent necessary to protect the securities. It is perfectly clear, under this state of facts, that the husband rested under no duty to protect the wife's dower interest. There was no legal or equitable obligation which the wife could lay hold of to enable her to sue on the covenant. The court points out that it is not sufficient that the performance of a covenant may benefit a third person, but it must have been entered into for his benefit.

The case at bar is decided upon its peculiar facts. We do not hold that the mere relation of husband and wife alone constituted a sufficient consideration to enable the plaintiff to maintain this action. We deem it unnecessary to decide that question at this time. What we do hold is that the equities of the plaintiff were such that, when considered in connection with the duty of her husband to provide for her future, and, with that purpose in view, the money was procured for the defendant to institute and pursue the necessary litigation to secure the fund to which her equities related, they, all taken together, were sufficient to sustain the plaintiff's action. The order of the appellate division granting a new trial, and the judgment entered thereon, should be reversed, and the original judgment in favor of the plaintiff and against the defendant affirmed, with costs in all the courts.

GRAY, J. (dissenting). I think that the order appealed from should be affirmed, and that any other doctrine than that laid down by the appellate division would be without support in principle or in the cases. The defendant needed money in order to prosecute an action to set aside certain provisions of the will of Samuel J. Tilden, deceased. He applied to the plaintiff's husband for that purpose, and the latter procured Dun to advance the money. The agreement between the defendant and the plaintiff's husband was that, in the event of the success of the action, in view of the assistance rendered by the latter as well as by Dun, the defendant would become responsible for the payment to the plaintiff of

the sum of \$50,000. The action was successful, and the defendant repaid the money loaned. In addition, he gave to the plaintiff a sum of \$8,500; but she has brought this action to compel the payment by the defendant of the whole sum mentioned in the agreement.

The question is whether the plaintiff had a cause of action upon the contract. It seems to me that this case is not brought within that class of cases wherein a third person is entitled to enforce a promise which has been made by one person to another, because of the absence of the essential element that some liability or duty must exist from the promisee to such third person in connection therewith. As it was held in *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49, the rule is that, to permit a third party to enforce such a promise, the promisee must have a legal interest that the covenant be performed in favor of the party claiming performance. How was that the case here? Could it be because of the general obligation on the part of the plaintiff's husband to support and maintain her? That, of course, is a well-recognized obligation in the law. But did the contract in question have that for its object? I cannot so regard it. It related solely to the payment of a large sum of money contingently upon the success of a certain litigation, of which the defendant was the promoter, and promised a reward or compensation to the party with whom made for his aid in furnishing the needed moneys. It is perfectly clear that this contract was not based upon marital obligations, but that it was simply a mode, suggested by the husband and adopted by both parties, for the payment by the defendant of the consideration for his (the plaintiff's husband's) services in the matter. It does not appear that the plaintiff's cause of action has any other basis than the mere fact of the marital relation. While that relation imposes strong legal and moral obligations upon the husband, it is difficult to see that they involve a liability on his part to provide a separate estate for his wife; and yet, if there is not that liability, what liability was there towards the plaintiff, which furnished the element required to exist in order that the third person, the plaintiff here, might claim the right to enforce the promise? It is not necessary that the wife should be privy to the consideration of the promise; but it is necessary that the promisee, her husband, should owe some debt or duty to her, in connection with the promise, to enable her to sue upon it.

I think that the insuperable legal objection to the plaintiff's cause of action is that the contract in question was not one which looked towards the discharge of any obligation owing by him to her, and, therefore, is not enforceable, upon the doctrine which underlies the cases where, as in the relation of parent and child, the promisee owed a duty which the contract was supposed to meet. I am prepared to admit, as it is argued, that we should recognize the obligation of the husband to support the wife to be as meritorious

as the obligation of the parent to support the child, and, if this contract could be regarded in that light, I might be prepared to extend to the present case the principle of the cases referred to. But, as previously suggested, the relationship between the parties here does not help us out in endeavoring to find support for the plaintiff's cause of action, for the reason that the contract which is sought to be enforced does not bear upon the husband's obligation, and is not connected with it, but simply provides for the payment of a sum of money as a compensation for his services in the event of success. In view of the more elaborate discussion in the opinion below, I think nothing more need be said, and that the order should be affirmed.

HAIGHT, MARTIN, and VANN, JJ., concur with BARTLETT, J., for reversal. PARKER, C. J., and O'BRIEN, J., concur with GRAY, J., for affirmance.

Order reversed, etc.

(22 Ind. App. 151)

CITIZENS' ST. R. CO. et al. v. BALLARD.¹

(Appellate Court of Indiana. Jan. 24, 1899.)

INJURY—DEFECTIVE STREET—STREET RAILWAY—DUTY TO REPAIR—SPECIAL FINDING—PRESUMPTION—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—REVIEW.

1. It cannot be presumed that a person injured did not exercise any care, from a special finding that the evidence did not show "what care" he was using when the injury occurred.

2. In the absence of knowledge to the contrary, one driving over a street is entitled to presume that it is in a reasonably safe condition for travel.

3. One injured by reason of a defective street, which he knows to be unsafe, is not guilty of contributory negligence, if he uses care proportionate to the known danger.

4. On an issue as to what would constitute constructive notice of a defect in a street, the court charged that a very short time might be sufficient, considering the location, character, and permanence of the defect, "and such other things as throw light on the question," and added that what the facts were and the inferences to be drawn therefrom were for the jury to determine, under all the evidence and circumstances. *Held*, in view of the closing clause, that the instruction was not erroneous, as authorizing the jury to consider facts not shown by the evidence.

5. Since a street-railroad company is bound to so maintain its tracks as not to impair the safe condition of the street, whether required by ordinance or not, an instruction that, if a street-railway company accepted an ordinance imposing such obligations, a violation thereof rendering the street dangerous would be negligence, which, if the proximate cause of another's death, who was exercising due care at the time, would render the company liable therefor, was not error.

6. A verdict of a jury cannot be disturbed on appeal where there is some evidence to support it.

7. It is not error to refuse requested instructions covered by those given.

Appeal from superior court, Marion county; L. M. Harvey, Judge.

Action by Mary Ballard, administratrix,

¹ Rehearing denied.

against the Citizens' Street-Railroad Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Latta, John W. Kern, and J. C. Bell, for appellants. George W. Spahr, for appellee.

ROBINSON, J. Appellants appeal from a judgment in appellee's favor awarding damages for the death of appellee's decedent. For opinion on the former appeal of this case, see 18 Ind. App. 522, 47 N. E. 643. The only errors assigned which are discussed by appellants' counsel question the overruling of the motion for judgment in appellants' favor on the answers to the interrogatories, notwithstanding the general verdict, and overruling appellants' motion for a new trial. The jury returned a general verdict in appellee's favor, and with it answered the following interrogatories: "(1) Q. Was the Citizens' Street-Railroad Company operating a track where the plaintiff's decedent was hurt at the time of his injury, under a contract with the board of commissioners of Marion county, Indiana, granted at the September term, 1865? A. No. (2) Q. Did the contract with said county commissioners require the Citizens' Street-Railroad Company to keep any portion of West Washington street in repair? A. Yes. (3) Q. Was the place where plaintiff's decedent was injured, at the time defendant laid its track at that point, a part of the city of Indianapolis? A. No. (4) Q. Has said territory since been annexed by the city of Indianapolis? A. Yes. (5) Q. Did the Citizens' Street-Railroad Company, when it originally laid the said track, lay the same so that the tops of the rails were on a level with the established grade of said Washington street? A. No. (6) Q. Had there ever been, up to the time of the accident, any change in the established grade of said Washington street? A. No. (7) Q. Had there ever been any change up to the time of this accident, in the elevation of the rails of said track? A. No. (8) Q. Did the plaintiff's decedent's vehicle upset at the time when the right hind wheel thereof was upon the north rail of the street-car track, and the remaining wheels had passed over the same to the north side thereof? A. No. (9) Q. Did the vehicle of plaintiff's decedent upset when the right hind wheel was between the rails of the street-car track, and the remaining wheels thereof had passed over said track to the north side thereof? A. No. (10) Q. Was there a depression or declivity in Washington street at the time of the accident of plaintiff's decedent, about four feet deep? A. Yes. (11) Q. Did the south edge of said depression or declivity extend up to within twenty inches of the said defendant's street-car track? A. Yes, clear to the track. (12) Q. At the time the vehicle of the plaintiff's decedent upset, was the left fore wheel at

the bottom of said depression? A. No. (13) Q. At the time the vehicle of the plaintiff's decedent upset, was the left hind wheel and the right fore wheel upon the slope of said depression or declivity? A. No. (14) Q. Was the said slope one of about 45 degrees? A. Yes. (15) Q. Would the said vehicle have upset, as it did upset, if the space between the rails of said street-car track and for eighteen inches on each side thereof had been filled up to the level with the top of said rails? A. No. (16) Q. Did said vehicle upset because of the depression or declivity upon the north side of said street-car track? A. Yes. (17) Q. Is there any evidence to show what care the plaintiff's decedent, Jehu Ballard, was using at the time of the accident? A. No. (18) Q. Did the plaintiff's decedent, Jehu Ballard, upset at a place about 125 feet from his front gate? A. Yes. (19) Q. Had he been living at said place eighteen months? A. Yes. (20) Q. Was the said depression and declivity and the street-railroad track in plain view from his front gate? A. No. (21) Q. Did the plaintiff's decedent know of the existence of the said depression or declivity, and of the condition of said street-railroad track, at the time of his injury? A. No. (22) Q. Was plaintiff's decedent, at the time of his injury, driving a blind horse? A. Yes. (23) Q. Had said depression or declivity been in Washington street since 1887, in the condition it was in January, 1894? A. Yes. (24) Q. Was plaintiff's decedent, Jehu Ballard, driving his wagon at the time it upset? A. Yes. (25) Q. Does the evidence show that plaintiff's decedent, Jehu Ballard, did not know the condition of Washington street between the street-car tracks and north of the same, at the time of and before the injury? A. Yes. (26) Q. Was Washington street, at the place of the accident, between the rails and immediately next to the same, worn below the original grade by the travel upon said street? A. Yes. (27) Q. How much had the street at such place been worn below the tops of the rails of the street-car track? A. Six inches. (28) Q. Had such portion of the street been in this condition for a period of eighteen months, at least, at the time of the accident to the plaintiff's decedent. A. Yes. (29) Q. Was the death of Jehu Ballard caused by falling out of his wagon on Washington street? A. Yes. (30) Q. Did any negligence of the street-railway company proximately cause the fall of plaintiff's decedent? A. Yes."

Taking the answers to the interrogatories and the evidence in support of them, and we cannot escape the conclusion that the negligence of both the city and the railway is shown. The answers to the interrogatories show a condition of affairs establishing negligence on the part of both the city and the railway company, beyond question. The street was not only unsafe for public travel, but both it and the railway tracks

had been permitted to remain in that unsafe condition for 18 months. And the answers to the interrogatories are not inconsistent with the general verdict, finding appellee's decedent free from contributory negligence, unless the seventeenth interrogatory and answer make them so.

The jury, by their general verdict, found, in effect, that the decedent, at the time of his injury, was exercising such care as a reasonably prudent person would exercise under like circumstances. And the answer of the jury that the evidence does not show what care he was using at the time of the accident is not necessarily a finding that the evidence does not show that he was exercising any care. It is said by counsel in their brief that, in preparing this interrogatory, the exact language employed in the case of *City of Bedford v. Neal*, 143 Ind. 425, 41 N. E. 1029, and 42 N. E. 815, was used. In the opinion in that case, the court used this language: "There is no evidence to show what degree of care she [the person injured] used to avoid danger in passing over the walk at the time she was injured." The court was not discussing any interrogatory. It is not the province of the jury to find the degree of care used, and the interrogatory in the form asked does not necessarily ask whether the evidence shows he was exercising any care. The jury may have understood the question asked as they would have understood it if the exact language in the *Neal* Case had been used; and to such a question the answer they did make would not be inconsistent with the general verdict. The question asked might be construed to mean the kind of care used, and, when the jury say that the evidence does not show this, they do not necessarily say that the evidence does not show that any care was used. A question could easily be framed that would ask that question directly.

It appeared from the evidence that the accident resulting in decedent's death happened between 6 and 7 o'clock in the evening in the month of January; that it was dark; that the horse decedent was driving was blind; that decedent was pursuing his usual avocation; that he was going in a direct line to his place of destination, to deliver a trunk. It was too dark to see the surface of the street and the street-car track, but the outline of the horse and wagon could be seen by a person standing on the lot abutting the street, and opposite the place where the accident occurred. A witness who saw the decedent driving across the street, and saw the wagon upset, testified that he noticed no increase of speed of the horse, nor anything of that sort, just before the accident occurred. It appears the decedent was at a place where he had a right to be, and was doing what he had a right to do. The jury found as a fact that the decedent did not know of the existence of the declivity in the street, or of the condition of the street-railroad track, at the time of his

injury. It is true there was evidence tending to show that he might have known the condition of the track and street; but from all the evidence in the case the jury could conclude, as they did, that he did not know their condition. From a careful review of all the evidence, we think the record discloses some evidence to sustain the finding both that appellants were negligent in permitting the street and railroad track to be and remain in the condition they were in at the time of the injury, and that the decedent was exercising such care as an ordinarily prudent person would use under the circumstances.

The court properly instructed the jury that the decedent had the right to presume, and to act on the presumption, unless he had knowledge to the contrary, that the street was in a reasonably safe condition for travel by him if he used due care; and the fact that he knew or had reason to believe the street unsafe would not preclude him from using the street, but in such case he must use care proportioned to the danger of which he knew or had reason to apprehend; and if he did not know or have reason to apprehend danger, or knew it, and used care proportioned to the known or reasonably apprehended danger, and notwithstanding such care was injured, then, so far as contributory negligence was concerned, there might be a recovery.

In speaking of what constitutes constructive notice, the court told the jury: "A very short time may be sufficient, considering the location of the defect in a street, the character of it, the extent to which the street is used, to what extent the defect or obstruction is permanent and prominent, and such other things as throw light on the question. What the facts are, and the reasonable inferences therefrom, are for you to determine, under all the evidence and circumstances considered in accord with the court's instructions." It is argued that the clause "and such other things as throw light on the matter" is too broad, and invited the jury to consider everything they might think proper. If the instruction stopped with that clause,—and counsel discuss it as though it did,—the objection might be well taken; but with the closing sentence, we think, the jury must have understood that they were to consider only such things or facts as were shown by the evidence.

In its thirteenth instruction the court said to the jury: "If you find that, at the time said track was placed in said highway, the territory at the point in controversy was not in the city of Indianapolis, and that said track was so placed by consent of and contract with the board of county commissioners, but that thereafter said territory was annexed to and became part of said city, and the city undertook, by ordinance, to name terms and conditions for the maintenance of said track for the purpose of preserving the public highway at that point in a reasonably safe con-

dition for public use and travel, and said street-railroad company accepted the terms of said ordinance, then the ordinance terms would be binding on said company, and any violation of the terms of said ordinance rendering said highway dangerous to travelers would be negligence; and if said condition proximately caused the death of Jehu Ballard, and he was at the time using due care, the defendant company would be liable therefor." It is objected to this instruction that it assumed that the ordinance of the city of Indianapolis was passed in an attempt to establish a method of maintaining this street, in common with others, and was so accepted by the company. But we fail to see where in this instruction is objectionable. Even if the street railway was built under a contract with the county commissioners, when the highway became a part of the city it was the duty of the company to maintain its track so as to preserve the public highway in a reasonably safe condition for public use and travel; and it was its duty to do this whether there was any ordinance requiring it to be done or not. It was the duty of the company to keep its tracks in such condition as not to render the highway unsafe for the public, regardless of any privilege granted or attempted to be granted by the board of commissioners; and this duty continued as long as the highway remained a public highway, no matter within what jurisdiction it might be. The instruction is directed simply to the duty of the company to keep the track in such condition as not to render the street unsafe for public use and travel. The cases cited by counsel denying the right of a municipality to impose additional burdens to those provided for in the contract with the municipality are not in point. Requiring a railway company to keep its tracks in such condition as not to interfere with the public use of the street is quite a different thing from requiring the company to make a certain kind of improvement prescribed by the municipality, and not provided for in the original contract between the company and city.

It is argued that the evidence does not show that the death of appellee's decedent resulted from the injury received. The jury answered that it did, and it cannot be denied that there was some evidence to sustain this finding. Counsel have discussed this evidence, but it is clear we cannot disturb the jury's finding upon this point without weighing the evidence, and this we cannot do. While a court might believe that the great weight of intelligent testimony in a given case was against a jury's finding, yet, if the finding is supported by some evidence, the verdict must stand.

The court fully instructed the jury on the question of proximate cause and the instructions requested by appellants upon that branch of the case were covered by the instructions given by the court. The court's

Instructions cover the whole case, and clearly and correctly state the law as applicable to the evidence. There is no error in the record, and the judgment is affirmed.

(176 Ill. 471)

BALTIMORE & O. S. W. RY. CO. v. ALSOP.

(Supreme Court of Illinois. Oct. 24, 1898.)

Dissenting opinion.

For majority opinion, see 52 N. E. 253.

CARTWRIGHT, J. (dissenting). I cannot agree to the rule stated in this opinion, that, as between appellant and its track-walker, whose daily duty it was to look out for trains and keep out of their way, the fact that the train was not running on schedule time tended to prove negligence, or was proper to be submitted to the jury as a basis for a verdict. Of course, it can make no difference that the train in this case was on the timetable. The only material fact was that the deceased had no notice from the timetable that a train would pass at that time, and the condition would have been the same if the train had been an extra. Under the rule stated, an extra or special train could not be started, or a train run, at an irregular time, until every track-walker, watchman, and employé had been found and notified that it was going to be run. This would seriously interfere with public interests as well as the rights of the employer. In the case of Railroad Co. v. George, 19 Ill. 510, cited in the opinion, a passenger was injured in a collision of defendant's train with the train of another railroad company on a track on which they had the joint use, where the train of the other company was running on its regular time, with a right to the track, and defendant's train was nearly five hours behind its time, and where a collision was almost inevitable. The duties and rights of the parties, as well as the facts, are so different in the two cases that I can see no similarity between them.

(177 Ill. 464)

CARR v. CARR et al.¹

(Supreme Court of Illinois. Dec. 21, 1898.)

HOMESTEAD—ABANDONMENT—ASSIGNMENT.

1. Testator devised to his wife the excess in value over \$1,000 of certain lots, with the tenements and improvements thereon, for her life, and then over to his heirs in fee; referring to the realty as his homestead, and expressing an intention "to give her the homestead, and all in excess in value of the \$1,000 in said premises,—meaning to devise the entirety" thereof. She accepted in writing the provisions of the will. *Held*, that her estate, being under the will an absolute estate for life, and not having been acquired by virtue of the statute, was not subject to be lost by abandonment.

2. Rev. St. c. 52, §§ 1, 2, making homesteads exempt from the laws of conveyance, descent, and devise, and providing that such exemption

shall continue after the death of the household-er, for the benefit of the surviving husband or wife, so long as he or she continues to occupy such homestead, "and of the children until the youngest child becomes 21 years of age," even if it entitles a minor child to any interest or right of occupancy during minority, as against a wife who was devised the entirety of such homestead for life, and ceased to occupy it, does not justify a decree ousting the widow entirely from the property, and requiring an account of all rents and profits.

Appeal from circuit court, Jersey county; Robert B. Shirley, Judge.

Petition by Georgia E. Carr and others against Henrietta J. Carr for an assignment of homestead. There was a decree for petitioners, and defendant appealed. Reversed.

Henry T. Rainey and Thos. F. Ferns, for appellant. Hamilton & Hamilton, for appellees.

CARTWRIGHT, J. Joseph S. Carr died testate February 26, 1896, possessed of an estate of homestead in lots 4 and 5 in block 3 of Adams' addition to the city of Jerseyville. He had been twice married, and his second wife, the appellant, Henrietta J. Carr, survived him as his widow. He left as his heirs at law his eleven children, nine of whom were born during the first marriage, and two during the second. Four of these children are minors. Two of them (the appellee Georgia E. Carr and Festus E. Carr) are children of the first marriage; and Mae E. Carr and Fern Carr, of the second. Bettie E. Wallace, one of the older heirs, is guardian of Georgia E. Carr and Festus E. Carr, and as such guardian filed a petition on behalf of Georgia E. Carr, one of her wards, in the circuit court of Jersey county, asking to have the homestead assigned to and vested in said Georgia E. Carr, for the reason that appellant had removed therefrom with her infant children, and thereby abandoned the same. Appellant answered, denying that she had abandoned the homestead, and also claimed said premises by virtue of the last will and testament of said Joseph S. Carr. The cause was referred to a master in chancery to take the evidence, and the following facts were proved: After the death of Joseph S. Carr, the defendant, his widow, continued to occupy the homestead with her children and her stepdaughter, the petitioner Georgia E. Carr, but there was some discord between the petitioner and her stepmother, in consequence of which the petitioner left and resided elsewhere. In the latter part of May, 1896, the defendant purchased another residence with money which she received for insurance of the life of said Joseph S. Carr. She supported herself by dressmaking, and the place purchased was nearer the center of town, and more convenient for her and her customers. She removed to the new residence with her children, and rented the homestead, and remained away from it until the petition in this case was filed, September 15, 1896. A bill had been filed by the nine heirs of Joseph S. Carr who

¹ Rehearing denied February 9, 1899.

were stepchildren of defendant (the minors suing by their said guardian, Bettie E. Wallace) against defendant and her children, asking to have a trust declared in the new property purchased by defendant. By this bill they claimed that they were entitled to nine-twelfths of the insurance money, and that the title to the premises purchased therewith should to that extent be vested in them. The minor heirs were seeking to take away the homestead because the defendant had acquired a new one, and the heirs were also asking to have nine-twelfths of the new property vested in them, whereupon defendant returned to the old homestead. There was evidence on behalf of petitioner that defendant said she was buying the new place for a home, and to get a better location for her business, and that she was afraid to live out at the old homestead, because it was lonesome. On the other hand, she testified that she left the homestead partly on account of family differences, in the hope that they would settle down, and in consequence of which she was afraid to live out there, and partly in order to be nearer her work as a dressmaker, so that she could make more money to support her children. She testified that she intended to return to the homestead, and did not move to the new home for the purpose of living there permanently. Her declarations in harmony with her testimony, made to various persons at the time when she was negotiating the purchase and removing to the new house, were proved. The will of Joseph S. Carr was also offered in evidence. The court, by its decree, found that the defendant had abandoned the homestead, and decreed that it be vested in the petitioner, and ordered the defendant to surrender possession within 40 days, and to pay over to petitioner the rents received after May 20, 1896, when she removed to the other place, and to pay costs.

It is insisted that the testimony of the defendant was incompetent, because the petition was by a guardian of an heir of the deceased, Joseph S. Carr, and that defendant's declarations in connection with her removal were incompetent for the same reason, and, therefore, there was no competent evidence that the homestead was not abandoned. The testimony related only to facts occurring after the death of Joseph S. Carr, and, if petitioner was suing for the homestead as his heir, the defendant would still be competent to testify to such facts. *Kingman v. Higgins*, 100 Ill. 319. But, in the view that we take of the case, the question whether defendant abandoned the homestead is not important. Joseph S. Carr disposed of all his property by his will, which contained 14 clauses, and various bequests and devises to his children. The second clause, which is material to this controversy, is as follows: "Second. I give, devise, and bequeath unto my beloved wife, Henrietta J. Carr, the excess in value, over and above one thousand dollars' (\$1,000) valuation, lots four (4) and five (5) in block No.

three (3) in Adams' addition to the city of Jerseyville, Illinois, together with the tenements and improvements thereon, for the term of her natural life, then to my heirs in fee; the same being my homestead. It is my intention to give her the said homestead, and all in excess in value of the one thousand dollars (\$1,000) in said premises; meaning to devise the entirety of said premises." The defendant accepted, in writing, the provisions of the will. By this provision of his will, Joseph S. Carr manifested his intention to devise the entire homestead property, whatever its value might be, to his wife. The property was inventoried as of the value of \$1,500, but the evidence at the hearing before the master was that its value was about \$800. The testator described the premises as being his homestead, and gave them to her; and, perhaps for the reason that there was a statutory limit in value to the homestead estate, he twice expressed his intention to also give her all in excess in value above said sum of \$1,000, and, to make assurance doubly sure, added, "meaning to devise the entirety of said premises." The devise was to her for life, with remainder to his heirs in fee. Although the statute declares that the estate of homestead shall be exempt from the laws of conveyance, descent, or devise, except as therein provided, it has been settled in this court that if a devise of property in which there is a homestead is made to the widow, and she accepts the provisions of the will, she will take the premises under the will, and by virtue of it, and will not take an estate of homestead under the statute. *Cowdrey v. Hitchcock*, 103 Ill. 262; *Stunz v. Stunz*, 131 Ill. 210, 23 N. E. 407; *Warren v. Warren*, 148 Ill. 641, 36 N. E. 611; *Fry v. Morrison*, 159 Ill. 244, 42 N. E. 774. The estate of homestead created by the statute, which continues exempt after the death of the householder, lasts so long only as the widow continues to occupy such homestead, and it may be lost by abandonment. The estate devised in this will is an absolute estate for life in the whole premises, not limited by value or occupation, and not subject to be terminated by abandonment; and it was, consequently, a different estate from that given by the statute. The acceptance of the provisions of the will by the defendant would prevent her from claiming the exemption of the homestead law, but she took under the will an estate for life, which could not be lost by her removal from the premises. It is therefore immaterial whether she left the homestead with the intention of returning.

If it be true, as claimed on the part of petitioner, that Joseph S. Carr could not, by his will, affect her right to occupy the homestead, until she should become 21 years of age, because of the provision of the statute that such homestead is exempt from the laws of devise, and also that defendant could not affect her right to the homestead by abandoning it, this decree could not be justified. If petitioner has a right of joint occupancy under the stat-

ute, which cannot be affected or defeated by the will, so that the devise to defendant is subject to such right of occupancy, the right is not to be enforced by turning the defendant out of the property, and requiring her to account to petitioner for all rents and profits received from it. The decree is reversed, and the cause remanded. Reversed and remanded.

(177 Ill. 525)

ST. LOUIS, A. & S. R. CO. et al. v. O'HARA et al.¹

(Supreme Court of Illinois. Dec. 21, 1898.)

RAILROAD RECEIVERSHIP — LIEN FOR NECESSARY CARS—CORPORATIONS—OFFICERS—SALARY.

1. Where a railroad is in the hands of a receiver for administration as a trust fund for the payment of incumbrances, the court may declare a lien in favor of a claim, accruing shortly before the receiver's appointment, for cars furnished to the road, and necessary for its successful operation, prior in right to existing mortgages.

2. A corporation is not liable to pay a salary to its president, unless it has been fixed by resolution or by-law of the board of directors.

Appeal from appellate court, Third district.

Foreclosure suit by the Farmers' Loan & Trust Company, trustee, and another, against the St. Louis, Alton & Springfield Railroad Company and its successor, the St. Louis, Chicago & St. Paul Railroad Company. Joseph Dickson and another were appointed receivers. Henry O'Hara intervened, claiming a superior lien. From the affirmance of a decree in his favor by the appellate court (75 Ill. App. 496), the defendants and others appeal. Affirmed.

The statement of facts and the opinion of the appellate court herein are as follows:

"In October, 1890, a bill was filed in the circuit court of Sangamon county, in the name of B. F. Johnston and others, against the St. Louis, Alton & Springfield Railroad Company, to enforce the collection of judgments recovered by the complainants against the company for cost of construction, aggregating \$73,918.32, the appointment of a receiver, etc. Joseph Dickson was appointed receiver. The road was heavily mortgaged, and in May, 1892, a decree of foreclosure was rendered by the court on cross bills of the Farmers' Loan & Trust Company, trustee, on a first mortgage, and the Atlantic Trust Company, trustee, on a second mortgage. Post, Martin & Co., a banking firm in New York, were interested, and for that reason entered into an arrangement with Henry O'Hara, a man of extensive experience in equipping railroads, building cars, etc., residing at St. Louis, to form a syndicate for the purchase of the road at the foreclosure sale, and to reorganize it. In pursuance of that arrangement, O'Hara bid off the road for himself and his associates in the syndicate, and it was reorganized under the name of the St. Louis,

Chicago & St. Paul Railroad Company, with O'Hara as president. The new company issued, and placed in the hands of Post, Martin & Co., \$1,200,000 of its first mortgage bonds, to be negotiated by them, for the purpose of paying the purchase price of the road at the master's sale, and for improving it and placing it in successful operation. Prior to the sale, O'Hara had, for the syndicate, bought from the complainants in the original bill the judgments above mentioned; taking an assignment to himself, and paying for them in his own money. After the sale the property was turned over to O'Hara, who, as president and treasurer, had active charge of its management until April, 1893, when he resigned, and turned it over to Post, Martin & Co. During the time he had control he expended several hundred thousand dollars, received by him from Post, Martin & Co., and in earnings, in extending the road, buying cars, and improving it generally. The terms of the foreclosure sale were not complied with. Post, Martin & Co. became embarrassed, and, as a consequence, proceedings were commenced against the new company, whereby the road was on the 13th of June, 1893, placed in charge of Joseph Dickson and Charles E. Kimball, as receivers. A short time afterwards the receivers obtained an order of the court authorizing them to issue certificates, in an amount not exceeding \$400,000, upon the pledge and faith of the property in their possession; and between the time of obtaining such order and the 22d of December, 1893, certificates were issued aggregating \$396,273. On the 7th of October, 1893, O'Hara filed an intervening petition, accompanied by an itemized statement of account, in which he sought to have declared in his favor a superior lien, over the mortgages, for the judgments purchased and material furnished during the time he was operating the road, amounting to something like \$125,000. Both railroad companies, the Atlantic Trust Company, and the receivers answered by general denial, and filed a cross bill, charging that O'Hara had received moneys largely in excess of the amounts disbursed by him while president and treasurer of the road, and praying for an accounting. The cause was referred to a special master, who took a large amount of testimony, stated an account, and reported. Before the report was made, O'Hara assigned 40 per cent. of his claim to his attorney, Seth F. Crews, and 60 per cent. of it to Eliza P. O'Hara, who filed intervening petitions. After sustaining certain exceptions to the special master's report, the court rendered a decree in favor of the petitioners for \$17,592.70, and declared a lien upon the property superior in right to the mortgages upon it."

Opinion by Presiding Justice HARKER:

"This appeal is prosecuted for the purpose of reversing a decree of the circuit court for \$17,592.70, rendered upon the intervening petition of Henry O'Hara, supplemented by the

¹ Rehearing denied February 9, 1899.

petitions of his assignees, Seth F. Crews and Eliza P. O'Hara. The court, by its decree, found that O'Hara was chargeable with \$947.517.95, and was entitled to credits to the amount of \$965,110.65, leaving a balance due him of \$17,592.70, for which he was entitled to a lien prior in right to that of the mortgage bondholders. Neither party seems satisfied with the decree, and appellees have assigned cross errors. Appellants complain of the allowance by the court of \$69,000 upon the car item,—for six hundred cars furnished,—the allowance of \$2,350 for car rental, and the declaring of a lien upon the railroad property superior to that of the mortgage bondholders. Appellees complain of the disallowance by the court of O'Hara's salary items, amounting to \$2,250, to the disallowance of a draft for \$15,000 dated March 17, 1893, and to the disallowance of a draft for \$10,000 dated March 21, 1893.

"The \$69,000 item was twenty per cent. of the cost of construction of six hundred freight cars built by the Madison Car Company for the St. Louis, Chicago & St. Paul Railroad Company, and was allowed for material furnished by O'Hara. The cars were delivered to the railroad company a few weeks before O'Hara resigned as president. It is undisputed that O'Hara furnished the material, and that it went into the building of the cars. The Madison Car Company was paid its proportion for the building of them (seventy-five per cent.) through drafts of O'Hara on Post, Martin & Co.; but it nowhere appears in proof that O'Hara was ever paid for his material, either by the railroad company or Post, Martin & Co. It is contended however, that this was a transaction entirely between O'Hara and Post, Martin & Co., and that O'Hara did not intend it as a charge against the railroad company; that he received credit for it upon the books of Post, Martin & Co.; that it was charged against the railroad company upon their books, and had been paid out of the proceeds of the mortgage bond sale made by them. With reference to the contention that the transaction was a personal one between O'Hara and Post, Martin & Co., and that he did not at first intend it as a charge against the railroad company, we deem it sufficient to say, without going into a discussion of the evidence bearing upon that point, that the record does not support such contention. It is true that he included the item in a general account which he once rendered to Post, Martin & Co.; but that is satisfactorily explained by his testimony that when he did so he knew Post, Martin & Co. were the fiscal agents of the road, and had had the financial management of the enterprise from the start, and that it was at that time understood between them that all his bills and accounts against them and the railroad company would be immediately adjusted and paid. It does not appear that Post, Martin & Co. had any authority to credit O'Hara's personal account with the item for material

furnished for the cars, and charge the amount against the railroad company. O'Hara testified that he gave no such authority. His claim could not be regarded as extinguished, therefore, even though Post, Martin & Co. retained from the proceeds of the bond sale an amount sufficient to pay it. The evidence shows, however, that, with the other disbursements from those proceeds, there was not a balance sufficient to pay it. In support of the contention that the circuit court erred in holding that the claim for material was a preferred one, and had priority over the mortgage to the Atlantic Trust Company, counsel have cited quite a number of decisions by the United States supreme and circuit courts. We do not regard them as supporting the contention. The leading ones are *Fosdick v. Schall*, 99 U. S. 239, and *Railroad Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787; and they are valuable to us in determining the question for the sole reason that they announce the rule that, where railroad property is in charge of a court for administration as a trust fund for the payment of incumbrances, it may declare a lien, prior in right to that of existing mortgages, in favor of claims, accruing within a reasonable time prior to the application, on account of wages, supplies, and materials necessary to keep the road a 'going concern.' When this railroad came into the hands of O'Hara, it was so poorly equipped that it was impossible to make its earnings meet running expenses without adding to its rolling stock. The construction of the six hundred cars was necessary to its successful operation. They were furnished in March, 1893, the present receivers took charge in June, and the intervening petition was filed in September following. The circumstances were such, both as to the necessities of the road for the material, and the time within which they were furnished before the application, as to bring the claim within the rule announced in the cases cited above. Again, the six hundred cars enhanced the value of the property for the stockholders, and the security for the mortgage bondholders. Furnished as they were, they came within the term 'permanent betterments,' as used by the courts. Independent of the holding of courts in adjudicated cases similar to this one, equity and good conscience would require that the claim should be declared superior in lien right to that of the mortgage bondholders.

"As to the car rental item of \$2,350, O'Hara was contradicted in his testimony that it was the amount of mileage earned by cars owned by him, as reported by the car-service agent. When he took charge of the road, it needed more rolling stock, but there was no money to buy it with. In that emergency he rented to the company some of his own cars. We see nothing irregular in that transaction, and nothing in the record to justify an attack upon Mr. O'Hara's integrity or veracity because of the manner in which the claim

was presented. It was not made a lien, but was simply allowed as a credit against funds which came into his possession while he had charge of the road.

"The court properly disallowed the salary item of \$2,250. The claim was for O'Hara's services during the nine months he had charge of the road as president. He was not president by virtue of any order of the court. His authority to hold that office and operate the road came from the new company, the St. Louis, Chicago & St. Paul Railroad Company. The new company had fixed no salary for him, and the law is well settled in this state that an officer of a corporation cannot recover salary, unless the same is fixed by resolution or by-law passed by the board of directors.

"The two draft items, which appellees contend should have been allowed, were drafts drawn on O'Hara by Post, Martin & Co. in March, 1893, and paid by him,—one for \$15,000, and the other for \$10,000. Appellees claim that the money was used for railroad purposes. The basis of that claim is that they were made to appear in O'Hara's credit in a railroad account sent out by Post, Martin & Co. No one pretends to trace the money into expenditures for the railroad. O'Hara had large dealings with that firm, independent of matters pertaining to this railroad. Mr. Post, one of the firm, testified that the drafts did not represent money which was used on railroad account, and that the railroad had nothing to do with it. He explained that they were originally placed to the credit of O'Hara on his personal account, but were, by an error of the bookkeeper's, subsequently transferred to the railroad account. As soon as the error was discovered they were credited back on the personal account, and O'Hara afterwards received credit on a statement of his personal account rendered by the firm to him. O'Hara himself treated them as belonging to his personal account, as evidenced by an account rendered to the firm by him. With this view, it is unnecessary to discuss the point as to whether a money advance should be held a preferred claim. We see no reason for in any wise changing the decree."

Patton, Hamilton & Patton, John C. Lanphier, Edward S. Robert, and Eleneious Smith, for appellants. Ralph Crews and Seth F. Crews, for appellees.

BOGGS, J. Our investigation of this record, aided by the arguments, oral and printed, of counsel for the respective parties, has led us to the conclusion that the judgment of the appellate court is correct. The facts are fully stated in the statement of facts prepared by that court, and its opinion is a satisfactory statement of the application of the law to such facts. The opinion of the appellate court is adopted as the opinion of this court, and its judgment is affirmed. Judgment affirmed.

(172 Mass. 492)

KING v. DALY et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 25, 1899.)

APPEAL—REVIEW OF DECREE.

A decree for plaintiff for less relief than demanded will be affirmed on his appeal, without bringing up the evidence, where it does not appear as a matter of law, from the facts stated in it, that the relief granted is insufficient.

Appeal from superior court, Suffolk county.

Bill by one King against Daly and others to restrain the defendants from using the name "Dr. Daly" and the name "Dr. Daly, Dentist." One of the defendants, who had done business at 12 Tremont Row, Boston, under the name "Dr. Daly" and "Dr. Daly, Dentist," sold out to plaintiff the good will of the business and the right to use the name "Dr. Daly." The superior court ordered an injunction to issue restraining defendants from using the name at 10 Tremont Row, or in the vicinity of that street, and a master, who was appointed to assess damages, assessed them at \$20. The finding of the master was affirmed, and plaintiff appealed. Affirmed.

C. J. Noyes, for appellant. M. W. Brick, A. F. Coulter, and A. H. Stetson, for appellees.

HOLMES, J. It is enough to say that it does not appear as matter of law, from the facts set forth in the decree, that the plaintiff was entitled to more relief than was granted. The judge must be taken to have found, as an additional fact, that more was not necessary to protect the plaintiff's rights, and could not be granted with justice. We cannot say that such a finding was impossible, and we cannot revise the finding, as the evidence is not before us.

Decree affirmed.

(172 Mass. 495)

GATES v. JOHNSTON LUMBER CO.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 25, 1899.)

TRESPASS—EQUITABLE RELIEF—SALES—DUTY TO REMOVE PROPERTY.

1. Injunction does not lie to restrain the owner of property situate on plaintiff's land from removing it, where it does not appear that plaintiff will be unable to collect his damages, or that by removing it himself he can prevent the trouble, or that the harm is more than a purely technical trespass.

2. The mortgagee of personal property situate on his land, who had consented to a sale thereof by the owner and given the buyer a stated time for removing it, has no right, on the buyer's failure to remove it within such time, to appropriate it to his own use.

Appeal from superior court, Middlesex county.

Bill by one Gates against the Johnston Lumber Company. This was a bill in equity by the owner of a lot of land on which was located a brickyard against defendant, who had bought at auction a lot of brick, which

was at the time in the yard. The title to the brick, before the purchase by defendant, was partly in one Rook, an insolvent debtor, and partly in plaintiff, as mortgagee. The brick was sold by the assignee of Rook, with the consent of the plaintiff. The plaintiff gave defendant until August 31, 1896, to remove the brick, which had been sold about July 18, 1896, but refused to give consent after that date, and posted a notice against trespassers on the premises. The defendant had not removed all the brick on August 31, 1896, but continued to remove brick thereafter. The bill prayed for an injunction to restrain the removal of more brick, and for damages. The superior court dismissed plaintiff's bill, and plaintiff appealed. Affirmed.

S. H. Dudley and Howland Dudley, for appellant. Heman S. Fay, for appellee.

HOLMES, J. It is not alleged that the entry by the defendant, for the purpose of removing its own property, will do the plaintiff any harm, beyond a purely technical trespass, nor that the defendant is not able to pay the plaintiff any damages which she may recover, nor that the plaintiff cannot prevent the trouble by removing the bricks from her land. She has no right to appropriate them because they were not removed within the time allowed at the sale.

Decree affirmed.

(158 N. Y. 140)

FRANKLIN BANK-NOTE CO. v. MACKEY.

(Court of Appeals of New York. Feb. 3, 1899.)

AGENCY—INSUFFICIENCY OF PROOF.

H., who was well acquainted with defendant, induced him to contract with plaintiff for the printing of certain bonds. Plaintiff thereafter delivered preliminary proofs to H., to be submitted to defendant, who approved them conditionally, but directed H. to inform plaintiff not to proceed further with the work at present. H. fraudulently directed plaintiff to proceed. Plaintiff testified that, while H. was unknown to him, he intended to pay him a commission for procuring the contract. *Held* insufficient to show that H. was defendant's agent, and that such issue was properly withdrawn from the jury.

O'Brien and Bartlett, JJ., dissenting.

Appeal from supreme court, general term, First department.

Action by the Franklin Bank-Note Company against Charles W. Mackey. A verdict was directed for defendant, and from an order of the general term (31 N. Y. Supp. 1057) sustaining plaintiff's exceptions, and ordering a new trial, defendant appeals. Reversed.

Henry L. Burnett, for appellant. William J. Gibson, for respondent.

VANN, J. The plaintiff alleged in its complaint that in May, 1887, it contracted with the Pittsburg & Northeastern Railway Company to furnish certain bonds, coupons, and certificates of stock for the sum of \$2,500, which the company promised to pay the plaintiff, and

the defendant guaranteed in writing that the company would pay the same; that the plaintiff entered upon the execution of the contract, prepared models, engraved and printed certain bonds, engraved certain stock certificates, and submitted proofs of portions of said bonds and certificates to the railroad company, but that neither the company nor the defendant had passed upon said proofs, and that both had declined to furnish plaintiff with the information and directions necessary to the completion of the contract; that the plaintiff had duly performed part of said contract, and had complied with the agreement so far as permitted by the railroad company and the defendant. Judgment was demanded for the sum of \$1,630, with interest from May 10, 1889.

Upon the trial it appeared that one Hall, who had no connection with the railroad company, or with either party, but was acquainted with the defendant, on learning that the railroad company was about to issue some bonds and stock, applied to several engraving companies, including the plaintiff, for propositions to do the work of engraving and printing the bonds, coupons, and certificates. So far as appears, he did this voluntarily, for the purpose of inducing a contract and securing commissions from one or both of the contracting parties. He took the various propositions to the defendant, who, upon examining them, found that the plaintiff's was the lowest, and thereupon told Hall that, if he would bring a proposition in proper form, he would act upon it. Hall at once procured from Mr. Cary, the manager of the plaintiff, a proposition in writing, dated May 13, 1887, and addressed to the railroad company, which was substantially in these words: "We will furnish the 2,500 coupon bonds for the sum of \$2,200, and 1,000 certificates of stock for \$330, the terms of payment being cash on completion of order. We would ask for a letter of acceptance of the above, and also a line from Mr. C. W. Mackey to the effect that the bill will be paid." The next day the defendant wrote at the bottom of this proposition: "I hereby accept the foregoing for the Pittsburg & Northeastern R. R. Co., and guaranty the payment of the bill. Charles W. Mackey." Although Hall presented this paper to the defendant, the latter did not send it back to the plaintiff by him, but Mr. Barnes, who was to be the chief engineer of the railroad company, sent it by mail, accompanied by a letter dated May 14th, in which he said: "I herewith send Mr. Mackey's acceptance of your proposal. Please send me the proofs for examination, when ready, and I will send them to Mr. Mackey for his approval." Two days later, Mr. Cary replied, and, among other things, wrote: "We are preparing the models, and will submit them for your approval in a few days." The plaintiff thereupon prepared what are known as models for the bonds and certificates. These models, according to the custom of the business, which was well known to both the plaintiff and defendant, are prepared by the en-

graver without charge, for the approval of the company intending to issue the bonds and certificates, before they are engraved or printed. They consist of pictures pasted upon a sheet of paper, the size of the proposed bond, with the form of the bond written out so that the model fairly suggests how the bond will appear when engraved and printed. The defendant furnished the manuscript for the work, but certain blanks were left therein, relative to the rate of interest and the like, as the details had not all been settled. The plaintiff completed the models, and sent them by Hall to the defendant, who examined them, and wrote upon each the following: "Model approved May 24, 1887, as far as it goes. Charles W. Mackey." After thus approving the models, the defendant delivered them to Hall, but told him, as both he and Mr. Barnes testified without contradiction, to tell the plaintiff not to go on with the work until further instructions, as "we might have to change the character of the bonds in different ways." Hall delivered the models to the plaintiff, but, instead of delivering the message, told the manager that Mr. Mackey said, "Go on with the work." Thereupon the plaintiff went on with the work, but the missing data prevented its completion. Proofs were printed of the imperfect bonds, but not of the coupons or certificates, and sent to the defendant, who made no comment, and sent back no word. The plaintiff never asked for the additional data, and did no work after sending said proofs. Matters remained in this shape until July 19, 1888, when the plaintiff sent a bill to the defendant for the value of the work done up to the time that the proofs were sent, nothing having been done subsequently. The defendant at once wrote, expressing his surprise, and stating that he distinctly informed plaintiff's agent that he did not want the bonds or certificates engraved until further orders. Some three years later, the plaintiff commenced this action, to recover the reasonable value of the services performed between the dates when the models were received and the proofs forwarded. On the trial, at the close of the evidence given in behalf of both parties, the court directed a verdict for the defendant, but ordered the exceptions to be heard in the first instance before the general term. That court, upon hearing the exceptions taken by the plaintiff, sustained them, and ordered a new trial. The defendant gave the usual stipulation, and came here.

The pivotal question in this case is whether Hall was the agent of the plaintiff, or of the defendant, for the purpose of delivering the models to the latter, and taking back his message to the former. The plaintiff claims that this was a question of fact for the jury, and hence that the learned trial judge erred in directing a verdict for the defendant. There was no evidence that Hall was the agent of the defendant, although it appeared that, years before, they were well acquainted. On the other hand, Mr. Cary, the manager of the

plaintiff, and its principal witness, testified on his cross-examination, not only that he expected to pay Hall a commission for getting the order, but referred to the delivery of the models to the defendant, as follows: "I presume one of my clerks took them down [meaning to the defendant]. I sent them with somebody that was authorized to show them to him, and to take what instructions he had to give." The next day, when Mr. Cary was on the stand, he stated: "I would like to state this: that yesterday, in the testimony in regard to the models and proofs, that I said—I think I said—Mr. Rose took the models down. It was Mr. Hall who took the models down, and Mr. Rose who took the proofs. Mr. Hall brought the models back, and gave them to me." Both Mr. Barnes and the defendant testified that Hall was the person who delivered the models, and that the defendant instructed him to tell the plaintiff's manager not to go on with the work until further instructions, as they might have to change the character of the bonds in different ways. Cary had written only a few days before that he was preparing the models, and would submit them for approval in a few days, so that Hall's visit as his representative had been duly announced. All of this testimony was neither contradicted nor modified, and it establishes the agency of Mr. Hall for the plaintiff for the purpose mentioned by Mr. Cary, to wit, that he "was authorized to show the models to him [defendant], and take what instructions he had to give." Owing to the way that the record is made up, with the testimony of Mr. Cary scattered over many pages, we had some doubt upon the first argument whether Hall was the messenger by whom the models were sent to the defendant; but a careful examination of the evidence leaves no doubt upon the subject, and, indeed, the learned counsel for the plaintiff, upon the re-argument, very fairly stated that Hall was the messenger used by Cary to deliver the models, and take back the defendant's instructions. Mr. Cary also testified: "After you get an order, it is the custom and rule to draw up certain models, and submit them for their approval or disapproval or qualification or correction, and that we do not go ahead with the work until those are returned, or until you come to some agreement about the model."

As the contract is silent as to the time of performance, the defendant had the right to give reasonable directions upon the subject; and, when Hall delivered the models, he was armed with authority from the plaintiff to take back the defendant's instructions. It thus conclusively appeared that Hall was the agent of the plaintiff for the limited purpose of delivering the models to the defendant, and taking back his message. *Jacobs v. Marshall*, 6 Duer, 689. If that message, which related to the subject of the errand on which the messenger was sent, had been delivered to the plaintiff, it would have saved the large

and needless expense for which compensation from the defendant is now sought. All of the work described in the complaint was done after the delivery of the models to the defendant, and before the delivery of the proofs to him. Under these circumstances, the plaintiff, who employed Hall, must stand the consequences of his carelessness or perfidy. In view of the positive and uncontradicted testimony of Mr. Cary as to the authority of Hall, who was called by neither party, we think there was no question of fact to go to the jury as to his agency.

The plaintiff, however, contends that both Mackey and Barnes were interested witnesses, and that their credibility presented a question of fact for the jury. There is no doubt that the defendant was interested, but Mr. Barnes does not appear to have been interested in any way. He was connected with the projected railroad enterprise, and expected to be its chief engineer; but he had no pecuniary interest in the contract in question, and there was nothing in his testimony or the circumstances to throw any doubt upon his candor as a witness. The mere fact that he expected to become an officer of the railroad does not make him an interested witness.

Moreover, the plaintiff did not ask to go to the jury upon this question. At the close of the evidence, the trial judge remarked: "I do not see that there is any question of fact to be submitted to the jury. * * * If Mr. Hall was the agent of the bank-note company, there is no issue of fact as to what the statements of the defendant were to him in regard to going on with the work. There is no dispute about that. It is testified both by Mr. Mackey and Mr. Barnes, and no testimony the other way. If that proof were conclusive and binding upon the bank-note company, why, of course, the plaintiff could not recover. If it were not, then the plaintiff might be entitled to a verdict upon the evidence as it stands." The plaintiff's counsel then said: "It is a question of fact of which party he was the agent. We ask to go to the jury on the question of fact involved in the case." After a colloquy between court and counsel upon the question of agency, the trial judge said: "I think there is a question of law whether, under the evidence in the case, upon which there is no conflict, Mr. Hall can be said to have been, in regard to this transaction, the agent of the bank-note company. The undisputed testimony of two witnesses is that as an independent direction was given Hall, entirely outside of the contract relating to the time of performance of the work, in regard to which there is no provision whatever in the contract, he was told this work must not be proceeded with until after the receipt by the plaintiff of further orders. If that is binding upon the plaintiff, why, it closes, in my judgment, this case. If it is not, then it does not." The defendant's counsel thereupon moved for the direction of a verdict for the defendant, and the

plaintiff asked to go to the jury upon the questions of fact involved in the case, specifying the question of agency, and the question as to the custom and usage of the bank-note company, but not asking that any other question should be submitted except in the general way already mentioned. In view of the remarks of the court, and the specific requests of counsel, it was incumbent upon the plaintiff, if it desired to have any question as to the credibility of the two witnesses named submitted to the jury, to present a definite proposition upon the subject. *Distin v. Rose*, 69 N. Y. 122; *Booth v. Railroad Co.*, 73 N. Y. 38; *Schille v. Brokhahaus*, 80 N. Y. 614.

The learned general term sustained the plaintiff's exceptions to the direction of a verdict against it, and held, in a very brief memorandum concurred in by a majority of the justices, that the case turned on the question whether Hall was the agent of the one party or the other. Its only authoritative declaration to justify the reversal was as follows: "On this question [referring to the subject of agency], plaintiff offered material evidence, which it was entitled to have considered with the other facts proved, which was excluded." This evidence was not pointed out, but the following questions, put by plaintiff's counsel to Mr. Cary on his redirect examination, with the rulings and exceptions thereto, are relied upon to justify the action of the general term: "Q. Did you ever give Mr. Hall any authority to represent the company? (Objected to, as calling for a conclusion. Objection sustained. Exception.) Q. Did Mr. Hall ever bring any other matter to your company? (Objected to as immaterial,—nothing to do with the case. Objection sustained. Exception.) Q. Has he ever brought any other work or job since this work? (Objected to as incompetent. Objection sustained. Exception.)" Just before these questions were asked, the witness had testified: "I don't know who Mr. Hall was. He came to our office to inquire. Never saw him, except in relation to this matter." We find no error in these rulings. The first question clearly involved a conclusion, and was excluded on that ground. If the plaintiff wished to establish any fact by Mr. Cary, its counsel should have asked a question that called for a fact, and not for a conclusion, as an answer. Later on in the trial, the proper question was asked of the same witness, and very fully answered. The other two questions were clearly immaterial, in view of the positive testimony of Mr. Cary to the effect that Hall had authority to show the models to the defendant, and take back his instructions. Moreover, the witness had already sworn, in substance, to the facts sought to be proved by these questions. But, assuming that the witness had answered the questions in the negative, which would have been the most favorable answer that he could give in aid of the plaintiff, it could not

have changed the result. The verdict was not directed on the theory that Hall was the general agent of the plaintiff, or that he had been the agent of the plaintiff on any other occasion or for any other purpose than the occasion and purpose referred to by Mr. Cary in his testimony. As long as that testimony was neither modified nor contradicted, it was quite unimportant whether Hall had received express authority to represent the plaintiff on any other occasion or not. The case turns upon what was done on the occasion when the models were delivered, and no competent question relating to that subject was excluded. The facts sought to be proved by these questions, although immaterial, were in fact proved before the close of the evidence. Admitting all that is claimed to be established by them to be true, and the result is not affected.

While the plaintiff may have a cause of action, none was established on the trial, and no exception was taken that warranted the action of the court below. We therefore correct its error, as well as our own, by reversing the order of the general term, and directing judgment for the defendant on the verdict, with costs in all courts.

GRAY and HAIGHT, JJ., concur upon the ground that the plaintiff failed to meet the burden upon it of proving the fact of Hall's agency for the defendant, Mackey, by a preponderance of evidence; and MARTIN, J., concurs absolutely. O'BRIEN and BARTLETT, JJ., dissent. PARKER, C. J., not sitting.

Order reversed, etc.

(158 N. Y. 124)

IDEL v. MITCHELL.

(Court of Appeals of New York. Feb. 3, 1899.)

PERSONAL INJURY — PROTRUDING NAIL — LANDLORD'S LIABILITY—RECOVERY—BURDEN OF PROOF.

Where there is no evidence to show what length of time unknown to landlord a nail had protruded from the floor of a hallway used by his tenant, no recovery can be had against him where it caused an injury to his tenant's wife, since it was necessary to establish that it had protruded for such a length of time as to charge him with constructive notice.

Appeal from supreme court, appellate division, First department.

Action by Caroline Idel against Edward Mitchell. From a judgment by the appellate division (39 N. Y. Supp. 1) affirming a judgment entered on a verdict in favor of plaintiff, defendant appeals. Reversed.

The plaintiff, who, with her husband, had occupied the third floor of defendant's building for a period of 10 years, was on the 24th day of February, 1893, engaged in sweeping the stairs between the second and first floors

when she caught her foot on a nail, and fell backward down the stairs. The result was an injury, and this action was brought to recover damages sustained. The plaintiff testified that, until a short time previous to the accident, there had been a carpet or crash upon the stairs, which, after removal, disclosed a number of nails sticking up in the steps of the staircase. By the terms of the lease, plaintiff was required to clean her own stairs leading from the third story to the second; and, when the second story was occupied, the tenant of it was required to clean the stairs leading from that floor to the first. The second floor was tenantless for some time, and so the plaintiff cleaned the stairs leading from the second to the first floor, as well as those from the third to the second, and this she did on Friday of each week. As to the nails in the steps, the plaintiff testified: "I said something to Mr. Halsey about there being a nail or more nails in the stairway. Mr. Halsey said, 'Better take a hammer and drive them in.' He was joking, 'Better take a hammer and drive it in.' That was done. I did it myself. I had a hammer in my premises. That was about a couple of weeks before I was hurt; six weeks or around like that,—six weeks or a couple of months. Q. Did you drive in more than one nail? A. Yes, sir. Q. All you could find? A. Yes, sir. When I washed the floors or walls, when there was one out, I knocked it in, or I would spoil my fingers. Q. As a matter of fact, you drove in all the nails that were sticking out that you could see? A. That I could see. Q. What part of the stairs was it you drove the nails in? A. In all parts. Q. If there was a nail sticking up high enough for anybody to see it, you drove it in? A. If I felt it, scrubbing the stairs. Q. You used to scrub the stairs? A. Yes, sir. Q. How often did you scrub the stairs you fell down? A. Nobody was living there. I did not scrub that flight of stairs. I only swept it. Q. You went up and down? A. Yes, sir. Q. When you swept the stairs,—how often did you sweep the stairs? A. Once a week. Q. What night was it you were hurt? A. Friday night. Q. Did you sweep it the same day in the week? A. Friday; Saturday morning it was clean. Q. You swept it every Friday night? A. Yes, sir; nobody was living on the floor. Q. When did you say you noticed there was a nail or two,—when you were scrubbing, or sweeping, or both? A. When I was sweeping. Q. The stairs you used to sweep down are those where you fell? A. Yes, sir. Q. And whenever you noticed a nail, sweeping, you drove it in? A. Yes, sir. Q. During the two months prior to the accident, you swept the entire stairway every Friday, didn't you? A. Yes, sir. Q. In the same general way? A. Yes, sir. Q. Did you step on this nail, or how was it you caught yourself? A. I was sweeping; all at once I stepped on the nail. Q. Stepped on it? A. Yes, sir; I had my foot

out, and fell backward. Q. You had never noticed nails in this particular stairway before that time, I suppose? A. No. * * * That nail, I think, I tumbled over on Friday, I did not see that nail there the Friday before." The plaintiff's husband testified: "I examined the stairs the morning following the injury, and I found some nails. They were sticking up from the step. They were protruding from and above the step,—a quarter of an inch, and some half an inch. I took a hammer and a pair of pliers, and some I pulled out, and some I knocked in. Q. In other words, did the step move up and down on the nail, or was it tight? A. Tight; the nail protruded. Q. The nails you pulled out, what were their condition? Were they apparently good nails or rusted? A. Rusted. The sixth juror: Q. I will ask him to describe the nail. In what part of the step was it? A. On the side; the front edge. It protruded above the step at the front edge of the step. I pulled it out. I did not keep the nail. I had pulled out other nails and driven other nails in the whole stairs, from the top to the bottom. Q. Was this nail the same kind of a nail you say you saw just after the carpet was taken up? A. No; all different. I did not examine them. I did examine it enough to give the jury a fair description of it. I testified to the jury that, when the carpet was taken up, there were some nails there. I saw this nail. I pulled out some, and drove in others, whenever I got the chance. This nail was of the same general kind as those nails." No other witnesses were sworn on behalf of the plaintiff, nor did the evidence adduced on the part of the defendant strengthen the plaintiff's case. The question presented is whether the motion to dismiss the complaint should have been granted.

Austen G. Fox, for appellant. William King Hall, for respondent.

PARKER, C. J. (after stating the facts). For the purposes of this appeal, at least, it must be deemed to be true that the plaintiff fell owing to a protruding nail in the stairs, and the injuries occasioned thereby this defendant should respond for, providing the plaintiff proved that the protruding nail was due to the fault of the defendant, otherwise not. Such fault would have been shown had the plaintiff proved that prior to the accident the defendant or his agent had knowledge of the protrusion of the nail, or that it had been in that situation for such a length of time that the defendant should have known of it. But it was not proved that any one ever saw this nail prior to the happening of the accident. For aught that appears in the testimony, it may have been either partly driven into or pulled out of the step within 15 minutes prior to the accident. It may

have been there longer, but whether it was or not the evidence does not disclose. That it had been there longer there is evidence from which a guess might be hazarded, but it would be a mere guess, and guesses have not as yet been, in terms, held to be a proper substitute for proof. The evidence that furnishes an excuse for a guess that the protruding nail may have been in that situation for more than 15 minutes prior to the happening of the accident is to be found in the testimony of the plaintiff, in which she says, in effect, that some little time previous to the accident a stair carpet had been removed, and thereafter every Friday she swept and scrubbed the stairs, in the doing of which she noticed a large number of nails sticking up, and she spoke to the defendant's agent about it, who told her to drive them in; and she took a hammer and drove in all the nails she could find. On the Friday preceding the accident, the plaintiff saw some nails sticking up, but she drove in every one of them. She testified: "Q. Did you drive in more than one nail? A. Yes, sir. Q. All you could find? A. Yes, sir. When I washed the floors or walls, when there was one out, I knocked it in, or I would spoil my fingers. Q. As a matter of fact, you drove in all the nails that were sticking out that you could see? A. That I could see. Q. What part of the stairs was it you drove the nails in? A. In all parts." Thus, it appears from the plaintiff's own testimony that, one week before the happening of the accident, she personally drove in all the nails she could find. No one contradicts her, nor asserts the fact to be that this nail was left protruding after she had completed the task that she set herself, for the very satisfactory reason given by her that she drove in all the nails she could find. Some readers of the testimony might surmise that, notwithstanding all her great care, she overlooked the nail that caused the trouble; but others might guess that some child in play had pulled the nail partly out or driven one partly in, for, according to the testimony of plaintiff's husband, the step was "tight," rendering impossible the conclusion that the nail could have worked out by the springing of the step from the riser as people walked over it. But it would be only a surmise after all, for the evidence does not establish either how the nail came to be in the position in which it was, or how long it had been there. The plaintiff therefore failed to meet the burden resting upon her of establishing that the nail causing the mischief had protruded for such a length of time as to charge the defendant with constructive notice of its presence, and the motion for a dismissal of the complaint therefore should have been granted. The judgment should be reversed, with costs. All concur, except BARTLETT, J., not voting. Judgment reversed, new trial granted, costs to abide event.

(158 N. Y. 131)

In re CARUTHERS.

(Court of Appeals of New York. Jan. 31, 1899.)

COURT OF APPEALS—JURISDICTION.

Since neither the constitution nor the Civil and Criminal Codes give the court of appeals any original jurisdiction, no relief can be granted on an application for an order to permit an attorney who had been duly admitted to practice to file in the clerk's office an oath nunc pro tunc as of December 31, 1898, under Laws 1898, c. 165, requiring it to be done before January 1, 1899.

In the matter of application of Allen Caruthers for registration as an attorney. Denied.

Louis Hess, for the motion.

HAIGHT, J. The moving papers show that the petitioner was duly licensed and admitted to practice as an attorney and counselor at law in this state on the 3d day of August, 1897; that he neglected to file, prior to the 1st day of January, 1899, in the office of the clerk of the court of appeals, the oath required by chapter 165 of the Laws of 1898; and he now asks for an order of this court permitting him to file the same nunc pro tunc as of December 31, 1898. The first section of the act alluded to provides that "every person duly licensed and admitted to practice as an attorney at law or as an attorney and counselor at law in the courts of record of this state must, before the first day of January, 1899, subscribe and take an oath or affirmation, which must be in the following form, * * * which oath or affirmation shall be filed in the office of the clerk of the court of appeals by the person making the same." The second section contains provisions with reference to those who shall be hereafter licensed. The third section requires the clerk of the court of appeals to keep a bound book or volume, which shall be designated as an official register of attorneys and counselors at law, in which their names shall be entered in alphabetical order. The fourth section makes it a misdemeanor on the part of any person who engages in the practice of the law as an attorney and counselor without having complied with the provisions of the act. The act contains no provision giving the court of appeals any power to relieve persons who have violated the act, and have become guilty of a misdemeanor. Section 190 of the Code of Civil Procedure provides that "from and after the last day of December, 1895, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the appellate division of the supreme court in either of the following cases, and no others." Laws 1895, c. 946. None of the "following cases" specified in the Code have any application to the proceedings under the act in question. In criminal proceedings "an appeal may be tak-

en from a judgment or order of the appellate division of the supreme court to the court of appeals in the following cases and no other: (1) From a judgment affirming or reversing a judgment of conviction; (2) from a judgment affirming or reversing a judgment for the defendant on a demurrer to the indictment, or from an order affirming, vacating, or reversing an order of the court arresting judgment; (3) from a final determination affecting a substantial right of the defendant." Code Cr. Proc. § 519. The constitution provides that "after the last day of December, 1895, the jurisdiction of the court of appeals, except where the judgment is of death, shall be limited to the review of questions of law," raised upon an appeal from the determination of an appellate division. Const. 1895, art. 6, § 9. It will thus be seen that under the constitution and the Civil and Criminal Codes the court of appeals is given no original jurisdiction, but is limited to the review of the determination of other courts; and our conclusion is that we have no power to grant the relief sought by the petitioner. The statute in this case has imposed upon our clerk a duty independent of the court, and with regard to these duties he should be treated as an independent public officer. Whether a court of original jurisdiction has the power, under the statute, to relieve an attorney from the consequences of his negligence after he may have become liable to criminal prosecution, we do not now determine. The motion should be denied. All concur. Motion denied.

(177 Ill. 506)

SNYDACKER et al. v. STUBBLEFIELD et al.¹

(Supreme Court of Illinois. Dec. 21, 1898.)

CHATTEL MORTGAGES—CONSTRUCTION—FUTURE-ACQUIRED PROPERTY—RIGHTS OF MORTGAGEES.

1. A written instrument, whereby defendant "conveyed and delivered unto the possession" of plaintiffs certain grain stored at a particular point, further provided that the transfer was by way of mortgage, to secure an indebtedness due plaintiffs; that they should sell the grain, apply the proceeds to his indebtedness, and account to defendant for the balance; and that "the receipt" was assignable by indorsement. *Held*, that the instrument was a chattel mortgage, and not a warehouse receipt.

2. Under a chattel mortgage on grain then in possession of the mortgagor in a certain elevator, and in which mortgage there is no provision for future-acquired property, the mortgagees were not, as against the assignee for the benefit of the mortgagor's creditors, entitled to grain placed in the elevator by the mortgagor after he had removed all grain which was in the elevator at the time of the mortgage.

Appeal from appellate court, Third district. Action by Joseph G. Snyder, John L. Fyffe, and William J. Fyffe against Frank R. Stubblefield, assignee of Melbourne E. Blatchley, insolvent, E. V. Baldwin, Loyal P. Griswold, S. N. Griswold, and S. P. McCracken.

¹ Rehearing denied February 14, 1899.

From a judgment for defendants, affirmed by the appellate court (72 Ill. App. 519), plaintiffs appeal. Affirmed.

Collin C. H. Fyffe, for appellants. Thomas Henshaw and Mark Meyerstein, for appellees.

BOGGS, J. M. E. Blatchley, in the year 1895, and for some years prior thereto, was engaged in Whitehall, Ill., in the business of operating a flouring mill and buying and shipping grain, and also in storing grain for others in certain elevators owned or operated by him. He owned or had control of a flouring mill and two elevators. The appellants, during the same period of time, were doing business as grain merchants in Chicago. On October 12, 1895, Blatchley applied to appellants for a loan of \$3,000, to be used in the purchase of wheat. Appellants consented to make the loan. Blatchley gave them two notes, one for \$1,700, due in three months, and the other for \$1,300, due in four months, each bearing 7 per cent. interest. He then had a quantity of wheat in his elevators,—6,000 bushels, as he represented to appellants,—and executed and delivered to appellants an instrument in writing which they insist should be construed to be the "receipt of the keeper of a public warehouse of class B." The notes given by Blatchley were renewed by other notes, and then again likewise renewed, the last renewal of the \$1,700 note being on June 24, 1896, and the \$1,300 note on July 14, 1896. On the 30th day of July, 1896, Blatchley made a voluntary assignment, and appellee Stubblefield, his assignee, received 3,461 bushels of wheat as the property of the insolvent. Appellants exhibited to the court in which the said assignment was pending their petition praying for an order directing the assignee to deliver the wheat in his hands to them by virtue of the said written instrument denominated by them a "public warehouse receipt." The prayer of the petition was denied, and the appellate court for the Third district affirmed the action of the county court, and appellants have prosecuted a further appeal to this court.

The instrument by virtue whereof appellants claim the ownership of the wheat in question is as follows: "Grain receipt. 6,000 bushels. October 12, 1895. I have this day conveyed and delivered unto the possession of Snyderacker, Fyffe & Co., of Chicago, Illinois, 6,000 bushels of wheat, stored in good covered cribs, numbered —, elevator —, and located on lots numbered —, belonging to M. E. Blatchley, and situate in the town of Whitehall, county of Greene, state of Illinois, each of said cribs being marked with the name —. The above-mentioned wheat is free from all claims and incumbrances except those due Snyderacker, Fyffe & Co., and this conveyance is made by way of mortgage, to secure the said Snyderacker, Fyffe & Co. for their advances and interest on the same at seven per cent. per annum until paid,

and commission of no less than one-half cent per bushel, and insurance at least to the amount of their advances. —. I agree, upon the request of said Snyderacker, Fyffe & Co., to procure the said wheat to be shelled and shipped, consigned to them or their order, as may be directed by them, at my cost and expense, and I guaranty the quality to hold out as stated. Said Snyderacker, Fyffe & Co. may sell said wheat in Chicago or elsewhere, and from the proceeds of such sales pay—First, the freight, inspection, insurance, and interest on their advances, and their commission for selling the said wheat, and all expenses incurred on account of said —; second, their advances on said wheat, and all sums owing them by me, so far as the balance of proceeds will go, and account to me for balance of proceeds, if any. If the net proceeds of sale of said wheat do not amount to a sufficient sum to pay Snyderacker, Fyffe & Co. the charges, advances, interest, and commission as aforesaid, I agree to pay such deficiency to them on demand. The said Snyderacker, Fyffe & Co. may, at any and all times, deal with said wheat, and any and every part thereof, in all respects as their own, accounting to me only for the net proceeds. The receipt, if assigned by indorsement in blank, or otherwise, on the back thereof, will at once vest the holder with full title and ownership in the property mentioned, with all power herein contained, the same as if issued to the assignee or subsequent holder, subject only to a return of whatever the net proceeds may exceed the holder's claim. No. —. M. E. Blatchley."

The opening sentence of the instrument would constitute a sale of the wheat to appellants, but it is followed by an express declaration that the transfer of title is only by way of a mortgage to secure the indebtedness due appellants. Then follows the agreement that Blatchley, upon request of appellants, shall ship and consign the wheat to appellants; and that they shall be authorized to sell the wheat in Chicago or elsewhere, and apply the net proceeds of the sale of the grain to the payment of their demands against Blatchley; and, if such proceeds do not discharge such demand, Blatchley shall pay the remainder; and, if the amount produced by the sale exceeds the amount due appellants, they shall account to Blatchley therefor. It is true, the instrument is denominated a "receipt" in its concluding sentence; but the legal effect to be given it is not to be determined from the name the party may have chosen to adopt, but from its terms, conditions, and provisions. Judged by the facts disclosed by the evidence, or by the legal effect of the instrument executed by the parties, the transaction was not a sale or a transfer of title by means of a warehouse receipt, but merely an attempt to create a lien on the wheat then in the elevator, and belonging to Blatchley, to secure the payment of a loan of money to be made by appellants

to him. The instrument is a "conveyance of personal property having the effect of a mortgage," within the meaning of those words as employed in section 1 of chapter 95 of the Revised Statutes, entitled "Mortgages." Not having been acknowledged and recorded, as required by the provisions of subsequent sections of that chapter of the statute, and the possession of the property to be affected by it not having been delivered to appellants, the conveyance was without validity as against the rights and interests of third persons. As between the parties, it created a lawful lien upon the identical grain covered by the writing. Whether such an instrument is good and effectual as against the assignee of an insolvent debtor need not be here considered, for the reason it was conclusively proven the wheat in the elevator when the mortgage was executed, and upon which it attached as between the parties, had been removed therefrom and disposed of by the debtor prior to the assignment, and did not come to the hands of the assignee. Had appellants held a mortgage executed and acknowledged in strict conformity with the statute, it would have availed them nothing, for the reason the assignee had not the property to which it attached. The instrument does not profess to operate upon any grain other than that then owned by Blatchley and then in his possession. Equitable interests in property subsequently acquired by a mortgagor are never declared except where the intent to bind after-acquired property is clearly expressed in the mortgage or writing relied upon to create the lien. *Borden v. Croak*, 131 Ill. 68, 22 N. E. 793.

The county court held appellants had no preference or lien, legal or equitable, in or to the wheat which was in the elevator at the time the assignment was made. This holding was correct, and its affirmance by the appellate court is affirmed.

Appellees Baldwin, Loyal P. and Seth N. Griswold, and McCracken had deposited wheat in the elevator operated by Blatchley. They held receipts therefor, and petitioned the county court to hold such receipts to be public warehouse receipts, and to order the assignee to deliver the grain to them according to the tenor of the receipts by them respectively held. This view of the rights of these appellees was accepted, and, as the assignee had sold the grain, an order was entered applying the proceeds of such sales to the satisfaction of the demands of the holders of such receipts. Appellants saved exceptions to such holding of the court, and, the appellate court having affirmed the order of the county court, they perfected an appeal to this court to bring the judgment of the appellate court in review here.

Appellants claim Blatchley was the keeper of a public warehouse of class B, within the meaning of section 1 of article 13 of the constitution of 1870 and of the statute enacted in pursuance of such constitutional provision.

That position is, we think, correct. But we do not agree with the contention of the appellants that said appellees sold their wheat to Blatchley and were simply contract creditors of the insolvent debtor. It appeared in the proofs the purpose of the appellees in delivering the wheat to the elevator was twofold: First, to hold the grain for better prices than were then current; and, second, to remove the wheat from the farms where it had been produced to a shipping point, while the roads were dry and solid. No doubt they expected to sell their grain to Blatchley, and no less doubt he expected to buy it when they concluded to accept the market price; but there was no contract they would do so, and they were entirely free to accept prices from and sell to other dealers. It was the custom of Blatchley to mix the wheat of different owners if of the same grade, and this appellees knew. It was not expected by them that if they did not sell to him he would return to them, or deliver to any one to whom they should sell, the identical wheat they had stored with him, but they were entitled to demand and have grain in the same quantity and of like quality. The general doctrine, frequently announced, that, in order to constitute a bailment, the obligation must be to restore the identical thing which was delivered, and that where the obligation of the receiver is to return another thing of equal value such receiver becomes a debtor to make such return and the transaction is a sale, has no application when the receiver comes into the possession in the capacity of a keeper of a public warehouse, within the purview of the constitution and statutes upon that subject. Article 13 of the constitution, entitled "Warehouses," and section 2 of the act of the general assembly, enacted to give effect to the constitutional requirement, in force July 1, 1871 (*Hurd's Rev. St.* 1897, c. 114, par. 135), contemplated that grain deposited in public warehouses by different owners will not be kept separate, and that the holders of receipts issued by the proprietors of such warehouses will not receive the same grain they put in storage, and secures to the owners of such receipts the title and right to a like quantity of other grain equal in value. The proprietors of such warehouses do not become debtors to make return of the identical grain deposited, and therefore debtors for the value of the grain, but custodians charged with the obligation to restore in quality and quantity. The judgment of the appellate court is affirmed. Judgment affirmed.

(172 Mass. 478)

TUSON v. CROSBY et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 12, 1899.)

INDEMNITY—BONDS—ACTIONS—EVIDENCE—VARI-
ANCE—CROSS-EXAMINATION—RELEASE
—APPEAL—REVIEW.

1. On an issue what, if any, money indemnitors of a prisoner's bail were paid through his

counsel, a cross-question to such counsel as to what retainer he received from the prisoner is immaterial.

2. Where a prisoner's counsel, called as a witness in an action on a bond to indemnify bail, had on cross-examination denied the receipt of money as a consideration moving to the indemnitors, it was a proper exercise of discretion to exclude a further question, whether he had received a certain large sum of money; no offer being made to connect it with such consideration.

3. A bond to indemnify a prisoner's bail may be released by parol.

4. Advantage of a variance can be taken only by a reservation of exceptions to a ruling on objection to it below.

Exceptions from superior court, Worcester county; Daniel W. Bond, Judge.

Action by Albert Tuson against James M. Crosby and others. There was a verdict for defendants, and plaintiff took exceptions. Overruled.

This was an action of contract against two of the sureties on a joint and several bond. The plaintiff offered evidence tending to show that the defendants, with the other obligors on the bond, executed the same, and that the plaintiff recognized for the appearance of said Yarrington, who is mentioned in the bond as principal, as recited in the bond, and that thereafter, to wit, in August, 1895, said Yarrington made default on said recognizance, and a suit was commenced by the commonwealth against said Tuson on his recognizance, and he paid the sum of \$2,100 in settlement of that case. The defendants called as a witness one John M. Brennan, of Providence, R. I., who testified, in substance, that said Yarrington was arrested in Providence, just before the time of making the bond in suit, on a requisition from the governor of Massachusetts, and was brought from Providence to Worcester, and lodged in jail, on an indictment in the superior court; that the witness was retained as counsel for said Yarrington in the matter of the Massachusetts indictment and requisition, and procured the plaintiff, Tuson, to bail him out, and further procured the bond in suit to be made to Tuson (the sureties being friends and clients of said Brennan, who was an attorney at law, one of the sureties being his wife), and that all the sureties signed the bond at his (Brennan's) request, and that no indemnity or inducement was offered to said sureties for signing said bond; that a consideration of \$100 was to be paid to said Tuson for going bail for said Yarrington. Said Brennan further testified that some time after said bond was signed, and said Yarrington was at large upon bail, the latter was arrested again in Providence upon a complaint that he was a fugitive from justice from the state of New York, and was in jail in Cranston, R. I.; that thereupon said Brennan, acting for all the parties, sent for Tuson, and made a verbal agreement with him, to wit, that he (Brennan) would procure said Yarrington to be bailed in Providence upon said complaint, provided Tuson would give a power of attor-

ney to a party in Rhode Island, authorizing him to take said Yarrington upon the Massachusetts bail bond and bring him to Massachusetts, and that thereupon the said attorney should bring him to Massachusetts, and should then surrender him upon his bail bond to the authorities in Massachusetts, or surrender him to Tuson, and that Brennan would pay the expenses of taking Yarrington to Massachusetts, and Tuson should, in consideration thereof, discharge the sureties and surrender the bond, and that Tuson agreed to do so, and to surrender the bond and send it to the said Brennan, who was acting for the sureties. And he further testified that Tuson did furnish said power of attorney, and that Yarrington was sent to Massachusetts, and said Brennan did procure said bail as aforesaid. And the defendants offered evidence tending to show that the attorney under the power of attorney (one Winslow) brought said Yarrington to Massachusetts, and surrendered him to Tuson, in Massachusetts. The defendants also offered other evidence corroborative of the testimony of said Brennan, with reference to the verbal agreement with Tuson, and as to the surrender of said Yarrington, and as to the agreement to discharge the sureties on the bond. Said Tuson, the plaintiff, contradicted this evidence of the defendants, and offered evidence tending to show that he furnished the said power of attorney, at the request of Brennan, for a different purpose from that testified to by Brennan, to wit, that the sureties on the bond might be protected by having said Yarrington in Massachusetts, where plaintiff could, if he saw fit, take him upon his bail bond, and prevent his being taken to New York by means of requisition papers from said New York. And he wholly denied the contract testified to by Brennan and other witnesses for the defendants, and denied that he ever agreed to receive said Yarrington or to surrender him, and denied that said Yarrington was ever surrendered to him in any manner or form. In cross-examination said Brennan testified that he was retained by said Yarrington as his attorney. The plaintiff's attorney asked him how much his retainer was. Upon objection being made, the court excluded said evidence. The plaintiff stated that he proposed to show that Brennan received a large sum of money from Yarrington to indemnify the sureties, but the court excluded the question asked, and the plaintiff excepted. The plaintiff then asked the said Brennan how much money he received from the said Yarrington. The court excluded the evidence; saying that he would admit the question how much he received, if any, to indemnify him or the sureties on the bond. The plaintiff excepted. The said Brennan denied that he received any money from Yarrington to indemnify the sureties on the bond. And the plaintiff asked the witness if Yarrington did not let him have \$1,200 or more. The plaintiff's counsel stated to the court that he

desired to show that the witness received a large sum of money from Yarrington, and submit to the jury whether it was not received for some purpose other than that of services as counsel. The court excluded the evidence, and the plaintiff excepted to the exclusion of all this evidence in cross-examination.

At the close of the evidence the plaintiff asked the court to rule as follows: "(1) The instrument sued on in this case, being a written instrument under seal, cannot be released or waived by a mere verbal agreement, and no verbal agreement of the plaintiff to release the bond can have any effect to discharge the defendants from liability. (2) If the defendants executed the bond in suit, and delivered it to the plaintiff, and thereafter the said Yarrington, named in the bond, made default in the criminal court of Worcester, and failed to indemnify and save harmless the plaintiff according to the condition of the bond, the defendants are liable, notwithstanding the fact that Yarrington was taken by an attorney of the plaintiff, and brought from Rhode Island to this state, and notwithstanding the fact that the plaintiff failed to surrender him. (3) If the defendants executed and delivered the bond, and Yarrington made default thereon, and failed to indemnify the plaintiff according to the condition of the bond, the defendants are liable in this action, even though the plaintiff verbally agreed with Brennan, or with either of the defendants, that he would surrender the body of said Yarrington to the authorities at Worcester. (4) If the defendants executed and delivered the bond in suit, and the said Perry Yarrington voluntarily defaulted upon his recognizance in Worcester, the facts set out in the joint answers of the defendants do not constitute any defense to this action." The court declined to give these rulings, but, upon the subject covered by them, ruled as follows: "If the plaintiff agreed substantially with the sureties on the indemnity bond, or the other agents (the people who represented them), if they would procure the release of Yarrington from custody in Rhode Island, and by means of a power of attorney to be given by the plaintiff to some one in Rhode Island, who should, at the expense of the sureties on the indemnity bond, bring Yarrington from Rhode Island to Massachusetts, and there deliver Yarrington to the plaintiff, to be delivered up to the authorities by the plaintiff, or to be delivered under the power of attorney to the authorities in Worcester county, and that then the plaintiff should surrender to them the indemnity bond; and if the defendants performed their part of that arrangement, and did deliver Yarrington to the plaintiff in Massachusetts, and the plaintiff took the control and custody of Yarrington, and prevented Winslow from taking Yarrington to Worcester, or accepting Yarrington from Winslow in pursuance of the agreement he had made with the de-

fendants, and then the plaintiff made some arrangements with Yarrington whereby Yarrington was to remain in Jamaica Plain, and, by reason of such an arrangement made by the plaintiff with Yarrington, Yarrington was enabled to depart, so he did not appear when he was called in Worcester,—then the plaintiff is not entitled to recover. In other words, if the arrangement was made, and was performed on the part of the defendants, fully, on their part, and the plaintiff took the responsibility, in this commonwealth, of what should be done with Yarrington, and allowed him to depart for any reason, whether it was by virtue of some agreement that he had made with him,—if any consideration whatever, it isn't material,—but if he allowed him to go, instead of surrendering him under the arrangement that was made, then it is his fault that there was a loss on his part, and he would not be entitled to recover here." The plaintiff excepted to the refusal to give the rulings above mentioned, and to the ruling of the court upon the subject covered by the same. The verdict was for the defendants.

F. P. Goulding and W. C. Mellish, for plaintiff. J. W. Corcoran and C. F. Aldrich, for defendants.

BARKER, J. The plaintiff contends that it was error to exclude certain questions which he put to the witness Brennan upon his cross-examination. Brennan was a counselor at law who was retained for Yarrington in the matter of the Massachusetts indictment and requisition, and who had procured the bond in suit to be made to the present plaintiff, and had procured the plaintiff to bail Yarrington. In cross-examination, Brennan testified that he was retained by Yarrington as his attorney. The plaintiff then asked how much his retainer was. The question was excluded, and the plaintiff then stated that he proposed to show that Brennan received a large sum of money from Yarrington to indemnify the sureties; but the court again refused to allow the question how much his retainer was to be put to Brennan. The plaintiff then asked Brennan how much money he received from Yarrington. The court excluded the question, but offered to allow the plaintiff to ask the witness how much, if anything, he received to indemnify the plaintiff or the sureties upon the bond. Brennan then denied that he received any money from Yarrington to indemnify the sureties on the bond. The plaintiff then asked if Yarrington did not let him have \$1,200 or more, and in connection with this question the plaintiff stated that he desired to show that the witness received a large sum of money from Yarrington, and to submit to the jury whether it was not received for some purpose other than that of services as counsel. We think the plaintiff's exceptions to these rulings should be overruled. The question how much Brennan received from Yarrington as a re-

tainer was immaterial to the issues upon trial. Brennan testified that he received no money from Yarrington to indemnify the sureties on the bond. This covered the issue to which this part of the examination was directed. The further question, whether Yarrington did not let him have \$1,200 or more, without an offer to show from this witness, or any other witness, for what purpose the money was paid, if paid at all, is not shown to have related to any issue upon trial, and could be properly excluded in cross-examination, in the discretion of the presiding justice.

The contention that the bond in suit could not be affected by subsequent parol agreements of the parties, but must be considered to remain in force until released by an instrument of equal dignity and solemnity, is not law. *Munroe v. Perkins*, 9 Pick. 298; *Foundry v. Hovey*, 21 Pick. 417; *Blasdel v. South-er*, 6 Gray, 149, 151; *Hastings v. Lovejoy*, 140 Mass. 281, 284, 285, 2 N. E. 776. The rulings requested and refused, which all rested upon this erroneous theory of the law, were, therefore, rightly refused. If, as the plaintiff now contends, there was a variance between the proof of the defense and the allegations of the answer, that question does not appear to have been raised at the trial, and cannot avail the plaintiff here. Aside from any questions which might be open if the plaintiff had contended at the trial that there was a variance, we see no ground for criticising the charge. Exceptions overruled.

(172 Mass. 488)

SPADE v. LYNN & B. R. R.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 16, 1899.)

CARRIERS—LIABILITY FOR INJURIES—ACTS OF FELLOW PASSENGERS—KNOWLEDGE OF PASSENGER'S INFIRMITY.

1. A carrier is not liable to a passenger for injuries received by the fall of another passenger, who was jostled by the conductor while removing a drunken passenger from the car in the exercise of due care.

2. Where a passenger was injured through the carrier's attempt to remove a drunken passenger from the car, the carrier, if liable at all, was liable only for the consequences of the injury, and not for any fright or other injury suffered by the passenger through the drunken man's presence, or the attempt to remove him.

3. The conductor's knowledge of a passenger's infirmities does not increase the carrier's obligations to her.

4. A carrier whose servants committed a battery on a passenger is liable for all damages sustained by him, even though the injury to a normal person would have been less.

Exceptions from superior court, Suffolk county; Justin Dewey, Judge.

Action by Margaret C. Spade against the Lynn & Boston Railroad. There was a judgment for plaintiff, and defendant brings exceptions. Exceptions sustained.

S. L. Whipple and W. R. Sears, for plaintiff. C. K. Cobb, for defendant.

HOLMES, J. This is an action for personal injuries, which already has been before the court. 168 Mass. 285, 47 N. E. 88. At the second trial the evidence was that the defendant's conductor, in removing a drunken man from a car, jostled another drunken man, who was standing in front of the plaintiff, and threw him upon her. The fall upon her seems to have been a trifling matter, taken by itself, but the fright caused by that and the rest of the occurrences in the car resulted in physical injury. The case comes up again upon exceptions.

The judge was asked to direct a verdict for the defendant. We find some difficulty in seeing upon what ground the jury were warranted in finding for the plaintiff. So far as appears, the conductor was acting rightly in putting the drunken man off the car. As against the plaintiff, he was doing one of the things which she had to contemplate as liable to happen, when she got into the car. We all know that, if people are standing in the passageway of a street car, you cannot remove a man forcibly through the passageway without more or less contact. If the fall upon the plaintiff was the necessary consequence of a lawful and reasonable act, then it was one of the risks which she assumed when she took her passage.

It is a question which deserves more discussion than it has received, whether a man is answerable for an injury inflicted upon an innocent stranger knowingly, or with sufficient notice of the danger, if the injury is an unavoidable incident of lawful self-protection. It might be said, and it has been held, when it is a question of paying damages, that a man cannot shift his misfortunes to his neighbor's shoulders. *Gilbert v. Stone*, Aleyn, 35, Style, 72; *Scott v. Shepherd*, 2 W. Bl. 892, 896; *Cooley, Torts*, p. 115. See *McLeod v. Jones*, 105 Mass. 403, 405; *Miller v. Horton*, 152 Mass. 540, 547, 26 N. E. 100; *Pierce v. Steamship Co.*, 153 Mass. 87, 90, 26 N. E. 415; *Whalley v. Railway Co.*, 13 Q. B. Div. 131. And compare the rule as to duress in contracts and conveyances. *Fairbanks v. Snow*, 145 Mass. 153, 155, 13 N. E. 596. On the other hand, the contrary has been intimated in a case of shooting in self-defense, the injury to the third person being treated on the footing of accident. *Morris v. Platt*, 32 Conn. 75, 84. See *Bac. Max. Reg.* 5, 6; *Addison, Torts* (6th Ed.) 380, 383. And the right to pull down a house when the destruction is necessary to stop a fire, as it usually is stated, looks the same way. See *Taylor v. Inhabitants of Plymouth*, 8 Metc. (Mass.) 462, 465; *Print Works v. Lawrence*, 23 N. J. Law, 590, 613. The alleged immunity for the necessary destruction of a building suggests that perhaps the question cannot be answered in general terms, and that one possible distinction may be found where the parties have a common interest, even though the act done in furtherance of it may cause more harm than good to the plaintiff. Perhaps it would be unsafe to

find any countenance to such a distinction in decisions as to the rights of landowners or officials in diking against water when it appears as a common enemy. *Rex v. Commissioners*, 8 Barn. & C. 355; *Nield v. Railway Co.*, L. R. 10 Exch. 4. Compare *Whalley v. Railway Co.*, 13 Q. B. Div. 131. But when we go a step further, and take a case like the present, where all parties concerned are in a conveyance, and to maintain order and keep the car clear of obnoxious persons is the defendant's right, and its duty to the plaintiff and the other passengers, no passenger can complain of any consequence which the performance of that duty necessarily entails. We assume for present purposes that carriers of passengers owe the same degree of care in respect of such matters as they owe in respect of the construction and management of their vehicles, but, if that care is shown, probably the injury must be regarded as an inevitable accident. As to whether there was any negligence in the manner of expelling the drunken man, or otherwise, we will go no further than to say that it has not been pointed out to us. We need not decide the question, as there must be a new trial for another reason.

A ruling was asked to the effect that the plaintiff could recover only for the pain and fright caused by the contact with her person, and not for such mental disturbance and injury as was caused by other acts of the conductor, and the general disturbance in the car. This was refused, and the jury were instructed that if there was a physical injury, and accompanied by it there was fright which operated to her injury in body or mind, she could recover for the damage caused by the fright, and the jury were told that they might take all that happened as one whole. The effect of the refusal and the instructions appears to us to have been that, when once a battery of the plaintiff was proved, the defendant became, or might be found, liable for all the consequences of the disturbance in the car, and of the plaintiff's fright, however caused. We do not so understand the law. By something of an anomaly, consequences of the defendant's conduct which would not of themselves constitute a cause of action may at times enhance the damages, if the conduct has some other consequence for which an action lies. But this further liability is not for all consequences of the defendant's conduct, but for consequences of the defendant's wrong to the plaintiff. The wrong to the plaintiff, if any, began with the battery; and it is for the consequences of the battery only that the defendant is liable, not for all the consequences of the drunken man's presence in the car, or of the defendant's attempt to remove him. We are perfectly aware of the difficulty of discriminating. But it seems quite possible in this case that the plaintiff's trouble was due, in substance, to the disturbance as a whole, although it may be that the jury would be warranted in finding that the impact upon her person gave the detonating spark,

without which she would not have collapsed. It is unnecessary to express an opinion whether the evidence in this case warranted the latter finding.

We may add a word with reference to a suggestion made on behalf of the plaintiff, and having some bearing upon the eighth instruction asked, and the instructions given. It is argued that, because the conductor had known the plaintiff for several years, the defendant's obligations to her were increased, if the jury believed that she was a particularly sensitive person, and that the conductor must have known it. We regard such an argument, even to the jury, as wholly inadmissible. Ordinary street cars must be run with reference to ordinary susceptibilities, and the liability of their proprietors cannot be increased simply by a passenger's notifying the conductor that he has unstable nerves. In this case it was left to the jury to say whether there was anything that called for special attention to the plaintiff, beyond what was due to other women. Nothing is pointed out to us as a basis for such increased obligation, except the conductor's acquaintance with the plaintiff, and that laid no foundation for it. We should add, however, to avoid being misunderstood, and with reference to the plaintiff's tenth request, that, if the defendant's servant did commit an unjustifiable battery on the plaintiff's person, the defendant must answer for the actual consequences of that wrong to her as she was and cannot cut down her damages by showing that the effect would have been less upon a normal person. *Braithwaite v. Hall*, 168 Mass. 38, 40, 46 N. E. 398. The measure of the defendant's duty in determining whether a wrong has been committed is one thing; the measure of liability when a wrong has been committed is another.

Exceptions sustained.

(152 Ind. 169)

CORBEY et al. v. ROGERS.

(Supreme Court of Indiana. Feb. 3, 1899.)

APPEAL—RECORD—PLEADING—ADOPTION OF ALLEGATIONS—MOTION TO STRIKE—MORTGAGES—ADVERSE CLAIMS—LIMITATIONS—RIGHT TO PLEAD STATUTE.

1. A motion to strike out a pleading or a part thereof can be made a part of the record only by bill of exceptions. It is not sufficient for the clerk to copy the motion into the transcript.

2. At the place in the bill of exceptions marked "Here insert," where the clerk should have copied a motion to strike out a pleading, the clerk referred to the page of the transcript where the motion might be found. *Hdd.*, that the motion was not thereby made a part of the record.

3. Where a complaint to foreclose a mortgage recites that a certain defendant "claims to have some interest in [the premises], but, if he has any interest, it is subject to plaintiff's mortgage lien, and said defendant is therefore made a defendant to answer as to his interest so claimed," such defendant cannot plead the statute of limitations without showing that he has an interest in the property.

4. Facts averred in one paragraph of a pleading cannot be made a part of another paragraph by reference.

Appeal from circuit court, Vigo county; James E. Piety, Judge.

Action by Benjamin F. Rogers, Jr., against William Corbey and another. From a judgment for plaintiff, defendants appeal. Affirmed.

I. N. Pierce and Wm. A. Keerns, for appellants. G. W. & J. H. Kleiser, for appellee.

MONKS, C. J. This action was brought by appellee against appellants to foreclose a mortgage. Appellant Corbey filed an answer in three paragraphs. A demurrer was sustained to the third paragraph. The cause was tried, and judgment rendered foreclosing said mortgage against appellants.

The errors assigned by appellant Corbey, and not waived by a failure to argue the same, are: "(1) The court erred in sustaining the motion of appellee to strike out certain portions of the third paragraph of the separate answer of appellant Corbey; (2) the court erred in sustaining appellee's demurrer to the third paragraph of answer."

It is well settled that a motion to strike out a part or all of a pleading can only be made a part of the record by a bill of exceptions. *Dudley v. Pigg*, 149 Ind. 363, 369, 48 N. E. 642, and cases cited; *Insurance Co. v. Johnson*, 48 Ind. 315, 317, and cases cited. The clerk has copied into the transcript what purports to be a motion to strike out parts of the third paragraph of answer. This did not, however, make it a part of the record. *Dudley v. Pigg* and *Insurance Co. v. Johnson*, supra. The clerk has also copied into the transcript a bill of exceptions, duly signed by the judge, showing the filing of a motion to strike out parts of the third paragraph of answer, and that the same was sustained; but at the place in the bill of exceptions marked "Here insert," where the clerk should have copied the motion to strike out, he has referred to the page of the transcript where the motion may be found. This did not make the motion a part of the record. *Insurance Co. v. Johnson*, supra; *Elliott, App. Proc.* §§ 818, 819. The parts of the paragraph to which the motion referred are not in any way identified by the bill of exceptions. No question is presented, therefore, concerning the action of the court in sustaining said motion. We do not think the court erred in overruling the demurrer to the third paragraph of answer.

It is alleged in the complaint that one Claiborne Hedges executed the note and mortgage sued upon, February 16, 1883, the note being payable 30 days after date; that said Hedges died intestate on December 16, 1892, and left surviving him his widow, the appellant Ellen Hedges, and that no letters of administration have been granted on his estate, and "the defendant Corbey claims to

have some interest in said estate, but, if he has any interest, it is subject to plaintiff's mortgage lien, and said defendant therefore is made a defendant to answer as to his interest so claimed." It is the rule in this state that such a complaint challenged the appellant Corbey to set up his claim, if any, superior to the mortgage, and on failure to do so he is precluded by the judgment and decree from ever after claiming any right in the mortgaged property superior to the mortgage so foreclosed. *O'Brien v. Moffitt*, 133 Ind. 660, 665-667, 33 N. E. 616, and cases cited; *Woollen v. Wisnimer*, 70 Ind. 108, 110, 111; *Woodworth v. Zimmerman*, 92 Ind. 349; *Craighead v. Dalton*, 105 Ind. 72, 4 N. E. 425. The third paragraph of the answer of the appellant Corbey set up the 10-years statute of limitation as a bar to the foreclosure of said mortgage, but in no way set forth the interest he claimed in the real estate, or that he was a grantee or mortgagee of Hedges, who executed the note and mortgage sued upon, or otherwise held under him, or that he owned or claimed any interest whatever in said real estate or any part thereof. The general rule is that the right to plead the statute of limitations is a personal privilege, but persons standing in the place of the party having the personal privilege, such as his grantees, mortgagees, executors, administrators, trustees, heirs, devisees, or other persons holding under him, may set up such a defense. 1 *Wood, Lim. Act* pp. 96, 97; *Busw. Lim.* 527; 13 *Am. & Eng. Enc. Law*, 709, 710; *Riser v. Snoddy*, 7 Ind. 442, 445, 446; *Cole v. Lafontaine*, 84 Ind. 446, 449; *Lord v. Morris*, 18 Cal. 482, 490, 491; *Grattan v. Wiggins*, 23 Cal. 16; *Baldwin v. Boyd*, 18 Neb. 444, 448, 449, 25 N. W. 580, and cases cited; *Mitcheltree's Adm'r v. Veach*, 31 Pa. St. 455; *Woodyard v. Polsley*, 14 W. Va. 211; *Werdenbaugh v. Reid*, 20 W. Va. 588, 589; *Smith v. Brown*, 99 N. C. 377, 6 S. E. 667; *Trimble v. Fariss*, 78 Ala. 260; *Steele v. Steele's Adm'r*, 64 Ala. 438; *Dawson v. Colaway*, 18 Ga. 573, 585. There may be cases where one owning real estate, or an interest therein, could set up the statute of limitations as a defense to an action to enforce a mortgage lien on such real estate when he did not derive his title from or through such mortgagor. But this we need not determine, for it is clear, we think, that said third paragraph of answer was not sufficient, because, as the complaint stood, it was incumbent on appellant, in addition to the allegation of the statute of limitations, to aver facts showing that he had such interest in the real estate described in the mortgage as entitled him to the benefit of said statute of limitations, and no such facts are set forth in said paragraph. If the complaint had set up the facts showing that Corbey had an interest in said real estate, and what that interest was, it would not have been necessary to set forth such facts in the third paragraph of answer. When, in a case like this, facts concerning the

interest of a defendant in the real estate are not set forth in the complaint, he must set them up in his answer. *Mann v. State*, 116 Ind. 383, 19 N. E. 181.

It is true that an attempt is made in the said third paragraph of answer to adopt and make the second paragraph of answer a part thereof by reference. It is settled, however, that facts averred in one paragraph of a pleading cannot be adopted and made a part of another paragraph by reference. *Potter v. Earnest*, 45 Ind. 416, 418, and cases cited; *Mason v. Weston*, 29 Ind. 561. It not appearing from the facts alleged in the third paragraph of answer that appellant had or owned any interest in the mortgaged real estate, the court did not err in sustaining the demurrer thereto.

There is some controversy between counsel as to whether section 299, Burns' Rev. St. 1894 (section 298, Horner's Rev. St. 1897), extending the limitation in case of the death of the person liable to an action before the expiration of the time limited for the commencement of the action, applies to this case. As the third paragraph of answer is insufficient for other reasons, it is not necessary to determine this question. Finding no error in the record, the judgment is affirmed.

(152 Ind. 166)

SHULTZ v. BOYD et al.

(Supreme Court of Indiana. Feb. 3, 1899.)

PAYMENT TO WRONG PARTY—RIGHT OF ACTION.

Though plaintiff is entitled to recover of an insurance company on a policy, and it paid defendants, she has no right of action against them, they not having assumed to act for her, or covenanted with it to take the money for her use, but having asserted a claim of right on their own account.

Appeal from circuit court, Wayne county; Henry C. Fox, Judge.

Action by Ophelia G. Shultz against James A. Boyd and others. Judgment for defendants. Plaintiff appeals. Affirmed.

John L. Rupe, for appellant. Thos J. Study, for appellees.

BAKER, J. Appellant's complaint discloses these facts: George W. Shultz, on November 1, 1889, procured a life insurance policy payable upon his death. The policy recites that the application is "a part of this contract." The application and the policy proper were made out upon a printed form. This form consisted of one folded sheet of paper, containing blanks for both the application and the policy. In the application appears this question, in printing: "Full name of the beneficiary for whom the insurance is desired?" In answer, Shultz subscribed, "To my legal heirs." In the printed form of policy a blank was left in which to write the name of the beneficiary. The blank was in this connection: The company "doth hereby promise to pay to _____ (the beneficiary under this policy), or to the legal representa-

tives or assigns of said beneficiary, the sum of," etc. The company wrote in this blank the name of the insured, "George W. Shultz." None of the printing was stricken out. Shultz received the policy in this condition, and retained it till February 20, 1890, and paid all premiums throughout. Shultz indorsed upon the policy: "February 20, 1890. I hereby transfer the within policy to [appellees], and such sums as may be due them to be paid first. George W. Shultz." On the day mentioned, he delivered the indorsed policy to appellees, as security for loans and advances. This was with the consent of the company, but without the knowledge or consent of appellant. Shultz died, intestate, in 1893, leaving appellant his sole heir. From issuance of policy to death of insured, appellant was sole heir presumptive. At Shultz's death appellees held the policy as security for more than the amount thereof. They demanded of the company payment of the full amount as due to them. The company paid. They applied the amount on the debt due them from Shultz. Appellant was in no way liable on the debt. She demanded of appellees that they pay her the amount they received from the company. They refused. Demurrer to answer was carried to complaint, and sustained. Judgment on appellant's refusal to plead further.

Appellant claims that the rules of construction establish that she is the beneficiary named (by class); that she acquired a vested right to receive the insurance money from the company; that the attempted assignment was ineffectual to divest her of the right; and that appellees, having received money that she alone rightfully could collect, must account. If the first three propositions are true, the fourth does not necessarily follow. An actor must show (1) a right (2) infringed (3) by one owing a duty correlative to the right. If it were granted that the complaint exhibits a right, in what has it been broken in upon, and by whom? Appellant asserts that she alone had the right to collect the insurance money. From that right would flow the correlative duty of the company to pay her. To pay what? Not to pay specific money that had been identified, set apart, and held by the company as custodian, but to pay from the assets generally the amount due appellant, as owner of the chose in action. It is not alleged that the company's assets are insufficient. Appellant's right has been infringed no more by the company's payment to appellees than it would have been by payment of the same amount to appellees or any one else upon another claim. The complaint sets forth no duty of appellees correlated to appellant's alleged right as sole beneficiary. They did not take from the company, with notice of appellant's rights, so much as to leave an execution ineffectual. They did not assume to act as her agents. They did not covenant with the company to take the money for her use. But they did assert a claim of right on their own account. If they obtained the mon-

ey wrongfully, and if the law implies against them any promise or trust, it is not in favor of appellant. *Patrick v. Metcalf*, 37 N. Y. 332; *Butterworth v. Gould*, 41 N. Y. 457; *Rowe v. Bank*, 51 N. Y. 674; *Peckham v. Van Wageningen*, 83 N. Y. 40; *Decker v. Saltzman*, 59 N. Y. 279; *Dumois v. Hill* (Sup.) 37 N. Y. Supp. 1093; *Sergeant v. Stryker*, 16 N. J. Law, 464; *Nolan v. Manton*, 46 N. J. Law, 232; *Moore v. Moore*, 127 Mass. 22; *Corey v. Webber*, 96 Mich. 357, 55 N. W. 982; *Rand v. Smallidge*, 130 Mass. 337; *Goreley v. Butler*, 147 Mass. 12, 16 N. E. 734; *Hopkins v. Beebe*, 26 Pa. St. 85; *Town of Rushville v. President, etc., of Rushville*, 89 Ill. App. 503; *Neill v. Chessen*, 15 Ill. App. 270; *Hall v. Carpen*, 27 Ill. 385; *Crews v. Heard*, 7 Ga. 60; 7 *Lawson, Rights, Rem. & Prac.* § 3692; 2 *Enc. Pl. & Prac.* 1021. The statements in *Lemans v. Wiley*, 92 Ind. 436, *McFadden v. Wilson*, 96 Ind. 253, and *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89, if limited to the facts in those cases, are not inconsistent with this decision. Judgment affirmed.

JORDAN, J., absent.

(152 Ind. 152)

BOYD v. BLOOM.

(Supreme Court of Indiana. Feb. 1, 1899.)

RIGHT OF WAY—GRANT—GATES—PLEADING.

1. Provision of a deed that the grantee should have "a free and undisturbed right to the use" of a way is not a grant of an open way, preventing the grantor from maintaining gates at the termini.

2. The theory of a complaint being that defendant has a right to use a right of way over plaintiff's land if he closes the gates across it, plaintiff cannot question defendant's right to use the way on the conditions alleged in the complaint.

Appeal from circuit court, Noble county; J. W. Adair, Judge.

Action by Marshall Boyd against Jacob Bloom. Judgment for defendant. Plaintiff appeals. Reversed.

H. G. Zimmerman, for appellant. H. C. Peterson, for appellee.

MONKS, O. J. Appellant sued appellee to enjoin him from removing a gate erected across a private way, and for damages. After the issues were joined, the court tried said cause, and made a special finding of the facts, and stated conclusions of law thereon in favor of appellee, to each of which appellant excepted. Judgment was rendered in favor of appellee. The errors assigned call in question each conclusion of law.

It appears from the special finding that one Shanower owned two adjoining tracts of land, and that the north end of one of said tracts abutted upon a public highway. In 1890 said Shanower sold and conveyed to appellant's grantor the tract abutting upon said highway, without any reservation in the deed, and at the same time sold and conveyed to appellee

the other tract, providing in said deed that appellee "should have a free and undisturbed right to the use" of a way out to the public road on the tract conveyed to appellant's grantor, 15 feet wide, and about 100 rods long. The deed to appellant's grantor was executed October 14, 1890, and the deed to appellee was signed and acknowledged on October 14, 1890, but was not delivered until the next day, October 15th. At the time that said deeds were executed, said way was fenced on both sides from the land sold to appellee, north to the highway, leaving a passageway about 15 feet wide between said fences, and so remained until April, 1895, when the west fence along said lane was taken down and removed by appellant, who then owned the same, without the consent and over the objection of appellee, and has not since been replaced; that, at the time said deeds were made, gates or bars were maintained across said way about 18 rods south of the highway, where they remained until 1893, when they were placed by appellant's grantor at the north end of said way, next to the highway, without the consent of appellee. There was no understanding or agreement between appellee and appellant or his grantor that a gate should be maintained on any part of said way; that the gate across the north end of said way next to the highway was removed by appellee October, 1896, before the commencement of this action.

It is the rule established by the authorities that, where one grants a right of way across his land, he may shut the termini of the same by gates, which the grantee must open and close when he uses the same, unless an open way is expressly granted. *Phillips v. Dressler*, 122 Ind. 414, 24 N. E. 226; *Frazier v. Myers*, 132 Ind. 71, 73, 31 N. E. 536; *Maxwell v. McAtee*, 9 B. Mon. 20; *Garland v. Furber*, 47 N. H. 301; *Bean v. Coleman*, 44 N. H. 539; *Amondson v. Severson*, 37 Iowa, 602; *Houpes v. Alderson*, 22 Iowa, 160; *Bakeman v. Talbot*, 31 N. Y. 366, 88 Am. Dec. 275, and note, p. 282; *Brill v. Brill*, 108 N. Y. 511, 15 N. E. 538; *Huson v. Young*, 4 Lans. 64; *Baker v. Frick*, 45 Md. 337; *Frank v. Benesch*, 74 Md. 58, 21 Atl. 550, and 28 Am. St. Rep. 237, and note, p. 239; *Short v. Devine*, 146 Mass. 119, 15 N. E. 148; *Green v. Goff*, 153 Ill. 534, 39 N. E. 975; *Whaley v. Jarrett*, 69 Wis. 613, 34 N. W. 727, and 2 Am. St. Rep. 764, and note, p. 766; *Sizer v. Quinlan*, 82 Wis. 390, 52 N. W. 590; *Connery v. Brooke*, 73 Pa. St. 80; *Hartman v. Fick*, 167 Pa. St. 18, 31 Atl. 342, and 46 Am. St. Rep. 659, and note; *Kohler v. Smith*, 3 Pa. Super. Ct. 176; *Washb. Easem.* (4th Ed.) pp. 255, 256, 291, 292; *Godd. Easem.* (Bennett's Ed.) 330, 331; *Jones, Easem.* §§ 400, 401, 406, 406.

It is insisted, however, by appellee, that the words of the grant that he "should have a free and undisturbed right to use" the way were an express grant of an open way, and appellant had no right, therefore, to maintain gates across the same. It is said by Mr.

Washburn, in his work on Easements (page 255): "Where the grant was of 'a free and unobstructed way,' it was held that the owner of the land might maintain gates across it, unless this would be inconsistent with the purposes for which the way was granted. *Garland v. Furber*, 47 N. H. 304." In *Brill v. Brill*, supra, it was held that, when the provision in a deed was that the owner of the dominant estate was to have "free ingress and egress" over the servient estate, the owner of the servient estate had the right to maintain gates across the way which the owner of the dominant estate, then using the way, was required to open and close; that, under said provision, the sole right of the owner of the dominant estate was a right of passage. The court said, at page 519, 108 N. Y., and page 540, 15 N. E.: "His grantor secured to him an easement of way; that is, the right to use the surface of the soil for the purpose of passing and repassing, and the incidental right of properly fitting the surface for that use. The plaintiff, as owner of the soil, has all the rights and benefits of ownership consistent with such an easement. *Atkins v. Bordman*, 2 Metc. (Mass.) 457; *Bakeman v. Talbot*, 31 N. Y. 371. Among others must be the right to have his lands fenced or unfenced at his pleasure." It was held in *Connery v. Brooke*, 73 Pa. St., at page 84, that a grant of the "free right of passageway, with free ingress and egress at all times," did not imply that a gate across it was an obstruction. The court said: "The fact that the gate was there at the date of the grant, and that it was allowed to remain, cannot change the plain meaning of the words of the grant; but it may help us to ascertain the intention of the parties, if there be any doubt as to their meaning. But what is meant by the free use of a passageway? Does it necessarily mean that there shall be no gate or door hung across it, or, if there is, that it shall always be kept open? Has not the owner of a passageway its free use if he hangs a gate across it at its intersection with the street? If I grant the free use, right, and privilege of the hall of my house, with free ingress and egress at all times, must I take off the door leading into it, or keep it wide open, in order that the grantee may have the free use of it, or cannot he have its free use if he can enter it by opening the door whenever he chooses? Without doubt, I cannot unreasonably obstruct his use of it; but, if the door amounts practically to little or no inconvenience, it seems to me that it is not necessarily a wrongful obstruction. 'Free' is a relative term when applied to the use of a thing. It does not follow that I have not the free use of a room because I have to open a door in order to get into it; nor does it follow that I have not the free use of an alley because I have to open a gate to go into and out of it. A gate may be so placed as to be a practical and unreasonable obstruction to the free use of a passageway; and it may be so constructed and placed as not to amount

to any practical obstruction to its use. Whether a gate in this case amounted to a wrongful obstruction was therefore a question of fact for the jury. If it was not a practical hindrance, and, under the circumstances, an unreasonable obstruction to the plaintiff's use of the passageway, then it was not a wrongful or illegal obstruction for which an action will lie." It is clear, we think, from the authorities cited, that the terms of the grant did not entitle the appellee to an open way out to the public road, and that appellant had the right to maintain gates across the way at the termini thereof. It is true that the owner of the servient estate has no right to maintain an unreasonable number or kind of gates, or to place the same so that they unnecessarily interfere with the use of the way by the owner of the dominant estate; but there is no finding that the gates across the way in controversy were not of a proper width, or were of a kind or so placed as to be a practical or unreasonable obstruction to appellee's use of the way over appellant's land.

It is insisted, however, by appellant, that the deed from Shanower to appellee conveyed no right of way over appellant's land, for the reason that the special finding shows that Shanower had no title to the land owned by appellant when he executed the deed to appellee for said way. Whether or not this insistence of appellant is correct we need not determine, for the reason that the theory of his complaint is that appellee has the right to use the way in controversy, if he closes and properly secures the gates across the same. Appellant is not in position in this case to question appellee's right to use said way upon the conditions alleged in his own complaint. It follows that the court erred in its conclusions of law. The judgment is reversed, with instructions to the court below to restate its conclusions of law, and render judgment in favor of appellant in accordance with this opinion.

(152 Ind. 161)

BOYD et al. v. SCHOTT et al.¹

(Supreme Court of Indiana. Feb. 3, 1899.)

JUDGMENT NUNC PRO TUNC—NEW TRIAL—WAIVER OF ERROR—QUIETING TITLE.

1. An oral announcement of the court's decision is not a sufficient basis for entry of judgment nunc pro tunc.

2. Before rendition of judgment, it is error to grant a new trial as of right; *Rev. St. 1894, § 1076* (*Rev. St. 1881, § 1064*), authorizing it to be granted by "the court rendering the judgment upon application made within one year thereafter."

3. The erroneous granting of new trial as of right is not waived by the other party proceeding with the second trial, he having reserved the question of the court's action.

4. Complaint in an action to determine right and quiet title to the oil under and a certain oil well on certain lands is sufficient, it being alleged that plaintiffs have a valid subsisting interest in the real estate described, and that defendants either claim title to the property adversely to them, or wrongfully hold possession thereof.

¹ See (App.) 63 N. E. 871.

Appeal from circuit court, Wells county;
E. C. Vaughn, Judge.

On rehearing. Reversed.

For former opinion, see 50 N. E. 379.

Dailey, Simmons & Dailey, for appellants.
Martin & Elchhorn, for appellees.

DOWLING, J. Appellants, claiming to be the owners of the petroleum, gas, and oil in and under certain lands in Wells county, and of certain oil wells on these lands, together with the exclusive right to drill for petroleum, gas, and oil, and to lay pipes to carry the same, brought this action to determine their said rights, and to quiet their title. Issues were formed upon the pleadings, and at the February term, 1896, of the Wells circuit court, the case was tried by a jury. At the request of the parties, a special verdict was returned. The appellants and the appellees, respectively, moved for judgment on the verdict. The court overruled the motion of appellees, and sustained that of appellants, and proper bench, docket, and order-book entries were made of such rulings. At that time, however, no judgment was entered of record by the clerk, and no minute or memorandum was made directing the entry of any such judgment, or announcing that a judgment was given by the court in favor of the appellants upon the special verdict; nor was there any written minute or evidence of the intention or desire of the court to render, or have entered, a judgment on said verdict, further than the minute and entry of the filing of said two motions, and the rulings in sustaining one of said motions and overruling the other. At the same term of the court appellees filed a motion and a bond for a new trial as of right, which motion was sustained over the objection and exception of the appellants, who afterwards obtained a bill of exceptions covering said ruling. At the September term, 1896, of said court, a second trial of said cause was had, resulting in a special verdict, followed by motions in favor of the parties respectively, and the rendition of judgment in favor of the appellees. At said latter term the court, of its own motion, entered *nunc pro tunc* a judgment in favor of the appellants upon said first verdict, and as of the term at which said new trial as of right was granted to the appellees. On the day of the last-named entry, and upon the motion of the appellees, the court altered and changed the bill of exceptions theretofore granted to the appellants upon the awarding of appellees' motion for a new trial as of right, so that instead of showing the failure and refusal of the court to render judgment in favor of appellants it was made to appear that, upon the overruling of appellees' motion for judgment upon said verdict, the court "rendered judgment upon the special verdict for the plaintiffs, and then and there audibly announced in open court to the counsel of both parties

that the court then and there rendered, and would cause to be entered, a judgment upon said special verdict in favor of the plaintiffs, and was proceeding to make and making his minute upon the court docket, showing a judgment to be entered by the clerk of this court in favor of the plaintiffs upon said special verdict, when, upon the request of defendants' counsel, the formal entry of such judgment upon the minutes of the court docket was not fully completed by the court, in order to enable defendants' counsel to procure their clients to execute a bond for the purpose of securing a new trial as of right; and it being then and there understood by the counsel of both parties that the court had announced in open court that judgment was awarded to the plaintiffs, but its entry by the clerk temporarily suspended."

The most that can be said of the facts supporting the court's action in entering *nunc pro tunc* the judgment upon the first verdict is that an oral announcement was made by the court of its decision in favor of the appellants; that a minute would have been made of such decision, from which an entry of judgment would have been made by the clerk, but for the request of appellees' counsel to withhold such minute; and that, therefore, the action was taken alone from the memory of the oral announcement, without memorandum, and with purposed omission of memorandum. There can be no doubt that, for some purposes, the oral announcement of the court's conclusion or decision would be conclusive; as, for instance, to prevent a dismissal by the plaintiff. But as constituting a judgment which would preclude strangers, or supply the basis for its entry *nunc pro tunc*, there is serious doubt. It is the general rule that some memorandum must exist as written evidence of the action of the court to be entered. *Makepeace v. Lukens*, 27 Ind. 435; *Hamilton v. Burch*, 28 Ind. 233; *Uland v. Carter*, 34 Ind. 344; *Schoonover v. Reed*, 65 Ind. 313; *Williams v. Henderson*, 90 Ind. 577; *Kelley v. Adams*, 120 Ind. 340, 22 N. E. 317. A collection of decisions to this effect will be found in 12 Am. & Eng. Enc. Law, p. 81. There having been no such evidence, the action of the court was not authorized. We do not, of course, disregard the rule that parol evidence is admissible upon such motions for a *nunc pro tunc* entry, but, as held in *Schoonover v. Reed*, supra, and other cases, it is admissible in connection with same minutes of the court's action. Nor do we doubt that, at the time the *nunc pro tunc* entry was made, the judgment might have been ordered and entered for the first time. When it not only appears that no memorandum was made, but that it was purposely withheld at the instance of the party to be benefited by the proceeding, there was no authority to make the *nunc pro tunc* entry. While we do not pass upon the action of the court in changing the bill of exceptions to correspond with the entry of the judgment *nunc*

pro tunc, the bill, made when the transaction was comparatively recent, was far better evidence of the action of the court at the time than the memory of the witnesses at a much later period. Not only so, but the change was in direct contradiction of the original bill. More than this, the excuse stated for the failure to render the judgment on the special verdict on the seventh Saturday of the February term, 1896, is that the entry was temporarily suspended "to enable defendants' counsel to procure their clients to execute a bond for the purpose of securing a new trial as of right"; and yet the record shows that such bond was filed, and was approved by the judge, March 21, 1896. There having been no judgment at the time of granting to the appellees a new trial as of right, the appellants insist that such ruling was erroneous; and to that effect are the decisions. *Whitlock v. Vancleave*, 39 Ind. 511; *Hutchinson v. Lemcke*, 107 Ind. 121, 8 N. E. 71; *Stanley v. Dailey*, 112 Ind. 489, 14 N. E. 375; *Personette v. Cronkhite*, 140 Ind. 586, 40 N. E. 59. The statute (Rev. St. 1894, § 1076; Rev. St. 1881, § 1064) authorizing new trials as a matter of right provides that "the court rendering the judgment, upon application made within one year thereafter by the party against whom the judgment is rendered, * * * and on the applicant giving an undertaking, * * * shall vacate the judgment and grant a new trial. * * *" The cases cited have been decided—and correctly, we think—upon the theory that this statute gives the right only after judgment, for the reason that many steps may intervene before the rendition of the judgment to obviate the granting of a motion therefor.

Appellees' learned counsel insist that, by proceeding with the second trial, appellants waived the error of the court in granting the new trial. The cases cited in support of this proposition differ from this case in the fact that here the appellants reserved the question of the court's action, and the alteration of the bill of exceptions did not deprive them of their exception, but continued it in their favor. It cannot be said, where a new trial as of right is erroneously granted, that the adverse party, to take advantage of the error, must not follow up the new trial, but must abandon further steps until the appeal. If this is correct, the same rule would apply to defeat most of the erroneous rulings of trial courts.

Appellees have assigned as cross errors the rulings of the court on the demurrers to the several paragraphs of the complaint, and on the motions of appellants and appellees, respectively, for judgment on the first special verdict. The allegations of each paragraph of the complaint show that appellants have a valid, subsisting interest in the real estate described, and that the appellees either claim title to the property adversely to them, or wrongfully hold possession thereof. Under the statute, this is sufficient. The special verdict finds every fact necessary to entitle the

plaintiffs to recover, and fully justifies the action of the court in sustaining appellants' motion for judgment, and in overruling the motion of appellees. The judgment is reversed, with instructions to proceed upon the first special verdict, and in disregard of the last trial.

(152 Ind. 145)

DAVIS v. STATE.

(Supreme Court of Indiana. Jan. 31, 1899.)

HOMICIDE—SPECIAL PLEAS—EVIDENCE—INSTRUCTION—WAIVER OF OBJECTION.

1. Objections to overruling of a motion to quash an indictment are waived by failure to point out any defect in the indictment.

2. Besides special pleas to the jurisdiction and in abatement, only the defenses of former conviction and former acquittal may be pleaded specially.

3. The grade of defendant's crime is not fixed by the verdict and judgment on the trial of another for the same offense.

4. An instruction directing the jury to assess the punishment of defendant, if they found him guilty, is harmless, the law authorizing them to determine only the question of his guilt.

Appeal from circuit court, Fountain county; J. M. Rabb, Judge.

James Davis was convicted of manslaughter, and appeals. Affirmed.

Puett & McFadden and C. M. McCabe, for appellant. W. L. Taylor, Atty. Gen., and James W. Bussey, Pros. Atty., for the State.

DOWLING, J. Indictment for murder in the first degree, in the Parke circuit court. On the application of appellant, the venue of the cause was changed to Fountain county, there was a trial by a jury, and appellant was found guilty of voluntary manslaughter. Motions to quash the indictment were overruled. Demurrers to the second, third, and fourth special pleas to the second count of the indictment were sustained. Motions for a new trial and to modify the judgment were overruled. These rulings are assigned for error.

Counsel for appellant having failed to point out any defect in the indictment, the objections to the decision of the court on the motions to quash are waived.

The first questions presented for examination here arise upon the action of the court in sustaining demurrers to the second, third, and fourth special pleas to the second count of the indictment. The substance of each of these pleas is as follows: That on the 21st day of May, 1896, the defendant herein and one Barney Roberts were quietly and peaceably walking along and upon a certain street and public highway in the town of Judson, Parke county Ind., going to their homes, each carrying a shotgun, the said Roberts walking in front, and this defendant following a few feet behind him in the same path, neither pursuing any one nor fleeing from any one, when suddenly the said Roberts was confronted by the said John Newkirk, with a drawn revolver in his hand, aimed directly at said Roberts,

and that said Roberts immediately raised his gun, and fired off and discharged the same into the body of the said Newkirk, killing him instantly; that from the time said Newkirk made his appearance, confronting Roberts as aforesaid, until he was shot and killed, this defendant was several feet behind the said Roberts, and said Roberts was unable to see this defendant at any time during said transaction, and that this defendant did not at any time, from the time said Newkirk appeared until said Roberts shot and killed him as aforesaid, utter any word or sound, or make any sign or gesture, and that he did not realize what was being done until the said Newkirk was shot and killed as aforesaid, and that he, said defendant, did not at any time fire off or discharge the gun which he carried, or any other gun, at, against, or into the said Newkirk, but that said Newkirk was shot and killed by the said Roberts as aforesaid, and not otherwise; that said Barney Roberts was thereafter duly charged by separate indictment in the Parke circuit court with the crime of murder in the first degree, for having shot and killed the said John Newkirk, and thereafter, the venue of said cause having been changed to the Fountain circuit court, the said cause came on for trial in and by said Fountain circuit court, before a jury legally impaneled; and that upon said trial the said Roberts was by the verdict of said jury, and the judgment and sentence of said court, convicted and found guilty of the crime of manslaughter, under said indictment, and was thereby acquitted, and found not guilty of any higher degree of homicide or crime therein. The third plea omits the narrative of the circumstances attending the shooting of Newkirk, and states only the facts of the indictment, trial, and conviction of Roberts of the crime of manslaughter. The fourth plea, after the allegations concerning the indictment, trial, and conviction of Roberts, states that the defendant did not, by word, sign, or gesture, in any manner participate in the acts constituting the crime of which Roberts was convicted; nor did he at the time of the commission of said offense counsel, encourage, or command the said Roberts to shoot the said Newkirk, or aid or abet the said Roberts in any way in the commission of said crime of manslaughter.

Notwithstanding the provisions of the statute, that in all criminal prosecutions the defendant may plead the general issue orally, and under it may prove on the trial that he has before had judgment of acquittal, or been convicted or pardoned, for the same offense, or any matter of defense, except insanity, it has been held in this state that such matters as might be set up by special plea at common law may yet be presented in that manner. Burns' Rev. St. § 1832 (Rev. St. 1881, § 1763); Clem v. State, 42 Ind. 420; Neaderhouser v. State, 28 Ind. 267; State v. Barrett, 54 Ind. 434. But the object of a special plea in criminal procedure is not to traverse the charge

contained in the indictment, or to give in detail the circumstances constituting the defense. At common law its scope was limited to certain special defenses, and no reason exists at this day for enlarging its range. It is said in Clem v. State, 42 Ind. 431: "The defenses which a defendant might plead specially in bar of the indictment were formerly of four kinds,—a former acquittal, a former conviction, a former attainder, and a pardon. But as attainders are prohibited in this country (Const. U. S. art. 1, § 10), and as pardons are not granted until after conviction (State Const. art. 5, § 17), the defenses which a defendant may thus plead specially are reduced to two,—a former acquittal and a former conviction." Since the decision in Clem v. State, supra, a statute has been enacted requiring the defense of insanity to be specially pleaded. 1 Burns' Rev. St. § 1833 (Rev. St. 1881, § 1764). Special pleas to the jurisdiction of the court, and in abatement, are allowed. 2 Hawk. P. C. 514; Whart. Cr. Pl. & Prac. §§ 422, 423; 1 Blsh. Cr. Proc. § 791. None of the matters contained in the second, third, and fourth pleas to the second count of the indictment are such as can be specially pleaded. They could not have been so pleaded at common law, nor does the Code of Criminal Procedure authorize that mode of pleading such defenses. The demurrers to these pleas were properly sustained.

The motion for a new trial calls in question the action of the court in sustaining objections to certain evidence offered by appellant, and in admitting other evidence over his objection. The record of the trial and conviction of Barney Roberts for the crime of manslaughter in killing Newkirk was properly excluded. The guilt or innocence of the appellant of the crime with which he was separately charged did not depend upon the conviction or acquittal of Roberts. Nor was the grade of appellant's crime fixed by the verdict and judgment in the case against Roberts. We have carefully examined all of the evidence objected to by appellant, and are of the opinion that wherever it was at all material it was properly admitted, and that where it was immaterial the appellant sustained no injury by it. The testimony excluded by the court was clearly incompetent, and we find no error in these rulings.

The court of its own motion gave to the jury instructions numbered from 1 to 49, inclusive. These instructions cover every aspect of the case, and state the law with clearness and precision. The criticism of counsel for appellant is directed against the thirtieth, thirty-seventh, and thirty-ninth, which were as follows: "(30) If a person sought to be arrested is inflamed by anger and intoxication, and is known by the officer to be armed and dangerous, and the circumstances are such, and the character of the person to be apprehended is such, that the officer is justified in believing, and does honestly believe, that, unless he first obtains dominion over the person so sought to be arrested, he cannot with safety to his life make the ar-

rest, then such officer would be justified in presenting a weapon to the offender, for the purpose, not of taking his life, but of obtaining dominion over him, and effecting his arrest with safety to himself; and his so doing would not, under such circumstances, be wrongful in the officer." "(37) It is the defendant's contention that he (Robarts) was moved to fire the fatal shot by fear of his life and person from the assault of the deceased, while the state contends that the shot was fired by the defendant, not from fear of his life or person, but to prevent his arrest by the deceased as marshal of the town of Judson. If, after a full and careful consideration of the evidence in the case, you entertain a reasonable doubt as to whether or not Robarts, at the time he fired the shot that killed the deceased, if you find that he did fire it, in fear of his life and person, and for the purpose of defending himself from apprehended danger to his life and person, or that he fired it to prevent the deceased from arresting him, that doubt must be resolved in favor of the defendant, and you must find that the shot was fired in Robarts' defense, and acquit defendant." "(39) In determining whether or not, on one hand, Robarts shot the deceased in his necessary self-defense, or what appeared to him at the time to be his necessary defense, or, on the other hand, that he shot the deceased solely to prevent the deceased from arresting him, you have a right to consider all the circumstances developed by the evidence that throw light upon the subject. You have a right, among other things, to consider the previous relations of Robarts and deceased,—whether or not they were amicable or otherwise, and whether or not, from such previous relations, Robarts had reason to apprehend danger to his life or person from the deceased. You have a right to consider whether or not Robarts knew of the official character of the deceased, if you shall find that he was an officer, and whether or not Robarts, at the time the deceased was killed, if you shall find that he was killed, had done any act which he knew rendered him amenable to arrest, and whether or not he was at the time apprehending that the deceased would attempt his arrest, and whether or not, at the time the fatal shot was fired by Robarts, if you shall find that he fired such shot, he recognized and knew who it was upon whom he fired the shot, and all that was said and done either by Robarts or the deceased that will tend in any manner to enlighten your minds upon that question. You should consider the manner in which the deceased approached Robarts, if he did approach him; whether or not he was armed with a revolver at the time, and what use he (the deceased) was making of such arms at the time; you remembering that you are the sole judges of what facts and circumstances are established by the evidence, and of the weight that shall be given to each circumstance established in the case." Taken in

connection with the other instructions given, we find no error in the thirtieth, thirty-seventh, and thirty-ninth instructions, above set out. The objections urged against each of them are fully met and removed by other parts of the charge of the court, every qualification and explanation thought necessary by counsel for appellant are elsewhere stated, and the jury could not have been misled by the inadvertent use of the word "defendant" in the thirty-seventh instruction, where "Robarts" was plainly intended.

Instruction numbered 48 is complained of because it directed the jury to assess the punishment of appellant, if they found him guilty. Under the law, the jury could determine only the question of the guilt or innocence of appellant, and, an attempt by them to assess the punishment being ineffectual, it follows that this part of the instruction could do no harm. *Henderson v. People*, 165 Ill. 607, 46 N. E. 711.

No error was committed by the court in refusing to give the special instructions asked for by appellant. As far as they stated the law correctly, they were completely covered by the instructions given by the court of its own motion.

After a careful examination of all the evidence in the cause, we are satisfied that it fully sustains the verdict.

The last two errors assigned relate to the form of judgment rendered by the court. The verdict was in these words: "We, the jury, find the defendant guilty of manslaughter, as charged in the second count of the indictment, and fix his punishment at imprisonment in the state's prison for a period of three (3) years. We further find that he is twenty-nine years of age. James Blisland, Foreman." The judgment of the court was in accordance with the indeterminate sentence law. The question of the constitutionality of this statute is no longer an open one in this state. *Miller v. State*, 149 Ind. 607, 49 N. E. 894; *Skelton v. State*, 149 Ind. 641, 49 N. E. 901; *Vancleave v. State*, 150 Ind. 273, 49 N. E. 1060; *Wilson v. State*, 150 Ind. 697, 49 N. E. 904. Finding no error in the record, the judgment is affirmed.

(152 Ind. 493)

ASPY et al. v. LEWIS et al. 1

(Supreme Court of Indiana. Jan. 31, 1899.)

WILL—CONSTRUCTION—SURVIVORSHIP.

Survivorship relates to death of testator, who, having but one child, devised his real estate to his wife so long as she remained a widow, and provided that "the above estate that is bequeathed to my wife shall be in full possession of my only daughter * * * at the death or marriage of my wife, provided she shall be living, and, if she is not living, at the death or marriage of my wife then the estate to go to the use of my brothers."

Appeal from circuit court, Bartholomew county; Francis T. Hord, Judge.

Action by Armstead Lewis and others

* Rehearing denied.

against Emma Aspy and others. Judgment for plaintiffs. Defendants appeal. Reversed.

W. W. Lambert and Herod & Herod, for appellants. Cooper & Cooper, for appellees.

HADLEY, J. The complaint shows that the will of Jonas Reed was duly admitted to probate in Bartholomew county on the 10th day of July, 1843; the part thereof material to a decision of this case being in the words following: "And I also direct that the real estate of which I die seised or possessed of be disposed of in the following manner, to wit: I bequeath to my beloved wife, Elizabeth, all my real estate so long as she remains a widow, namely: The east half of the southwest quarter of section 18, in town 10 north, of range 7 east, containing 80 acres, more or less, being in the Indianapolis district; together with all the rights, privileges and appurtenances thereto belonging. And I direct further that the above estate that is bequeathed to my wife shall be in the full possession of my only daughter, Maria Louisa, at the death or marriage of my wife: provided she shall be living; and, if she is not living, at the death or marriage of my wife then the estate to go to the use of my brothers and sisters, or their heirs." The testator left surviving him his wife, Elizabeth Reed, and his daughter, Maria Louisa Reed, and several brothers and sisters. His wife and widow, Elizabeth, never remarried, and died in 1897. His daughter, Maria Louisa, intermarried with John Aspy, Sr., had children, and died before her mother, Elizabeth Reed. This suit is for partition and to quiet title. Appellants' separate demurrers were overruled to the complaint, which presents the only question for decision. The appellants (defendants below) are the widower and children of Maria Louisa, deceased, and claim title through her by virtue of the will of Jonas Reed, on the theory that Maria Louisa took a fee simple; and appellees, who are the brothers and sisters, and their descendants, of Jonas Reed, claim title through the will by virtue of the fact that Maria Louisa, the daughter, died before her mother, and on the theory that Maria Louisa took only a contingent remainder under the will. The real question, therefore, raised by the assignments of error is, in whom is the title,—the heirs of Maria Louisa, the daughter, appellants herein, or the brothers and sisters and their heirs, appellees herein?

It has been said that the intent of the testator must be the polar star in the construction of a will. Among the rules of construction is that which springs from our human nature when engaged in the serious and solemn business of making a final disposition of property, and when natural affection for wife and children has the most impartial and sincerest sway. In such moments it is presumed that the testator will have a just and tender regard for those dependent ones who are the natural recipients of his bounty, and

whose future comfort and happiness have the promptings of his affection. Hence it is that no construction of a will is to be accepted that disinherits a child or direct descendant in favor of collateral kindred, unless the language of the will is such as to clearly indicate such intention. In a recent well-considered case the court said: "An heir cannot be disinherited unless the intention to disinherit be expressed, or is to be clearly and necessarily implied. When one construction of an ambiguous will leads to a disinheritance of the heir, and another favorable to the heir, the latter construction must be adopted." *Crew v. Dixon*, 129 Ind. 85, 27 N. E. 728. Another rule of construction is that the law looks with disfavor upon the postponement of estates, and the intent to postpone must be clear and manifest, and must not arise by mere inference or construction. "And the law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested." *Doe v. Considine*, 6 Wall. 458-475; *Bruce v. Bissell*, 119 Ind. 525-530, 22 N. E. 4; *Hellman v. Hellman*, 129 Ind. 59-64, 28 N. E. 310. "It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary." *Doe v. Considine*, supra; *Hellman v. Hellman*, supra; *Amos v. Amos*, 117 Ind. 19, 19 N. E. 539; *Id.*, 117 Ind. 37, 19 N. E. 543; *Harris v. Carpenter*, 109 Ind. 540, 10 N. E. 422. Another principle of construction, correlative to the one just stated, is that words of survivorship must be held to relate to the death of the testator, rather than to the death of the first taker, if the words of the will are capable of such construction. This doctrine is in aid of a vested, as against a contingent, remainder. In the case of *Harris v. Carpenter*, supra, the will, so far as it relates to the question here presented, is as follows: "Item 2. I further give and devise to her [widow], in lieu of her interest in my lands, the following part and parcel of the farm, * * * on which we now reside, bounded as follows, to wit: * * *; she, my said wife, to have the same after my death for and during the period of her natural life, and at her death the same shall be the property of and pass to my daughter, Laura Carpenter, in fee; but if she, said Laura, be not living, then to her heirs forever,"—concerning which the court said: "Construing the will before us in the light of the foregoing authorities, we have reached the conclusion that the survivorship provided for in the last clause of the second item had reference to the time of the death of the testator, and that upon his death Mrs. Carpenter became seised of a vested remainder in fee in the land devised by that item of the will." In *Hoover v. Hoover*, 116 Ind. 498, 19 N. E. 468, the will under consideration provided that certain lands should go to the widow of testator "for and during

her natural life, and at her death said real estate shall pass in fee simple, in equal portions, to my son, Andrew, and my daughter, Hattie; the east half of said farm to go to my son, Andrew, if he be living, and, if he be dead, then to his widow." Mitchell, J., speaking for the court, said: "Accepting the position as established that words of survivorship in a will, unless there is a manifest intent to the contrary, always relate to the death of the testator, and that, in the absence of a contrary intent, a will always speaks as from the date of the testator's death, there can be no doubt but that Andrew took an estate in fee simple, which vested immediately upon the death of his father." The same principle is reaffirmed and followed in the following cases: *Hellman v. Hellman*, supra; *Wright v. Charley*, 129 Ind. 257, 28 N. E. 706; *Borgner v. Brown*, 133 Ind. 391, 33 N. E. 92. In *Fowler v. Duhme*, 143 Ind. 248, 42 N. E. 623, the testator, Moses Fowler, devised the residuum of his real estate to his three children upon condition, namely: "(a) In the event of the death of any of my said children without lawful issue living at the time of the death of such child, then the share of such deceased child shall vest in such of my children as shall then be living." This court, in a very elaborate opinion, and upon review of many authorities of this and other states, concluded that the death intended related to one occurring in the lifetime of the testator, and not to one occurring after his death.

In this, and many other cases of its class, it is conceded that the application of the rule contended for is often repugnant to the simple import of the words used; but, keeping the intent of the testator as the central thought, the common import of words must yield to well-established rules of construction, if thereby the general intent of the testator, as gathered from the whole will, may be consistently maintained. Courts do not close their eyes to the fact that in the preparation of wills words are often carelessly used, and without an adequate sense of their legal effect, and without a mental grasp of all the conditions that may arise affecting the bequest; and when an inaccuracy is apparent, or even doubtful, courts, to prevent miscarriage of testamentary intent, generously interpose such rules of construction as time and experience have approved. Some of these salutary and pertinent rules are aptly and succinctly stated in *Moore v. Hare*, 144 Ind. 573, 43 N. E. 870, as follows: "It is settled law that words of survivorship in a will, unless there is a manifest intent to the contrary, always relate to the death of the testator; and, in the absence of contrary intent, a will always speaks as from the testator's death. The law not only favors the vesting of remainders, but it also presumes that words postponing the estate relate to the beginning of the enjoyment of the remainder, and not to the vesting of such an estate. In the ab-

sence of a clear manifestation of the intention of the testator to the contrary, an estate will be held to vest at the earliest possible period. The intent to postpone must be clear and manifest, and must not arise by mere inference or construction." The will of Stoughton Fletcher gave to his daughter, Mrs. Ritzinger, certain real estate for life, with provision that at her death said real estate "shall go to her children in fee. If any child of hers shall have died, leaving a child or children, then the portion of said real estate that would have gone to the parent shall go to such child or children." And, applying the rules above stated, the court adds: "There being no manifest intent to the contrary, it will be presumed that the clause providing that at the death of Mrs. Ritzinger the real estate devised shall go to her children in fee simple relates to the beginning of the enjoyment of the remainder, and not to the vesting of that estate, and that the clause, 'if any child of hers shall have died, leaving a child or children,' has reference to a death during the lifetime of the testator." The principles announced in this case have the uniform approval of many decisions of this state, and cannot now be open to controversy. Applying them to the will under consideration, we are irresistibly led to the conclusion that the survivorship of Maria Louisa related to the death of the testator, and not to the death of the life tenant. Can it be said that Jonas Reed intended by his last will to disinherit his grandchildren—the children of his only daughter—in favor of his brothers and sisters and their children? The testator devised all his real estate to his wife for life, "and I direct further that the above estate that is bequeathed to my wife shall be in the full possession of my only daughter, Maria Louisa, at the death or marriage of my wife." From the use of the term "full possession" at the death of her mother is implied that the testator meant that his daughter should have some sort of interest in the property before the death of her mother—some right short of full possession—until the happening of that event. There can arise no doubt but the testator intended to devise the whole estate in his farm to his wife and only daughter; to his wife, the use and enjoyment during her life, and, upon her death, the full possession—that is, the full enjoyment of the estate in fee—to his daughter. The proviso, paraphrased, reads thus: "Provided she [my daughter] shall be living, and, if she is not living at my death, at the death or marriage of my wife then the estate to go to my brothers and sisters, or their heirs." If it may be said from the words used that the time of survivorship of the daughter is doubtful, the well-established rules of construction require us to construe the words referring to the death of the daughter to relate to the death of the testator, and the clause, "at the death or marriage of my wife then the estate to go to the use of my brothers and sisters, or their

heirs," to relate to the vesting of the remainder in the brothers and sisters at the death of the testator, contingent upon the death of Maria Louisa prior to that time. Such a construction accords with legal principles. It is invoked by a common sense of natural justice. It responds to the sentiment of natural affection borne by a parent to his offspring. It secures the inheritance to direct descendants. It asserts a vested remainder as against an executory devise. It avoids the mischief of uncertainty in the estate. It secures the vesting of the estate at the earliest possible period. It follows that the judgment must be reversed for error in overruling appellants' demurrers to the complaint. Judgment reversed, and cause remanded, with instructions to sustain each of the separate demurrers of appellants to the complaint.

(152 Ind. 157)

TOWN OF WHITING v. DOOB.

(Supreme Court of Indiana. Feb. 2, 1899.)

ORDINANCES—STATUTES—REPEAL—COMPLAINT—DEMURRER.

1. Demurrer to the "complaint," filed after filing of an amended complaint, refers thereto.

2. Act April 10, 1885, authorizing town trustees to prohibit the incumbering of the sidewalks of the town, and riding thereon, by by-laws, ordinances, or regulations "not repugnant to the laws of the state," does not by implication repeal Rev. St. 1881, § 1640 (Burns' Rev. St. 1894, § 1709), providing that, when an act is made a public offense by statute, such act shall not be made punishable by an ordinance.

3. An ordinance making it unlawful for a person to ride a bicycle on a sidewalk does not, so far as it concerns sidewalks other than those of brick, stone, plank, or gravel, make punishable, in violation of Rev. St. 1881, § 1640 (Burns' Rev. St. 1894, § 1709), the same act made a public offense by section 3361 (section 4398), making it unlawful for one to ride on "brick, stone, plank, or gravel sidewalks."

4. A complaint for violating an ordinance against riding a bicycle on sidewalks, which is valid only so far as concerns sidewalks other than "brick, stone, plank, or gravel," should show that the sidewalk ridden on was not composed of one of those materials.

Appeal from circuit court, Lake county; John H. Gillett, Judge.

Action by the town of Whiting against Henry Doob for violating an ordinance. From a judgment for defendant, the town appeals. Affirmed.

John W. Wartman and John G. Erdlitz, for appellant. F. N. Gavitt, for appellee.

DOWLING, J. The appellee was charged with the violation of an ordinance of the town of Whiting, in riding a bicycle upon a sidewalk of that corporation. The action was commenced by filing a verified complaint before a justice of the peace of Lake county. On the day of the trial, and before any other proceedings were had, an amended complaint was filed. Appellee thereupon filed a demur-

rer, which referred to this pleading as the "complaint." The demurrer was sustained, and there was judgment for the appellee. An appeal to the Lake circuit court was taken by the town, and there, as is shown by the record, "the defendant renews his demurrer herein." The court sustained the demurrer, and, the appellant refusing to amend or plead further, judgment was rendered for appellee. The town of Whiting appealed to this court, and the error assigned is the ruling of the court on the demurrer. The objection is made by counsel for appellee that the demurrer was sustained, not to the complaint, but to the amended complaint, and, therefore, that no question is presented by the assignment of error. We think otherwise. The amended complaint superseded the complaint first filed, so that it ceased to be a part of the record. Kirkpatrick v. Holman, 25 Ind. 293. The pleading last filed by appellant became the complaint in the cause, and was the only pleading on file to which a demurrer could be addressed.

The ordinance under which this proceeding was taken reads thus: "Sec. 14. It shall be unlawful for any person to ride, propel, or use in any manner upon any sidewalk within the corporate limits of the town of Whiting, any bicycle, or safety-wheel, used for exercise, business, or pleasure. * * *" Section 54 of this ordinance declares the penalty for a violation of its provisions. The validity of the ordinance is assailed on the ground that riding or driving upon the sidewalks of any town in this state is made a public offense against the state, for which punishment is prescribed, and that such offense cannot be made punishable by an ordinance of any incorporated town or city. The sections of the statutes to be considered are these: "It shall be unlawful for any person to ride or drive upon the brick, stone, plank, or gravel sidewalk of any town or village, or upon any similar sidewalk for the use of foot passengers by the side of any public highway in this state, unless in the necessary act of crossing the same." Acts 1867, p. 194 (Burns' Rev. St. 1894, § 4398; Rev. St. 1881, § 3361). "Whenever any act is made a public offense against the state, by any statute, and the punishment prescribed therefor, such act shall not be made punishable by any ordinance of any incorporated city or town; and any ordinance to such effect shall be null and void, and all prosecutions for any such public offense as may be within the jurisdiction of the authorities of such incorporated cities or towns, by and before such authorities, shall be had under the state law only." Acts 1881, p. 114 (Rev. St. 1881, § 1640; Burns' Rev. St. 1894, § 1709). Counsel for appellant contends that an act authorizing boards of town trustees to prohibit the incumbering of the sidewalks of such towns, and riding or driving thereon, and empowering such boards to carry out the provisions of the act or by-laws, ordinances,

and regulations approved April 10, 1885, repeals by implication so much of the act of 1881, *supra*, as prohibits cities and towns from enforcing ordinances against acts which are punishable as offenses against the state. We cannot discover in the act of 1885 any indication that it was intended to repeal the earlier statute. The two acts are not repugnant. The boards of towns may, by ordinance, by-law, or other mode of regulation, prohibit riding or driving on the sidewalks; but by the terms of this very act they must do so by by-laws, ordinances, or regulations not repugnant to the laws of the state. The object of the statute of 1881 was to prevent a double prosecution for a single act, by withholding from cities and towns the power to impose fines or penalties in any case where the offense was punishable under the criminal laws of the state. There is no reason to suppose that the legislature by the act of 1885 intended to abolish this salutary restriction. But the statute making it a misdemeanor to ride or drive upon a brick, stone, plank, or gravel sidewalk being a penal one, it is to be strictly construed, and it could not be held to apply to the act of riding or driving upon sidewalks constructed of other materials than brick, stone, plank, or gravel. In an indictment under this law, it would be necessary to state particularly the kind of sidewalk—whether brick, stone, plank, or gravel—over which the person charged rode or drove. Riding or driving over sidewalks other than such as are composed of brick, stone, plank, or gravel not being made an offense against the state, and punishable as such, the authorities of cities and towns may lawfully prohibit riding or driving upon such sidewalks; and if, in an action under a general ordinance of a city or town, the complaint showed that the sidewalk over which the defendant rode or drove was not of brick, stone, plank, or gravel, but was constructed of other material, such ordinance would be valid as to such other kinds of sidewalks, and a prosecution might be maintained under the same. In this case the town ordinance is general in its terms. The complaint fails to show that the sidewalk therein mentioned is not of brick, stone, plank, or gravel, and that it is composed of some other material. Under such a complaint, if upheld, the penalty might be recovered against appellee even if the sidewalk was of brick, stone, plank, or gravel. That a bicycle is a vehicle, and that riding a bicycle upon the brick, stone, plank, or gravel sidewalks of a town or city is a public offense against the state, punishable under the act of 1881, *supra*, is settled by the decisions of this court. *City of Indianapolis v. Higgins*, 141 Ind. 1, 40 N. E. 671; *Bybee v. State*, 94 Ind. 443.

As the complaint fails to show that the act charged against appellee was such as the town had authority to prohibit and punish, the demurrer to it was properly sustained. Judgment affirmed.

(21 Ind. App. 546)

STATE v. YOUNG.

(Appellate Court of Indiana. Feb. 3, 1899.)

CRIMINAL TRESPASS — AFFIDAVIT AND INFORMATION — DESCRIPTION OF LAND.

1. The affidavit and information in a prosecution under Horner's Rev. St. 1897, § 1941 (Burns' Rev. St. 1894, § 2018), for entering on land of another after being forbidden by the owner to do so, need not specifically describe the land, but only charge the offense as having been committed in the county and state, and designate the land as that of a person named other than defendant.

2. An affidavit and information charging that defendant, being about to enter on the land of C., and being forbidden by him to do so, did thereafter enter on the land of C., does not sufficiently charge that the land on which he entered was the land on which he was forbidden to enter.

Appeal from circuit court, Adams county; D. D. Heller, Judge.

Charles Young was prosecuted for entering on land. The affidavit and information were quashed, and the state appeals. Affirmed.

David E. Smith, for the State.

BLACK, C. J. A prosecution was instituted against the appellee by affidavit and information under the statutory provision that "whoever, being about to enter unlawfully upon the enclosed or unenclosed land of another shall be forbidden so to do by the owner or occupant, or his agent or servant, * * * and shall thereafter enter upon such land, shall be guilty of a misdemeanor," etc. Horner's Rev. St. 1897, § 1941 (Burns' Rev. St. 1894, § 2018). Upon the appellee's motion the court quashed the affidavit and information. We have not received a brief on behalf of the appellee, but in the brief for the state we are told that it was objected below that in the affidavit and information the land in question was not particularly described. It is settled that in such a case the land need not be specifically described. Besides charging the offense as having been committed in the county and state, the land need not be more particularly described than by designating it as the land of a person named other than the defendant. Compare *State v. French*, 120 Ind. 229, 22 N. E. 108, 735, with *Winlock v. State*, 121 Ind. 531, 23 N. E. 514. And see *State v. Smith*, 7 Ind. App. 166, 34 N. E. 127, and *State v. Murphy*, 7 Ind. App. 44, 34 N. E. 248. But, construing the language of the affidavit and information in its ordinary sense, and applying the rule of pleading that the offense must be charged with reasonable certainty, we must hold that the court did not err, because it was not charged that the land on which the appellee entered was the land upon which he was forbidden to enter; the charge being that the appellee on, etc., at and in the county of Adams, and state of Indiana, being then and there about to enter unlawfully upon the land of David D. Coffee, and being then and there forbidden

to do so by him, the said David D. Coffee, "he, the said Charles Young, did thereafter, on said date aforesaid, enter unlawfully upon the land of said David D. Coffee." The judgment is affirmed.

(22 Ind. App. 610)

NIEHAUS v. COOPER.¹

(Appellate Court of Indiana. Feb. 3, 1899.)

ADMINISTRATORS—ACTIONS—COMPLAINT—WIFE AS WITNESS—BOARD.

1. The complaint of the administrator of a life tenant under a will to recover rents and profits belonging to her, but converted to his own use by one named in the will as executor, but who did not qualify as such, need not allege that the estate of testator had been settled and his debts paid.

2. The administrator is the one to sue for property of intestate converted by another to his own use.

3. Defendant being a party and incompetent to testify, his wife is, by provision of Horner's Rev. St. 1897, § 501, also incompetent to testify for him.

4. One cannot recover against his mother's estate for her board, she having resided as a member of his family, without any agreement or expectation that he was to be compensated by her.

Appeal from superior court, Vanderburgh county; John H. Foster, Judge.

Action by Elder Cooper, administrator, against William C. Niehaus. Judgment for plaintiff. Defendant appeals. Affirmed.

S. R. Hornbrook and W. M. Wheeler, for appellant. Posey & Chappell, for appellee.

WILEY, J. Appellee, as the administrator of the estate of Catherine Niehaus, deceased, was plaintiff below. The complaint was in four paragraphs. The first charged appellant with conversion of money and property belonging to the decedent, to his own use; the second paragraph proceeds upon the theory to recover for money and property which came into appellant's possession as the agent of decedent; the third paragraph seeks to charge appellant as executor de son tort; and the fourth is upon a promissory note.

Briefly stated, the first paragraph alleges that one John Niehaus died, testate, December 15, 1880; that at the time of his death he was the owner of both real and personal property; that, by his will, he devised to his wife, Catherine Niehaus, all of his property during her life, and at her death it was to go in equal portions to his children and grandchildren; that appellant was one of the children of said John Niehaus; that said will was duly admitted to probate; that said Catherine elected to take under the will; that, by said will, appellant was nominated as executor, but never qualified as such; that, at the death of the said John, said Catherine was the owner of and entitled to the possession of all the property left to her by said will; that, immediately after the death of said John, said appellant took charge of all of said property, used, managed, and controlled the same, all without any right or authority from said

Catherine; that he continued to use, manage, rent, and control said property; that all of said personal property, and the rents and profits of the real estate, were wrongfully and unlawfully appropriated and converted to his own use and benefit, and without the knowledge or consent of said Catherine; that the said Catherine died, intestate, April 28, 1895; that appellee was duly appointed as administrator of her estate, and qualified as such; that no part of the property so converted by appellant has been returned either to said Catherine or her administrator; and that a demand has been made upon him for the return thereof. Accompanying this paragraph is a bill of particulars, setting out the property and money charged to have been converted. Appellant demurred to this paragraph of complaint, which was overruled, and such ruling is one of the errors assigned. Appellant says that this paragraph is not good, because it does not aver that the estate of the said John Niehaus had been settled, and his debts paid. In support of this contention, we are cited to *Crist v. Crist*, 1 Ind. 570, and *Leach v. Prebster*, 35 Ind. 415. We have examined these cases, but they lend no aid to appellant's position. Appellant has not pointed out any infirmity to the paragraph we are now considering, and we are unable to see any. There was no error in overruling the demurrer.

Appellant's answer was in six paragraphs. The first, second, and third pleaded the statute of limitations to the first, second, and third paragraphs of the complaint; the fourth was a general denial; the fifth, payment; and the sixth, set-off. To the fourth paragraph of complaint, appellee filed an answer of non est factum. To these affirmative answers, appellee replied by general denial. As no question is raised as to the second, third, and fourth paragraphs of complaint, we do not deem it necessary to refer to them in detail. The cause was tried by the court, and, at request of appellant, the court made a special finding of facts, and stated its conclusions of law thereon. In so far as the facts found are essential to the decision of the case, they are as follows: That appellee is the administrator of the estate of Catherine Niehaus; that decedent died, intestate, April 28, 1895; that said Catherine was the wife and widow of John Niehaus, who died, testate, December 15, 1880; that, at the time of his death, the said John was the owner of certain property, real and personal; that he left, surviving him, the said Catherine, three sons, one daughter, and two grandchildren, who were children of one of said John's sons, who died before him; that, by his will, he devised to said Catherine a life estate in all his property, both real and personal, with power to sell and dispose of the personal property, and the remainder, in five portions, to his surviving children and grandchildren; that, by said will, appellant was nominated executor, but did not qualify; that said will was probated,

¹ Rehearing denied.

and thereafter remained in full force; that said Catherine elected to take under the will; that, upon the death of the said John, appellant took possession and charge of the estate, both real and personal, for the said Catherine, and managed and controlled the same for her until March 1, 1887; that he collected divers sums of money, and expended money in her behalf; that on said 1st day of March, 1887, the said John and Catherine had a full and complete settlement of all matters between them; that there was found due her from him \$120, which he then paid her; that on or about March 16, 1887, the said Catherine leased to said John certain real estate for three years, for the agreed rental of \$25 per year; that, during said lease, said John agreed to pay all taxes, etc., on said real estate, and keep the dwelling house in repair; that, on said day, appellant went into possession of the real estate so leased, and remained in possession until the death of said Catherine; that in March, 1887, the said Catherine entered into an agreement with the remaindermen that they should go into the possession of their several tracts of real estate, and that they were to pay to her \$25 each per annum, pay insurance, taxes, etc.; that subsequent to March, 1887, the said Catherine lived with appellant and a Mrs. Kirkpatrick, her daughter, in their respective homes; that from November 15, 1891, up to the date of her death, she resided with appellant, as a member of his family, and upon the real estate leased to him; that on the 17th day of August, 1885, appellant obtained possession of \$300, belonging to the said Catherine; that on July 20, 1889, he obtained an additional sum of \$300, belonging to her, and deposited the same, being \$600, in a bank in the name of "C. Niehaus," under an agreement with the bank that said appellant should have exclusive control of said money; that on August 6, 1892, appellant assumed exclusive control of said sum of money, to the exclusion of said Catherine, and converted the same to his own use; that on September 1, 1890, appellant obtained and had possession of \$50 in cash, belonging to said Catherine, which had been sent to her as rent, and converted the same to his own use; that in the years 1891, 1892, 1893, and 1894, appellant also came into the possession of the sum of \$200, which had been paid to him for the said Catherine, which he converted to his own use; that for funeral expenses and medical attention, and as a donation to a church, appellant paid out, on account of the said Catherine, the sum of \$88, and that such payments were made in good faith, and for the benefit of her; that for 5 years immediately preceding her death the said Catherine was infirm in body and mind; that for 2½ years she required almost constant attention, and was unable to perform any services for herself; that appellant and his family gave her all needed attention while she resided with him, and that such services were worth \$600; that while she was living with appellant, as

a member of his family, he being her son, there was no agreement or expectation that she was to pay for any board, care, or attention furnished her by appellant or his family; that there was no administration of the estate of the said John Niehaus, appellant failing to qualify as executor; that the evidence does not show that the said John left any indebtedness or claims against his estate; that appellant signed the note sued on in the fourth paragraph of complaint, but that the same was never delivered to the said Catherine, and she had no knowledge of it; that said note was made under an agreement between Mrs. Kirkpatrick, his sister, and herself; that said note was signed as an evidence of a debt appellant then owed the said Catherine, for the amount of said note; that the said Mrs. Kirkpatrick had no authority to act for the said Catherine in said matter; that, before the action was commenced, a demand was made upon appellant to pay over to appellee the amount he owed the said estate; that all debts or claims against the estate of said Catherine have been paid; and that, by the unlawful conversion of said sums of money, appellee has been damaged in the sum of \$863.80. Upon the foregoing facts, the court stated six conclusions of law, but they may all be properly considered under the sixth, which is: "That the plaintiff ought to recover of and from the defendant the sum of \$863.80 and his costs," etc. The appellant excepted to each conclusion of law, and moved the court for judgment on the special findings of fact. This motion the court overruled. Appellant also moved for a new trial, and this motion was overruled. The assignments of error other than above referred to challenge each conclusion of law, the overruling of the motion for a new trial, and in overruling appellant's motion for judgment.

Appellant insists that, as to some of the facts, the evidence does not warrant such findings. After a close examination of the record, we find that there is evidence upon which the court could have found every fact stated. To put it differently, there is evidence to support every fact found by the court. This being true, we cannot disturb the judgment on the evidence. The real question for us to determine is: 'Did appellant convert to his own use the money of his mother? If he did so unlawfully convert it, the administrator of her estate is the person entitled to recover it from him. He is her representative. The facts found by the court show beyond any question of doubt that he did convert to his own use several sums of money, which said sums, after deducting all credits to which he was entitled, together with the interest thereon, aggregated the amount the court found was due from him, and for which judgment was rendered. In regard to the \$600, which was deposited in bank in the name of "C. Niehaus," Mrs. Kirkpatrick testified that in 1890 her mother had a certificate of deposit for \$600; that appel-

lant took it to get the interest on it; that her mother afterwards gave her the certificate to keep, and directed her not to give it to appellant; that subsequently he snatched it from her, and afterwards told her that he had gotten the money, and spent it. The cashier of the bank testified that the bank gave a certificate of deposit for \$600 in the name of "C. Niehaus," and that appellant told him that it was his mother's money. But we need not say more about the evidence, for, as we have seen, the findings are fully supported by the evidence. Under the facts found, the court very properly stated its conclusions of law, and rendered judgment against appellant.

In his motion for a new trial, appellant assigned as one of the reasons therefor that the court erred in excluding certain evidence offered. Appellant had his wife called as a witness, and offered to prove by her that in 1882 she gave him \$300 in money, and that he deposited it for her in a bank, etc. Upon objection, the court refused to permit her to testify. Such refusal was not error. It is not contended that appellant was a competent witness, and by the plain provision of section 501, Horner's Rev. St. 1897, he being incompetent, she was likewise incompetent. The provision of the statute is that "when the husband or wife is a party, and not a competent witness in his or her own behalf, the other shall also be excluded." Here the husband (appellant) was a party, and was incompetent, under sections 498 and 499, *supra*. So, it follows that she was incompetent. The courts have frequently construed these statutes, and of the many cases we cite the following: *Lynam v. Buckner*, 60 Ind. 402; *Creighton v. Hoppls*, 99 Ind. 309; *Scherer v. Ingerman*, 110 Ind. 428, 11 N. E. 8, and 12 N. E. 304.

Appellant urges that, as the court found that the services rendered by him and his family in boarding and caring for his mother were worth \$600, he is entitled to a credit for that sum. We do not so understand the law. It is found that the decedent resided with appellant as a member of his family, and that there was no agreement or expectation that he was to be compensated by her. Under these facts, there is no liability for such services, and the question is so firmly settled in this state that further comment is unnecessary. See *Story v. Story*, 1 Ind. App. 284, 27 N. E. 573; *McCormick v. McCormick*, 1 Ind. App. 594, 28 N. E. 122; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. 808, and 34 N. E. 611; *Fuller v. Fuller's Estate* (Ind. App.) 51 N. E. 373.

In his motion for a new trial, appellant assigned as one of the causes that he was taken by surprise as to certain matters therein specified. This reason, in his motion for a new trial, he supported by affidavits. After carefully considering the matters thus presented, we are clearly of the opinion that the trial court did not abuse its discretion in over-

ruling the motion for that cause. Looking at the entire record, it seems to us that a correct conclusion was reached, and that there is no error in the record for which a reversal should be ordered. Judgment affirmed.

(21 Ind. App. 537)

TOWN OF THORNTOWN v. FUGATE et al.
(Appellate Court of Indiana. Feb. 2, 1896.)
SURFACE WATER—DIVERSION—JUDICIAL NOTICE—
ASSIGNMENT OF ERROR—ACTS OF TOWN
—EVIDENCE.

1. Action will lie against a municipal corporation for collecting surface water in a channel, and pouring it on the land of another.

2. The court will take judicial notice that defendant "Town of Thorntown" is an incorporated town; so that, under Burns' Rev. St. 1894, § 377 (Rev. St. 1881, § 374), it is unnecessary to allege this in the complaint.

3. The first paragraph of the complaint being sufficient, sufficiency of the second paragraph cannot be questioned under the assignment of error that the complaint does not state facts sufficient to constitute a cause of action.

4. Evidence that the work on a drain which diverted surface water onto plaintiff's land was done under the supervision of the town marshal, and was accepted and paid for by the town, is sufficient to show that it was done by the order and under the authority of the town.

Appeal from circuit court, Boone county; Barton S. Higgins, Judge.

Action by William P. Fugate and others against the town of Thorntown. Judgment for plaintiffs. Defendant appeals. Affirmed.

Dutch & Dutch and F. M. Goldesbery, for appellant. Ira M. Sharp, for appellees.

HENLEY, J. Appellees were the plaintiffs below, and commenced this action to recover for injuries to their real estate alleged to have been caused by appellant in collecting together surface water in a ditch or channel, and pouring it upon appellees' property. The complaint was in two paragraphs. Appellant answered by the general denial to both paragraphs of complaint. There was a trial, resulting in a verdict or appellees. Appellant's motion for a new trial was overruled, and judgment rendered in favor of appellees. The errors assigned are that the complaint does not state facts sufficient to constitute a cause of action, and that the lower court erred in overruling the motion for a new trial. The first paragraph of complaint in this cause alleges that appellees are the owners of certain described real estate; that, quoting the language of the complaint, "the plaintiffs are, and for the past twenty years have been, the owners in fee simple, and in possession of the following described real estate, in the town of Thorntown, Boone county, Indiana, to wit, lots 4, 5, 6, 7, 8, 9, in Cloud and Fisher addition, in the town of Thorntown; that Bow street, in said town, runs east and west; that plaintiffs' said lots are situated on the north side of said street; that for a long distance south of plaintiffs' said lots, to wit, a distance of 300 feet, the natural slope of the land is towards the

northeast; that in the southwest part of the town of Thorntown, and about one-fourth of a mile distant from the plaintiffs' lots, there is a natural ridge or elevation, about six feet in height, extending in an irregular direction from southwest to northeast; that on the southeast side of said elevation, for a great number of years prior to 1896, there was, and still is, a depression in the surface of the earth, in which was collected a large body of surface water; that in 1896, about the month of July, the said defendant wrongfully and unlawfully constructed a certain ditch or drain extending from said pond through said natural elevation in a westerly direction, and thence north, across said Bow street, a distance of about a mile, to the south line of plaintiffs' lots; that said defendant constructed, and caused to be constructed, certain other lateral ditches or drains, which were connected by said defendant with said main ditch; that said lateral drains collected all of the surface water off a large area of land, to wit, about 86 acres, and caused the same, together with the water drained by said ditch from said pond, in one body to be cast and drained on plaintiffs' lots; that by reason thereof the soil has been washed away from plaintiffs' lots, and they have been to great expense in hauling earth to fill up and repair the washes occasioned by said ditch, and the value of plaintiffs' lots has been thereby greatly decreased; and the plaintiffs say, by reason of the facts above alleged, they have been, and are, damaged in the sum of one hundred (\$100) dollars."

We think the complaint good. It charges appellant with collecting surface water, and pouring it upon appellees' property, thereby damaging it. The rule that an action will lie against a municipal corporation for collecting surface water in a channel, and pouring it upon the land of another, is too well established to warrant a discussion of the subject. *Wels v. City of Madison*, 75 Ind. 241; *Davis v. City of Crawfordsville*, 119 Ind. 1, 21 N. E. 449; *City of New Albany v. Ray*, 3 Ind. App. 321, 29 N. E. 611; *Ashley v. City of Port Huron*, 35 Mich. 206; *Gillison v. City of Charleston*, 16 W. Va. 282; *City of Aurora v. Gillett*, 56 Ill. 132; *Ross v. City of Clinton*, 46 Iowa, 606. This court will take judicial notice of the fact that appellant is an incorporated town, and it is provided by section 377, *Burns' Rev. St. 1894* (section 374, *Rev. St. 1881*), that "neither presumptions of law nor matters of which judicial notice is taken need be stated in a pleading."

The first paragraph of complaint being sufficient, the sufficiency of the second paragraph cannot be questioned under appellant's assignment of error. *Railway Co. v. Dally*, 18 Ind. App. 308, 47 N. E. 1078; *Bank v. Cooper*, 19 Ind. App. 13, 48 N. E. 236; *Trammel v. Chipman*, 74 Ind. 474.

The motion for a new trial is based upon seven causes. The seventh reason is not dis-

cussed, and is therefore waived. Reasons 1 to 6, inclusive, relate to the sufficiency of the evidence, and are discussed together. We think the evidence fairly sustains the material allegations of appellees' complaint. There is evidence to the effect that appellant, by its work in constructing and deepening a certain drain, caused large quantities of surface water to be collected and discharged upon the land described in the complaint; that said land is the property of appellees; that the water discharged upon appellees' premises is largely in excess of that which would naturally flow upon and over the same; and that appellees have suffered damage thereby. It is contended by counsel for appellant that it is not shown by the evidence in any legal or proper manner that appellant did or caused to be done the work which appellees claim resulted in turning the water upon their property. It is shown that the work was done under the supervision of the town marshal of the town of Thorntown (appellant), and was accepted and paid for by appellant. We believe this sufficient to show that the work was done by the order and under the authority of appellant. It is said in the case of *City of New Albany v. Ray*, supra: "By express statutory provision, municipal corporations have exclusive control of streets and alleys, and the establishment and maintenance of drains and sewers." Further along in the same opinion it is said: "The power of a city to improve streets or construct drains does not depend upon the formal adoption by the common council of any plan or system for such improvement or drainage." Under the evidence, we think the trial court did not err in rendering judgment for appellees. Judgment affirmed.

(22 Ind. App. 632)

KURIGER v. JOEST et al.¹

(Appellate Court of Indiana. Jan. 27, 1899.)

ESTOPPEL—FORGERY.

Defendant is estopped from claiming that his signature as surety on a note given plaintiff was a forgery, where, before the note was due, and while the maker was solvent, plaintiff, not knowing of the forgery, took it to defendant, to see if he would buy it, and he, after examining it, though knowing his signature was not genuine, made no claim of forgery, but arranged for a subsequent meeting to negotiate for taking up or purchasing it, and plaintiff by reason thereof delayed action on the note till after the death and insolvency of the maker.

Appeal from circuit court, Vanderburg county; C. A. De Bruler, Judge.

Action by Conrad Kuriger against Nicholas Joest and others. Judgment for defendants. Plaintiff appeals. Reversed.

P. W. Frey and O. E. Woods, for appellant. James G. Owen, for appellees.

WILEY, J. The record was filed in this court January 7, 1897, and appellees' brief was not filed till November 17, 1898. The

¹Rehearing denied, 54 N. E. 414.

appellant was plaintiff below, and the only question presented by the record is the sufficiency of the complaint. The complaint was originally in four paragraphs, but the first was withdrawn. The second, third, and fourth paragraphs of complaint were challenged by a demurrer, which was sustained. Appellant refusing to plead further, judgment was rendered against him for costs. The ruling on the demurrer is assigned as error.

Counsel for appellant, in their brief, have so fully, fairly, and specifically stated the facts pleaded, that we adopt their language. They say: "It is alleged substantially in each paragraph: That the appellant, Conrad Kuriger, loaned to one Nicholas Weber the sum of five hundred dollars (\$500), and took from said Weber for said loan a note signed by Nicholas Weber, and purporting to be signed by Nicholas Joest, appellee, as surety for Nicholas Weber. That, before said note became due, appellant, Kuriger, believing the signatures thereon to be genuine, presented said note to appellee Joest, requesting said appellee to buy the same; he, the appellant, desiring to go to Germany, to be gone some time, and wishing to dispose of it before leaving. That said Joest examined said note, and what purported to be his signature thereon, and told appellant to return in two days, and, if he (the appellee) could raise the money, he would buy the same. That, on the day appointed, appellant went to appellee Joest, and was told by him that he did not have \$500 of loose money. Appellee further told appellant to go to a certain political meeting on an evening a few days from that time; that Nicholas Weber, maker of said note, would be there, and he would then ascertain if said note could not be taken up. That, when appellant went to said meeting, said Weber was not there. That thereafter he had another conversation with said appellee Joest, wherein said Joest told appellant that he (Joest) would try and dispose of the note before appellant left for Germany. That at none of these meetings and at no time did appellee inform said appellant, or intimate to him, that the signature purporting to be that of the appellee was not what it purported to be, but by his acts and conduct gave the appellant to understand that the note and the signature thereon were valid. That, a few days after the last conversation with appellee, appellant went to Germany, was absent from the 14th day of August, 1894, until the 12th day of October, 1894. That while appellant was absent from this country the said Nicholas Weber, maker of said note, died, and that his estate was insolvent. Appellant also charges in his complaint that if the appellee Joest had informed him that the note was not in all respects valid and all right, he, the said appellant, would not have gone to Germany, but would have remained at home, and secured himself against any loss on account of said loan to said Weber; that said appel-

lant believed the note and signature was [were] true and genuine, and relied upon the same, because the said appellee had made no intimation whatever that said note was not in all respects right and correct, and that appellant had no knowledge or information that there was or would be any pretense on the part of said Joest that said note was not genuine, until after the return of said appellant from Germany, and after the death of Weber. * * * The further allegation is made that appellee Nicholas Joest knew appellant held the note of Nicholas Weber, and that the name of Nicholas Joest was attached as surety, and did not make known to the appellant that said note was not genuine, although said appellee had ample opportunity so to do; that said appellee well knew whether said note was genuine or not, and purposely concealed the facts from appellant. * * * The third paragraph of the plaintiff's amended complaint is substantially the same as the second, save and except that the appellant makes the additional allegation that, if appellee had disclosed to the plaintiff below that the signature of the said Nicholas Joest was a forgery, the plaintiff would and could have caused the apprehension of the said Nicholas Weber, maker of the note, as a forger, and upon the crime of forgery, or for having obtained money under false pretenses, and at the same time, could and would have brought suit against Nicholas Weber, the maker of said note, for the sum represented by the note, for money had and received by said Nicholas Weber. * * * The fourth paragraph of the plaintiff's amended complaint is substantially the same as the second and third, save and except that the additional allegation is made that, if the forgery of the name of Nicholas Joest had been disclosed to the plaintiff below, he could and would have brought suit against the said Nicholas Weber, that the said Nicholas Weber was at that time solvent, and that said plaintiff, the appellant here, could have secured and collected his debt by process of law." The prayer of the complaint is that appellee ought not to be permitted to make the pretended claim that the note sued on is not genuine, and that he be estopped from so claiming. A copy of the note accompanies the complaint as an exhibit. The note is dated November 1, 1893, due in one year, and is for \$500.

From the statement of the facts pleaded, it appears that each paragraph seeks to invoke the doctrine of estoppel in pais, and this is the sole question discussed. Upon the question as to what is ordinarily required to constitute an estoppel by conduct, opposing counsel agree that there must be (1) a representation or concealment of material facts; (2) the representation must have been made with a knowledge of the facts; (3) the party to whom the representation was made must have been ignorant of the truth of the matter; (4) the representation must have been made

with the intention that the other party should act upon it; (5) the other party must have been induced thereby to act. See *Roberts v. Abbott*, 127 Ind. 83, 26 N. E. 565; *Bigelow, Estop.* (Ed. 1886) p. 552. We must take the facts as pleaded, apply them to the rules just stated, and determine whether they constitute an estoppel in pais. (1) There must be a representation or concealment of a material fact. The allegations in each paragraph of the complaint are very full and specific that the appellee did conceal from appellant the fact that his name was forged to the note in suit. It is averred that the note was exhibited to appellee; that he examined it, and made an engagement with appellant to meet him at a subsequent time to negotiate further with him in regard to taking up or purchasing the note. Appellee must have known that he did not sign the note, and that as to him it was forged, and by his demurrer he admits the facts charged. As to whether or not he signed the note was a material fact, and what he said about the note, and his conduct in relation thereto, were calculated to, and did, convey to the mind of the appellant that his signature was genuine; and, by his failing to inform appellant that the note was a forgery as to him, he thereby concealed from him a material fact. (2) It is also shown by specific averment that appellee had full knowledge that the signature on the note purporting to be his was not his genuine signature, but that it was forged, and hence the concealment was made with knowledge of that fact. (3) It is further shown that the appellant, from whom appellee concealed the fact that as to him the note was a forgery, was ignorant of such fact. He believed in good faith, and had good reason to believe, that the note was genuine. (4) As appellee thus concealed from appellant a material fact, it was necessary to charge that his conduct and silence were intended to operate as a delay on the part of appellant, and the allegations of each paragraph of the complaint are amply sufficient to show that it did so operate. (5) It also clearly appears from the allegations of each paragraph that appellant was by the silence and conduct of appellee induced to act, for it is shown that he believed that the note was genuine, and left his home, and went to Europe, resting in that belief. Thus, it appears that all the elements required to constitute an estoppel in pais are present.

Appellee insists that the case of *Henry v. Heeb*, 114 Ind. 275, 16 N. E. 606, is an authority in this case, and must control. We have examined that case with much care, and find that the decision rested upon facts materially different from those in the case at bar, and therefore is clearly distinguishable from it. In that case it was sought to invoke the doctrine of ratification of a forged signature, and the court said "that the distinction made in many well-considered cases seems to be this: Where the act of signing constitutes the crime of

forgery, while the person whose name has been forged may be estopped by his admissions, upon which others may have changed their relations, from pleading the truth of the matter to their detriment, the act from which the crime springs cannot, upon considerations of public policy, be ratified without a new consideration to support it." And, continuing, it was further said: "In the case of a known or conceded forgery, we are unable to discover any principle upon which a subsequent promise by the person whose name was forged can be held binding, in absence of an estoppel in pais, or without a new consideration for the promise." Appellant does not contend that the facts pleaded show a ratification, but that what appellee did and said about the note estops him from now pleading non est factum. We cannot understand why one who sees and knows that his name has been forged to a note may not by his conduct be estopped from pleading forgery. It is settled by many well-considered cases that while a person whose name has been forged may be estopped by his admissions, upon which others may have changed their relations, from pleading the truth of the matter to their detriment, the act from which the crime springs cannot, upon considerations of public policy, be ratified without a new consideration to support it. *Henry v. Heeb*, 114 Ind. 275, 16 N. E. 606; *Lewis v. Hodapp*, 14 Ind. App. 112, 42 N. E. 649; *Shisler v. Vandike*, 92 Pa. St. 447; *McHugh v. Schuykill Co.*, 67 Pa. St. 391; *Workman v. Wright*, 33 Ohio St. 405; *Owsley v. Phillips*, 78 Ky. 517; 2 Rand. Com. Paper, § 629. These cases firmly establish the doctrine that a person, by admissions, may be estopped from pleading forgery; and, by analogy, it is plain that he may also be estopped by conduct, where such conduct leads another to act to his detriment. Appellant undoubtedly, under the facts, suffered a change in his relations, by refraining from steps which otherwise might, and probably would, have secured him in his rights as against the maker of the note. As to what is required to constitute a change of relations, may be easily determined from authorities. Thus, in *Purviance v. Jones*, 120 Ind. 162, 21 N. E. 1099, it was held that where one is induced to forego his purpose to secure his money before the statute of limitations has barred his claim, by the assurance of the debtor that a note has been signed and delivered to a bank for his benefit, he may, upon the death of the debtor with the note still in his possession, be entitled to compel a delivery, or require it to be treated in an equitable suit as having been delivered as represented. In discussing the question, *Mitchell, J.*, on page 165, 120 Ind., and page 1100, 21 N. E., said: "It may be that the evidence was such as to have justified a finding that the note had been delivered to the bank for the plaintiff's benefit, but the fact was not so found. The intestate, having received the plaintiff's money, may have in-

duced him to forego any effort to enforce collection, upon the assurance that a note had been left with the bank for the amount of the debt for his benefit. If the plaintiff rested upon that assurance until the statute of limitations had barred the debt, the estate may now be estopped to say that the note was not delivered, as against one who relied upon the statement, and who would now suffer actual pecuniary loss if the note actually signed was not treated as having been delivered according to the representations made and relied upon." In *Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, appellees were depositors in appellant bank. They sent their passbook to be written up and balanced, and, when this was done, it was returned to them, with the debits and credits and their paid and canceled checks. Some of the checks, which had been duly signed, had been raised by a clerk in their employ before presented for payment. Appellees did not make any examination of the paid checks and the passbook to see if any error had been made, and an action was brought against the bank to recover the balance in favor of appellees, predicated upon the amount of the checks as originally issued. The court, by Mr. Justice Harlan, said: "Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear by evidence that the benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the check paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank. An inquiry as to damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgeries might be proper, if this were an action by it to recover damages for a violation of his duty. But it is a suit by the depositor, in effect, to falsify a stated account, to the injury of the bank, whose defense is that the depositor has by his conduct ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectually, exercising it." The supreme court of Texas has stated the rule as follows: "It has been held by this court

that, when one party has been prevented or induced by the conduct and representations of another from taking prompt action for the collection of his debt, this is such a change in his position, for the worse, as to meet the requirement of the law in order to create an estoppel;" citing, as authority, *Schwarz v. Bank*, 67 Tex. 217, 2 S.W. 865. 2 Herm. Estop. p. 906, says: "It is not necessary that a party should act affirmatively upon a declaration, to create an estoppel. If he had acted, not in reliance upon it, but has means in his power to retrieve his position, and, relying upon the statement in consequence of it, he refrained from using those means, the estoppel will be enforced for his benefit." In *Bank v. Keene*, 53 Me. 103, arrest is named as one of the means of obtaining security which the plaintiff had not availed himself of, by the conduct and declaration of his adversary. In *Knights v. Wiffen*, 5 Q. B. 660, it was held that it need not appear that any benefit would result from the attempt to secure payment, but that the injured party had the right to make the attempt, and, losing the exercise of the right by his reliance upon the declaration, the declarant was estopped. In *Continental Nat. Bank v. National Bank of the Commonwealth*, 50 N. Y. 585, the plaintiff held a note purporting to have been forged. Upon hearing that the same was forged, plaintiff asked defendant about it, and, after looking at the note, admitted the signature to be genuine. The plaintiff relied upon such statement, and refrained from taking any steps against the person who passed the forged instrument, to secure payment from him. The trial court instructed the jury that if the plaintiff relied upon the defendant's admission that the note was genuine, and was thereby induced to refrain from obtaining security by the arrest of the one passing the note, or by attachment of his property, and thereby sustained an injury, the defendant would be estopped from denying his signature. This instruction was held to correctly state the law, and, in the course of the opinion, *Folger, J.*, said: "These cases appear to us to lay down a sound rule. It must be that the conduct of men, which may be influenced by the declarations of those with whom they deal, is not confined to that which is shown by affirmative and positive acts following upon and induced by those declarations. Conduct is not alone that which is active, positive, and affirmative. Conduct, as limited to this inquiry, is the reserve of one's own powers of person and property, and of those means of help which can be summoned from friendly or accommodating sources and from the tribunals of justice, and is as often forbearance of their use, and quiescence and contentment with the affairs as they are, as action designed to change affairs. And such quiescence and consent, induced by false or erroneous statement, may be quite as damaging as any result from action. It is as bad to fail to recover property gone, when, with

the knowledge of the existing fact, it might have been retrieved, as it is to lose it. And so it is as damaging to rely in quiet upon an untrue statement, to the neglect of using the means of recovery, as it is to rely upon an untrue statement, and by action thereon meet with loss irreparable. To hold otherwise would be to assert that the law makes a difference between damage received by action, and omission to act in circumstances precisely similar, save in these elements."

By the conduct and representations of the appellee, he either adopted the signature, knowing it to be a forgery, or by his silence and concealment induced appellant to rely and act upon it; and in either event he should not, in good conscience, be permitted to say that he is not bound, under the facts pleaded, to respond to appellant for any injury he has sustained. In other words, he is estopped from setting up the defense of forgery. As was said in *Bank v. Keene*, supra: "If the jury found that the defendant adopted the signature, knowing it to be a forgery, his liability for the whole amount of the note is not denied. And the result would have been the same if they found that he was estopped from denying the signature. There are some cases in which one may be liable only for damages caused by his representations. But the general rule applicable to estoppels in pais is not that one may deny the truth of representations made by himself, upon which another has been induced to rely, and pay the damages caused thereby, but that he shall not be permitted to deny their truth." In the Massachusetts case (*Bank v. Buffinton*, 97 Mass. 498), the court said: "The injury which, permitting him to deny the truth of his representation, would occasion to the plaintiffs is the loss of a good and valid indorser upon the notes, which, so far as he is concerned, is the liability for their full amount. If the action were for deceit in making a false representation, the rule of damages would be found by ascertaining, as the defendant asks should be done in this case, in how much worse condition the plaintiffs had been put by reason of the deceit. But the plaintiffs are not in that position. They had some notes of doubtful value. They do not ask to be compensated for having discovered this fact a few days later than they might have done, if they had not trusted to the defendant's statement, which perhaps occasioned them little injury; but they say, and the finding of the jury entitles them to say, that in consideration of their trusting the defendant's assurances, by his procurement, and thereby exposing themselves to the injury which such delay might occasion, which is a sufficient consideration in law, the defendant made himself liable to them as indorser. The injury in the case at bar which would result to the plaintiffs from allowing the defendant's admission that he was indorser to be disproved would be the loss of his security as indorser, and the estoppel is

to be co-extensive with the injury." In the case of *Forsyth v. Day*, 46 Me. 176, it was held that if a forged note is presented to the alleged maker, and he deceives the holder by language and acts calculated to induce reasonable belief that the note was genuine, he will be estopped from denying his signature, if the holder, acting upon the belief, has been injured. This case is parallel in all of its essential features to the one before us. Here appellee was shown the note, with what purported to be his own signature. He examined it. He told the holder that he did not have ready money at that time to take up the note, and that he would see him again in a short time, and fixed the place and time of the meeting. He again saw the note, and agreed to see Weber, and see what could be done. He must have known that his signature to the note was forged, and yet he concealed the fact of the forgery, to the injury of appellant, in that he was lulled into silence and inaction, and did not take the steps necessary to preserve his rights and secure the payment of the money which he had loaned Weber, and which the averments of the complaint say he could and would have done. And, in line with the doctrine last announced, it was held in *Merrill v. Tyler*, Seld. Notes, 83, that language of a person whose name had been forged to a note, which induced a holder to advance more money upon it, estops the party purporting to be the maker from denying his signature, in so far as it concerns the money advanced on the faith and reliance of his word. There is a long line of cases holding that mere silence of the person whose name has been forged, when the instrument purporting to bear his signature is shown him, will not work an estoppel, unless the holder has been damaged thereby. *Corser v. Paul*, 41 N. H. 24; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Bank v. Wentzel*, 151 Pa. St. 142, 24 Atl. 1087; *McKenzie v. Linen Co.*, 6 App. Cas. 82. But we have not been cited to any case, and we have been unable to find any, holding that the silence of one whose name has been forged, with a knowledge of the fact, where the holder has relied and acted upon such silence, to his injury, in the belief that the signature was genuine, would release him from liability. The doctrine of estoppel will apply when the party sought to be estopped has stood by and remained silent when it was his duty to speak. This is one of the essential elements of estoppel. Thus, in *Anderson v. Hubble*, 93 Ind. 580, the court said, "The term 'standing by,' so often used in the books and reports in discussing cases of estoppel, does not mean actual presence or actual participation in the transaction, but it means a silence when there is knowledge, and a duty to make a disclosure." It has been held that silence, when it is the duty of the party to speak, is equivalent to concealment. *Stoddard v. Lemmond*, 48 Ga. 100; *Cady v. Owen*, 34 Vt. 508; *Manufacturing Co. v. Kimmel*, 87

Ind. 500; *Wheeler v. Railroad Co.*, 115 U. S. 29, 5 Sup. Ct. 1061, 1160; *Jeneson v. Jeneson*, 66 Ill. 259; *Griffin v. Nichols*, 51 Mich. 575, 17 N. W. 63. And in *Gatling v. Rodman*, 6 Ind. 289, it was held that the term "standing by" does not mean or import an actual presence, but implies knowledge under such circumstances as to render it the duty of the possessor of the particular knowledge to communicate. See, also, *State v. Holloway*, 8 Blackf. 45; *Ellis v. Diddy*, 1 Ind. 561. In *Richardson v. Chickering*, 41 N. H. 380, the meaning of the phrase "standing by," as defined in *Gatling v. Rodman*, supra, is expressly approved, and favorably commented upon. *Herman on Estoppel* (volume 2, p. 1131, § 1007) lays down the following rule: "Where a party sees an obligation, with his name signed to it without his authority and consent, yet tells the obligee that the signature is his, he is bound by it, and will be estopped to say that it is not his act and deed. Reason and policy of law forbid that a party who is apparently an obligor should assert that he is such, and bound by his obligation, and afterwards escape the debt by plea of non est factum." While appellee did not, when the note was shown to him, and he saw his name upon it, tell appellant that the signature was his, he did not deny it, but his representations and conduct led appellant to believe that it was his genuine signature, and there is no question but what he relied and acted upon it. By his conduct, with a full knowledge of the facts, he conveyed to the mind of appellant that the note bore his genuine signature, with as much force and certainty as if he had said to him, "Yes; that is my note, and I signed it."

From the many authorities we have cited, and upon elementary principles as established by the text writers, we may deduce the wholesome rule that where, by the conduct or representations of one, another is induced to act, or to refrain from acting, and injury results to him, the party making the representations is thereafter estopped from denying the truth of such representations. Hence, when appellee, by his representations and conduct, led appellant to believe that the note in suit was genuine, and, resting in that belief, he was induced to forego suing Weber as for money had and received, or to take such other steps as might be necessary to secure to him the payment of the money loaned, and he was induced to leave his home for a sojourn in Europe for several months, and on his return to find that Weber was dead and his estate dissipated, and the further fact that, if appellee had informed him that his name had been forged to the note, he could have secured himself, these facts and such conduct, which are well pleaded, are sufficient to estop appellee from now asserting that the note, as to him, is a forgery.

Each paragraph of the complaint states a good cause of action, and the court erred in sustaining the demurrer thereto. The judg-

ment is reversed, with instructions to the court below to overrule the demurrer to each paragraph of the complaint.

(21 Ind. App. 495)

BOARD OF COM'RS OF CLARK COUNTY v. HOWELL.

(Appellate Court of Indiana. Jan. 27, 1899.)

STATUTE OF FRAUDS — CONTRACT NOT TO BE PERFORMED IN A YEAR — MEMORANDUM — PLEADING.

1. A contract of employment to render services for a year, to commence in the future, is a contract within the statute of frauds, as an agreement not to be performed within a year from the making thereof, so that, being oral, action to enforce it, or to recover damages for its breach, cannot be maintained.

2. Part performance of a contract that cannot be performed by either party within a year does not prevent interposition of the statute of frauds to an action to enforce or recover damages for the breach thereof.

3. An exhibit set out in a complaint as an order passed by defendant county board of commissioners, and spread on its records, which is signed "Peter Dillon, P. B." is not, without further allegation, shown to be signed by an authorized agent of defendant, so as to satisfy the statute of frauds.

Appeal from circuit court, Floyd county; Jacob Herter, Judge.

Action by James Howell against the board of commissioners of the county of Clark. Judgment for plaintiff. Defendant appeals. Reversed.

Thomas H. Stradly, for appellant. Edgar A. Howard, for appellee.

BLACK, C. J. It is assigned as error that the Clark circuit court, from which the venue was changed to the court below, erred in overruling the demurrer of the appellant to the appellee's complaint for want of sufficient facts. It was, in substance, shown by the complaint that on the 1st day of September, 1895, the appellant being in regular session, and there being before the board for consideration the appointment of a janitor for the court house of Clark county for the year beginning September 1, 1895, it employed and engaged the appellee as such janitor for said ensuing year, under and by virtue of an order by said board upon that date passed and spread upon the records of "said court," a copy of which order is exhibited. It is further alleged that the appellee, pursuant to the terms of said order, accepted said employment, and entered upon the duties of janitor of the court house for one year beginning September 1, 1895, for which services he was to receive the sum of \$480; that he performed the said duties of janitor from the 1st of September, 1895, until the 15th of June, 1896, at which time he was discharged without cause; that the appellant had ever since refused, and still refused, to permit him to perform his said duties as janitor of said court house; that he was willing, and had ever since been willing, to perform his part of said order of employment, and to comply

with all the provisions thereof; and that because of the appellant's failure and refusal to permit him to do so he had been damaged in the sum of \$500, for which he demanded judgment.

The exhibit filed with the complaint was as follows: "In the Matter of Appointing a Janitor for Court House. The board, being advised that the present janitor's time would expire before the next regular session of this board, proceed to appoint James W. Howell janitor of the court house for one year from Sept. 1st, 1895, and longer if he renders satisfactory service to the circuit court and the officers, at a salary of \$480 per annum, payable quarterly. Peter Dillon, P. B. Attest: June 14th, 1895."

There is inconsistency in this complaint. While it is alleged that the board of commissioners, on the 1st day of September, 1895, under and by virtue of an order that day passed, employed the appellee for the year beginning on the same day, and that he accepted said employment, and entered upon the duties thereof, for one year beginning on the same day, yet the order itself, thus alleged to have been made September 1, 1895, states that the board was advised that the then employed janitor's time would expire before the next regular session of the board, and that the board proceeded to appoint the appellee for one year from September 1, 1895. The order is dated June 14, 1895. As the pleading must be taken most strongly against the pleader, and as the exhibit, so far as it differs from the averments of the pleading, controls, we must regard the complaint as declaring upon a contract of employment to render service for a year to commence in the future. Being an "agreement that is not to be performed within one year from the making thereof," no action could be brought thereon unless the agreement, or some memorandum or note thereof, be in writing, "and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." Horner's Rev. St. 1897, § 4904 (Burns' Rev. St. 1894, § 6629). An oral agreement for service for a term extending beyond one year from the date of the making of the contract, which service cannot, according to the contract, expire within one year from that date, is within the statute of frauds, and no action can be maintained upon such a contract, either for the purpose of enforcing it or to recover damages for the breach thereof. Shumate v. Farlow, 125 Ind. 359, 25 N. E. 432. Where a complaint is based upon a written contract, the plaintiff must recover upon the written contract, or not at all. Carter v. Gordon, 121 Ind. 383, 23 N. E. 288. Where a party to a contract voidable under the statute of frauds has rendered services pursuant to the contract, he may recover the value of the services under a quantum meruit. Wolke v. Fleming, 103 Ind. 105, 2 N. E. 325.

The doctrine of part performance has no

application in the case of a contract that cannot be performed by either party within a year. Wolke v. Fleming, supra.

The signature is required for the purpose of attesting the writing as that which contains the terms of the contract. Jones v. Dock Co., 2 Q. B. Div. 314. In that case it was held that an entry in the record of the minutes of the proceedings of a corporation, signed by a person having authority thereto, may constitute a memorandum of a contract required by the statute of frauds sufficient to charge the corporation. In Chase v. City of Lowell, 7 Gray, 83, it was held that the vote of an authorized committee of a city electing their clerk as city engineer for a year from a subsequent date, duly recorded, and signed by him as their clerk, was a sufficient note or memorandum to take the appointment out of the statute of frauds. In Tufts v. Mining Co., 14 Allen, 407, the vote of a corporation, signed by its clerk, was held to constitute a contract in writing, within the statute of frauds. In Argus Co. v. Mayor, etc., 55 N. Y. 495, it was held that an entry in the minute book of a resolution passed by the governing body of a municipal corporation expressing the terms of a contract, signed by the clerk of that body at the end of the day's minutes containing the resolution, constituted a note or memorandum in writing, signed by the party to be charged within the meaning of the statute of frauds, and was sufficient to bind the corporation, where the contract, by its terms, was not to be performed within a year. It was said, per Folger, J.: "In this case the party to be charged, and whose subscription is needed, is the defendant, a municipal corporation. It is plain that such a defendant can make no note or memorandum nor subscribe the same, save by an officer or agent thereof. It is so, also, that it ordinarily acts by its legislative or governing body, and that the action of that body is expressed in the minutes of its action, recorded, as it takes place, in the books kept for that purpose by its clerk or secretary. Hence it is that its agreements are rarely oral, but, *pari passu* with the making of them, they are, on the instant of formation, put into writing, and thus a note or memorandum of them is made; and, the minutes of each day's doings of the body being signed by the clerk thereof, there is a subscription of the note or memorandum made by the party, by its agent duly authorized. This is a satisfactory compliance with the statute. It meets the purpose and intention of the law by providing an enduring and unchanging evidence of the agreement; and it meets its letter, for there is some note or memorandum of it in writing, subscribed by the party to be charged thereby, the subscription made by an authorized agent." In Caldwell v. School City of Huntington, 132 Ind. 92, 31 N. E. 566, the complaint alleged that the school city, on the 24th of May, 1887, by a resolution passed at a regular

meeting, employed the plaintiff as superintendent of the public schools of the city from the 1st of August, 1887, to the 31st of July, 1888; that he was notified of his election, and accepted the employment; that the secretary of the board willfully and purposely failed and refused, as such secretary, to make the record of the employment; that the minutes of the meeting contained a resolution, but that the same was in the possession of the defendant, or had by the defendant been destroyed or mislaid, so that a copy could not be filed with the complaint; that afterwards a new board repudiated the contract, and employed another teacher. The action was brought to recover the year's salary. The court said, "It seems too clear for argument that no contract or memorandum was signed by the party to be charged," and the complaint was held insufficient on demurrer.

At the bottom of the order set out as an exhibit, opposite the word "Attest," are the name "Peter Dillon," and the annexed initials, "P. B." There is no averment in the complaint in relation to any signature or concerning the person whose name is thus added. The exhibit is set out as an order alleged to have been passed by the board, and spread upon its records. It may be considered that the records of the board of commissioners show what is thus exhibited. The question is whether or not it appears as a fact that the memorandum was signed by the appellant, or by some person lawfully authorized by the appellant to sign it. In *Goddard v. Stockman*, 74 Ind. 400, 404, speaking of the board of county commissioners, it was said: "No statute has been called to our attention, or come under our observation, which requires that the proceedings of the board be signed by the members of the board, though it is doubtless the common usage, and the better practice, that the proceedings be so signed and authenticated. The auditor of the county is required to 'attend the meetings of such commissioners, and keep a record of their proceedings,' and 'the commissioners of each county shall use a common seal; and copies of their proceedings, when signed and sealed by the said auditor, shall be sufficient evidence thereof, on the trial of any cause in any of the courts of this state.' 1 Rev. St. 1876, p. 351, §§ 7, 10. But, conceding the propriety and necessity of the signatures of the commissioners, we are clear that unsigned orders of the board are not void, and, when properly signed within a reasonable time, become valid from the time when made." In *Weir v. State*, 96 Ind. 311, it was held that an unsigned record of a board of county commissioners, showing an election of a secretary of the board of health of the county, was not void as against a collateral attack, but supplied evidence of the action of the board. In the case at bar, the action being based upon the alleged contract, it devolved upon the appellee to show in his

complaint a contract, or some note or memorandum thereof in writing, signed by the party to be charged therewith, or by some person thereunto by that party lawfully authorized. There is no averment whatever in the complaint in relation to the name at the end of the exhibit, or to any person so named. We cannot judicially know, or presume that the trial court judicially knew, that the order was signed or attested by a person who, at the date of the order, was a member of the board of county commissioners, and held a particular official position in the board, and had authority to sign and attest the proceedings of the board of that date. The complaint is seemingly evasive, and the facts are meagerly stated. They should have been stated fully, directly, and plainly. Granting all indulgence possible, we cannot regard the complaint as sufficient on demurrer. Judgment reversed.

(21 Ind. App. 516)

PHOENIX INS. CO. v. OVERMAN et al.

(Appellate Court of Indiana. Jan. 31, 1899.)

INSURANCE—INCUMBRANCE—DELIVERY—EVIDENCE
—NOTICE—TENDER.

1. Whether a mortgage on insured's chattels was ever delivered, so as to constitute an incumbrance, in violation of the policy, is a question for the jury, though O., the owner, signed and acknowledged the mortgage to D., and caused it to be recorded; it not appearing that D. or O. ever agreed that it should be given, or that D. ever requested O. to give it, and there being no testimony that it was ever delivered to D. or any one for him, but O. testifying that he never delivered it or the note it was to secure, and D. that he knew nothing of it till after the fire, though O. had said he would give him a mortgage on some lots, and S. was to look after such a mortgage for him.

2. A mortgage of record before the issuing of a policy providing against incumbrances is not notice thereof to the insurer.

3. Bringing money into court for a party's use is not a sufficient tender.

Appeal from superior court, Grant county; Hiram Brownlee, Judge.

Action by Clarkson D. Overman and others against the Phoenix Insurance Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Paulus & Cline, for appellant. Austin De Wolf, for appellees.

ROBINSON, J. This was an action upon a policy of fire insurance to recover a loss by fire. The jury returned a general verdict against the company, with answers to interrogatories. It is argued that the verdict of the jury is not sustained by sufficient evidence; that the evidence shows that, at the time the policy was issued, there was a chattel mortgage upon the property, which rendered the policy void, under one of the provisions thereof. The policy contained the following provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of insurance be per-

sonal property, and be or become incumbered by a chattel mortgage." It is well settled that an insurance company may insert in its policy the above provisions, and enforce them against a policy holder. *Insurance Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. 757, and cases cited.

Prior to the issuing of the policy, Overman had signed and acknowledged a chattel mortgage to one Allan Dillon on the property afterwards insured, and had caused the mortgage to be recorded in the recorder's office. The mortgage was given to secure a note for \$800. But there is no evidence in the record that Overman and Dillon ever agreed that the mortgage should be given, or that Dillon ever requested Overman to give the mortgage; nor is there any evidence that the mortgage was ever delivered to Dillon or to any person for him. Overman testified he never delivered either the note or mortgage. Dillon testified that he knew nothing of the mortgage until after the fire, and that was from hearsay; that in the latter part of 1895 Overman said he would give a mortgage on some outlots, and one Seale was to look after it for him, but this was the only mortgage Seale was to look after for him; that Overman said nothing about giving this mortgage on the chattels. While there was evidence of facts and circumstances going to show that the mortgage was executed within the meaning of the law, yet it is seen there was some evidence from which the jury might say, in answers to interrogatories, that neither the note nor the mortgage was ever delivered to Dillon or to any one for him. Whether the mortgage was ever delivered to Dillon or to any one for him was a question of fact proper to be found by the jury. The acts and conduct of parties might make a prima facie case of delivery, but this could be explained or contradicted by the testimony of the parties themselves. In such case an important question to be determined is whether the mortgagor intended to part with all control over the instrument, and lodge it in the grantee, and this intent must be gathered from all the evidence. The fact of delivery must be determined from the acts done, and from the testimony of the parties. If Overman signed and acknowledged a mortgage to Dillon on the property insured, and did so at the request of Dillon, to secure and indemnify him, and delivered the same to the county recorder for the use and benefit of Dillon, and intended at the time to surrender, and did surrender, all control over the instrument, and the instrument was recorded, it would be a good delivery, and would become a valid lien. In the case at bar, even if it were conceded that Overman surrendered the control of the mortgage, the evidence not only fails to show that it was ever within the power or control of Dillon or any person for his use and benefit, but the testimony of Dillon himself is that there was no agreement that any such mortgage should

be made, and that he knew nothing of its existence until after the loss, and then only from hearsay. See *Purviance v. Jones*, 120 Ind. 162, 21 N. E. 1099; *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. 331; *Stevens v. Stevens*, 150 Mass. 537, 23 N. E. 378; *Anderson v. Anderson*, 126 Ind. 62, 24 N. E. 1036; *Vaughan v. Godman*, 94 Ind. 191.

It was not necessary that it be shown that Dillon expressly refused to accept the mortgage security. His assent to the contract must be affirmatively shown in some manner before the contract can have any existence. Unless the mortgage was delivered to Dillon, or to some one for his use and benefit, it could not become an effective lien; and, as there is some evidence to support the jury's conclusion, we cannot disturb the finding upon that question.

The fact that the mortgage had been placed on record before the issuing of the policy was not notice to the insurance company of the existence of the mortgage. *Insurance Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. 757; *Shaffer v. Insurance Co.*, 17 Ind. App. 204, 46 N. E. 557.

A tender of money, to be sufficient, must first be offered to the party entitled to receive it, or to some one authorized to receive it for him, and, if refused, the money must then be paid into court for his use and benefit. Bringing the money into court for the party's use is not sufficient.

Other errors were assigned, but, as they have not been discussed, they are deemed waived. Judgment affirmed.

(21 Ind. App. 535)

PRUDENTIAL INS. CO. OF AMERICA v. HUNN.

(Appellate Court of Indiana. Feb. 1, 1899.)

LIFE INSURANCE — INSURABLE INTEREST — PLEADING.

1. Where an insurance company contracts with a person whose life is insured to pay the sum insured to another, it is unnecessary for such other, in an action on the policy, to show an insurable interest.

2. A policy issued to one on the life of another, the former not having an insurable interest, is void as against public policy.

3. A mother, as such, has not an insurable interest in the life of her son, so that she can take out a policy thereon.

4. A complaint on a policy on the life of plaintiff's son, which alleges that it was issued to plaintiff, cannot be claimed to declare on a policy issued to the son, though the policy is made an exhibit, it not being necessarily inconsistent with the averment that it was issued to her.

Appeal from circuit court, Vanderburg county; H. A. Mattison, Judge.

Action by Minnie Hunn against the Prudential Insurance Company of America. Judgment for plaintiff. Defendant appeals. Reversed.

J. E. Williamson, for appellant. James B. Rucker, for appellee.

BLACK, C. J. The complaint by the appellee, Minnie Hunn, against the appellant, contained two paragraphs, both based upon a certain policy of life insurance. A demurrer to each paragraph for want of sufficient facts was overruled. The verdict for the appellee was expressly based upon the second paragraph, by which it was alleged, in substance, that the appellant, in consideration of the quarter-annual payment of \$4.88, to be paid to it on or before the 27th day of February, May, August, and November in every year, executed to the appellee a policy of insurance on the life of Thomas S. Hunn for \$1,000, on the 27th day of May, 1895, a copy of which policy was made an exhibit. It was further alleged that said Thomas S. Hunn died on the 30th day of August, 1896, in the city of Evansville, Vanderburg county, in this state; that the appellee was his mother, and that the policy was made payable to her as such; that proofs were furnished the appellant of the death of said Thomas S. Hunn on the 26th day of September, 1896; that the appellee performed all requirements of said policy on her part to be performed, and all quarter-annual premiums were paid to the appellant, and receipted for by it; that by consent and agreement of the appellant the time for the payment of the quarter-annual premium or payment which fell due on the 27th day of August, 1896, was extended by it to the 31st day of August, 1896, at which time it was fully paid to it; that the payment of said sum of \$1,000 had been demanded of the appellant, and payment had been refused, although the same was due, wherefore, etc. In the policy, filed as an exhibit, the appellant promised to pay "unto Minnie Hunn, beneficiary, mother of Thomas S. Hunn, of," etc., "herein designated as the insured, or, if the insured survive the beneficiary, to the executors, administrators, or assigns of the insured, one thousand dollars, immediately on acceptance of satisfactory proofs of the death of the insured," etc. The first paragraph was, in effect, the same as the second, except that the first did not contain an averment of demand (which was not necessary, the action being upon a promise to pay a certain sum of money at a specified place to a designated person, upon acceptance of satisfactory proofs of the death of a person named during the continuance of the contract), and except, also, that the first did not contain an allegation of extension of time for payment of the premium.

The complaint does not show in either paragraph that the appellee had any insurable interest in the life of Thomas S. Hunn, unless the averment that he was her son be a sufficient showing in that regard. Where an insurance company contracts with the person whose life is insured to pay the sum insured to another person, it is not necessary for such other person, in an action brought by him upon the policy, to show that he had an insura-

ble interest in the life insured. A person has an insurable interest in his own life, and he may effect such insurance, and appoint any one to receive the money in case of his death during the existence of the policy. *Investment Co. v. Baum*, 29 Ind. 236; *Insurance Co. v. Sefton*, 53 Ind. 380; *Insurance Co. v. Volger*, 89 Ind. 572; *Association v. Houghton*, 103 Ind. 286, 2 N. E. 763; *Amick v. Butler*, 111 Ind. 578, 12 N. E. 518; *Burton v. Insurance Co.*, 119 Ind. 207, 21 N. E. 746. A policy issued to one upon the life of another, the former having no insurable interest in the life of the latter, is void; it being a wagering policy, and in contravention of public policy. *Insurance Co. v. Hazard*, 41 Ind. 116. In that case it was said: "In our opinion, no one should hold a policy upon the life of another, in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquired the policy by purchase and assignment from another." See, also, *Amick v. Butler*, 111 Ind. 578, 12 N. E. 518. It is not necessary that the insurable interest appear on the face of the policy, but it must be shown in an action thereon. Whether or not a person to whom a policy is issued on the life of another has an insurable interest in the life insured is a question of law, dependent upon the facts; and, in a pleading based upon the policy, the facts from which the conclusion of law may be drawn should be stated. *Insurance Co. v. Sefton*, 53 Ind. 380. In *Burton v. Insurance Co.*, 119 Ind. 207, 21 N. E. 746, it was decided that, as a rule, a grandfather is under no legal obligation to support or provide for his grandchild, and that, though this relationship be stated in the complaint, the court cannot, as a matter of law, infer from this fact alone such an insurable interest in the life of the grandfather as will uphold a policy issued upon his life directly to the grandchild. In *Insurance Co. v. Volger*, 89 Ind. 572, which involved a policy of insurance taken out by a daughter on the life of her mother, it was said: "It will be observed that the complaint does not show that the appellee had at the time of receiving the policy, or afterwards, any insurable interest in the life of her mother, the assured, unless the fact of the relationship of mother and daughter gave her such interest. The law is well settled that a policy taken by, and payable to, one upon the life of another, in the continuance of whose life the assured has no pecuniary interest, is void, as being against public policy. * * * The insurable interest in the life of another must be a pecuniary interest. Some of the authorities tend in the direction that near relationship, as between parent and child, is a sufficient foundation upon which to rest an insurable interest. But this view is not sustained by the weight of authority." It was held in that case that, in an action upon a policy taken out by one upon the life of another, the com-

plaint must state facts showing that the former had an insurable interest in the life of the latter.

In the complaint before us the appellee is represented as a contracting party, and the argument on behalf of the appellee proceeds in part upon the same theory. It is also claimed in argument that the policy shows that the person whose life was insured contracted with the appellant. A policy of life insurance is property. It is a chose in action. The question as to who is the owner thereof, with right to sue thereon, when there has been no assignment of the contract, depends upon the question with whom was the contract made, to whom was the policy issued, by the insurance company? In *Insurance Co. v. Volger*, 89 Ind. 572, 574, it was said: "It was alleged in each paragraph of the complaint that the appellee insured the life of her mother, that the policy was payable to the appellee, and that she paid seven annual premiums thereon. Though the policy was payable to the appellee, it may be, if it had been taken out, and the premiums paid by her mother, that the latter, as claimed in the first cause of demurrer, would be the real party in interest, and that in such case the action should have been brought by her. * * *

But, as the appellee took out the policy and paid the premiums, we think she should be regarded as the real party in interest,"—the complaint of the appellee in that case being in two paragraphs, one seeking specific performance of the contract in the policy to issue a paid-up policy, and the other seeking judgment in a certain sum for premiums paid by the appellee on the policy. See, also, *Association v. Houghton*, 103 Ind. 286, 2 N. E. 763. In case the person insured is only nominally the contracting party, while the beneficiary named in the policy "has in reality procured the insurance and paid the premiums, then, in order that the transaction may be taken out of the category of wagering contracts, the beneficiary must have had an insurable interest of a pecuniary character, or of that nature, either present or prospective, at the time the policy had its inception." *Amick v. Butler*, 111 Ind. 578, 583, 12 N. E. 518. In *Society v. McDonald*, 122 Pa. St. 324, 330, 15 Atl. 439, it was said that: "Although the policy states that the first annual payment of \$24 was paid by McDevitt [the person on whose life the policy was issued], the plaintiff [McDonald] unequivocally testified that he paid all the money that was paid on it. It is very plain from all the testimony that McDevitt simply suffered the use of his name; that the insurance was effected at the suggestion of McDonald, or McDonald's wife, at their own expense, for their exclusive benefit." It was held that, the plaintiff having no insurable interest in the life of McDevitt, there was nothing to support the policy. The policy set forth as an exhibit in the case before us might have been executed to the ap-

pellee, as alleged in the complaint. There is nothing in the policy which is necessarily inconsistent with this averment in the complaint. It is a well-settled and necessary rule that a complaint must proceed upon some definite theory. The appellee cannot be permitted to claim that the complaint declares upon a policy issued to her, and also that it declares upon a policy issued to the person whose life was insured. It must be treated as a complaint on a policy executed to the appellee, and therefore cannot be held sufficient on demurrer. The judgment is reversed.

(21 Ind. App. 531)

SHUFFLEBARGER v. OLLEMAN.

(Appellate Court of Indiana. Feb. 1, 1899.)

APPEAL—REVIEW OF FINDINGS.

A finding on conflicting evidence will not be disturbed.

Appeal from circuit court, Morgan county; George W. Grubb, Judge.

Action by Amanda M. Olleman against William O. Shufflebarger. Judgment for plaintiff. Defendant appeals. Affirmed.

W. R. Harrison and C. G. Renner, for appellant. Oscar Matthews, for appellee.

WILEY, J. Appellee sued appellant in ejectment before a justice of the peace, and recovered judgment for possession and five dollars damages. Appellant appealed to the court below, where it was tried by the court without the intervention of a jury, resulting in a finding and judgment for appellee. Appellant's motion for a new trial was overruled, and on appeal he has assigned error (1) that the complaint does not state a cause of action, and (2) that the court erred in overruling the motion for a new trial. Appellee urges that the causes assigned for a new trial do not present any question for review, and that the evidence is not in the record. The reasons assigned in the motion for a new trial are statutory, and, while the language used is not in strict harmony with the wording of the statute, yet, although the objections urged, both against the motion for a new trial and to the evidence not being in the record, are somewhat technical, it is proper for us to waive such technicalities, and decide the case upon its merits.

Appellant was a tenant of appellee, under a written lease. By the terms of the lease, the tenancy commenced on March 1, 1896, and ended on the last day of February, 1898. At the expiration of this lease, appellant held over, and he contends that his so holding over was by a subsequent agreement with appellee that he was to have the premises for another year. The only question discussed by appellant is the sufficiency of the evidence to sustain the finding and decision of the trial court. As the appellate tribunal will not weigh the evidence where there is a conflict, and there

is some evidence in the record to support the judgment, there must be an affirmation, unless some reversible error is presented by the record. In the case before us the record does not present any question, and no question is discussed, as we have seen, except that the evidence does not support the finding. Appellant insists that on August 5, 1897, before the expiration of his tenancy under the lease, he entered into an agreement with appellee to the effect that he was to have the use of the premises another year, beginning March 1, 1898. As this was an affirmative defense to appellee's cause of action, it was necessary for him to establish this subsequent agreement by a preponderance of the evidence. The decision therefore rests upon the question: Did appellant and appellee enter into an agreement whereby appellant was to have the premises for a year from March 1, 1898? Appellee testified that she did not make any such agreement, and gave appellant no permission to remain after the last day of February, 1898. Appellant claims, and so testified, that the agreement he relied upon was made in the office of one E. E. Stevenson, in Indianapolis. Mrs. Hanch testified that she was at the office of Mr. Stevenson on said day, and heard all that was said, and saw all that was done, and that no such agreement was made. Mr. E. E. Stevenson testified that appellant and appellee, Mrs. Hanch, and a Mr. Park came to his office on the occasion named; that appellant brought with him a written lease; that appellant read over the lease he had; that it was not satisfactory to appellee; that he (Stevenson) told them that he would write a lease that he thought would suit; that there was a difference between them as to the rent to be paid, and the surety appellant was to give to secure the payment of rent; that the lease he did prepare was not satisfactory to appellant; that there was also a difference between them as to repair work that appellant was to do; that they left his office without coming to any agreement upon that point; that when they left his office they said they would come back the next week, and, if they could agree, they would sign the lease. The evidence further shows that appellant and appellee did not return to Mr. Stevenson's office, that the lease was never signed, and that it was afterwards destroyed. In behalf of the appellant there is some evidence that an agreement was reached in the office of Mr. Stevenson on the day mentioned, between appellant and appellee, as to all the terms and conditions of the lease; that it was not signed on that day, because it was late, and they agreed to meet there the following Tuesday to sign the lease; that appellant went to the office of Mr. Stevenson on that day to sign the lease and perform his part of the agreement, but it is not claimed by appellant that the lease was ever executed. Appellant testified to these facts, and was corroborated by another witness. Appellant also testified that he sowed some

wheat on the farm in the fall of 1897, in the belief that he had leased it for the year following; but, as to this, appellee testified that she told appellant she did not want him to sow any wheat, and that she would not suffer it to be done under any circumstances. There is a great deal of evidence about matters which have no relevancy to the real question in issue, and we need not refer to it. The trial court had the witnesses before it, heard all the evidence, and determined all material questions of fact in favor of appellee. From the evidence the trial court could, and doubtless did, conclude that the minds of the parties never met, and hence never agreed upon any contract for a continuance of the lease. In any event, there is an abundance of evidence from which the court could have reached the conclusion it did, and, there being evidence to support the judgment, we cannot disturb it. The judgment is affirmed.

(21 Ind. App. 534)

DRAKE v. GROUT et al.

(Appellate Court of Indiana. Feb. 2, 1899.)

PLEADING—EXHIBIT—STREET IMPROVEMENT—ASSESSMENT.

1. A paper, not the foundation of the action, cannot be made part of the complaint by filing it with it as an exhibit.

2. An answer to a complaint for an assessment for street improvement, which alleges that the whole cost was assessed on defendant's lot, and none on the property on the other side of the street, and that defendant has paid half thereof, and that this was all the property was liable for, states a good defense; Acts 1895, p. 384, § 5, providing that the cost of street improvement shall be apportioned on the lands abutting on the part of the street improved.

Appeal from superior court, Marion county; Vinson Carter, Judge.

Action by Robert B. Drake against Charles S. Grout and others. Judgment for defendants. Plaintiff appeals. Affirmed.

E. A. Parker, for appellant. H. J. Milligan, for appellees.

COMSTOCK, J. Appellant instituted this action against appellees to foreclose a lien for street improvement assessment against lot No. 1 of Fletcher's addition to the city of Indianapolis. The work contracted to be done was the filling of what is designated in the complaint as the "State Ditch" in the city of Indianapolis. A copy of the contract for the performance of the work entered into between the board of public works of said city and appellant, and of the assessment roll for said work, are made parts of the complaint. An attempt is made to show the location and direction, with reference to said lot, of the ditch by a diagram, which is filed with the complaint as an exhibit. This exhibit is not, however, the foundation of the action, and cannot be made a part of the complaint by attaching it thereto and naming it an exhibit.

Appellees filed the following answer: "For answer to the amended complaint herein, the

defendants say that the contract for the improvement of Columbia avenue, mentioned in the complaint, was awarded to the plaintiff as alleged, but that the price for said improvement was three and $\frac{50}{100}$ dollars (\$3.50) per lineal foot on each side of said street, including street intersections; that the total length of said improvement was twenty (20) feet, and the total cost of said improvement was one hundred and forty dollars (\$140.00); that one-half of the street intersections was apportioned upon the lots and land abutting upon the intersecting street for a distance to the street line of the first street extending across the said intersecting street in either direction from said Columbia avenue in the sum of thirty-five dollars (\$35.00), leaving one hundred and five dollars (\$105.00) to be assessed upon the property on Columbia avenue abutting upon the part of the street improved as alleged in the complaint. And defendants say that the whole of said one hundred and five dollars (\$105.00) was assessed upon the property of the defendant Charles S. Grout, and no part of the said one hundred and five dollars was assessed upon the property directly opposite of the property of said defendant Charles S. Grout, nor upon any other property. And on account of said intersecting street the said property of Charles S. Grout was assessed of said thirty-five dollars the sum of four and $\frac{17}{100}$ dollars (\$4.37), which he fully paid before this action was begun; and said Charles S. Grout also paid, before this action was begun, the one-half of said one hundred and five dollars, to wit, the sum of fifty-two and $\frac{50}{100}$ dollars, and all interest thereon. And defendants say that said assessment is improper and illegal; that before this action was begun the full amount for which the property mentioned in the complaint was liable on account of said improvement was fully paid, and neither defendant has signed any waiver, or exercised or claimed the option of paying the assessments in installments." The demurrer to this answer, upon the ground that it did not state facts sufficient to constitute a defense to plaintiff's cause of action, was overruled. Appellant refusing to plead further, judgment was rendered against him for costs. This action of the trial court is the error presented by this appeal.

It will be observed that the answer attacks only the amount of the assessment. Under the statute, this right is given when, as in the case before us, the property owner has not signed any waiver, or exercised or claimed the option of paying the assessments in installments. Acts 1895, pp. 386, 387. Section 5 of the same act, at page 384, provides: " * * * The cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, or so much thereof to be improved as is uniform in the extent and kind of the proposed improvement per running foot, and the total cost thereof, exclusive of one-half the cost of street and alley intersections, shall be apportioned

upon the lands or lots abutting thereon. The remaining one-half cost of street and alley intersections shall be apportioned upon the lands or lots abutting on the street or alley intersecting the street or alley under improvement for a distance to the street line of the first street extending across the said intersecting street or alley in either direction from the street or alley improved," etc. The record presents a case of ordinary street improvement, in which it appears from the answer that the property against which it is sought to enforce the lien has paid one-half the cost of the improvement, which is all, under the averments of the answer and the statute, that could be legally assessed against it. Judgment affirmed.

(21 Ind. App. 509)

YOUNG et al. v. YOUNG et al.

(Appellate Court of Indiana. Jan. 31, 1909.)

CONTRACTOR'S BOND—CHANGE IN PLANS—ACTION—PARTIES.

1. A bond by C. as principal, and Y. as surety, binding themselves to school trustees, conditioned that C. has filed a proposal for constructing a school house, and that if C. enters into a contract with the trustees for such construction, and faithfully performs it, and pays the debts incurred in the prosecution of the work, and saves said trustees harmless on account of any damage to any one arising from any cause in connection with the work, it shall be void, inures to the benefit of persons furnishing work or material, and they can sue thereon without the trustees being parties.

2. Where the construction contract is part of the builder's bond, and provides that changes can be made in the plans and specifications in the manner therein stated, such changes do not release the surety.

Appeal from circuit court, Tipton county; L. J. Kirkpatrick, Judge.

Action by William R. Young against Emanuel R. Coxen and others. From a judgment for plaintiff and one of the defendants, certain defendants appeal. Affirmed.

Gifford & Coleman and Oglebay & Oglebay, for appellants. Waugh, Kemp & Waugh, for appellees.

HENLEY, J. This action was begun by appellee William R. Young against appellants Emanuel R. Coxen and Samuel J. Porter, as principals, and William B. Young, William J. Minor, Leonard Compton, Joseph A. Innis, and Seneca G. Young, as sureties, on a bond given to the trustees of the school city of Tipton, to secure the faithful performance of a contract entered into by the principals on said bond and such trustees, wherein said Coxen and Porter agreed to build a school house in the city of Tipton. The bond sued upon, and which is made a part of the complaint, is as follows: "Know all men by these presents, that E. R. Coxen and S. J. Porter, contractors, as principals, and —, as sureties, are jointly and severally held and firmly bound unto E. H. Shirk, A. F.

Grove, and A. F. Moore, as school trustees of the city of Tipton, Indiana, or their successors, in the penal sum of ten thousand (\$10,000.00) dollars, for the payment of which, well and truly to be made and done, we jointly and severally bind ourselves, our heirs, executors, administrators, and assigns. Signed and sealed and dated this 28th day of May, 1894. The condition of the above obligation is such that the said E. R. Coxen and S. J. Porter, contractors, of Elwood and Tipton, Indiana, have filed their proposal, which is made a part hereof, for furnishing such materials as is specified, and performing all labor necessary to erect, finish, and complete a two-story brick school building, with stone foundation, on school lot at the southwest corner of Oak and Armstrong streets, in the city of Tipton, Tipton county, Indiana, according to the plans, specifications, and detail drawings prepared by James Beuff, architect, of Kokomo, Ind., and adopted by said school board, and which plans, specifications, and detail drawings are considered to be, and are hereby made, a part hereof: Now, if the said E. R. Coxen and S. J. Porter will enter into a written contract with the said Tipton school trustees for the proper execution and completion of said building, and do faithfully perform and execute the work so bid for to the satisfaction and acceptance of the superintendent in charge of said work, and to the satisfaction and acceptance of said school trustees, and in accordance with and agreeable to the plans, specifications, and detail drawings aforesaid, and that the said contract, if awarded, shall be made a part hereof, and promptly pay all the debts incurred in the prosecution of said work, including labor and materials furnished, and that they will indemnify and save harmless the said school trustees from any and all liabilities to any person, persons, or corporation on account of any damage to the property of any person, persons, or corporation arising from any cause whatever in any way connected with the construction of the work so bid for, then this bond be void; else in full force and effect. E. R. Coxen. S. J. Porter. W. B. Young. Wm. J. Minor. L. Compton. J. A. Innis. S. G. Young." The complaint avers that appellee William R. Young furnished labor and material in the construction of said building; that the material so furnished consisted of the paint to be used to paint said building, and the labor furnished was in putting the paint upon the building. The execution of the bond, as set out herein, is alleged, and the further fact that there is due and unpaid to said appellee, for such labor and material, the sum of \$125, for which he demands judgment. The defendants who were sureties on said bond in suit filed a demurrer to the complaint, alleging as cause want of sufficient facts and a defect of parties defendant. This demurrer was overruled. The appellee Compton, who was one

of the defendants in the lower court, filed a cross complaint against appellee Young and the principals and his co-sureties on the bond in suit. The cross complaint of Compton is substantially the same as the complaint of appellee Young, and is founded on a claim for labor and material furnished by said Compton in the construction of said school building under the contract of Coxen and Porter. Appellants demurred to the cross complaint of Compton for the same reasons as are stated in the demurrer filed to the complaint. This demurrer was overruled. Afterwards appellants William B. Young, Seneca G. Young, Joseph A. Innis, and William J. Minor filed a cross complaint against Emanuel R. Coxen, Samuel J. Porter, William R. Young, "Lenn" Compton, and the school city of Tipton, which admits the execution of the bond in suit, the building of the school house by the contractors Coxen and Porter, and that there are debts due and owing from said contractors to the appellees Young and Compton, but it avers that the cross complainants are the sureties on the bond in suit, and that the school city of Tipton owes to said contractors a sum of money sufficient to pay all the debts due on account of said building, and that said Coxen and Porter are insolvent. The relief asked in said cross complaint is that the said school city of Tipton be required to account for the money due from it to the said Coxen and Porter, and pay the same into court, to be applied upon this indebtedness of Coxen and Porter under said contract due to William R. Young and Leonard Compton. A demurrer for want of facts directed to said cross complaint by the appellees was sustained. Afterwards the appellants William B. Young, Seneca G. Young, Joseph A. Innis, and William J. Minor filed a second paragraph of answer, directed to the appellees' complaint and to the cross complaint of Compton, admitting the execution of the bond, but alleging that, at the time the bond was given, there were certain plans and specifications adopted, and that said bond was executed and was intended to cover the construction of a house as described in the plans and specifications at the time the bond was signed, but that, after the execution of the bond and the making of the contract, the said school city of Tipton caused the plans and specifications of said building to be changed, thereby increasing its cost more than \$1,000, which changes were made without the knowledge or consent of the bondsmen. Appellees' demurrer, for want of facts, directed to this answer, was also sustained.

The alleged errors of the lower court presented by appellants are—First, the ruling of the lower court in overruling the demurrer to the complaint; second, the overruling of the demurrer to the cross complaint of Leonard Compton; third, sustaining the separate demurrers of appellees Compton and Young to the cross complaint of appellants; fourth,

sustaining the separate demurrers of appellees Compton and Young to the second paragraph of appellants' answer.

The first and second errors discussed involve the same question. It is contended by appellants' counsel that whatever right or remedy appellees have against such sureties on the bond in suit is the result of equities against such sureties, and not the result of any contractual relations which exist between them by virtue of said contract. Counsel argue from this standpoint that the school city of Tipton was a necessary party defendant to the complaint of appellee Young and to the cross complaint of Compton. In this position we think counsel are in error. It is well-settled law in this state that the person for whose benefit a contract is made with another may maintain an action on such contract. *Judson v. Romaine*, 8 Ind. App. 390, 35 N. E. 912; *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590; *Carnahan v. Tousey*, 93 Ind. 561; *Williams v. Markland*, 15 Ind. App. 669, 44 N. E. 562. Such a bond as the one in suit is valid, and can be enforced by any person to whom the principal is indebted for work or material under the contract secured by the bond. Its provisions are intended to inure to the benefit of those who furnish the labor and material to the contractor, this being their only protection, they not being permitted to secure a lien upon buildings of this class. It is a contract made by the trustees of the school city of Tipton for the benefit of the laborers and material men; and the letting of the building contract, and the fact that the contractors agreed to pay for all labor and material, were a sufficient consideration upon which to rest the undertaking. *Williams v. Markland*, *supra*.

The school city of Tipton could not have been made liable upon the complaint of appellee Young, or upon the cross complaint of Compton, and was not a necessary party defendant in either instance.

As to the third error assigned, the cross complaint of appellants did not state a cause of action against either of the appellees. In fact, no relief was demanded as against them. The judgment asked in the cross complaint under consideration is against the school city of Tipton alone. The record does not show that the school city of Tipton either demurred to or answered said cross complaint, and no judgment was rendered upon said cross complaint either for or against said school city; hence there was no judgment or ruling in the lower court testing the sufficiency of this cross complaint as to the school city of Tipton.

It is next contended by counsel for appellants that the court erred in sustaining appellees' demurrer to the second paragraph of the answer of appellants William B. Young, Seneca G. Young, Joseph A. Innis, and Wil-

liam J. Minor, which was directed to the complaint of appellee Young and the cross complaint of Compton. As we have heretofore stated, this answer alleged that the plans and specifications were departed from, and a larger and more costly building was erected, and that the changes were made without the knowledge or consent of appellants, who are the sureties on the bond in suit. The cases cited by counsel, in which it is held that sureties are entitled to stand on the strictness of their obligation, and that the contract of suretyship cannot be held to extend beyond the strict scope of its terms, and cannot be extended by implication, clearly pronounce the well-settled rule of law on that subject in this state. *Irwin v. Kilburn*, 104 Ind. 113, 3 N. E. 650; *Hart v. State*, 120 Ind. 83, 21 N. E. 654, and 24 N. E. 157; *Dunlap v. Eden* (Ind. App.) 44 N. E. 561; *City of Lafayette v. James*, 92 Ind. 240; *Town of Salem v. McClintock*, 16 Ind. App. 656, 46 N. E. 39. But in this case the contract of Porter and Coxen with the trustees of the school city of Tipton, under which the building was erected, and to secure the faithful performance of which the bond in suit was given, was referred to in the bond, and was made a part of it as fully as if it had been written therein. In this contract it was provided: "Should any alterations be required in the work shown or described by the drawings or specifications, a fair and reasonable valuation of the work added or omitted shall be made by the architect, and the sum herein agreed to be paid for the work, according to the original specifications, shall be increased or diminished, as the case may be. In case such valuation is not agreed to, the contractors shall proceed with the alteration, upon the written order of the architect, and the valuation of the work added or omitted shall be referred to three (3) arbitrators, no one of whom shall have been personally connected with the work to which these presents refer, to be appointed as follows: One by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding; and each of the parties hereto shall pay one-half of the expense of such reference." The averments of the answer do not show that the parties to the building contract exceeded their authority in the changes made by them. The construction contract being a part of the bond, and it being provided therein that changes could be made in the plans and specifications of the building in the manner therein stated, the sureties thereby consented in advance to any departures from the original plan which were within a strict construction of the contract. *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669. It was simply a matter of contract, and the answer does not show an abuse of its terms. The judgment is affirmed.

(21 Ind. App. 520)

STATE v. SCHOONOVER et al.

(Appellate Court of Indiana. Feb. 1, 1890.)

CRIMINAL LAW—CONTINUANCE—ADMISSION.

Though, under Horner's Rev. St. 1897, § 1782, defendant, in a criminal case, to avoid a continuance asked by the prosecutor for an absent witness, must admit as true the facts the prosecutor states he expects to prove, yet where the prosecutor makes a statement of what facts the absent witness would testify to, and defendant merely admits the "statement," and trial proceeds without objection, defendant can deny the truth of the facts to which it is claimed the witness would testify.

Appeal from circuit court, Greene county; W. W. Moffitt, Judge.

Cora Schoonover and another were tried for adultery, and acquitted, and the state appeals. Affirmed.

William A. Ketcham and Charles I. Hunt, for the State.

COMSTOCK, J. The appellees, Cora Schoonover and Roy Hincey, were prosecuted, by affidavit and information, in the Greene circuit court, for the crime of adultery. Said case was called for trial on the 12th day of September, 1898, in the Greene circuit court, and the state of Indiana announced, through its prosecuting attorney, that the state was not ready for trial because of the absence of Maggie Schoonover, and asked for a continuance of said cause on account of the absence of said witness. Thereupon the defendants' attorneys stated, in open court, before his honor, William W. Moffitt, sole judge, that the defendants did not require the prosecuting attorney to set out, in his application for a continuance, any of the formal parts required in such an application, but that all the defendants asked and required of the prosecuting attorney for a continuance of said cause, on account of the absence of said witness, was for said prosecuting attorney to write out the statement, and sign the same, setting out fully what the said absent witness would testify to, which was accordingly done by the prosecuting attorney, and filed, and thereupon, without any objection to the formality of the application, the defendants stated in open court to his honor, through their attorneys, that "they would admit the statement of the prosecuting attorney so set out on paper as aforesaid, and would go to trial"; and thereupon the state, for the reason of the admission of the application and the statement set out on paper as the evidence of said witness, announced that it was ready for trial, and entered upon the trial of said cause, and, as a part of the evidence for the state, the prosecuting attorney read said statement and application for a continuance in evidence to the jury as the testimony of Maggie Schoonover; that, during the introduction of the evidence for the defendants, the defendant Cora Schoonover was called as a witness, and was asked, among other things, in a question incorporating the said statement

of the prosecuting attorney for a continuance, whether or not said statement was true, which statement she was permitted, over objections of the prosecuting attorney, to deny. The prosecuting attorney at the time excepted and objected to the ruling of the court, and the court then permitted the witness to answer said question, and deny the statements made in said application for a continuance.

"This appeal is prosecuted by the state," to use the language of the appellant's brief, "for the purpose of testing a reserved question of law; that is, may the defendants in a criminal case admit the statement of the prosecuting attorney set out on paper for a continuance, and go to trial, and, after the application and statement is read in evidence to the jury, be permitted to introduce evidence in their behalf denying the truth of the statement and application of the statements therein made?" Whether such denial may be made must depend upon the statement admitted. Upon the subject of admissions to avoid the continuance of the trial of a cause on account of the absence of a witness, the sections of our statute are numbers 1781 and 1782 of Horner's Revised Statutes of 1897 and the Revised Statutes of 1881. Said first-named section provides the method by which the defendant may obtain a continuance of the cause on account of the absence of a witness, and concludes: "If, thereupon, the prosecuting attorney will admit the truth of the facts which the defendant, in his affidavit for a continuance, alleges that he can prove by the absent witness, or by the written or documentary evidence therein specified and described, the trial shall not be postponed for that cause." Said section 1782 is in the following language: "Whenever the prosecuting attorney desires to obtain a postponement of the trial of a criminal cause on account of the absence of any witness whose name is indorsed on the indictment, such continuance shall be granted on his official statement in manner and form as specified in the preceding section; but the defendant may require the same to be in writing. If the defendant will admit that the facts which the prosecutor states he expects to prove are true, the trial shall not be postponed for that cause." It is clear, from the language of this section, that, to avoid the continuance of a trial on account of the absence of a witness for the state, the defendant should have admitted, not only that the absent witness would testify to the facts as stated by the prosecuting attorney, but that these facts were true, and would be submitted to the jury as uncontroverted. The defendants admitted the statement of the prosecuting attorney so set out. His "statement" was what facts the absent witness would testify to. He did not state that such testimony was true. With such admission, without objection upon the part of the state, the trial proceeded. It does not appear that the court

made any order in the premises. The admission of the defendants could not be enlarged. They did not object to the reading in evidence of the statement to which the prosecuting attorney said the absent witness would testify. It was read as testimony in the cause. The prosecution could ask no more, under the admission; it could only have the weight of oral testimony, and was subject to contradiction. *Wheeler v. State*, 8 Ind. 116; *McLaughlin v. State*, Id. 281; *Wasells v. State*, 26 Ind. 30; *Mayfield v. State*, 110 Ind. 593, 11 N. E. 618; *Warner v. State*, 114 Ind. 139, 16 N. E. 189; *Gillett, Cr. Law*, § 795. Whatever the law may be in some of the other states, it is settled in our own that, when a continuance is asked by either the prosecuting attorney or the defendant in a criminal cause on account of the absence of a witness, in order to avoid a continuance the opposite party must admit the truth of the facts to which it is claimed the absent witness will testify. Upon the admission made by the defendants in the case before us, it would have been error to have refused a continuance, but that is not the question before this court.

The learned counsel for appellant strongly relies upon the case of *Powers v. State*, 80 Ind. 77. From a careful reading of that opinion, we believe that it may be distinguished from the case at bar, the difference in the phraseology of the two admissions being apparent. We quote from the opinion: "During the progress of the trial, the defendant moved for a postponement for the purpose of obtaining the testimony of an absent witness; stating in his affidavit what he expected to prove, and showing the proper steps had been taken to procure the witness' attendance, etc. Thereupon, without making any objection to the sufficiency of the showing, the counsel for the state said: 'We will admit, under the form of the law governing such cases, that the witness would testify if he were present as stated in the affidavit,' and the affidavit was accordingly read in evidence to the jury." The state was permitted, over the objection of the defendant, to introduce testimony impeaching the character of said witness. The supreme court held that this was error, upon the ground that the admission must be construed as admitting the facts stated in the affidavit to be true. The court doubtless construed the words, "under the form of the law governing such cases," as embracing the condition set out in the statute that the facts to be testified to are to be taken as true. Counsel for appellant in his able brief cites *Willis v. People*, 1 Scam. 399; *Dominges v. State* (Miss.) 45 Am. Dec. 317; *Hyde v. State* (Tex.) 67 Am. Dec. 630; *U. S. v. Sacramento* (Mont.) 25 Am. Rep. 742; *State v. Jennings* (Mo.) 51 Am. Rep. 233. The decisions in *Willis v. People*, supra, were not based upon a statute. In *Hyde v. State*, supra, the court held that a motion for continuance on the ground of the absence of a

witness should not be refused because the adverse party admits that the witness, if present, would testify as stated in the affidavit. It does not support appellant's position. In *U. S. v. Sacramento* (Mont.) 25 Am. Rep. 742, the court held that where the public prosecutor moved to postpone the trial of a person indicted for a misdemeanor on account of the absence of witnesses, and counsel for the accused offered in open court to admit that the witnesses if present would testify to the facts stated in the affidavit, and the application was denied, that (1) the prisoner waived his constitutional right to be confronted with the testimony, and (2) that the affidavit was competent evidence for the prosecution. The decision was not based upon a statute. In *State v. Jennings*, supra, the supreme court of Missouri held that a statute providing that, on a criminal trial, where the defendant moves for a postponement on the ground of the absence of a material witness, the trial may proceed on the public prosecutor's agreement to admit that the witness, if present, would testify as set forth in the affidavit, and that such statement might be received as his evidence, was constitutional. A later decision of the same court (*State v. Berkley*, 92 Mo. 41, 4 S. W. 24) held the same unconstitutional. The authorities cited by appellant are either not in point or do not sustain its claim. The appeal of the state is not sustained.

(21 Ind. App. 477)

WHEELER v. ROHRER et al.

(Appellate Court of Indiana. Jan. 26, 1899.)

GUARANTY—ACCEPTANCES—SURETY—ACTION—ARREST OF JUDGMENT.

1. In case of an absolute guaranty, no notice of acceptance by the guaranteee is necessary.

2. There is a contract of suretyship, and not of guaranty, where bonds, the consideration for the sale of goods by G. & Co. to T., are executed as the joint and several undertaking of W. and T., and authorize the sale of goods by G. & Co. to T., and in one W. undertakes not merely to pay damages resulting from failure of T. to fulfill her agreement, but also to pay for the goods bought by her if she failed to pay for them, and in the other he designates himself as surety for T., and it is recited, if she fails to pay for goods bought, "the parties hereto" agree to indemnify G. & Co. against any loss, and all persons interested in the contract "are hereby secured" against loss.

3. Principal and surety on a bond may be sued in the same action, their liability accruing at the same time, and arising from one breach of the same contract.

4. Defendant, who is present and excepts to the sustaining of plaintiff's motion for judgment, is not prevented from filing motion in arrest of judgment, though judgment, the special findings, and conclusions of law are entered of record on the last day of the term, and judgment rendered on the same day.

Appeal from circuit court, Marion county; Henry Clay Allen, Judge.

Action by John H. Rohrer and others against Philip S. Wheeler and another. Defendant Wheeler appeals. Affirmed.

George Shirts and Pickens, Cox & Kahn, for appellant. Hord & Perkins, for appellees.

ROBINSON, J. Appellees sued appellant, Philip S. Wheeler, and one Agnes W. Templeton, for the value of certain goods sold said Templeton. Templeton confessed judgment. Wheeler answered in two paragraphs, to which a reply in denial was filed. Judgment in appellees' favor. The questions raised may all be considered in a discussion of the special finding of facts. The special finding shows that, in 1895, appellees, as the Germantown Cigar & Tobacco Company, were wholesale dealers in tobacco; that Agnes W. Templeton, a retail dealer, desired to buy goods of appellees, which appellees refused to sell to her on credit unless she would give acceptable security; that thereupon, in order to induce appellees to sell goods to her on credit, she and said Wheeler executed to appellees a certain undertaking or bond; that the bond, dated May 18, 1895, and signed by Templeton and Wheeler, provided that the said Templeton and Wheeler bound themselves to appellees in the penal sum of \$1,000, for the payment of which they bound themselves jointly and severally; that the condition of the bond "is that as the above-bound Philip S. Wheeler has by this instrument agreed to indemnify or make good any loss by reason of nonpayment for goods received and sold by A. W. Templeton on account of the above-named Germantown Cigar and Tobacco Company, as their account may appear, now, if the said A. W. Templeton will not pay for all goods shipped by the Germantown Cigar and Tobacco Company when ordered by said A. W. Templeton, then said Philip S. Wheeler agrees to pay and indemnify said J. H. Rohrer, J. A. Brown, A. C. Kercher, Joe Endress, Jr., and David Rohrer, known as the Germantown Cigar and Tobacco Company, and all persons interested in the said agreement, against all demands by reason of an agreement or covenant in the contract for the purchase of cigars from said Germantown Cigar and Tobacco Company, then this obligation is to be void, else to remain in force"; that said bond was delivered to appellees for the purpose of inducing appellees to sell goods to Templeton on credit; that appellees, after receiving said bond and making inquiries as to the financial responsibility of Wheeler, accepted the same, and, in consideration thereof, were induced to, and did, sell and deliver to said Templeton, in pursuance thereof, from the 22d day of May to the 31st of July, 1895, goods amounting to \$1,056.50; that said Templeton paid \$145 of said sum, and that the balance (\$911.50) is wholly unpaid, and has been due since November 1, 1895; that after the 29th day of July, 1895, appellees refused to sell said Templeton any more goods without additional security, and thereupon, in order to induce appellees to continue to sell goods to her on credit, said Templeton and Wheeler, on September 3, 1895, executed a second bond, whereby

Templeton, as principal, and Wheeler, "as surety for said principal," bound themselves jointly and severally to appellees in the penal sum of \$1,500; that the condition of the bond was that, as Templeton "has entered into a contract with the Germantown Cigar and Tobacco Company whereby the said company agrees to and does furnish cigars from time to time to said Templeton, * * * now, if the said Templeton will well and truly pay all amounts legally due for goods and cigars purchased, * * * then the bond to be void, otherwise the parties hereto agree to, and do indemnify said Germantown Cigar and Tobacco Company against any and all loss that may arise from said contract, and all persons interested in said contract are hereby secured against all demands by reason of an agreement or covenant in the contract for the purchase of cigars" from said company; that, in consideration of said bond, appellees sold and delivered to said Templeton, between September 11, 1895, and November 16, 1895, goods amounting to \$277.75, which sum is long past due and wholly unpaid; that in the fore part of July, 1895, Wheeler was notified by appellees that Templeton had failed to pay for the goods she had purchased under the bond dated May 18, 1895, or for any part of them, and said Wheeler requested appellees to continue to sell her goods thereunder; that in December, 1895, Wheeler was notified of the amount Templeton had failed to pay for goods purchased under said bonds,—\$1,189.25, and that the same was due; and that payment was demanded from Wheeler, but he refused to pay. The finding further states that Templeton appeared in open court in person, and confessed judgment for the full amount sued upon in appellees' complaint, and that judgment was rendered against her. The court stated as conclusions of law that appellees were entitled to judgment against Wheeler for \$1,296.28. There were two paragraphs of complaint, each counting on a separate bond. The statement of the condition of the bonds shows the purpose for which they were given. The contracts whose fulfillment these bonds were given to secure were the contracts Templeton had with these appellees to purchase goods. The bonds were the inducement for appellees to give Templeton credit, and if she carried out her contract with appellees, and paid for the goods, the bonds were void. Each paragraph of complaint is accompanied by a bill of particulars showing the account appellees held against Templeton. The complaint is not open to the objection that the contracts to secure the performance of which the bonds were given are not described, or a violation of the same not shown.

Under the special findings and conclusions of law, it is argued by appellant's counsel that these bonds are bonds of strict guaranty, and not original undertakings, and that the findings fail to show any notice of acceptance to Wheeler. Even if we should hold that the liability of appellant is that of a

guarantor, notice of acceptance was unnecessary. If it was a contract of guaranty, it was an absolute guaranty, and not an offer to guaranty; and, where an absolute guaranty is made, no notice of acceptance by the guarantee is required. *Bryant v. Stout*, 16 Ind. App. 380, 44 N. E. 68, and 45 N. E. 343, and cases there cited. *Brandt*, Sur. (2d Ed.) §§ 193, 194. But the bonds in question show an original undertaking on the part of appellant, and not a collateral guaranty. In a strict collateral guaranty, the guarantor does not undertake to do what the principal is bound to do, but he undertakes, in the event the principal fails to do what he has promised, to pay damages for such failure. A guarantor undertakes to pay such damages as result from the principal's default. A surety undertakes to do the particular thing if the principal fails. See *Nading v. McGregor*, 121 Ind. 470, 23 N. E. 283; *Wall-Paper Co. v. Emerson*, 17 Ind. App. 482, 46 N. E. 1018; *Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. 160; *Lane v. Mayer*, 15 Ind. App. 382, 44 N. E. 73; *Bryant v. Stout*, 16 Ind. App. 380, 44 N. E. 68, and 45 N. E. 343; *Brandt*, Sur. (2d Ed.) § 1.

While the bonds are not drawn with that precision which should characterize a legal instrument, yet from the whole instruments we cannot escape the conclusion that they were intended to be, and are, the original undertakings of appellant. The bond, in each case, was the consideration for the sale of the goods. In the first bond the undertaking of appellant was not merely to pay the damages resulting from the failure of Templeton to fulfill her agreement, but he agreed to pay for the goods she bought in case she failed to pay for them. In the second bond appellant designates himself as surety for Templeton, and agrees that, in case she fails to pay for goods purchased, "the parties" agree to, and do, indemnify appellees against any loss, and all persons interested in the contract "are hereby secured" against loss; and in each case the bond was the joint and several undertaking of appellant and Templeton. We fail to see where these bonds differ in any essential respect from an ordinary bond of a principal and surety, signed by both parties, and conditioned to answer for a default of the principal. Appellant did not enter into any contract collateral to that of the principal, but he promised to do that which his principal was bound to do. He bound himself jointly with his principal as an original promisor, and gave the creditor the right to sue him jointly with his principal. See *Burns v. Manufacturing Co.*, 87 Ind. 541; *Morgan v. Organ Co.*, 73 Ind. 179; *Shearer v. Peale*, 9 Ind. App. 282, 36 N. E. 455. These bonds authorized sales to be made to Templeton, and, if she failed to pay for the goods, Wheeler promised to do so. The principal debtor is a party to the undertaking which is joint and several. In the case of *McMillan v. Bank*, 32 Ind. 11, the

court said: "There is no case in the books, to our knowledge, and some pains has been bestowed in their examination, in which one contracting jointly with the principal debtor has been deemed a guarantor, and allowed to avail himself of such defenses as are peculiar to that character." It was not necessary that the finding should show that Templeton is insolvent. The obligee had the right to sue both the obligors in the same action. Had the obligee been compelled to sue the principal first, such a finding would be necessary. But here the liability of the obligors accrues at the same time on the same bond, and arises from one breach of the same contract. *Bryant v. Stout*, supra.

The fact that the special findings and conclusions of law were entered of record on the last day of the term, and judgment rendered on the same day, did not necessarily prevent appellant from filing a motion in arrest of judgment. The record shows appellant was present and excepted to the sustaining of appellees' motion for judgment, and a motion in arrest of judgment could have been then made. A motion in arrest cuts off a motion for a new trial, unless the grounds of the motion for a new trial are unknown at the time the motion in arrest is made. *Elliott*, App. Proc. § 834, note. See *Railway Co. v. Case*, 122 Ind. 310, 23 N. E. 797, and cases cited. The Code provides that, where a verdict is rendered on the last day of the term, the motion for a new trial may be filed on the first day of the next term. The court may render judgment, however, on the last day of the term, but that does not cut off the right to file the motion for a new trial at the next term. Appellant had a right, before judgment was rendered, to file a motion in arrest, and it does not appear from the record that this right was denied. There is no error in the record, and the judgment is affirmed.

COMSTOCK, J., took no part in this decision.

(22 Ind. App. 346)

DIAMOND PLATE-GLASS CO. et al. v. CURLESS.¹

(Appellate Court of Indiana. Feb. 2, 1899.)

OIL WELLS—CONTRACT—LEASE—TERMINATION.

An instrument provided that the party of the first part "this day granted and leased" to the second party, their heirs and assigns, certain tracts of land, each 20 feet square, of certain described land, containing 160 acres, second party to have right of ingress and egress over the whole land, and to pay the first party one-sixth of all oil produced; that this "grant and lease shall be deemed to commence at and run from the date of the signing thereof, and shall be deemed to have terminated whenever natural gas ceases to be used generally for manufacturing purposes in H., or whenever their heirs or assigns shall fail to pay or tender the rental price herein agreed on within sixty days of the date of its becoming due; * * * and, as an additional consideration, the said second party agree to pay said first party an annual

¹Rehearing denied. See 77 N. E. 283.

rental of one hundred dollars each year for each gas well drilled * * * which produced gas in paying quantities, * * * said payments to commence and become due * * * as to each of said gas wells after the completion thereof, and to continue thereafter annually during the continuance of this lease. Until the drilling of a gas well * * * by said second party, they shall pay to said first party an annual rental of $\frac{50}{100}$ dollars an acre. * * * If the wells are not drilled in five years from the date, the rental to be raised to one dollar an acre. * * * Should any other gas well be put down on said * * * tract of land other than herein stipulated for, then said second party * * * shall thereafter be relieved and released from the payment of the rental * * * provided." Held that, the party of the second part not having taken possession, no tenancy was created, but that there was a mere agreement whereby the second party, till possession was taken by them, agreed to pay an annual sum for the right to go on the land during the year, and prospect for gas and oil, which agreement ran only from year to year, and was terminable at the end of any year by the first party refusing to accept, or the second party failing or refusing to pay the stipulated sum.

Appeal from circuit court, Tipton county; George H. Gifford, Special Judge.

Action by Marion Curless against the Diamond Plate-Glass Company and others. Judgment for plaintiff. Defendants appeal. Reversed.

Blacklidge & Shirley and Stuart Bros. & Hammond, for appellants. Moon & Wolf, for appellee.

ROBINSON, J. Appellee recovered a judgment against appellants before a justice of the peace for acreage rent claimed to be due on a certain agreement. Appellants appealed to the circuit court, where appellee filed an amended complaint, to which demurrers were overruled. Appellants filed a cross complaint, asking to have the agreement canceled, which was struck out on motion. Judgment against appellants. The errors assigned question the sufficiency of the complaint, sustaining the motion striking out the cross complaint, and overruling the motion for a new trial.

This is not a suit to collect well rental on certain tracts, each 20 feet square, as in the case of Plate-Glass Co. v. Tennell (decided by this court December 13, 1898) 52 N. E. 168; but it is a suit to collect acreage rental on all the land described in the agreement. In the above case no provision was made for any acreage rental on the whole land, but on the particular square tracts, and well rental on those particular tracts was alone in controversy. That case was entirely different from the one at bar. In this case we have nothing to do with the tracts 20 feet square.

The questions involved are to be determined by a construction of the written instrument executed by the landowners to the assignor of the appellants. The instrument provides that the party of the first part "this day granted and leased to the second party, their heirs and assigns," certain tracts of land, each 20 feet square, of certain real estate,

particularly described, and containing 160 acres, second party to have right of ingress and egress over the whole land, to erect necessary buildings, use of highways adjoining to lay pipes, to deliver first party free gas for domestic use, to pay the first party one-sixth of all oil produced, and further providing: "This grant and lease shall be deemed to commence at and run from the date of the signing hereof, and shall be deemed to have terminated whenever natural gas ceases to be used generally for manufacturing purposes in Howard county, Indiana, or whenever the second party, their heirs or assigns, shall fail to pay or tender the rental price herein agreed upon within sixty days of the date of its becoming due. And in the event of the termination hereof, for any cause, all rights and liabilities hereunder shall cease and terminate. And, as an additional consideration, the said second party agree to pay to said first party an annual rental of one hundred dollars each year for each gas well drilled as aforesaid which produces gas in paying quantities sufficient for manufacturing purposes. Said payments to commence and become due and payable on the first day of January, as to each of said gas wells after the completion thereof, and to continue thereafter annually during the continuance of this lease. Until the drilling of a gas well on said premises by said second party, they shall pay to said first party an annual rental of $\frac{50}{100}$ dollars an acre, to be paid on the 1st day of January of each year, commencing 1891; if the wells are not drilled in five years from date, the rental to be raised to one dollar an acre thereafter as to each 40-acre tract. Should any other gas well or wells be put down on said — acre tract of land other than herein stipulated for, then said second party, their heirs and assigns, shall thereafter be relieved and released from the payment of the rental as in this contract provided." Appellants never took possession of the premises described in the instrument. The fact that the parties have used the word "lease" does not necessarily determine the character of the instrument. The intention of the parties, as gathered from the whole instrument, must determine its character. It cannot be construed to be a lease for years. It lacks one of the essential requisites of such a lease. It does not have a certain determination, "either by an express enumeration of years, or by reference to a certainty that is expressed, or by reducing it to a certainty upon some contingent event, which must happen before the death of the lessor or lessee." Wood, Landl. & Ten. §§ 207, 209; Woodf. Landl. & Ten. (12th Ed.) p. 117; 3 Ohlt. Bl. pp. 140, 143; Tayl. Landl. & Ten. § 15. Nor could it be a tenancy from year to year, even if the relation of landlord and tenant ever existed between the parties. Such a tenancy exists where the premises are occupied with the assent of the landlord, without any agreement as to the duration of

the term. Burns' Rev. St. 1894, § 7089 (Rev. St. 1881, § 5208). If we should conclude that the relation of landlord and tenant existed, an annual rent having been paid, the tenancy could be no greater than from year to year, and such a tenancy may be terminated by the tenant at the end of any year. To terminate such a tenancy by a tenant, the statute does not require notice to be given to the landlord. And conceding that a tenancy existed, if it was a tenancy at will, it was at the will of both parties. If an estate is at the will of one of the parties, it is equally at the will of the other party. *Knight v. Iron Co.*, 47 Ind. 106.

In the agreement in question, appellants did not bind themselves to put down a well within any specified time. It was optional with them whether any wells would be drilled. This is clearly shown to have been the intention of the parties by the provision that, if wells were not drilled within five years from the date of the agreement, the amount to be paid per acre was to be increased. All rights remained in the landowner, except those granted to appellants. From the terms of the instrument it is clear that appellants did not have the exclusive right to take gas from the land described for any fixed time, or for any time. The record says nothing whatever about any contemporaneous oral or written agreement between the parties. If such an agreement existed, it has not been brought to this court. Appellee granted to appellants a bare right to occupy land for a particular purpose. Until possession was taken, no present title was vested in appellants, except the mere right of exploration for gas and oil; and this right was not exclusive. The sum paid for this right was paid annually, but at the end of the year there is nothing in the agreement compelling the landowner to accept, or the appellants to pay, this amount for another year. In the case of *Reed v. Lewis*, 74 Ind. 433, cited by appellee's counsel, the instrument provided that the first party "doth hereby demise, grant, and lease unto" the party of the second part, "his executors, administrators, and assigns," certain real estate, until the machinery on the same should be removed. Possession was taken under the instrument. This was held not to be a lease for years, because it is of uncertain duration, and "leases for years must have a certain beginning and a certain ending, and so the continuance of the term must be certain,"—citing 1 Shep. Touch. 272; Co. Litt. 451. Concerning the nature of the estate conveyed, the court said: "The lease in controversy is to continue until an uncertain contingency, to wit, the removal of the machinery; but as the word 'heirs' is not now necessary to create a fee, and as every grant is construed most strongly against the grantor, and conveys all he has unless a lesser estate is expressed, it would seem that here an estate in fee was created, determinable upon the happening of a contingency." In the case of *Gilmore v. Hamilton*, 83 Ind.

196, also cited by appellee's counsel, the first party "doth hereby demise and grant" certain real estate to the second party, "their heirs, executors, administrators, and assigns, * * * during the time they may occupy the same for a sawmill yard." The grantees took possession. The court did not decide what estate passed by the grant, but simply held that it did not create a tenancy at will, which the lessor could terminate by a month's notice to quit at his option. The above cases are clearly distinguishable from that at bar. In the case at bar, possession was not taken under the agreement; no attempt was made to convey the real estate; not even the right of exclusive possession was given. It was simply a grant of a right to drill wells and erect other appliances necessary to drill and operate the wells. In neither of the above cases does it appear that any rent was reserved. In *Knight v. Iron Co.*, 47 Ind. 106, cited by appellants' counsel, the instrument was signed by the grantors and the grantee, and, for the consideration of one dollar, "doth hereby bargain, sell, and convey unto the party of the second part, his heirs and assigns, all the mineral coal, limestone, iron ore, fireclay, and oil in and upon and under" certain lands. The grantee was to enter upon the lands, and search for coal, etc., to open and work the mines, to pay a certain amount annually, and also royalty during continuance of the agreement. A failure to make payments upon request or within 60 days after demand was to be deemed an abandonment of the agreement. The agreement gave the grantee the right to abandon the lands and mining at any time. In that case it was held that the agreement created a tenancy at will.

Counsel for appellee cites the case of *Gas Co. v. Kibbey*, 135 Ind. 357, 35 N. E. 302. The lease in that case is in some particulars like the instrument in question, but it also contains some material differences. The lease in that case provided expressly that the lessors "covenant and agree and hereby bind themselves, their heirs, executors, and assigns, not to drill, or to suffer or permit others to drill or put down, any other gas well or wells on any part of said entire eighty-acre tract of land described as above during the continuance of said contract," except the lessor could drill a well on the premises for the use of himself and neighbors. Suit was brought by appellee to restrain appellant, a stranger who had entered upon the land, and commenced to bore a well, and it was held that injunction would lie. In the instrument under consideration no such provision is found, nor does the record show any such agreement was made at the time the lease was executed, or at any other time. In the cases of *Gas Co. v. Teters*, 15 Ind. App. 475, 44 N. E. 549; *Edmonds v. Mounsey*, 15 Ind. App. 399, 44 N. E. 196; *Breckenridge v. Parrott*, 15 Ind. App. 411, 44 N. E. 66; *Oil Co. v. Albright*, 18 Ind. App. 151, 47 N. E. 682.—the leases under consideration were for terms

of years. In *Oil Co. v. Blake*, 13 Ind. App. 680, 42 N. E. 234, the landowner granted all the oil and gas in and under certain lands, the grantee expressly agreeing to commence drilling a well within 30 days, and to complete a well within 30 days after drilling commenced, and, upon failure so to do, to pay annually thereafter five dollars per acre until the well was drilled and suit was brought to recover the rental for the whole tract. The liability of the company for the rental was placed upon the ground that the company was given an exclusive right to all the oil and gas under the land, and that the landowner could not have granted this right to others, because it was already granted to the company; that the failure to make the test was not the fault of the landowner, but of the company, and, by the terms of the contract, the company had expressly agreed to pay a certain acre rental in the event it failed to drill a well as agreed. The case differs from the case at bar in that it gave the company an exclusive right; that the company had bound itself to drill a well, and to drill it within a certain time; while in the case at bar the exclusive right to drill was not granted, nor did the grantee obligate himself to drill a well at any time. In the case at bar it was optional whether a well should be drilled, while in the above case it was not. As we construe the instrument in question, it was an agreement whereby appellants, until possession was taken by them, agreed to pay an annual sum for the right to go upon the land at any time within the year, and prospect for gas and oil; that the agreement ran only from year to year; and that, at the end of any year, either party could terminate the agreement, the one by refusing to accept, and the other by refusing to pay the stipulated sum. It has some of the elements of a tenancy from year to year, and also a tenancy at will, but it is neither. Possession never having been taken by the terms of the instrument, it cannot be said that the relation of landlord and tenant ever existed. It is well settled that in a lease, where the relation of landlord and tenant exists, the lessee will not be permitted at his option to terminate the tenancy before the expiration of the term by failing or refusing to pay rent under a clause in the lease providing that the grant shall terminate whenever the grantee shall fail to pay or tender the rent within a certain time after it becomes due. See *Ray v. Gas Co.*, 138 Pa. St. 576, 20 Atl. 1065; *Gas Co. v. De Witt*, 130 Pa. St. 235, 18 Atl. 724; *Leatherman v. Oliver*, 151 Pa. St. 646, 25 Atl. 309; *Sargent v. Robertson*, 17 Ind. App. 411, 46 N. E. 925. But construing the instrument in question, as we do, to be an agreement whereby a right was granted for a stipulated sum, payable from year to year, and continuing from year to year if both parties desired that it should so continue, it could be terminated by either party at the expiration of such period, and a failure to pay the stipulated sum,

as provided in the agreement, or a refusal, under the terms of the agreement, to pay such sum, would work its termination. Judgment reversed.

(59 Ohio St. 368)

STATE ex rel. ATTORNEY GENERAL v. HEFFNER. SAME v. STALLSMITH. STATE ex rel. SAAL v. BUSHNELL, Governor, et al. STATE ex rel. KELLY v. THRALL.

(Supreme Court of Ohio. Jan. 17, 1899.)

ELECTION OF COUNTY OFFICERS—CONSTITUTIONAL LAW—OFFICIAL TERM OF SHERIFF.

1. The provisions of the tenth article of the constitution, requiring the general assembly to provide by law for the election of county officers, and that such officers shall be elected on the first Tuesday after the first Monday in November, disable the general assembly to provide by law for an interval between the official terms of a sheriff and one elected to succeed him.

2. The power conferred upon the general assembly by the twenty-seventh section of the second article of the constitution, to provide for the filling of vacancies in office, refers to such vacancies as may occur fortuitously. It does not authorize the creation of an interval between the official terms of persons elected to the office of sheriff.

3. The act of April 26, 1898, "to amend sections 1202 and 1203 of the Revised Statutes" (93 Laws, 351), is void, including its repealing section; and said original sections continue in force notwithstanding said act.

4. All persons elected at the November election, 1898, to the office of sheriff in the several counties of the state, were entitled, upon qualification, to enter upon the discharge of their official duties on the first Monday in January, 1899; and those who have not so qualified and entered are entitled to do so now.

(Syllabus by the Court.)

Quo warranto by the state, on the relation of the attorney general, against one Heffner and against one Stallsmith; and quo warranto by the state, on the relation of one Saal, against Asa S. Bushnell, governor, and Charles Kinney, secretary of state; and mandamus by the state, on the relation of William A. Kelly, against Charles Thrall. To the answers of the several defendants, the relators file general demurrers. Overruled in the action against Stallsmith, and sustained in the other cases.

In the case of the state ex rel. the attorney general against Heffner, the petition alleges that the defendant Heffner, having been elected sheriff of Mercer county for two successive terms of two years each, and having on the first Monday of January, 1899, occupied said office continuously for four years, nevertheless he refused to vacate said office, and asserted his right to continue therein until the first Monday of September, 1899; and prayed that he be ousted therefrom. In his answer, Heffner admits his election to said office in November, 1894, and his re-election thereto in November, 1896, and that he qualified and held the office for both of the terms for which he was so elected, but that in consequence of the act of

April 26, 1898, to amend sections 1202 and 1203 of the Revised Statutes, he really believes that he is entitled to hold the office until the first Monday in September, 1899; that the governor has failed to issue to him a commission for that purpose, but that he is ready, able, and willing to qualify according to law; that no candidate was nominated or elected to fill said office during the interim of eight months between said first Monday in January and said first Monday in September, 1899; but that at the general election held in November, 1898, one Lawrence Shunk was duly elected sheriff in Mercer county, and thereafter and prior to the first Monday of January, 1899, received his commission from the governor, and has qualified according to law; but that he was not voted for by the electors of said county to fill said interim of eight months; but that Shunk has, nevertheless, made demand upon the defendant for the surrender to him of said office, which the defendant has refused. He further alleges that on the 2d day of January, 1899, the county commissioners of said county of Mercer appointed one James B. Shock sheriff of said county of Mercer, to enter upon the duties of said office and hold the same until the first Monday of September, 1899; and that, pursuant thereto, the governor commissioned Shock as sheriff, who duly qualified according to law, and made demand on the defendant for the surrender to him of said office. Wherefore the defendant, if not entitled to the office himself, is unable to determine to which of said demandants he should surrender the same. To this answer there is a general demurrer.

In the state ex rel. the attorney general against Stallsmith, the petition alleges that the defendant was duly elected and commissioned to the office of sheriff at the general election in 1896; qualified and entered upon the office on the first Monday in January, 1897, for the period of two years, to be completed on the first Monday of January, 1899; that at the general election in November, 1898, the defendant was chosen as his own successor in the office of sheriff of Perry county, but refused to qualify as such elected officer; averring and claiming that, in consequence of said amended act, he was entitled to hold the same during said interim, by virtue of section 8 of the Revised Statutes of Ohio; and praying that he be ousted from said office. Defendant Stallsmith, answering, admits the averments as to his several elections in November, 1896 and 1898, and alleges that he served the full term for which he was first chosen, and that pursuant to his re-election, in 1898, he qualified as such sheriff for his second term, by giving bond to the satisfaction of the commissioners of said county, and taking the oath of office, which was indorsed upon said bond, as required by law. To this answer there is a general demurrer.

In the state ex rel. Saal against Asa S. Bushnell, as governor, and Charles Kinney,

as secretary of state, the relator alleges that at the November election held in 1896 one Theodore F. McConnell was duly elected sheriff of Cuyahoga county for the term of two years from the first Monday of January, 1897, and that he duly qualified and entered upon his office, and was the lawful sheriff during the term of two years; that at the general election in November, 1898, said McConnell was duly elected as sheriff of said county for the term of two years, to commence on the first Monday in September, 1899, and that he has duly qualified by executing his bond, with sureties and conditioned according to law; that said bond has been certified to be correct in form by the county solicitor of Cuyahoga county, and has been approved by the commissioners of said county, and his oath has been indorsed thereon. Relator further says that he has been duly appointed by the county commissioners of Cuyahoga county to fill said vacancy in the office of sheriff for the period between the first Monday in January, 1899, and the first Monday of September, 1899, and is entitled by virtue of said appointment to have issued to him a commission as sheriff by the governor and secretary of state for said term, but that said defendants, as governor and secretary of state, have refused to issue to him such commission, and prays for a peremptory writ commanding the issuance thereof. To this petition there is a general demurrer.

In the state of Ohio ex rel. William A. Kelly against Charles Thrall, the relator alleges that one Stephen Thrall, by virtue of two successive elections to the office of sheriff of Delaware county, held said office continuously for four years, ending, as he alleges, on the 31st day of December, 1898; that at the general election held in November, 1898, one Jacob Schaffner was elected sheriff of said county, for a term beginning on the first Monday of September, 1899, and to end on the first Monday of September, 1901; that, by virtue of said amending act, there existed a vacancy in said office from the first Monday in January to the first Monday in September, 1899, said Schaffner not having been elected thereto, and said Stephen Thrall being disqualified to hold over. He further alleges that on the 7th day of January, 1899, the court of common pleas of Delaware county, pursuant to section 1208 of the Revised Statutes, appointed the relator sheriff of said county for said interim; that, as such appointee, he gave bond and performed the other acts required in qualification for said office; and that the defendant Charles Thrall, claiming to be entitled thereto by virtue of his appointment to said office for said interim made by the county commissioners of said county on the 7th day of January, 1899, usurps and unlawfully holds and exercises said office. The relator prays that the defendant be ousted from said office, and that he be inducted therein. To this petition there is a general demurrer.

W. H. West, T. B. Williams, and Frank S. Monnett, Atty. Gen., for the State. Pugh & Pugh and F. M. Marriott, for relator Kelly. Francis J. Wing and J. H. Schnelder, for relator Saal. Mattingly & Short, for defendant Heffner. Frank A. Kelly, John Ferguson, and John T. Pyle, for defendant Stallsmith. Jones & Jones, for defendant Charles Thrall.

SHAUCK, J. (after stating the facts). The numerous controversies which these actions present and suggest arise out of the act of April 26, 1898 (93 Ohio Laws, 851), "to amend sections 1202 and 1203 of the Revised Statutes." Prior to the amendment, section 1202 provided: "There shall be elected in each county biennially a sheriff and coroner who shall hold their office for two years, beginning on the first Monday of January next after their election." Section 1203 provided for the qualification of the officers so elected before said first Monday of January. The only change attempted by the amending act is the substitution of the first Monday of September for the first Monday of January. The sheriffs elected at the November election in 1896 were chosen and commissioned for official terms of two years, to be completely ended on the first Monday of January, 1899. Assuming the constitutional validity of the amending act, the briefs of counsel present a variety of views touching the manner in which the office is to be filled during the eight months intervening between the first Monday of January and the first Monday of September in the year 1899. By one it is contended that there is a vacancy to be filled by appointment to be made by the county commissioners pursuant to the first clause of section 1208, providing that "when the office of sheriff becomes vacant the county commissioners shall appoint some suitable person to fill the vacancy who shall give bond and take the oath of office prescribed for the sheriff, and hold his office for and during the unexpired term of the sheriff whose place he fills." Another contends that there is a vacancy to be filled by appointment to be made by the court of common pleas, pursuant to the last clause of section 1208, providing that "when the sheriff is incapable by reason of absence, sickness or other disability, of serving any process required to be served, or by reason of interest is incompetent to serve, the court of common pleas may appoint some suitable person. * * *" Another presents the view that, notwithstanding the expiration of their official terms, the sheriffs elected in 1896 continue in office during said interim of eight months until the first Monday of September, 1899, when the sheriffs chosen in November, 1898, may take office according to the terms of the amending act; and this view is supposed to be supported by section 8 of the Revised Statutes, providing that "any person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless it

is otherwise provided in the constitution or laws."

Since all of these views assume the validity of the amending act, and since its validity is challenged by the petition against Heffner and in some of the briefs, it seems to present the question of first importance. It is said by those who maintain the validity of the act that the question was decided in accordance with their view in *State v. Brewster*, 44 Ohio St. 589, 9 N. E. 849. If this question was involved in that case, it is strictly accurate to say that it was overlooked. The report shows that counsel agreed as to the existence of a vacancy resulting from the amendment of both the constitution and the statute, and the consideration of the court was devoted exclusively to the manner in which the admitted vacancy should be filled.

It is also said that this act should be held valid in view of the decision of this court in *State v. McCracken*, 51 Ohio St. 123, 36 N. E. 941. That case, however, related to the office of the clerk of the court, and gave effect to section 16 of article 4 of the constitution,—a part of the judicial article,—relating to that particular office, and ordaining that "there shall be elected in each county by the electors thereof one clerk of the court of common pleas, who shall hold his office for the term of three years and until his successor shall be elected and qualified." The effect of this section was distinctly held to be to take the office of clerk out of the operation of other provisions of the constitution which might otherwise have been controlling. In the view taken of the act there considered, it was vital to its validity that, because of the constitutional provision quoted, the act did not create a vacancy in the office. Moreover, neither of the cases cited was affected by section 3 of article 10 of the constitution. It has never been held by this court that the legislature may create a vacancy in an existing county office to be filled by appointment, although it was held that the official term of an elected clerk of the court may, by the operation of the constitutional provision referred to and an act of the legislature, be in effect extended beyond the term for which he had been elected, the extended term not exceeding any limitation placed thereon by the constitution.

Although the power exercised by the general assembly in this instance is legislative in character, it must be exercised conformably to the pertinent sections of the tenth article of the constitution: Section 1: "The general assembly shall provide by law for the election of such county and township officers as may be necessary." Section 2: "County officers shall be elected on the first Tuesday after the first Monday in November by the electors of each county, in such manner and for such term, not exceeding three years, as may be provided by law." Section 3: "No person shall be eligible to the office of sheriff or county treasurer for more than four years in any period of six years." The mandatory provision that

the general assembly shall provide by law for the election of county officers is a clear denial of its power to provide for their appointment, and the requirement that such officers shall be elected on the day named negatives the view that they may be appointed by any authority. *State v. Brennan*, 49 Ohio St. 33, 29 N. E. 593. The power of the general assembly with respect to the subject is completely comprehended in these sections of the tenth article, and section 27 of the second article: "The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law. * * * The nature and the terms of the power granted by this section indicate that, in its application to county officers, it is subordinate to the provisions of the tenth article. The vacancies for which it authorizes the legislature to provide are those which occur fortuitously, as by death or resignation, in offices for which there has been provided, in obedience to the tenth article, an elected incumbent. The power to provide for the filling of such vacancy does not imply a power to create an interval in the office between the official terms of two persons elected to fill it. With respect to the interval which the general assembly has attempted to create by the legislation in question, it is "otherwise provided" by the tenth article, and, as to the principles involved in the act, does not differ from that considered in *State v. Brennan*.

But it is said that the act does not create a vacancy in the office, because the sheriff in office on the first Monday in January should hold until the first Monday in September, when his successor may qualify under the amending act. This proposition is completely answered by the third section of the tenth article, disqualifying all persons to serve as sheriff for more than four years in any period of six years, and the fact appearing in the state ex rel. against Heffner, that on the first Monday in January the defendant had held the office for four years continuously. We are not advised of the number of counties in the state in which the same condition exists. But in the state against Stallsmith we learn that the defendant was first elected in November, 1896, and again in November, 1898; and it is clear as to him that, although he would be qualified to hold over during the interval referred to, there is to be, by the terms of the act, at the close of his second term, an interval of disqualification of like duration and origin, for which a sheriff cannot be elected under any provision of law now existing. But the number of such instances of disqualification cannot be important. In view of the general nature of the subject, the act is void, since it cannot operate in every county of the state. The word "eligible," in the third section of the tenth article, refers as well to qualification to continue in office as to qualification to take office. By its terms, the test of eligi-

bility relates to continuance in or occupancy of office. It prescribes no qualification peculiar to the taking of office, but as to the two offices of sheriff and treasurer, with respect to which there are peculiar reasons for limiting the duration of incumbency, it prescribes such limitation. The term has been usually so interpreted in similar connections. *State v. Murray*, 28 Wis. 96; *Carson v. McPhetridge*, 15 Ind. 327; *Smith v. Moore*, 90 Ind. 204; *Gosman v. State*, 106 Ind. 203, 6 N. E. 349. Original sections 1202 and 1203 were enacted in obedience to the mandate of the tenth article of the constitution. The repealing section of the act of April 26, 1898, is void, as are the other sections. The original sections are now in force, notwithstanding said act. The persons who were elected to the office of sheriff in November, 1898, were entitled to qualify and enter upon the duties of the office on the first Monday in January, 1899. Those who failed to do so then are now entitled to qualify and enter upon such duties.

Since we entertain no doubt as to the validity of the official acts of the persons who have occupied the office of sheriff since the first Monday of January, by whatever claim of title, no such doubt should be inferred from any of the views here expressed. It is with becoming regret that we reach a conclusion regarding the effect of these constitutional provisions which defers the accomplishment of such important public purposes as must have moved the legislature to pass the act in question. Should such purposes continue to commend themselves to the judgment of the members of the general assembly, it is obvious that they may be attained by an act changing the date of the commencement of the official term of the sheriff, and providing for the election for the interval of some one who will not, in consequence, serve more than four years in any period of six years. In the state ex rel. against Heffner the demurrer to the answer will be sustained, and there will be a judgment of ouster. In the state ex rel. against Stallsmith the demurrer to the answer will be overruled, and the petition dismissed. In the state ex rel. Saal against the governor et al. the demurrer to the petition will be sustained, and the petition dismissed. In the state ex rel. Kelly against Thrall the demurrer to the petition will be sustained, and the petition dismissed.

(59 Ohio St. 255)

CITY OF CIRCLEVILLE v. SOHN.

(Supreme Court of Ohio. Dec. 13, 1898.)

MUNICIPAL CORPORATIONS — PUBLIC WAYS — LIABILITY FOR DEFECTS.

1. The duty, enjoined by statute on municipal corporations, to keep their public ways open, in repair, and free from nuisance, is ministerial and mandatory, and requires the removal from such ways of all dangerous defects and obstructions, from whatever cause arising, when brought to the notice of the corporation.

2. The corporation is liable for injuries caused by a dangerous defect or obstruction in a street

or sidewalk under its control, after reasonable notice of its unsafe condition, though it arose from the construction or alteration of the street or sidewalk in conformity with a plan adopted by the municipal authorities.

Shauck, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Pickaway county.

Action by Ella M. Sohn against the city of Circleville to recover for injuries caused by defective sidewalk. Judgment for plaintiff. Defendant brings error. Affirmed.

The petition alleges "that the defendant, the city of Circleville, Ohio, is a municipal corporation of the fourth grade of the second class, duly organized under the laws of the state of Ohio; that there is a certain street in said city, called 'Court Street,' with sidewalks on both sides of the same, which have been constructed and maintained, upon grades established by said defendant, for the use of public travel by pedestrians having occasion to travel thereon; that the said street is, and was at the date hereinafter mentioned, one of the most public streets in the said city, and that the said sidewalk, at the points hereinafter named, was a greatly frequented place, and much traveled by the general public, being within two squares of the business center of said city; that on the west side of said street, between Mound and Union streets, there is an alley, called 'South Boundary Alley,' extending from Canal street, and intersecting said Court street, at a point between the lots of G. F. Wittich and Dorothea Turney; that, from a point near St. Philip's Episcopal Church to the said Court street, said alley descends and slopes rapidly, and where the same crosses said sidewalk it has a slope of at least 2 feet in 16 feet, thereby making said slope dangerous for persons traveling thereon, in times when the same is covered with ice and snow; that said sidewalk at said point, crossing said alley, is constructed in a dangerous and defective manner, by reason of said unusual and abrupt slope, and having rough and uneven stones thereon, and between which there are large fissures; that the same is so constructed at said point as to have a depression or gutter in the middle, for the purpose of permitting and allowing drainage on and through said alley, from said Episcopal Church, and from lots adjoining on said alley, and over said sidewalk, and emptying into a gutter running along the said Court street, between the said sidewalk and the street proper; that in times of rainfall there is a large flow of water over and through said alley at said point, and in times of freezing the said sidewalk at said point becomes covered with ice from said drainage, and also from the drainage from lots adjoining on both sides of said alley, thereby making said sidewalk, from all said causes aforesaid, unusually dangerous to persons walking thereon; that said alley and said sidewalk have remained in said condition, as to the construction thereof, for a

great many years, to wit, for at least 10 years, with the full knowledge of the defendant of all the conditions aforesaid; that accidents have frequently happened at said point, to persons walking on said sidewalk, by said persons slipping and falling, when the same was covered with ice and snow; that the said G. F. Wittich and the said Dorothea Turney have, with the knowledge and consent of said defendant, for a long time prior to the injury hereinafter alleged, to wit, for at least 10 years prior thereto, and at the time said injury occurred, used said alleyway as a means of drainage for their slops and surplus water, coming from their said premises, and the same has been allowed and permitted by the defendant to flow over and across said sidewalk, and into said gutter, continuously, for the said period of time aforesaid; that on or about the 16th day of March, A. D. 1895, and for more than a month next preceding, said defendant, with full knowledge of all the facts heretofore stated, had carelessly and negligently suffered ice, frozen snow, and sleet to accumulate on said sidewalk at said point, and the same was at said date dangerous to persons passing along the same, by reason of its slippery condition, and the defective condition of said sidewalk, as hereinbefore stated; that at said date aforesaid, about 8 o'clock in the evening, this plaintiff was passing along the sidewalk, in the usual way, using all due care, and ignorant of its defective and dangerous and slippery condition, and while so walking she fell, and broke, fractured, and sprained her right limb near the ankle joint, and ruptured the ligaments, and otherwise injured her said limb; that by reason of the injury aforesaid she was laid up and confined to her bed for the period of five days, and has suffered great bodily pain and mental anguish, and was prevented for the last three months from attending to her business, and incurred about \$125 expense for medical attendance and nursing, in attempting to be cured of said injuries; and this plaintiff further avers that she is still lame and crippled from said injuries, and is only able to attend to her business by the use of her crutches, that the said injuries still exist, and that she will, as she verily believes, be and remain permanently lame, crippled, and disabled from said injuries."

By an amendment the following allegations were added to the petition: "That in consequence of the defective condition of the said alley, where the same crossed the said sidewalk, as it was at the time of her said injury, as described in her petition, and of the said unusual, abrupt, and dangerous slope thereof at said point, and of the accumulation and flow of the water over and through said alley and across said sidewalk, from the sources and causes as averred and described in her petition, and the freezing of the said ice and snow thereon, in the defective condition of the said sidewalk at said point, at the time of said in-

jury, so caused and brought about by the negligence of said defendant, and by the negligence of the said defendant in permitting the same to be and remain in said condition, the said plaintiff became and was injured, as described in her petition."

The defendant answered, denying, substantially, the alleged defective condition of the sidewalk, and all negligence on its part, and charging the plaintiff with contributory negligence. The plaintiff controverted the allegations of contributory negligence, and upon a trial of the issues thus joined the defendant prevailed. The judgment in its favor was reversed by the circuit court, for error in the charge, and in refusing to give instructions requested by the plaintiff.

The charges so held erroneous are as follows: "If you find, from the evidence, that the plaintiff's fall was caused by the plan or design of the sidewalk, then the defendant cannot be held liable." "If you find, from the evidence, that the plaintiff's fall was caused by the plan or design of the sidewalk, and not by any failure to repair the same, or a defect in its construction after the plan was adopted, then the defendant cannot be held liable." "The city had a right to open out the alley, and to construct said sidewalk, and the alley crossing which intersects it at that point; and if you find, from the testimony, that the alley crossing complained of was constructed in a reasonably safe manner, according to a plan enacted by the city council of the city of Circleville, and that it has remained substantially in that condition since, and was so at the time the injury complained of took place, and that the defect, if any, was in the plan, and not in its construction, or the want of repair on the part of the city, but that the injury complained of occurred and was caused by the adoption of a plan which, I have stated before, was reasonably carried out, and substantially built according to the plan, then and in that case the plaintiff cannot recover."

The instructions requested and refused are as follows: "If you find, from the evidence, that the accumulation of ice on the pavement, where the same crossed over South Boundary alley, combined with the defective condition of said alley at said point, and that the municipal authorities knew, or should have known, of its defective condition, then and in such case I charge you that the city is liable, unless you find that the plaintiff was guilty of contributory negligence in going upon said pavement at this point." "The duties of the municipal authorities of this state to keep the streets, alleys, and sidewalks of the municipality for which they act in repair are ministerial, and not legislative; and, although they may exercise their discretion as to whether such improvements shall be made, yet, when they do decide to make them, the law requires that they shall be made in a reasonably safe condition for public travel, and, in their acts in constructing the streets, alleys, and sidewalks in such a manner as to be reasona-

bly safe for public travel, the municipality for which they act may be held liable." "The law of this state imposes upon the municipal authorities the duty of making and keeping the sidewalks of the municipality in reasonably safe condition for persons walking along and over them, and in the performance of this duty the authorities act in a ministerial capacity, and for their negligence in the performance of their duty the municipality for which they act may be held liable." "The same duty was imposed upon the defendant, through its municipal authorities, to make and keep in a reasonably safe condition the sidewalk where it crossed over South Boundary alley, as the other parts of said pavement."

The case is brought here on error by the city.

C. A. Weldon and Clarence Curtain, for plaintiff in error. Abernethy & Folsom and Schleyer & Gearhart, for defendant in error.

WILLIAMS, J. (after stating the facts). The instructions given and refused by the court of common pleas, for which its judgment was reversed by the circuit court, raise the question whether a municipal corporation is exonerated from liability for injuries caused by an unsafe condition of a public way under its control, which it has suffered to remain after notice, when the defect arose in the execution of a plan adopted by the corporation for a local improvement. Its immunity from liability is defended here on the ground that, in the adoption of plans for local improvements, municipal bodies are in the exercise either of a legislative power, which is discretionary and not subject to judicial control, or of a judicial power, and not responsible for errors of judgment. Cases are cited in support of the proposition, some of which place the exemption from liability on one of these grounds, and some on the other, but none on both. It is said in *Detroit v. Beckman*, 34 Mich. 125, that "when complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, it is apparent that the fault is with legislative action." And in *Urquhart v. City of Ogdensburg*, 91 N. Y. 67, it is declared that the exercise of the power to make local improvements is quasi judicial. The courts of these states, in numerous decisions, maintain respectively these divergent views of the grounds on which municipal corporations are not liable in such cases, but concur in holding their nonliability; and on that question they are at variance with a large number of reported cases, especially of those decided by the courts of the Middle and Western states. In *Blyth v. Village of Waterville*, 57 Minn. 115, 58 N. W. 817, it is held that "a municipal corporation is liable for an injury caused by having an unsafe sidewalk, the condition of which is due to the plan adopted for its construction, when the city could have remedied the defect, but did not do so." And in *Gould v. City of Topeka*,

32 Kan. 485, 4 Pac. 822, the court hold that a "city has no more right to plan or create an unsafe and dangerous condition of one of its streets than it has to plan or create a public or common nuisance." The same doctrine is maintained in Indiana, Iowa, and other states.

We will not attempt a review or discussion of the cases on this subject. In their briefs, which show diligent research, counsel have collected the cases on both sides, and ably presented their different views. Text writers on the subject lean to the side of municipal liability in such cases. In *Dillon on Municipal Corporations* (volume 2, p. 1294), under section 1024, it is said: "Does the principle that actionable negligence cannot be predicated of the plan itself (Id. § 1046) go so far as to exempt from liability if that plan leaves the streets in an unsafe and dangerous condition for public use? In the author's opinion this question ought to be answered in the negative." And in *Harris on Damages by Corporations* (volume 1, p. 165) that author says: "As to the liability of a city for damages for an injury resulting from a defective plan, the decisions are not all harmonious, but the weight of authority is now, perhaps, in favor of holding the city liable for defects in the plan as well as in the execution of the work." And see *Elliott, Roads & S. c. 20*, and *Jones, Neg. Mun. Corp. c. 4, p. 67*. It has been held in this state, in a number of reported cases, that municipal corporations are liable for injuries caused to property abutting on streets, by changes in their grades, notwithstanding the establishment of the grade was a lawful exercise of municipal authority, and the work was done in conformity with the plan so adopted. The court recognizes that in this class of cases it has taken ground in advance of some adjudications elsewhere, and its position is maintained on principle. The doctrine established by them has since been adopted and followed in several other states.

In *City of Dayton v. Pease*, 4 Ohio St. 80, the city of Dayton was held liable in damages for injuries to property resulting from the fall of a bridge, forming part of one of its streets over a canal, where the fall was owing entirely to defects in the plan of the bridge, which had been approved by the council, and the bridge was constructed under its direction and in accordance with the plan. While the question here is not precisely the same as in that case, it is nearly so, and involves an application of the same principle. And, in view of the irreconcilable conflict of decisions elsewhere on this question, we are at liberty to adopt such rule as will best harmonize with those of this court and our legislation on the subject, and as to us seems most reasonable and practicable. Our statute in express terms places the public ways of each municipality in its control, coupled with a positive command to keep them open, in repair, and free from nuisances. In the per-

formance of that duty the municipal authorities are required to remove and keep removed from its streets all dangerous defects, obstructions, and nuisances of every kind, as they may arise from time to time, from any cause. There is no exception from the requirement in favor of defects, obstructions, or nuisances which are placed, or caused to be placed, in a street, by the corporation, or by its officers or agents; nor is there any less reason for holding the corporation liable for a disregard of its duty to remove such obstacles from its streets, when placed there by its own act or the act of its officers, than there is for making it answerable for its negligence in permitting similar obstacles to remain when placed in the street by other persons. The statutory duty is ministerial in its nature and mandatory in terms, and was imposed for the benefit of those having occasion to use the streets, so that they might use them with safety, and not for the benefit of the corporation, and ample means for its prompt and efficient performance are placed in the control of the corporation. While municipal legislation may be necessary in providing means and measures for the performance of the duty, as it is with respect to many strictly ministerial duties, its performance, or the omission to perform it, is not the exercise of legislative or judicial power; nor is it discretionary.

We are of opinion, therefore, that a municipal corporation should be held liable for injuries caused by a dangerous defect or obstruction in a street or sidewalk, which it suffers to remain after reasonable notice of its existence, though it arose in the construction or alteration of the street or sidewalk in accordance with a plan adopted by the municipal authorities. We express no opinion in regard to the weight of the evidence. There was not a total lack of evidence tending to support the issues for the plaintiff, and its sufficiency is for the jury under proper instructions, and for the lower courts. Judgment affirmed.

SHAUCK, J., dissents.

(59 Ohio St. 307)

OHIO OIL CO. v. LANE.

(Supreme Court of Ohio. Dec. 13, 1898.)

OIL AND GAS CONTRACT — LEASE TO OPERATING COMPANY—PAYMENT FOR WELL NOT USED —CONSTRUCTION OF CONTRACT.

A contract between the owner of lands and a company operating in oil and gas, whereby such minerals are granted in place to the operating company upon the stipulation that, if gas only is found, it will pay a fixed sum per year for each well "while the same is being used off the premises," and containing no stipulation inconsistent therewith, should not be so construed as to require it to pay such sum for a gas well whose product is not used, even though the jury should be of the opinion that it might have been so used off the premises without financial loss to the company.

(Syllabus by the Court.)

Error to circuit court, Auglaize county.

Action by Thomas A. Lane against the Ohio Oil Company. Judgment for plaintiff. Defendant brings error. Reversed.

The controversy arises out of the second cause of action in the petition filed in the court of common pleas by Lane against the oil company. That cause of action, as alleged by him, is, in substance, that on the 5th of May, 1890, being the owner of 120 acres of land lying in Mercer county, he entered into a contract with the oil company, a copy of which is in the record, its material stipulations being as follows: "In consideration of the sum of \$420, the receipt of which is hereby acknowledged, Thomas A. Lane, of Transit. Hamilton county, Ohio, first party, hereby grant unto the Ohio Oil Company, an Ohio corporation, second party, its successors and assigns, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas, or water, and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil, gas, or water from said premises; excepting and reserving, however, to first party the one-sixth ($\frac{1}{6}$) part of all oil produced and saved from said premises, to be delivered in the pipe line with which second party may connect its wells, namely: * * *. If gas only is found, second party agrees to pay three hundred dollars (\$300) each year, in advance, for the product of each well while the same is being used off the premises, and first party to have gas free of cost to heat six stoves in dwelling house during the same time. * * *. The second party shall have the right to use sufficient gas, oil, or water to run all necessary machinery for operating said wells, and also the right to remove all its property at any time."

Said second cause of action contains the following allegations: "That, under said agreement, said defendant drilled and constructed upon said land one well, which produces in paying quantities gas only, the said well being drilled and completed about the 15th day of February, A. D. 1891; and plaintiff says that said defendant has never made any payment for gas from said well. Plaintiff avers that said defendant agreed to use the gas produced on said premises within a reasonable time off said premises, and thereupon to pay for same, and that said gas from said well was, or reasonably should have been, used off said premises on or before the 6th day of May, A. D. 1891, continually, and that any delay since that time is unreasonable; and thereby defendant became indebted to plaintiff on the 6th day of May, A. D. 1891, in the sum of three hundred dollars (\$300) for the gas from said first well. And plaintiff says that said last-mentioned sum has never been paid, but that the whole amount thereof, together with interest thereon from the 6th day of May, A.

D. 1891, is and remains due and owing to the plaintiff from said defendant."

The company filed the following answer: "For answer to the second cause of action in the second amended petition, defendant says: It admits that it has not made any payment for gas under said contract of lease, and it denies each and every other allegation in said second cause of action contained."

On the trial, the drilling of a gas well on the premises by the company being admitted, the plaintiff was permitted, against the objection of the company, to introduce evidence tending to prove that the well yielded gas in paying quantities, which was explained to mean quantities that would make the well worth tubing, if a market for the gas could be had, and that pipe lines were in operation, at points from three to five miles from the well, for the purpose of conveying gas to various municipalities in the western portion of the state. It was admitted that the oil company did not use the gas, or sell it. There was also conflicting evidence as to whether the company could or not have laid pipe to existing lines and thus without loss have sold the gas; the evidence offered by the plaintiff in that regard being objected to by the defendant.

Counsel for the defendant requested the court to give the following instructions to the jury: "(1) There being no evidence to show that defendant used the gas off the premises from the well upon which rental is claimed in this case, I charge you that your verdict must be for the defendant. (2) I charge you that, under the terms of the lease, it was left to the discretion of the defendant to determine whether it could use or market the gas from this well off from the premises without loss to itself; and, there being no evidence that the defendant did not exercise this discretion in good faith, your verdict must be for defendant." These were refused, and the defendant excepted.

The court instructed the jury that the defendant admitted that it "did enter into a contract with the plaintiff, of the nature and character set forth in the petition, a copy of which you will find in the petition"; and, further, that if the well drilled upon the premises was a paying gas well, and the defendant could by reasonable diligence have found a market for the gas prior to November 27, 1891 (the date of the commencement of the action), then the \$300 would be due; also, that, "if gas was found in the well in paying quantities (and there is no serious controversy on that question), it was the duty of the defendant to make a reasonable effort to find a purchaser for the gas,—utilize the gas, or find a purchaser, so that it could have been utilized,—off the premises." In various forms the jury were directed to inquire whether the defendant could have placed the gas in market without loss, and that, if it could, the sum of \$300 was actually due, with interest.

To the several parts of the charge as given the defendant excepted, and a verdict was

returned in favor of the plaintiff for \$379.50. The defendant's motion for a new trial was overruled, and a judgment was entered on the verdict. The judgment was affirmed by the circuit court. This is a petition in error to reverse both judgments.

Layton & Stueve and Wheeler & Brice, for plaintiff in error. Goeke & Culliton, for defendant in error.

SHAUCK, J. (after stating the facts). The numerous questions raised by the objections to the evidence offered by the plaintiff in the trial court, and the exceptions to the refusal of the court to give the instructions requested by the defendant, depend upon the meaning of the stipulations in the contract of May 6, 1890. That is true, also, of the questions raised by the exceptions to the instructions given, unless it is the exception to the portion of the charge advising the jury respecting the admissions of the defendant. Although a contract of this character should not be copied into the petition, either in lieu of or in addition to allegations of its terms, the written agreement in this case was treated throughout the trial as though it had been put in evidence, and the defendant did upon the trial practically admit its execution. It does not contest it now. In its answer it denied all of the allegations of the second cause of action except that of nonpayment; nor did it admit upon the trial, as is alleged against it in the petition, that "it agreed to use the gas produced on said premises within a reasonable time off said premises, and thereupon to pay for the same." On the contrary, its consistent contention has been that the instrument, whose execution it admits, does not support the controverted allegation of the petition as to that promise. By the terms of the instrument executed the company promised to pay a stipulated price for the gas "while the same is being used off the premises." It did not in terms undertake to use the gas off the premises within a reasonable time, as alleged in the petition, nor to use it off the premises if it could do so without loss, as is stated in the charge. But, in support of the charge, it is said that upon construction of the instrument the obligations stated in the charge should be inferred, and that the phrase "while the same is being used off the premises" only determines how long the payments are to be kept up." That view of the phrase is not helpful, for it fixes the beginning of the term of payment, as well as its close.

It is further said that "inconsistent claims must be construed according to the subject-matter, and the motive and intention of the parties, as gathered from the whole instrument." This is a familiar and established rule of interpretation. Its terms presuppose the presence of clauses that are inconsistent or not clearly expressed. The company was engaged in prospecting in the vicinity for oil, and in producing it when found. It was known to both parties that, in drilling for oil, gas

might be found. For the purpose of fixing their rights in the mineral which might be discovered, they entered into a contract containing stipulations familiar to operators and owners having similar motives. *Gas Co. v. Teters* (Ind. App.) 44 N. E. 549; *Bryan, Oil & Gas*, 97. If oil, the principal object of search, should be found, the owner was to receive one-sixth of it, delivered in the pipe line. But, "if gas only" should be found, the operating company was expressly granted the right to use it on the premises in driving machinery for drilling other wells, to use it for that purpose on other premises, or to place it in the market, but without incurring any obligation to pay therefor unless it should be taken from the premises of the plaintiff. The recovery was upon the theory that, if gas should be found in such a quantity, the plaintiff was entitled to recover at all events, if the jury were of the opinion that the gas could have been sold without loss. That view is not only without warrant in the terms of the instrument, but it is distinctly refuted by the stipulation that the company might, without making compensation, use the entire quantity in further operations upon the premises of the plaintiff.

From a consideration of all the terms of the contract, and from the purposes of the parties at the time of its execution, it is obvious that the operating company's obligation to pay for the gas only in case it should be "used off the premises" was deliberately inserted, as expressive of the intention of the parties. There is, therefore, no occasion for the application to this contract of any rule relating to the interpretation of contracts whose terms are ambiguous or inconsistent. In view of the terms of the contract, the plaintiff's admission that gas had not been used off the premises was equivalent to the admission that he had no cause of action. Judgments of the circuit court and the court of common pleas reversed, and judgment for the plaintiff in error.

(152 Ind. 582)

AMERICAN TRUST & SAVINGS BANK OF CHICAGO et al. v. McGETTIGAN.¹

(Supreme Court of Indiana. Feb. 17, 1899.)

BILL—DEMURRER—RECEIVERS—CONTROL OF ASSETS—MORTGAGE—VALIDITY—SUIT TO CANCEL.

1. A demurrer to a bill by a receiver calls in question, not only the sufficiency of the facts to constitute a cause of action, but the right of plaintiff to maintain the suit.

2. Where property is placed in the hands of a receiver, he takes it subject to all existing rights and equities of the creditors, and the standing of liens remains unaffected by the receivership.

3. A mortgage given by a corporation to secure a loan made at the time to the corporation is valid, as against existing creditors, though accompanied by an agreement that its execution should be concealed, and that it should not be recorded within the time prescribed by law.

4. A receiver cannot sue to cancel a mortgage given by a corporation, of which he is receiver.

¹ Rehearing denied.

er, to secure bonds transferred as collateral for a loan made at the time, under averments, not that the contract was fraudulent as against prior creditors, but that an agreement to withhold the mortgage from record was fraudulent against those who became creditors on the faith that the property was unincumbered; the matter being one to be determined on distribution, to which all the creditors should be made parties.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Suit by John E. McGettigan, receiver of the Premier Steel Company, against the American Trust & Savings Bank of Chicago and others. From a judgment overruling demurrers to the complaint, defendants appeal. Reversed.

R. W. McBride, Caleb S. Denny, Mason & Latta, Blackledge & Thornton, and D. P. Baldwin, for appellants. Miller, Winter & Elam, Elliott & Elliott, and Ayers & Jones, for appellee.

HADLEY, J. This suit was commenced by John E. McGettigan, receiver of the Premier Steel Company of Indianapolis, against the American Trust & Savings Bank of Chicago and the Bank of Commerce of Indianapolis, as trustees of a certain bond issue of said steel company, Henry E. Southwell, et al., to cancel the mortgage given by the Premier Steel Company to secure bonds issued by it to the amount of \$300,000. The substance of the complaint, after certain formal allegations, is as follows: That the plaintiff was duly appointed the receiver of the Premier Steel Company by the Marion circuit court, and was by order of court authorized to bring this suit to test the validity of this mortgage; that on the 7th day of July, 1891, by a resolution of the board of directors, the president and secretary of the Premier Steel Company were directed to execute 300 bonds, of \$1,000 each, secured by mortgage on the property of the company, and to dispose of them to the best advantage; that the bonds, bearing date August 1, 1891, and a mortgage to secure the same, were signed by the president and secretary, covering the property of the company, which is described in the complaint; that said officers were not authorized by said company to pledge said bonds as collateral security for loans; that the bonds and mortgage were signed by the president and secretary (a copy of said mortgage being filed as a part of the complaint, as Exhibit A), but the bonds were not sold or disposed of in any way, and the company thereafter held itself out as being possessed of the property free from incumbrance, and procured large loans and credits upon the strength of such representations; that on the 13th day of July, 1892, being then insolvent, and largely indebted for loans and credits obtained as aforesaid, all of which was at the time well known to defendant Southwell, and being at the time indebted to Southwell in the sum of \$20,000 upon two notes dated December 21, 1891, for

\$10,000 each, payable one year after date, and having obtained from Southwell an additional loan of \$30,000 upon three notes, of \$10,000 each, dated July 13, 1892, payable one year after date, all of said notes being indorsed by Charles W. De Pauw, president, and W. H. Coen, secretary and general manager, of said company, thereupon said general manager and said Southwell executed the agreement of that date, which is made a part of the complaint, and which is in the following words: "This memorandum of agreement, made this thirteenth day of July, A. D. 1892, between the Premier Steel Company of Indianapolis, Indiana, and H. E. Southwell of Chicago, Illinois, witnesseth: Whereas, H. E. Southwell is now the holder and owner of five certain notes of the Premier Steel Company, for ten thousand dollars each, payable to the order of C. W. De Pauw, and by him indorsed, payable one year after date, two of said notes being dated December 21st, 1891, and three being dated July 13th, 1892; and whereas, the Premier Steel Company has deposited with the American Trust & Savings Bank of Chicago three hundred of its six per cent. gold bonds, of \$1,000 each, payable twenty years after date, secured by a mortgage deed on the property of said Premier Steel Company, dated August 1st, 1891, in escrow: Now, it is hereby agreed between the parties hereto that said bank shall continue to hold said bonds and said mortgage deed, which deed has not been filed of record, upon the following understanding, to wit: That, whenever the owner of said notes shall feel himself insecure in regard to the same, then, upon his request, said bank shall file said trust deed for record, notice of said request to be given previously to said Premier Steel Company; otherwise, said bonds and trust deed to remain as at present until the payment of said notes. It is further agreed that if, at any time before the expiration of the aforesaid notes, said Premier Steel Company shall desire a further loan of fifty thousand dollars, and said Southwell shall not be able to furnish said amount, then the said trust deed shall be filed of record, and \$200,000 of said bonds shall be released to said steel company, the other \$100,000 remaining as security for the aforesaid notes. Witness our hand and seals the day and year above written. Premier Steel Company, by W. H. Coen, Sec'y & Gen'l Man'gr. H. E. Southwell." It is then averred that such secretary and general manager had no sufficient authority from said company to execute said agreement; that at the time said Southwell well knew that said company was insolvent, or in danger of insolvency; that said company was largely in debt, and intended and expected to buy large quantities of material upon credit, and to borrow large sums of money, and incur large debts, to carry on its business and construct new and additional buildings, etc., all of which improvements to said property were by its terms to be covered

by said mortgage; that, knowing that the business of said company was largely carried on upon credit, and that to record the mortgage would injure the credit of the company and prevent it from obtaining credit, and knowing that it was obtaining and was intending to obtain credit by holding out to the world that its property was free from incumbrance, said Southwell fraudulently agreed with said company to withhold said mortgage from the record for the purpose of permitting said Premier Steel Company to fraudulently hold itself out as being possessed of said property free of incumbrance; that thereafter said company contracted large debts, borrowed large sums of money, and obtained materials and property upon credit, upon such representations that its property was free from incumbrance, and that such credits and property could not have been obtained otherwise, and that a very large part of the indebtedness of said company now existing, to wit, more than \$100,000, is for loans and credits and property obtained after said agreement was made, and while the mortgage was so fraudulently withheld from the record; that the same was so fraudulently withheld until the 29th day of April, 1893, a few days prior to the appointment of said receiver, when said Southwell caused said mortgage to be placed on record; that said bonds have never been sold or in any way disposed of, except to place the same in the American Trust & Savings Bank aforesaid as security for said loans so made from Southwell; that, within a day or two before this receiver was appointed, said Charles W. De Pauw, knowing that the receiver was about to be appointed, took possession of \$200,000 of the bonds, and still retains possession thereof, claiming that he is entitled to them for the benefit of the creditors of the company upon whose paper he is indorser, and that he has made a voluntary assignment to the Union Trust Company of Indianapolis; that said mortgage is an apparent lien upon said real estate, and casts a cloud upon the title of the plaintiff; that said Southwell claims that he has and holds a lien upon said real estate prior and superior to that of the plaintiff, and of the creditors aforesaid who gave credit to said Premier Steel Company upon the understanding that the property was free from incumbrance; that said Premier Steel Company is insolvent; that said Southwell ought not to be permitted to hold said mortgage as a lien prior to the rights of the creditors of said company who gave credit to said company upon the faith that said property was unincumbered as aforesaid; and that the said Charles W. De Pauw and the Union Trust Company have no right to or interest in said bonds. Prayer, that the mortgage be adjudged void and canceled, that the title of the plaintiff to the property be quieted as against any claim of the defendants, and for all other proper relief. The separate demurrers of the American Trust & Savings

Bank and the Bank of Commerce, trustees, and Henry E. Southwell, to the complaint, were overruled. Answers to the complaint were filed, but, as no question is presented to this court upon them, they need not be noticed. The trustees filed a cross complaint, in which they joined in asking a foreclosure of the mortgage. To the cross complaint the receiver filed his separate answer, in five paragraphs. The first paragraph of answer covers substantially the same ground as the complaint. The second and third paragraphs present substantially the same facts pleaded in estoppel. The trustees filed demurrers to each the first, second, and third paragraphs of this answer. These demurrers were overruled.

The demurrers of appellants to the complaint call in question, not only the sufficiency of the facts to constitute a cause of action, but also the right of the plaintiff to maintain the suit. *Pence v. Aughe*, 101 Ind. 317; *Wilson v. Galey*, 103 Ind. 257, 2 N. E. 736; *Farris v. Jones*, 112 Ind. 498, 14 N. E. 484.

The first assault made upon the complaint is that the plaintiff cannot maintain this suit on behalf of all the creditors, as he shows by his complaint one class of creditors that have no right or equity that can be asserted against the mortgage. It is well established that when a court takes possession of the property of an insolvent corporation, and appoints a receiver, such receiver "is the arm of the court," by which it administers the trust for the benefit of the creditors. But the court receives such property impressed with all existing rights and equities of creditors, and the relative rank of claims and the standing of liens remain unaffected by a receivership. Every legal and equitable lien upon the property of the corporation is preserved, with the power of enforcing it. *Gluck & B. Rec.* § 6; 20 Am. & Eng. Enc. Law, p. 407; *Woerishoffer v. Construction Co.*, 99 N. Y. 398-402, 2 N. E. 47; *Hubbard v. Bank*, 7 Metc. (Mass.) 340; *Minchin v. Bank*, 36 N. J. Eq. 436; *Snow v. Winslow*, 54 Iowa, 200, 6 N. W. 191; *Hale v. Frost*, 99 U. S. 389. And it is as much the duty of a receiver, in administering an estate, to protect valid preferences and priorities, as it is to make a just distribution among the general creditors. He is strictly the officer of the court, and it is his duty to so conduct the business that the interests of all persons shall be protected. He should not advocate the cause of one claimant against another. Between them he is indifferent, owing a like duty to all, and for that reason should, as far as possible, see to it that each has an equal opportunity to enforce his claim. *Gluck & B. Rec.* §§ 28, 48; *First Nat. Bank v. E. T. Barnum Wire, etc., Works*, 58 Mich. 315-317, 24 N. W. 543, and 25 N. W. 202; *People v. Security Life I. & A. Co.*, 79 N. Y. 267-271. It is true, as asserted by counsel for appellants, that the right of the receiver to bring this action depends upon the right of the creditors repre-

sented by him to have united in bringing it, if no receiver had been appointed. The complaint and argument by appellee proceed upon the assumption that the appellee, in bringing it, was acting on behalf of all creditors to set aside a fraudulent mortgage. In him all the creditors unite. His complaint is their joint complaint, in which they seek to have the mortgage adjudged absolutely void. They do not ask the court to recognize superior equities in the junior creditors, and for postponement of the mortgage to such equities, but insist that, upon the facts pleaded, the mortgage should be canceled and entirely swept away, and be held of no force and effect whatever as against or in favor of any one. If the complaint shows that the creditors could not join in such a complaint, it is bad. It is a familiar rule of pleading that, when several persons join in an action, the complaint must show a good cause of action in all, or it is insufficient on demurrer for want of facts. *Brown v. Critchell*, 110 Ind. 31-35, 7 N. E. 888, and 11 N. E. 486; *Brumfield v. Drook*, 101 Ind. 180-197; *Parker v. Small*, 58 Ind. 349-352; *Maple v. Beach*, 43 Ind. 51-59. We do not doubt the receiver's right to maintain an action to set aside a mortgage when the facts pleaded by him show the mortgage to be void, or show it to be voidable at the suit of all the creditors. This court has so held (*National State Bank v. Vigo Co. Nat. Bank*, 141 Ind. 352, 40 N. E. 799), and we are satisfied that the rule is correctly stated in that case. But this complaint does not present such a case. It is alleged that the Premier Steel Company, being "insolvent and largely indebted," entered into the agreement of July 13, 1892. Being "insolvent and largely indebted" implies that the steel company had existing creditors when the agreement of July 13th was executed. It also affirmatively appears that Southwell became a creditor for \$50,000 at the time of the agreement, and received from the company a preference it had the undoubted right to give. It is shown that the security given was for an adequate consideration received,—that Southwell contributed to the estate of the debtor as much as he took away,—and it is not shown how the transaction in any way injured the previous creditors, or could operate to defraud them. The mortgage was valid, as against existing creditors, even though accompanied by an agreement that its execution should be kept concealed, and that it should not be recorded within the time prescribed by law. *Hutchinson v. Bank*, 133 Ind. 271-281, 30 N. E. 952. A receiver, while acting for a court of conscience, must act impartially, and may not sequester the security of one creditor for the benefit of others who have no equity. The only persons, if any, injured by the alleged fraud, were the subsequent creditors without notice; and the re-

ceiver cannot maintain an action that shows upon the face of it that the relief sought will place the creditors having an equity in a worse condition, and the creditors having no equity in a better condition, than they occupied before his appointment. The complaint presents facts indicating a controversy among the creditors as to equities in the debtor's property. Its averments are not that the contract giving Southwell a security was fraudulent, or for any reason invalid, as against prior creditors, but that the agreement to withhold the mortgage from record was fraudulent against those who became creditors on the faith that the property was unincumbered. It discloses a controversy that cannot be fully adjudicated in the absence of the creditors holding conflicting equities. The case presented is one of distribution, to which all the creditors become parties, and may implead each, and have their equities defined. Equity seeks the administration of insolvent estates by the shortest and cheapest methods available, and, holding the estate in custodia legis, a court of equity will not clothe its receiver with authority to sue, or permit a creditor to sue, and involve the trust property in litigation, and expose the estate to costs and attorney's fees, if there is open any other complete remedy, less expensive, and more comprehensive in its subjects. In application of this principle, it becomes obvious that the court below should not have authorized the cross complainants to institute their cross action to foreclose the mortgage. It goes but halfway. In it no equities can be adjudicated but those of parties. General creditors are not, and cannot be made, parties, unless possibly upon their own application. It may entail upon the estate heavy expenditures for costs. It implies a dispossession of the receiver, and sale by the sheriff; and it seems clear, in the interest of an economical administration of the trust, and a speedy settlement thereof, the court should order its receiver to sell the alleged mortgaged property free from liens of every character, under an order that all liens and claims should be transferred to the fund. This is but the exercise of a well-recognized equitable power, and will bring all the creditors, all the beneficiaries of the fund, to a contest in its distribution, with ample opportunity to implead each other and receive a full and complete adjudication of their equities.

The conclusion we have reached makes it unnecessary to review the alleged subsequent errors. The judgment is reversed, with instructions to sustain appellants' demurrers to the complaint, without leave to amend, and to order a dismissal of the consolidated cross complaint, and for further proceedings in accordance with this opinion.

DOWLING, J., was absent.

(152 Ind. 172)

BASYE v. BASYE.

(Supreme Court of Indiana. Feb. 14, 1899.)

HUSBAND AND WIFE—CONVEYANCE TO WIFE—RESCISSI—FRAUD—EQUITABLE RELIEF—PLEADING—DEMURRER.

1. Equity will set aside a conveyance procured by fraud, though it be by a husband to his wife.

2. A complaint that plaintiff's wife, with the intent to deceive him, promised to be a dutiful wife, and requested that certain property be deeded to her, and that he might put the consideration at a certain sum, which would show his interest in it, and, relying on her promises, he deeded the property to her, without other consideration, shows that the conveyance was without consideration.

3. A voluntary conveyance by a husband to his wife, fraudulently procured by the wife through shamming affection for him and promising to be a dutiful wife, with the intention of abandoning him and procuring a divorce as soon as the conveyance was made, will be set aside for fraud, since her promises as to future conduct and representation as to her affection were representations of present facts, and not merely unfulfilled promises.

4. The fact that a complaint shows another action pending between the parties, for the same cause, does not make it demurrable for want of facts, since the defense of a former action pending is a separate ground for demurrer, under Burns' Rev. St. 1894, § 342, subd. 3 (Horner's Rev. St. 1897, § 339, subd. 3).

Appeal from circuit court, Henry county; W. O. Barnard, Judge.

Bill by Wilson J. Basye against Mary E. Basye. From a decree for defendant on demurrer to the complaint, complainant appeals. Reversed.

John Lockridge and William A. Brown, for appellant. M. E. Forkner and Adolph Rogers, for appellee.

BAKER, J. Suit to cancel deed for fraud. The material averments of appellant's complaint are these: The parties are husband and wife, and have been for 20 years. They owned by entreties certain land. There had been small differences between them, and appellee, without appellant's fault, had treated him coldly for a long time. Appellant was a dutiful husband throughout. He was in love with his wife, and she knew it. He desired to live with her in peace, concord, and affection. Suddenly she became profuse in professions and demonstrations of love; she promised to be a dutiful and loving wife for the rest of their days. This conduct of hers was hypocrisy; in shamming she had in mind to defraud him by getting the title, and then deserting him. With this intent, and while making her false protestations and promises, she begged him to make her a deed, stating that the entire title ought to be in the wife, and that he might put the consideration at \$2,200, which would always show his interest in the land. He was ignorant of her fraudulent design, and, relying on the apparent sincerity of her actions and promises, deeded her his interest, without consideration other than that the title should be in her as his

wife and in trust for him, and that their marital relations should continue peaceful and loving. In a few days she abandoned him, and filed her complaint for divorce, which is yet pending, untried. The charges in the complaint for divorce are untrue. Demurrer to complaint for want of facts was sustained. Judgment on appellant's refusal to plead further. Appellant cites no authorities, and simply insists in a general way that the complaint states sufficient facts. Appellee contends that the complaint is bad, because it shows: First, that the deed was voluntary; second, that it was for a sufficient consideration; third, that there was no fraud; fourth, that the suit is between husband and wife concerning real estate; and, fifth, that a divorce proceeding is pending, in which alone the matters complained of can be adjudicated. Though a voluntary conveyance is valid between the parties, and parol evidence is inadmissible to impress a trust upon an absolute deed, equity affords relief against fraud in the procurement. The \$2,200 which was to have been named in the deed would have constituted a valuable consideration, if paid; and appellant could not have proceeded without repaying or offering to repay the amount. But the complaint does not show that this sum was recited in the deed as a consideration, much less paid. It affirmatively appears that appellant executed the deed without consideration other than one he could not tender back. Appellee cites *Fouty v. Fouty*, 34 Ind. 434, *Burt v. Bowles*, 69 Ind. 6, *Bethell v. Bethell*, 92 Ind. 324, and other authorities, to the effect that fraudulent representations must relate to existing facts, and that promises made to be performed in the future, and afterwards broken, do not constitute fraud; to permit a rescission for fraud by one who has no ground for complaint except an unfulfilled promise, a broken contract, would obscure elementary distinctions between remedies, and tend to nullify the statute of frauds. In this case the false representations were made concerning a present fact. Representations may consist in acts as well as words. When appellee caressed her husband, after a long period of coldness, she made a solemn affirmation of present fact just as much as when she told him in words that she loved him and begged his forgiveness of her past indifference. When she caressed him, and promised to be a good wife in the future, her promise, as well as her kiss, was a representation of present fact. A present state of mind is a present fact. *Bigelow, Frauds* (Ed. 1888) pp. 483, 484. Appellee owed appellant the utmost good faith and frankness. There existed between them a relation of special confidence and trust. The principle also applies here that, whenever the confidence resulting from such a relationship is abused, equity will interfere. 2 Pom. Eq. Jur. § 963; *Schouler, Husb. & Wife*, § 403; *Bigelow, Frauds* (Ed. 1888) p. 353. It was a fraud on appel-

lant for appellee to conceal her intention of abandoning him as soon as she got his property. That the husband is usually the stronger may be true; but that he is not always the dominating force in the marriage union is known from many well-authenticated instances, extending from the present back to the time of Dillah. A few of these have gotten into the law books. In *Evans v. Carrington*, 2 De Gex, F. & J. 481, the wife induced the husband to deed property to her, on the basis that it was her due under the marital relation. She intended, as soon as she could get possession, to leave, and never to live with her husband again. The deed was annulled. *Evans v. Edmonds*, 13 O. B. 777, is very similar in facts and result. *Brisson v. Brisson*, 75 Cal. 525, 17 Pac. 689: The wife importuned the husband to put the title to his land in her name, stating that she would hold it for his benefit, and reconvey it on demand. When she made the promise, she intended to hold the land as her own, and to desert her husband. This was held to be active fraud. *Bartlett v. Bartlett*, 15 Neb. 593, 19 N. W. 691, resembles the *Brisson* Case. A quotation from *Turner v. Turner*, 44 Mo. 539, shows the nature of that case: "A wife in whom her husband reposed the strictest confidence might well be calculated to exert an influence on his mind and obtain the title to property in her own name. If it was done with an honest intent to secure a home for herself and her offspring, the transaction would not only be legal, but praiseworthy. But if the influence was exerted with the design of despoiling the husband, and then abandoning him, the law would condemn and stigmatize the transaction." *Stone v. Wood*, 85 Ill. 603: Wood and his wife had lived in Galesburg. Wood went to Bloomington to work. His wife wrote him that, if he would put the title to their Galesburg property in her name (by means of a trustee), she would sell it for \$1,800, pay his debts, and come to him with the balance, and they would buy a new home. She intended to cheat her husband, financially and maritally. After getting the deed, she conveyed to Stone, who knew of her fraud and held the property for her benefit. The court decreed that the defendants restore the title to plaintiff and account for rents. In *Meldrum v. Meldrum*, 15 Colo. 478, 24 Pac. 1083, the wife had grown tired of her husband; but she wanted some of his property, unincumbered. So she simulated ardent affection, and he, under the spell of her allurements, conveyed to her a valuable property in Denver. Then she drove him from the house, and applied for a divorce. His suit to regain the property was sustained. The fourth claim of appellee is that this suit will not lie because it is between husband and wife concerning real estate. Married women have been emancipated by the statutes of this state. They must respond for frauds practiced upon their husbands, as well as for

those upon others. The final contention is that the complaint is bad because it shows that a divorce proceeding is pending. If a complaint states facts sufficient to constitute a cause of action, and also sets forth facts that make out a defense in bar, a demurrer for want of facts should be sustained. But the defense of a former action pending is not in bar; it is abatement merely. If the complaint exhibits a ground for abatement, the demurrer should be framed and addressed accordingly. *Burns' Rev. St. 1894, § 342, subd. 3* (*Horner's Rev. St. 1897, § 339, subd. 3*). The case of *Rose v. Rose*, 93 Ind. 179-185, in so far as it might be considered an authority to the contrary, is overruled. What would have been the effect of a decree of divorce in appellee's favor, rendered before the commencement of this suit, is not involved. The demurrer for want of facts should have been overruled. Judgment reversed.

(153 Ind. 536)

RODWELL v. JOHNSON et al. ¹

(Supreme Court of Indiana. Feb. 14, 1899.)

SUPPLEMENTARY PROCEEDINGS.

Where an insurance policy was sold and assigned by the insured before an action against him, and it is not alleged that such assignment was fraudulent or void for any reason, the policy is not subject to supplementary proceedings on a judgment obtained in such action.

Appeal from circuit court, Vanderburg county; John H. Foster, Judge.

Supplementary proceedings by Ellen Rodwell against William A. Johnson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Hornbrook & Wheeler, for appellant. W. M. Blackey and J. E. Williamson, for appellees.

MONKS, C. J. This was a proceeding supplementary to execution, instituted by appellant against appellees. Appellant sought to subject to the payment of her judgment against appellee William A. Johnson an endowment insurance policy on the life of said Johnson for \$5,000, executed by the appellee the New York Life Insurance Company to said Johnson, payable, in 15 years after date, to him, his heirs, executors, administrators, or assigns, and held by appellee Macke as security for the loan of money made by him to said appellee Johnson. It is alleged in the complaint that the appellee Susan Z. Johnson, wife of the appellee William A. Johnson, claims to have an interest in said insurance policy, and that appellant believes that said claim is wrongful and invalid. Appellant by her complaint admits the validity of the lien of appellee Macke on said policy to secure the indebtedness of said Johnson to him, and only asks that what remains of said policy after the payment of said lien be applied in payment of her judgment. A cross com-

¹ Rehearing denied.

plaint was filed by appellee, by which he sought to enforce his claim against said policy. The court tried the cause, and found against appellant, over a motion for a new trial, rendered judgment against her.

The only error properly assigned calls in question the action of the court in overruling appellant's motion for a new trial. The causes assigned for a new trial are (1) that the decision of the court was not sustained by sufficient evidence; (2) that the decision of the court is contrary to the policy. The policy provides that, if the premiums are not paid on or before the day whereon the policy should become void, and all premiums previously paid should be forfeited to the company, and no action or right of action shall be maintained against the company by the assured or any other person, in all right, claim, or interest, arising under any statute or otherwise, to or in any policy or surrender value, or to any temporary insurance, whether required or provided for under any statute or not, is thereby expressly waived and relinquished. There is evidence to the effect that a premium was due on said policy, of \$377.55, July 1, 1895, and the insured was unable to pay the same, and that Macke, who had the policy as surety, refused to pay the same, and that appellee William A. Johnson agreed with appellee Susan Z. Johnson, in consideration that she would pay the premium, that, if he could not sell the same within 60 days enough to pay off the claim of appellee Macke and the amount paid by her, the policy should be hers, and he would transfer the same to her, subject to the lien of appellee Macke, in which event she was to pay the indebtedness of said William A. Johnson the further sum of \$363 out of said policy, when collected; that on September 8, 1895, not having been able to sell said policy for the amount provided in said agreement, William A. Johnson assigned and transferred the same to her in writing, in all respects as required by the rules of the said company. This evidence shows that the insurance policy was sold and assigned to appellee Susan Z. Johnson before the commencement of this action, and also before the rendition of the judgment which is the foundation of this proceeding. If the policy was owned by her when this action was commenced, the finding against appellee was clearly right under the issues. It is not alleged in the complaint that any sale or assignment of said insurance policy was made to the appellee Susan Z. Johnson, nor are any facts alleged showing that such assignment was fraudulent and void for any reason as to appellant. If such facts had been alleged, however, we could not have disturbed the finding upon the weight of the evidence.

It is contended by appellees that the contract of insurance was such that, even if it were the property of appellee William A.

Johnson, it could not be reached in any way for the payment of appellant's judgment. It is not necessary, however, to determine this question, for the reason that, if it could be so applied, it had been sold and assigned to another before this action was commenced. Judgment affirmed.

(152 Ind. 507)

UDELL v. CITIZENS' ST. R. CO.¹

(Supreme Court of Indiana. Feb. 15, 1899.)

SPECIAL VERDICT — OBJECTIONS — STREET RAILROADS — INJURIES TO TRESPASSERS — CONSTITUTIONAL LAW — TITLE OF ACT — JURY TRIAL.

1. The question of the validity of a special verdict is not raised by an objection to the filing of defendant's request for a special verdict, where no demand was made that the jury be directed to bring in a general verdict, and no objection was made on the return of the special verdict, nor any request that the jury be sent back with instructions to make a general verdict.

2. Where a boy, being unable to get on an open electric car, stands upon the side of the car, on which strips extend to prevent the egress or ingress of passengers, placing his foot on the boxing of the axle, and rides thereon for some distance without paying a fare or offering to do so, and without being asked for his fare, he not being seen by any employé of the railroad company, though he had money in his pocket with which to pay such fare, if asked for it, and falls off and is run over by the wheels of the trailer, the railroad company is not liable for injuries received, the place where the boy was riding being very dangerous.

3. Plaintiff, while so riding, was not a passenger to whom the carrier owed a safe carriage and immunity from injury.

4. The fact that plaintiff was a child about nine years old did not make him less a trespasser on the car, if the other facts compelled the conclusion that he was wrongfully on the car.

5. Act March 11, 1895, amending the practice act, and providing for special verdicts, sufficiently expresses the subject in the title, "An act to amend section 380 of an act concerning proceedings in civil cases, approved April 7, 1881, and designated as section 546 of the Revised Statutes of 1881."

6. Act March 11, 1895, providing for special verdicts, which act, except as to form, did not change the law governing special verdicts as it had existed in the state since 1852, is not unconstitutional, as violating the right of trial by jury.

7. Where an application for a special verdict is made under Act March 11, 1895, and 144 interrogatories are submitted to the jury, covering every material fact, exclusion of others tendered, calling for mere opinions and for conclusions of law, was proper.

8. Where a special verdict is requested, no instructions are proper, except such as are necessary to inform the jury as to the issues, the rules for weighing evidence, who has the burden of proof, and whatever else may be necessary to enable the jury clearly to understand its duties.

Appeal from superior court, Marion county; L. M. Harvey, Judge.

Action by Clarence Udell, by William O. Udell, his next friend, against the Citizens' Street-Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

William V. Rooker, for appellant. Miller & Elam, for appellee.

¹ Rehearing denied.

DOWLING, J. Action for damages for a personal injury sustained by the infant appellant. There were two trials of the cause in the Marion superior court, the first resulting in a disagreement of the jury. On the second trial, upon the request of appellee, in writing, made before the introduction of any evidence, the court, agreeably to the requirements of the act of 1895, directed the jury to return a special verdict. Such special verdict was prepared by counsel on either side of the cause, was submitted to the court for revision, and was in the form of interrogatories properly framed. The court gave to the jury only such general instructions concerning their duties as are suitable where a special verdict is requested, and refused to give certain special instructions tendered on behalf of appellant. On the return of the special verdict, appellant moved for judgment in his favor upon it, which motion was overruled. He also filed a motion for a new trial, and the court overruled it. Judgment was thereupon rendered for appellee on its motion. Exceptions to these rulings were saved by appellant.

The errors discussed by appellant's counsel in their briefs, and orally, are the ruling of the court on appellant's objection to appellee's request for a special verdict, the rulings on the motions for judgment on the special verdict, and the decision of the court on the motion for a new trial.

The first of these errors is not available to appellant, for the reason that no question touching the same is properly presented for the determination of the court. The appellee having filed its request for a special verdict, appellant filed his objection to it, in these words (title omitted): "The plaintiff objects to the filing of the defendant's request for a special verdict herein, for the reason that the same is filed pursuant to the act of March 11, 1895, concerning proceedings in civil cases, which act is unconstitutional and void, for the reason that it deprives the plaintiff of the right of trial by jury upon the issues as joined in the complaint and answer, and requires the jury to take from the court, and not from the pleadings, the questions to be decided by the jury." It will be observed that the objection was only to "the filing of the defendant's request for a special verdict." No demand was made, either before the introduction of the evidence or afterwards, that the jury be directed to bring in a general verdict. On the return of the special verdict no objection was made to it by appellant, nor was there at that time a request that the jury be sent back with instructions to make a general verdict. No motion was made for a *venire de novo*. If counsel for appellant thought they were entitled to a general verdict, they should have asked for it at the right time, and in the proper manner. If they thought the verdict returned by the jury was not the proper one, or that it was imperfect, they should have

asked the court to set it aside and award a *venire de novo*. *Boseker v. Cramer*, 18 Ind. 44; *Tidd*, Prac. 922; *Smith v. Jeffries*, 25 Ind. 376; *Elliott*, Gen. Prac. § 935, and cases cited. The question as to the validity of the special verdict, however, is properly presented under the motion for a new trial, and is considered in another part of this opinion.

Did the court err in overruling appellant's motion for judgment on the special verdict, and in rendering judgment thereon in favor of appellee? The special verdict shows that appellant at the time of the accident was a boy aged about eight years and seven months, of average size, strength, and intelligence; residing with his parents on Udell street, in the city of Indianapolis, three-fourths of one mile from a public resort known as "Armstrong Park." The appellee was the owner of, and was operating, an electric railroad for the transportation of passengers in the city of Indianapolis and in North Indianapolis, in Marion county, Ind. On June 26, 1892, appellee stopped the train, consisting of a motor car and a trailer, both being open or summer cars, with tops supported by posts, at Armstrong Park, for the purpose of receiving passengers. A long step or footboard ran along these cars on the right-hand side (when looking towards the front end), by means of which passengers entered upon the platforms or floors of said cars. The cars were provided with seats running across, from side to side, upon each of which five persons could be seated. On the left-hand side of the cars there was no step or other means of entrance, and wooden strips or slats extended from end to end on such left-hand side to prevent the ingress or egress of passengers. These slats were so adjusted that they could be raised or lowered to admit or discharge passengers on that side of the car. No passengers were received by appellee on the left-hand side of its cars at the park on the day mentioned, nor did appellee invite passengers to enter its cars on that side. Appellant, who was at Armstrong Park, got upon the forward part of the trailer car, on the left-hand side thereof; placing his feet on the boxing of the axle, and holding onto a portion of a seat with his hands. He neither paid any fare, nor offered to do so, nor was he asked for his fare by any employé of appellee. He had a nickel in his pocket, with which he could have paid such fare, and he intended to do so, if asked for it. He rode in the place described, in a stooping position, on the outside of the car, for about three-fourths of a mile, and until he arrived at Udell street, where he intended to get off. Here he was unable to retain his hold and fell off, and was run over by the wheels of the trailer. The right leg and the toes of the left foot were so crushed as to require amputation. After the train started, appellant exercised reasonable care, under the circumstances, to avoid being hurt. He could not have gotten off with safety from

the time the train started until he fell, nor could he draw himself into the car, or release his hold, for the purpose of stopping it. The cars ran through from Armstrong Park to Udell street without stop. None of the employes of appellee saw the appellant when the train was in the act of starting, or while he was hanging on the outside of the trailer after the train was under way, although they might have seen him, if they had made an examination of that side of the car. No such examination was made. The place where appellant was riding was not a proper one, and was very dangerous. The car on which appellant rode was crowded with passengers, many of whom stood on the footboard or step and on the floor of the car. The position of some of these was such as to render it difficult for the employes of the appellee to see appellant. Some of these passengers were near to appellant while he was hanging on the outside of the car, and, if he had wished to do so, he could have touched them or spoken to them; thereby making them aware of his presence, or asking them to stop the car. He did neither. When appellant came to the car at the park, there was no room for him to get upon it as a passenger. A bystander told appellant to go around to the left-hand side of the car and get on, and he acted on this suggestion. When the car left the park, the seats, the aisles between the seats, the platforms, and the foot or running boards were full of passengers. Before the day of the accident, appellant had been warned against hanging on the outside of street cars and riding there. He did not know that he had no right to do so, or that it was a dangerous place to ride. In the usual way of collecting fares upon the car on which appellant was riding, the conductor could have seen appellant, and appellant knew this. Appellant intended to pay his fare, when called upon. When the passengers were entering the car at Armstrong Park the conductor and motorman were temporarily absent from it, and took no part in assisting passengers to get on or in seating them. When appellant got upon the boxing of the axle at Armstrong Park, he did not comprehend the danger of his position, but afterwards became aware of it. While appellant was standing upon the boxing of the axle and hanging on the side of the car, the train was run at the rate of 18 or 20 miles per hour. Appellant first attempted to get on appellee's cars, as a passenger, from the platform at the east entrance of Armstrong Park, but was unable to do so on account of the crowd of persons on the cars. Appellee's servants in charge of the train could have stopped it after leaving Armstrong Park, and before reaching Udell street, if they had been asked to do so.

Upon a careful review of these facts, giving to the conduct of the appellant the most favorable construction, we do not think that they sustain the proposition that appellant

was a passenger upon the appellee's cars, to whom appellee owed the duty of safe carriage and immunity from injury. Appellant was not in a place intended for passengers. He was not received as a passenger. His presence on the car was not made known to appellee's agents and servants. He did not conduct himself as a passenger. Appellee's servants were not required to search for trespassers before starting the cars, and appellee was not bound to discover appellant, and remove him from the perilous situation in which he had voluntarily placed himself. The distressing consequences of the act of appellant in standing on the outside of the car, on the iron boxing of the axle, cannot be said to be the result of any act or omission of appellee or its employes. The circumstance that appellant had a nickel in his pocket, with which to pay his fare when called upon, did not make him a passenger. If he did not intend to pay his fare unless called upon, and left the car, or attempted to leave it, without paying such fare, that fact of itself would be entitled to weight in determining the question of his right on the car. It is shown by the special verdict that, although the train was run at a high rate of speed from Armstrong Park to Udell street, appellant was able to maintain his hold, and did not fall off, until he arrived at or very near his destination, and that the rate of speed of the cars when approaching Udell street was generally reduced. As the special verdict fails to show that appellant was a passenger, the rules concerning the overloading of street cars and the duty of street-car companies to passengers, stated in *Pray v. Railway Co.*, 44 Neb. 167, 62 N. W. 447, and the cases there cited, do not apply. The fact that appellant was a child aged eight years and seven months did not make him any less a trespasser, if the other facts found compel the conclusion that he was wrongfully upon the car. If, after an ineffectual attempt to get on the car at a proper and usual place, he abandoned that intention and became a trespasser, he lost the right to that measure of care and protection which a carrier of passengers is required to extend to one who seeks to be carried as a passenger. The theory of both paragraphs of the complaint is that appellant was a passenger on appellee's car. The special finding does not sustain this theory. On the contrary, the only conclusion which can be drawn from the facts found is that appellant was wrongfully upon the car, in an improper, unusual, and dangerous place, that he was not known to be there by appellee's employes in charge of the train, and that the consequent injury was due to his voluntary exposure of himself to evident peril. We find no error, therefore, in the action of the court in overruling appellant's motion for judgment on the special verdict, and in rendering judgment for appellee.

The constitutionality of the act of March 11, 1895, amending the practice act, and pro-

viding for special verdicts, is called in question, and a decision upon it is involved in the refusal of the trial court to give the special instructions tendered by appellant. Two points are made in support of this objection: First, that the subject of the act is not expressed in the title; and, second, that the act violates the right of trial by jury.

The title is as follows: "An act to amend section 389 of an act concerning proceedings in civil cases, approved April 7, 1881, and designated as section 546 of the Revised Statutes of 1881." The act so amended is entitled "An act concerning proceedings in civil cases." Laws 1881, p. 240. That the title of the act of March 11, 1895, sufficiently complies with the requirements of the constitution, has been frequently decided by the courts of this state. Like decisions have been made by the courts of Louisiana, from the constitution of which state this provision is said to have been borrowed. *Greencastle Southern Turnpike Co. v. State*, 28 Ind. 382; *Walker v. Caldwell*, 4 La. Ann. 297; *Duverge v. Salter*, 5 La. Ann. 94; *Blakemore v. Dolan*, 50 Ind. 194. It is said in *Greencastle Southern Turnpike Co. v. State*, supra, that: "Since the decision in *Walker v. Caldwell*, supra, the legislature of Louisiana, with a few exceptions, has adopted the following formula: 'Be it enacted,' etc., 'that — section of an act entitled,' etc., 'be amended and re-enacted so as to read as follows.'" A formula substantially like this was adopted by the general assembly of the state of Indiana at least as early as March 2, 1853, and the same has been used by every legislature in this state since that date. There is nothing in the first point.

Does the act of March 11, 1895, violate the right of trial by jury? In our opinion, it does not. Except as to their form, the act of March 11, 1895, did not change the law governing special verdicts as it had existed in this state since 1852. The Civil Code of 1852 required the court, at the request of either party, to direct the jury to give a special verdict in writing upon all or any of the issues, and in all cases, when requested by either party, to instruct them, if they rendered a general verdict, to find specially upon particular questions of fact to be stated in writing. 2 Rev. St. p. 114, § 336. This provision continued in force until the enactment of March 11, 1895. Its validity was not questioned. Acquiescence in the constitutionality of this statute for so long a period by the courts of this state is a circumstance of some weight in determining the question of the validity of a similar statute. Independently of this consideration, however, we are unable to perceive that the statute under examination in any way invades the province of the jury, or deprives the citizens of this state of any common-law right connected with a trial by jury to which, under the constitution, they are entitled. In civil actions, under the constitution of this state, the jury never pos-

sessed the right to decide questions of law. Their inquiries have always been confined to matters of fact. The scope of such inquiries is not abridged by the act of March 11, 1895. The argument of counsel founded upon the distinction between primary facts and inferences or conclusions from facts is unsound. If an inference or conclusion from a fact or facts is itself a fact proper to be found by the jury, it may be made the subject of an interrogatory. But if the proposed inference or conclusion from a fact or facts is not itself a fact, but a conclusion or inference of law, then the jury has no right to find such conclusion or inference. The statute in question authorized either party to submit to the jury every essential question of fact, together with every proper inference or conclusion of fact. If parties to actions did not avail themselves of this privilege, it was not because of any defect or prohibition in the law. We have examined *Railroad Co. v. Stout*, 17 Wall. 657; *Paterson v. Wallace*, 1 Macq. 748; *Mangam v. Railroad Co.*, 38 N. Y. 455; *Railroad Co. v. Van Steinburg*, 17 Mich. 99; *Railroad Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37; *Railroad Co. v. Walborn*, 127 Ind. 142, 26 N. E. 207; *Mann v. Railroad Co.*, 128 Ind. 138, 26 N. E. 819; *Railroad Co. v. Grames*, 136 Ind. 39, 34 N. E. 714,—cited by counsel for appellant, and find nothing in them inconsistent with the views expressed in this opinion. If the jury is required to find any conclusion of law in answer to an interrogatory, such finding must be disregarded. *Railway Co. v. Miller*, 141 Ind. 544, 37 N. E. 348; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Weaver v. Apple*, 147 Ind. 304, 46 N. E. 642.

Appellant complains of the refusal of the trial court to submit to the jury certain interrogatories prepared and tendered on his behalf. The act regulating special verdicts expressly authorized the court to change and modify the interrogatories prepared by counsel. One hundred and forty-four interrogatories were submitted to, and answered by, the jury. They covered every material question of fact in the case. Many of those tendered by appellant's counsel called for mere opinions, for conclusions of law, and for facts which were evidentiary, and the court did right in excluding them.

It is further objected that the court erred in refusing to give special instructions numbered from 1 to 6 tendered by appellant's counsel. It is sufficient to say that where a special verdict is requested no instructions are proper, except such as are necessary to inform the jury as to the issues made by the pleadings, the rules for weighing and reconciling the testimony, and who has the burden of proof as to the facts to be found, with whatever else may be necessary to enable the jury clearly to understand their duties concerning such special verdict, and the facts to be found therein. *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948. The court gave to the jury all instructions necessary to enable them

to understand their duties concerning the special verdict and the facts to be found therein. It was neither necessary nor proper for it to give general instructions as to the law of the case. *Roller v. Kling*, *supra*, and cases cited.

The motion for a new trial was properly overruled. Finding no error in the record, the judgment is affirmed.

(152 Ind. 177)

MAGNUSON v. BILLINGS.

(Supreme Court of Indiana. Feb. 15, 1899.)

RULES OF COURT—PLEADING—DENIALS—HARMLESS ERROR—CONTINUANCE.

1. A rule of court is obligatory upon the court, and cannot be dispensed with in a particular case.

2. In an action on a purchase-money note and a chattel mortgage, defendant alleged that he was induced to buy through fraud; that, soon after discovering the fraud, he returned the property, informing plaintiff that it was not as represented; that plaintiff directed him to leave the property, which he did; but that plaintiff refused to surrender the note and mortgage. *Held*, that a reply was merely an argumentative denial, which alleged that, while defendant had the property, he misused it, damaging it in a certain sum; that he returned the property, and left it on plaintiff's premises without her knowledge or consent; and that plaintiff did not accept it.

3. Error in permitting an additional paragraph of reply to be filed is harmless, where evidence of all its allegations is admissible, under a general denial already pleaded.

4. It is not error to deny defendant a continuance on permitting plaintiff to file an additional paragraph of reply, where evidence of all the material allegations of the reply is admissible under a general denial already pleaded.

Appeal from circuit court, Noble county; Hiram S. Biggs, Special Judge.

Action by Clara Billings against Henry Magnuson. From a judgment for plaintiff, defendant appeals. Affirmed.

L. W. Welker, for appellant. Ferrall & Hanan and F. P. Bothwell, for appellee.

HADLEY, J. On the 26th day of January, 1896, appellee filed her complaint against the appellant, praying judgment on a note, and foreclosure of a chattel mortgage executed to secure the same. On the 6th day of January, 1897, appellant filed his answer in five paragraphs. On the 3d day of March, 1897, appellee filed her reply in general denial, which placed the cause at issue. On the 17th day of May, 1897, the court set the cause for trial on the 25th day of May, 1897; and on the day set, and after the cause was called for trial, appellee moved the court for leave to file "an additional and second paragraph" of reply to the second paragraph of appellant's answer. Appellant resisted the motion, upon the ground that the issues were closed, and appellee had not complied with rule 5 of the court, which required applications to open issues to be supported by the affidavit of the applicant, and upon the further ground that the proposed further reply

set up new matter, that would require new and additional evidence, which he was not prepared to present. The motion was sustained, a proper exception awarded appellant, the additional reply filed, and cause tried, resulting in a judgment and decree for appellee. The overruling of appellant's motion for a new trial presents the only question for review here.

The second paragraph of answer charged that the note and mortgage were given for a stallion, cart, and harness; that the defendant was induced to buy the property by the fraudulent representations of the plaintiff; that, soon after the defendant discovered the fraud, he returned the property to the plaintiff, informing her that it was not as she had represented it to be, "and was worthless; and that he had brought the stallion, cart, and harness back, and the plaintiff directed him to place the stallion in her barn, and the cart and harness in the shed, which the defendant did as requested, and then demanded of the plaintiff a return of his note and mortgage, which she refused." The additional and second paragraph of reply to the answer stated that the property was purchased by and delivered to the defendant, on the — day of May, 1896, and that the property was then in good condition; that the defendant kept and used said property until the 20th day of July, 1896; that he worked the horse all the time, and negligently failed to feed and care for him, so that said horse became very poor and weak, and negligently permitted the collar used on the horse to rub, wear, and create great and painful sores on his neck and shoulders, and failed to treat said sores, and they made ugly scars on the horse, to his damage of \$50, and did use, wear out, and damage said cart and harness \$20, and on the 20th day of July brought said property, in its damaged condition, to the plaintiff's house, and left the same on her premises, without her knowledge or consent, and without notice to her of his intention to rescind the contract, and the plaintiff has never accepted a return of the property, or taken possession of it.

The fifth rule of said court is properly in the record, and is in the words following: "In all cases where issues are or may be completed, motion for leave to reopen the issues, and file an additional pleading, must be upon the affidavit of the party making application, or his attorney, showing some reasonable excuse for not filing such pleading before issue joined, and that the facts set out in said pleading are believed to be true, and he believes the same can be sustained on the trial of the cause, by proof. Such affidavit and motion must be accompanied by the pleading proposed to be filed, or the same will not be entertained." The first reason assigned for a new trial is that the court erred in sustaining appellee's motion for leave to file her second paragraph of reply to the second paragraph of answer, without a compliance with the court's rule 5. Courts have power to

adopt rules for conducting the business therein, not repugnant to the laws of this state. Burns' Rev. St. 1894, § 1375. And, when adopted and published, they have the force and effect of law, and are obligatory upon the court, as well as upon parties to causes pending before it. Elliott, Gen. Prac. § 186; Lancaster v. Railway Co., 132 Ill. 492, 24 N. E. 629; David v. Insurance Co., 9 Iowa, 45; Pratt v. Pratt, 157 Mass. 503-505, 32 N. E. 747; Rout v. Ninde, 111 Ind. 597, 13 N. E. 107. So long as a rule of court remains unrepealed, it cannot be dispensed with in a particular case. Thompson v. Hatch, 3 Pick. 512-516; Mining Co. v. Ruble, 9 Or. 121; Ogden v. Robertson, 15 N. J. Law, 124; Quynn v. Brooke, 22 Md. 288; State v. Edwards, 110 N. C. 511, 14 S. E. 741. A rule of court is a law of practice, extended alike to all litigants who come within its purview, and who, in conducting their causes, have the right to assume that it will be uniformly enforced by the court, in conservation of their rights, as well as to secure the prompt and orderly dispatch of business. Furthermore, a rule adopted by a court is something more than a rule of the presiding judge; it is a judicial act, and when taken by a court, and entered of record, becomes a law of procedure therein, in all matters to which it relates, until rescinded or modified by the court. Treishel v. McGill, 28 Ill. App. 68; Shane v. McNeill, 70 Iowa, 459, 41 N. W. 166. In this case it is conceded that the issues were closed at the time application was made by appellee to file an additional reply, and there is no pretense that the application was accompanied by an affidavit of the applicant or her attorney showing some reasonable excuse for not filing such pleading before issue joined, and that he believed said answer to be true and capable of proof upon the trial. Rule 5 was a law of the court providing that an affidavit disclosing certain facts should constitute the condition upon which the court would exercise its discretion with respect to reopening the issues, and the court had no power to waive it, and it follows that appellee's motion should have been overruled. But the additional and second reply was an argumentative denial, and all evidence under it was admissible under the general denial pleaded in the first paragraph of reply. Hence the defendant was not damaged, and the action of the court in permitting it to be filed was harmless, and not reversible error. Railway Co. v. Braden, 110 Ind. 558, 11 N. E. 357; Board v. Huff, 91 Ind. 333; Gheens v. Golden, 90 Ind. 427; Ketcham v. Coal Co., 88 Ind. 515; Hervey v. Parry, 82 Ind. 263.

Upon filing the second paragraph of reply, the appellant moved the court for a continuance of the cause, upon the ground that he was not prepared to produce the evidence to refute the new facts brought into the case by said second paragraph of reply, which motion was supported by the defendant's affidavit in denial of the facts pleaded, his present un-

preparedness, and belief that he would be able to produce the witnesses at the next term of court. The motion for continuance was overruled, and this action of the court is called in question by the second reason assigned for a new trial. All the material facts pleaded in the second paragraph of reply were in issue under the general denial of the first paragraph, and the second paragraph neither enlarged nor limited the scope of the evidence, and the action of the court was but a reasonable exercise of discretion. There was no error in overruling the motion for continuance.

There are other questions reserved, but, as they are not discussed in appellant's brief, they are deemed to be waived. The motion for new trial was properly overruled. Judgment affirmed.

(152 Ind. 182)

STARK v. BINDLEY.

(Supreme Court of Indiana. Feb. 16, 1899.)

MALICIOUS PROSECUTION—PREMATURE ACTION—GRAND JURY—JURISDICTION.

1. Where a person held by a justice of the peace to answer a charge of felony, under Burns' Rev. St. 1894, § 1703 (Horner's Rev. St. 1897, § 1634), gives a recognizance to appear at the November term of the circuit court, the grand jury at the September term after the recognizance was given has no jurisdiction to investigate the offense by virtue of the proceeding before the justice; hence their indorsement of "Ignoramus" on the papers does not terminate the prosecution.

2. An action for malicious prosecution cannot be maintained until the prosecution complained of has been legally terminated in favor of defendant therein.

Appeal from circuit court, Clay county; S. M. McGregor, Judge.

Action by Frances Kabbes Stark against Edward H. Bindley. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Samuel R. Hamill, A. W. Knight, I. W. Harper, and A. J. Kelley, for appellant. George A. Knight, Isaac N. Pierce, and Lamb & Beasley, for appellee.

MONKS, C. J. Appellant brought this action against appellee to recover damages for an alleged malicious prosecution. Appellant's demurrer to the second paragraph of answer was overruled, and, refusing to plead further, judgment was rendered on demurrer in favor of appellee. The only error assigned calls in question the action of the court in overruling the demurrer to the second paragraph of answer. The allegations of the second paragraph of answer are substantially as follows: That on September 21, 1891, appellee filed an affidavit before a justice of the peace charging appellant with the crime of larceny. Appellant was arrested and had a preliminary examination on said charge before the justice on September 22, 1891, and on said day was held by said justice to answer to said charge of larceny, and required to give her recogni-

zance to appear at the November term, 1891, of the Vigo circuit court, to answer said charge. Failing to give said recognizance, she was committed to jail until September 25, 1891, when she gave recognizance, as required by said commitment, to appear and answer said charge at the November term, 1891, of the Vigo circuit court, and was discharged from jail. The September term, 1891, of the Vigo circuit court was in session when said affidavit was filed, at the time the hearing was had, and at the time appellant entered into her recognizance, and continued in session until November 14, 1891. The grand jury for the September term of said court was in session after appellant had been recognized to appear at the November term of said court, and took up the investigation of said charge against appellant, and had the papers certified to said court by said justice of the peace. On October 19, 1891, the grand jury at said September term returned said papers to the clerk of the court with the word "Ignoramus" indorsed thereon, and signed by the foreman of said grand jury. There was no order, judgment, or entry of said court, made or entered of record, discharging appellant from custody, or releasing her from the recognizance to appear at the November term of said court to answer said charge. There was no other or further proceeding of any kind had or taken respecting said charge against appellant by the Vigo circuit court or by the grand jury at any time thereafter, and there was no record made of the return of "Ignoramus" by the grand jury. This action was commenced and was pending before the commencement of the November term, 1891, of said court. The question presented is, was the criminal prosecution against appellant terminated or at an end, within the meaning of the law, when this action was brought? If it was, the court erred in overruling appellant's demurrer to the second paragraph of answer, and the judgment should be reversed; otherwise, the judgment should be affirmed.

It is first insisted by appellee that the return of "Ignoramus" by the grand jury was not a legal termination of said cause, until a judgment was rendered thereon by the circuit court discharging appellant's bond, and releasing her from the duty of further appearing to answer the charge preferred against her by appellee. For a full discussion of this question, see note to *Ross v. Hixon* (Kan. Sup.) 26 Am. St. Rep. 135-137 (s. c. 26 Pac. 955). It is not necessary to determine whether a judgment of discharge is necessary, upon a return of "Ignoramus," to legally terminate such prosecution, for the reason that, even if such judgment is not necessary, the return set forth did not terminate said prosecution. The justice of the peace, in requiring, and appellant, in giving, her recognizance to appear and answer said charge of larceny at the November term of the Vigo circuit court, merely complied with the provisions of section 1703, Burns' Rev. St. 1894 (section

1634, Horner's Rev. St. 1897). Where the person held to answer a charge of felony by the justice of the peace gives a recognizance to appear at the next term of the circuit court, as the appellant did, it is the duty of the clerk to docket the case for the term at which such person has given bond to appear. If the grand jury at the September term of said court had returned an indictment charging her with the same larceny for which she was held to answer by the justice of the peace, said recognizance could not have been forfeited for a failure to appear at said term, because the condition thereof did not require her to appear at said term, but at the November term. Section 1790, Burns' Rev. St. 1894 (section 1720, Horner's Rev. St. 1897). To have given the said court jurisdiction over the person of appellant at the September term, if indicted at that term, it would have been necessary to issue a bench warrant on said indictment, and cause her arrest thereon, when she could have given a recognizance to answer said indictment, or in default thereof have been committed to jail. It is true that the grand jury at the September term had jurisdiction to investigate said larceny, and it was their duty to do so; but this was by virtue of the fifth clause of section 1735, Burns' Rev. St. 1894 (section 1606, Horner's Rev. St. 1897), which provides that the grand jury must inquire "into violations of the criminal laws of this state generally of which the court has jurisdiction," and not under the second clause of said section. The second clause only applies to cases where the person is under bail to appear and answer at the term the grand jury is impaneled. As appellant's recognizance did not require her to appear at the September term of said court, the grand jury at the September term had no jurisdiction to investigate said alleged offense by virtue of said proceeding instituted by appellee against appellant before the justice of the peace, a transcript of which, and all papers, were filed with the clerk of said court. The indorsement of "Ignoramus" on the papers of said cause was a nullity. Said grand jury had no authority to act upon the transcript and papers in said cause, and said court had no jurisdiction over the person of appellant at said time on account thereof, for the reason that the proceeding was not pending at said term, but was for the November term of said court. If at the November term of the Vigo circuit court the grand jury had returned an indictment against appellant for the larceny charged in appellee's affidavit, she could have been required by the court to appear and plead thereto, and on failure to do so her recognizance could have been forfeited, notwithstanding said return of "Ignoramus" at the September term. This is true because the condition of her recognizance required her to appear and answer said charge at said November term. If appellant had not given a recognizance for her appearance, but had been in jail on said charge, awaiting the action of the grand jury

thereon, when the return of "Ignoramus" was made upon the papers in said cause by the grand jury, the grand jury and court would have had jurisdiction, and a judgment of the court on said return discharging appellant from custody would have been a legal termination of the proceeding instituted by appellee. The return of "Ignoramus" did not, therefore, terminate the prosecution instituted by appellee against appellant, and the same was not at an end when this action was commenced. It is settled law that an action for malicious prosecution cannot be maintained until the prosecution complained of has been legally terminated in favor of the defendant therein. *McCullough v. Rice*, 59 Ind. 580, 584, and cases cited; *Gorrell v. Snow*, 31 Ind. 215; *Hays v. Blizzard*, 30 Ind. 457, 458; *Steel v. Williams*, 18 Ind. 161, 163, 164; *Lytton v. Baird*, 95 Ind. 349, 361; *Cottrell v. Cottrell*, 126 Ind. 181, 182, 25 N. E. 906.

It follows that the court did not err in overruling the demurrer to the second paragraph of answer. Judgment affirmed.

(152 Ind. 186)

GRAHAM v. RUSSELL, Auditor.

(Supreme Court of Indiana. Feb. 17, 1899.)

ADMINISTRATION—REOPENING—TAXATION—PLEADING.

1. Under *Burns' Rev. St. 1894*, § 8560, authorizing the county auditor, on notice to a taxpayer, to add for any number of years omitted property to the tax duplicate, with its proper valuation, and to charge such property to the owner with the taxes thereon, the auditor has such an interest as qualifies him to move to reopen an administration to collect taxes evaded by the decedent, as provided by section 2558, for persons interested in the estate who were not summoned and did not appear at the final settlement.

2. There is no duty resting on the state to file claims against a decedent's estate for taxes owing by him to the state, it being the administrator's duty to pay them, under *Burns' Rev. St. 1894*, § 8587, without their being filed.

3. Ignorance of the administrator that his intestate had failed to list and return all his property for taxation will not defeat reopening of the administration to subject the estate to payment of delinquent taxes.

4. Under *Burns' Rev. St. 1894*, § 2558 (*Rev. St. 1881*, § 2403), authorizing a person interested who was not summoned and did not appear at the final settlement to move to reopen an administration, a county auditor moving to reopen to collect delinquent taxes against the estate need not aver failure of summons, since the auditor would have had no authority to appear, and the state could not be compelled to appear.

Appeal from circuit court, Daviess county; D. J. Hebron, Judge.

Action by Robert Russell, as auditor, etc., against Mary Ann Graham, executrix of the estate of Richard C. Graham, deceased. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Padgett & Padgett and Heffeman & Mattingly, for appellant. O'Neill & Hoffman, for appellee.

JORDAN, J. Appellee, as the auditor of Daviess county, filed his petition in the lower court on October 4, 1897, whereby he sought to have the final settlement of the estate of Richard C. Graham, deceased, set aside, and said estate reopened for further administration, in order that certain taxes due from said estate to the state of Indiana, for state and county purposes, might be collected out of the assets of said estate. The petition was filed after the term of court at which the final settlement was approved, and the action is apparently based upon section 2403, *Rev. St. 1881* (section 240, *Horner's Rev. St. 1897*, and section 2558, *Burns' Rev. St. 1894*), wherein it is provided that a final settlement may be set aside and reopened at any time within three years, for illegality, fraud, or mistake in such settlement, or in the proper proceedings thereof, by any person interested in the estate who did not appear at such final settlement, and was not summoned to attend the same. Appellant unsuccessfully demurred to the petition, on the grounds—First, that the plaintiff had not the legal capacity to sue; second, insufficiency of facts; third, misjoinder of cause of action. There was an answer in denial, and upon the trial the court made a special finding of facts, and stated its conclusions of law thereon, in favor of appellee, and rendered a judgment setting aside the final settlement made by appellant as the executrix of said estate, and ordered that the estate and the administration thereof be opened and reinstated upon the docket of said court, and that the plaintiff recover his cost.

The errors assigned relate to the overruling of the demurrer to the petition, and to the exceptions to the court's conclusions of law on its special finding of facts. The petition discloses that appellee is, and has been for more than two years prior to the commencement of the action, the auditor of Daviess county, Ind.; and it further sets forth his duties under the tax statutes relative to property subject to taxation which the owner thereof has omitted to return for that purpose. The pleading then proceeds to show, among other things, substantially the following facts: Richard C. Graham was at and prior to his death a citizen and resident taxpayer of the city of Washington, Daviess county, Ind., and had been for a period of over 20 years. During all of said period, he was the owner of a large amount of real and personal property situated in said county, his said personal property consisting of money on hand and on deposit in the banks, and of money loaned by him and of rights, bonds, and credits, etc. The moneys which he had on hand, and also the amounts of money which he had loaned out, and the amounts which he had on deposit, were unknown to the several township assessors, who called upon him from year to year during the aforesaid period to assess him. Graham, as the petition charges, neglected, failed, and omitted, for the year of 1881, and for each suc-

ceeding year thereafter, including the year 1895, to list and return for taxation all of his said property, but listed and returned only a small portion thereof, although he was during each of said years duly called upon for that purpose between the 1st day of April and the 1st day of June, by the proper township assessor of the township in which he resided. It is charged that the fair cash value of the property which said Graham neglected and omitted to list and return for taxation for each of said years was \$10,000, and over and for several of the years in question, it is alleged, he omitted to list and return property to the amount and value of \$25,000, all of which omission was unknown to the said assessors, and was by the said Graham concealed from said officials. The property omitted during each of the years in question is alleged to have consisted of money on hand and on deposit in bank, and money loaned and bonds of the said city of Washington and other obligations, all subject to taxation, and held and owned by Graham on the 1st day of April of each of said years. It is also averred that, just prior to the 1st day of April of each of the years mentioned, he would temporarily convert \$10,000 and over of his money into greenbacks, in order to evade assessment and the payment of taxes thereon, and fraudulently concealed said fact of conversion from the assessor who called upon him to list his property, and fraudulently failed to list or return said amount or any part thereof for taxation. Graham, as it is averred, died testate, at said county, on July 29, 1895, leaving a liability for taxation due against his estate for state and county purposes to the amount of \$3,000 on account of his failure to list and return all of his property for taxation as aforesaid charged, for which amount said estate, it is averred, is still indebted. On August 12, 1895, his last will and testament was duly probated in the Davless circuit court; and appellant, his surviving widow, was duly appointed thereunder, and qualified as the executrix of his said will, and assumed the administration of his said estate. Under his will, she was given all of his real and personal property, of every description, held and owned by the testator at the time of his death, and the same was turned over, under the will, to appellant, and is now held by her. It is further charged that appellant, as said executrix, never filed in said court, nor with the clerk thereof, any inventory whatever of the personal property left by said decedent or testator, and omitted and neglected to file such inventory for the fraudulent purpose of concealing the personal estate of her said husband, and for the fraudulent purpose of preventing the proper tax officials of said county, whose duty it was to assess omitted property, from discharging said duty. Immediately after the expiration of one year from the time of her appointment by the court as executrix, to wit, on August 27, 1896, she filed her report in said court

for final settlement, and the clerk thereof fixed October 5, 1896, for the hearing of the same, and gave the usual notice provided by law to the heirs and creditors of the time and place fixed by him for hearing said report. At the time fixed for hearing the report, no one offered any objections thereto, and the court approved it, and discharged said executrix from the further administration of said estate; and it is further averred that at no time during the pendency of said estate in court was there any paper or statement made or filed by said executrix showing the personal property left by the testator at the time of his death. Appellee, prior to June 1, 1897, had no knowledge or information that said decedent had omitted to list and return for taxation the property in question; and it is averred that the first information he received of that fact was on said 1st day of June, 1897, and that thereupon he immediately proceeded to take the necessary steps to have appellant appear before him to be examined, under oath, touching the amount of money, notes, and bonds held by said testator at his death; but, after she was served with the proper notice to appear, she failed and refused to do so, or submit to such examination. It is further alleged that no administration of said estate is now pending in any court of this state, and that appellant still resides in the said county of Davless. The prayer is that the matters and things set forth in the petition be inquired into, and, if found to be true, that the final settlement of the estate be set aside, etc.

It is insisted by counsel for appellant that appellee, as county auditor, cannot maintain this action, for the following reasons: First, the facts do not disclose that he has such an interest in the estate as would authorize him, in contemplation of the statute upon which the action is founded, to file a petition for the purpose which he has; second, that the facts alleged are not sufficient to warrant the court in awarding him any relief. We will consider these in their order.

Section 8560, Burns' Rev. St. 1894, of the law relative to taxation, being section 142 of the tax law of 1891, empowers the county auditor, upon notice to a taxpayer, to add, for any year or number of years, omitted property to the tax duplicate, with the proper valuation thereon, and to charge such property to the owner thereof with the taxes thereon. The powers granted to the county auditor under the section mentioned are not limited alone to that official, but the tax law also extends such powers to the county treasurer and the county assessor and boards of review. The tax law intends, and has so declared in no uncertain terms, that all property liable to taxation shall be charged with that burden, and that none shall escape through the fraud or omission of the owner or holder thereof; and it is made the imperative duty, under the law, of every taxpayer, to list and return for taxation all per-

sonal property of every description owned and held by him on the 1st day of April of each year legally liable to taxation. The provisions of the law to which we have referred, granting the powers mentioned to the county auditor and other officials, are intended to afford an instrumentality or agency through which the state, as far as possible, can prevent property subject to taxation from escaping the burden or charge imposed by the law. *Saint v. Welsh*, 141 Ind. 382, 40 N. E. 903; *Reynolds v. Bowen*, 138 Ind. 434, 36 N. E. 756, and 37 N. E. 962. It was held in the latter case that the power to assess property is a summary one, and that in order to secure uniform and just taxation, which the law intends, and to protect the state's revenue against a dishonest evasion of the law, and also to protect the honest taxpayer, it is necessary that tax laws be liberally interpreted, in aid of the taxing power. The right of the county auditor and the other officials who in like manner are empowered and charged with the duty to see that omitted property is subjected to taxation is a continuing one against each and every taxpayer, and it is not terminated with the death of the latter, but proceedings in discharge of such duty can be maintained against his estate after his death, and the notice required by the law may be served upon his administrator or executor. *Reynolds v. Bowen*, supra; *Saint v. Welsh*, supra. Neither the taxpayer nor his estate after his death can claim any vested rights in the fruits of his fraud or omission to list and return all of his property liable to taxation, and the law, when properly invoked, will not permit either to profit thereby. Charged and empowered by the state with this duty, appellee, as county auditor, certainly cannot be considered, under the facts, in the eye of the law, as a stranger to the estate in question, and as one having no interest therein. Conceding that the court's order of final settlement, as insisted by counsel for appellant, stood as a bar against appellee taking any proceedings against Graham's estate to secure the taxes in controversy, certainly then he was interested in having such final settlement set aside, in order that he might proceed to discharge the duties imposed upon him by the law. Appellee was, at least, interested on behalf of the state, which he, under the law, represented as one of its instrumentalities in seeing that the taxes, which had accrued by reason of the omitted property, should be paid by the estate of the defaulting decedent. The right which he seeks to maintain by this action, under the circumstances, is but incidental to the general power or right with which he is invested by the legislature in respect to the assessment of taxes on omitted property. The estate in question, it appears, had been finally settled, and its assets turned over to appellant, leaving the matter in regard to the taxes now in controversy still virtually pend-

ing unsettled as a liability for which the estate should account. That appellee, as the instrument or agency of the state, is authorized by the statute to petition the court, and secure the final settlement to be set aside upon a showing of sufficient facts, so far as it affects him adversely, in the discharge of his duties as such, we think there can be no doubt. The case of *Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168, and 28 N. E. 73, asserts principles which support this holding. Taxes which are assessed or imposed under the authority of the state for governmental purposes, either for the state direct or for some of its subdivisions, in a legal sense, may be said to be the property of the state, and the latter is certainly interested in their collection. Therefore, if the order of final settlement in question is, as claimed by counsel for appellant, a bar to appellee in the discharge of the duties with which he is invested relative to the taxation of omitted property, it must follow that his right to institute and maintain this action, under the circumstances, cannot be successfully denied, and the steps which he has taken in the matter, in his capacity as county auditor, must, in legal contemplation, be deemed to be those of the state, and the action may be viewed as though it had been instituted in the name of the state, upon the relation of appellee as county auditor, which is certainly a proper procedure.

The contention of appellant's counsel that the petition ought to have alleged that the taxes in dispute had been filed as a claim against Graham's estate prior to its final settlement is without merit. The facts disclose that the decedent had for many years prior to his death failed to list and return for taxation a large amount of his property, and at his death it is charged he was liable to the payment of taxes, on account of his said default, in the sum of \$3,000 and over, which had accrued and were due for state, county, and township purposes. Taxes are not such claims which the law of this state either requires or intends shall be filed for payment against a decedent's estate. It is true that taxes, in the order prescribed by the statute for the payment of liabilities of a decedent's estate, come within the fourth provision of such order of payment. *Rev. St. 1881, § 2378* (*Burns' Rev. St. 1894, § 2534*). The duty, however, rests upon the administrator or executor to pay the taxes due against the estate without their being filed or presented for payment. *Burns' Rev. St. 1894, § 5387*; *Ring v. Ewing*, 47 Ind. 247; *Henderson v. Whitinger*, 56 Ind. 131. It may be true that appellant, as insisted by her counsel, was, at the time she made her final report, ignorant of the acts of her testator in failing to list and return all his property for taxation; but this fact, under the circumstances, cannot avail her to defeat the setting aside of the final report, or prevent the estate which she represents from being subjected to the payment of the

taxes for which the decedent was justly liable. He, while in life, owed, as one of the highest duties to the government, the duty to pay all taxes imposed upon his property liable to taxation. As a compensation for the discharge of their duty, the state afforded him protection to his life, liberty, and the due enjoyment of the property with which he had been blessed; and the discharge of this duty, if the decedent is shown to have omitted it, must rest upon his estate. With or without knowledge of the existence of this liability of her decedent, it existed, all the same, against the property of his estate until paid, unless barred by some provision of law. *Beard v. Allen*, 141 Ind. 243, 39 N. E. 665, and 40 N. E. 654. With this charge or liability against the estate, she, immediately after the expiration of the year allowed by law, procured it to be declared by the court as finally settled, and secured her discharge from further administration of her trust. It has been held by this court that, under the present statutes relating to the settlement of a decedent's estate, the fact that a claim was pending against an estate undisposed of at the time of the final settlement constitutes such illegality as will, on the petition of the claimant, filed within the prescribed time, result in setting aside such final settlement. *Dillman v. Barber*, 114 Ind. 403, 16 N. E. 825. A tax claim or charge, as we have seen, is not required to be filed against an estate, but it must be taken notice of by an administrator or executor, and paid without being filed; and, if he proceeds to finally settle the estate without the payment of such tax claim, settled or determined by proper adjudication in court, he does so at the peril of having such final settlement set aside, under the statute in question, at the instance of some one entitled to institute an action for that purpose. We do not place much stress upon the question of fraud imputed to appellant by the averments in the petition, for the reason, we think, that the fact alone that she is shown to have filed a petition for final settlement, and secured its approval by the court, when the claim or liability now in dispute existed and was virtually pending against the estate undisposed of, must be considered such illegality, within the meaning of section 2403 (section 2558), supra, as will result in setting aside the final settlement, and reopening the estate, for the purpose contemplated by the appellee.

It is further insisted that the petition is insufficient, for the reason that it is not averred therein that appellee did not appear at the final settlement, nor was he personally summoned to attend the same. It is true that this court has held that in order to make a petition sufficient, under the statute, to set aside a final report after the term of court at which the same was approved, in a case where an ordinary individual or person is the petitioner, it must be shown by the averments of the pleading that the petitioner was not personally served with the process of the court to

attend the hearing of the final report, and, if not so served, that he did not attend the hearing thereof as a party thereto. *Dillman v. Barber*, supra; *Williams v. Williams*, 125 Ind. 156, 25 N. E. 176. But where, as in this case, the state, through the county auditor, may be said to be the petitioner, the rule asserted by this court under the provisions of section 2403 (section 2558), supra, is not applicable. The reasons for this assertion are obvious. The county auditor is a public officer, invested, under the law, with certain duties and powers, among which, as we have seen, are those in regard to the taxation of omitted property. In no sense can it be said that he, as such official, is the owner of the taxes arising out of assessment upon property which, in the discharge of his duties, he secures to be placed upon the tax duplicate; for such taxes, as we have heretofore said, are considered in law as belonging to the state, and the auditor is invested with no power or rights in any manner to cancel or release the claim of the state for such taxes. The state, as the sovereign power, is the real party in interest, and not the county auditor. The latter has no authority, under existing laws, to attend a final settlement of a decedent's estate on behalf of the state; nor can he be legally summoned by the administrator or executor to attend the hearing upon a final settlement, and his presence at such hearing could in no manner bind the state. It is equally clear that an administrator or executor cannot, under the law as it now exists, invoke the process of the court as against the state, and thereby compel it to attend a proceeding for a final settlement of the estate which he represents, and therein litigate a question that may arise upon such settlement relative to an unpaid claim for taxes. *Snodgrass v. Morris*, 123 Ind. 425, 24 N. E. 151. It is a well-settled rule, and one of universal application, that the state, in its sovereign capacity, can be sued only by its own permission, and then only in the manner by which it has consented to be sued. The state of Indiana has not, under any statute, consented that an administrator or executor of an estate may bring it into court, and thereby force it to become a litigant at the hearing of a final report in respect to a claim for taxes against such estate. It is evident, under the circumstances, we think, that inasmuch as the county auditor was not authorized to appear at the final settlement made by appellant, and thereby bind the state, and as the latter, in the absence of a statute granting such authority, could not be summoned to attend the hearing of the final report made by appellant, therefore the averments in the petition in respect to these matters are not essential, and their absence does not render the pleading insufficient, as in other cases. Such averments, under the circumstances, could serve no essential purpose, for the evident reason that the matters or facts pertaining to such questions would not be open to inquiry or investigation upon the hearing of a

petition, presented on behalf of the state, to set aside, as in this case, an order approving a final report.

It follows from what we have said that the petition is sufficient, and the court therefore did not err in overruling the demurrer thereto. The facts set out in the special finding are substantially the same as those alleged in the petition, and the court's conclusions of law thereon are correct, and the judgment below is therefore affirmed.

(22 Ind. App. 106)

GILMORE v. WARD.¹

(Appellate Court of Indiana. Feb. 16, 1899.)

PLEADING—DEMURRER—EXHIBITS—CONTRACTS—DEMAND—ARREST OF JUDGMENT.

1. A demurrer "to the plaintiff's complaint" on the ground "that neither paragraph of said complaint states facts sufficient to constitute a cause of action" is joint, and should be overruled if either paragraph is sufficient.

2. The institution of an action for money due on a contract is a sufficient demand therefor.

3. A demand for property due on a contract is shown by an allegation that defendant refused to let plaintiff have it "when demand was made by plaintiff of defendant."

4. The specifications according to which a contract is to be performed need not be made an exhibit of a complaint for money due on the contract, when unnecessary for a proper construction of the contract.

5. Where the court has jurisdiction of the subject-matter and the parties, the judgment will not be arrested, if the complaint contains one good paragraph.

Appeal from circuit court, White county; T. F. Palmer, Judge.

Action by John W. Ward against Ephriam Gilmore. From a judgment for plaintiff, defendant appeals. Affirmed.

Foutz, Spitter & Kurrie, for appellant. Reynolds & Sills, for appellee.

ROBINSON, J. Overruling a demurrer to the complaint and a motion in arrest of judgment are the only errors assigned. The complaint is in three paragraphs. The following demurrer to the complaint was filed: "The above-named defendant demurs to the plaintiff's complaint in the above-entitled cause, and, for cause of demurrer, says, all and severally, the following: (1) That the said complaint does not state facts sufficient to constitute a cause of action against the defendant; (2) that neither paragraph of said complaint states facts sufficient to constitute a cause of action against this defendant." It is argued by appellee's counsel that this demurrer is joint, and not several. This view is supported by the authorities. The body of the demurrer is addressed to the whole complaint. The whole complaint is alleged to be bad, and one reason assigned is that neither paragraph is good. If the body of the demurrer is joint, it cannot be changed by assigning the causes separately. *Silvers v. Railroad Co.*, 43 Ind. 435; *City of Connersville v. Connersville Hydraulic Co.*, 86 Ind.

¹ Rehearing denied.

235. Thus, a demurrer which read, "The plaintiff demurs to the second, third, fourth, fifth, and sixth paragraphs of answer of the defendants, and assigns for cause that neither of said second, third, fourth, fifth, and sixth paragraphs of answer alleges facts sufficient to constitute a defense to the plaintiff's cause of action," was held to be joint. *Stanford v. Davis*, 54 Ind. 45. In *Meyer v. Bohling*, 44 Ind. 238, a demurrer as follows: "The said defendant demurs to the first, second, and third paragraphs of the complaint for the following reasons: (1) The same do not, nor does either of them, state facts sufficient to constitute a cause of action against said defendant,"—was held a joint demurrer. In *Washington Tp. v. Bonney*, 45 Ind. 77, the following demurrer was held to be joint: "Come now the plaintiffs in the above-entitled cause, by their attorneys, and demur to the second, third, and fourth paragraphs of defendant's answer, for the following grounds of objections: (1) Said paragraphs of said answer, nor either of them, state facts sufficient to constitute a cause of defense to said plaintiff's complaint." In *Cooper v. Hayes*, 96 Ind. 386, the following was held to be a demurrer to the entire complaint: "Now at this time come Samuel Cooper and Anna Cooper, defendants, and demur to the first and second paragraphs of plaintiff's complaint, for the reason that the same, and neither one of the same, constitute a cause of action against the said defendants herein named." It follows that, unless each of the three paragraphs of the complaint is bad, the demurrer was properly overruled.

The second paragraph of the complaint avers that appellant agreed to pay appellee 5½ cents per cubic yard for all dirt removed from a certain ditch, according to the specifications of said ditch,—25 per cent. to be paid at the end of the first, second, and third months, provided appellee worked steadily; after deducting the price of two black mares, which was \$150, all that was due appellee to be paid when ditch was finished, and accepted by surveyor; that appellee performed all the conditions on his part to be performed; "that plaintiff was to receive two black mares, and pay therefor \$150, by deducting that amount from what was due him for said work, but the defendant refused to let plaintiff have said mares when demand was made by plaintiff of defendant; that said work he was to do under and by virtue of said contract has been performed, and accepted by said surveyor"; that appellee had removed 5,000 yards of dirt, according to the specifications, and by virtue of his contract, a copy of which is made an exhibit. The contract provided that after deducting the price of the two mares, \$150, all that was due said Ward should be paid when the ditch was completed, and received by the surveyor. This paragraph of complaint is to recover money due on a contract, and in such cases it is held that the suit constitutes a sufficient demand.

Olvey v. Jackson, 106 Ind. 296, 4 N. E. 149, and cases cited; Bertha v. Sparks, 19 Ind. App. 431, 49 N. E. 831. Even if a demand was necessary, we think the averments of the complaint show such was made. The theory of the complaint is not to recover a monthly payment, but it is to recover the total amount due on the completion of the work. Construing the averments of the complaint and the contract together, the mares were to be delivered on the completion of the work, and we think the complaint shows a demand for them. At any rate, the complaint must be held to show that appellant had notice of the completion of the work under the contract. The written contract between the parties is the foundation of the action; the work to be done in a certain manner, which is set out, and accepted by the surveyor, which was done. An exhibit of the specifications, under the averments, was not necessary to a proper construction of the contract between the parties. The second paragraph of complaint states a cause of action.

There was a general verdict. A motion in arrest of judgment was overruled. But the rule is well settled that where the court has jurisdiction of the subject-matter, and has acquired jurisdiction of the parties, the judgment will not be arrested, if the complaint contains one good paragraph. *Lange v. Dammier*, 119 Ind. 567, 21 N. E. 749; *Durham v. Hiatt*, 127 Ind. 514, 28 N. E. 401; *Sims v. Dame*, 113 Ind. 127, 15 N. E. 217; *Baddeley v. Patterson*, 78 Ind. 157; *Waugh v. Waugh*, 47 Ind. 580; *Kelsey v. Henry*, 48 Ind. 37; *Peden v. Mall*, 118 Ind. 556, 20 N. E. 493. Judgment affirmed.

(22 Ind. App. 288)

ROTHENBERGER et al. v. GLICK. 1

(Appellate Court of Indiana. Feb. 14, 1899.)

SUBSCRIPTION—CONTRACTS—CONSIDERATION—DELIVERY—SUBSCRIBERS' LIABILITY—CONDITION PRECEDENT—FAILURE TO PERFORM—SUBSTANTIAL COMPLIANCE.

1. Defendant signed a subscription for the building of a church, promising absolutely to pay the subscription as stated therein. *Held* that, while he might withdraw before the subscription was delivered, he could not do so after delivery, since on delivery it became a contract, and obligated each subscriber to pay according to its terms, independent of the liability of others.

2. Where various persons signed a subscription for the erection of a church on a site designated therein, the consideration is not only the mutual promises of the various subscribers, but the additional promise of the officers to use the money to erect the building on the site designated.

3. A condition in a subscription contract that a church shall be erected on a particular site, described, is reasonable, and compliance therewith is a condition precedent to the subscribers' liability.

4. Where plaintiffs failed to comply with a material condition of a subscription contract, evidence that they had borrowed money on the faith of the subscription was properly excluded, since they had no right to presume defendant would waive performance of the condition.

¹ Rehearing denied.

5. Defendant signed a subscription for the building of a new church "on the present site," described. The site was subsequently changed to the opposite side of a public highway, about 80 feet from the old church. There was a sharp contest as to the site, on which the congregation divided; defendant being of the party desiring it to remain on the old site, never consented to the change, and refused to pay his subscription on that ground. *Held* not a substantial compliance with the subscription, and that defendant was not liable thereon.

Appeal from circuit court, Clinton county; J. V. Kent, Judge.

Action by Josiah Rothenberger and others against John Glick. From a judgment for defendant, plaintiffs appeal. Affirmed.

Brumbaugh & Combs, for appellants. John O. Farber, for appellee.

ROBINSON, J. Appellants sued appellee upon the following instrument:

"We, the undersigned, agree to pay the sums annexed to our names to the treasurer of the Fair Haven Evangelical Lutheran Church, Clinton Co., Indiana, for the erection of a brick house of worship for said church, on the present site of the Fair Haven Church; it being on a lot in the southwest corner of the northeast $\frac{1}{4}$ section eight, town. 22 north, range 2 west. The payment of the sums subscribed is to be as follows, to wit: One-third on the first day of March, 1892; one-third on the first day of December, 1892; one-third on the first day of September, 1893.

Names.

Amounts.

John Glick.

\$50 00

—[With other subscribers.]"

Appellee answered in three paragraphs. In the first paragraph he admits the signing of the subscription paper sued on, and pleads facts at great length, the effect of which is that appellants failed to comply with the condition of the subscription; that they abandoned the site described in the subscription contract, and erected the building, before suit was brought, upon another and different site,—all of which was done over the objection and protest of appellee, who was a member. The second paragraph of answer pleads no consideration, and the third, denial.

Overruling a demurrer to the first paragraph of answer is the first error assigned and discussed. The subscription was not made upon the condition that others should subscribe, or that it should become payable only in the event a certain amount should be subscribed. In such cases, the contract is, in a sense, between the subscribers themselves, and one cannot withdraw or revoke his subscription without the consent of all. See *Cravens v. Mills Co.*, 120 Ind. 6, 21 N. E. 981; *Current v. Fulton*, 10 Ind. App. 617, 38 N. E. 419. In the case at bar, after the paper had been signed and before its delivery, the subscription by appellee could have been withdrawn at any time. But after its delivery it became a contract between appellants and each of the subscribers, and was equal-

ly binding upon both parties. The liability of each subscriber was in no way dependent upon the liability of the others. Were this a suit on the subscription after it became due, and before the erection of the church, we would have a different question from that presented. In such case, the building of the church is not a condition precedent to the payment of the subscription, but the subscription must be paid when due, and, if an attempt is afterwards made to use the money in a way different from that stated in the subscription, the subscriber has his remedy. In such case, the presumption would be indulged that the building would afterwards be erected in accordance with the terms of the subscription. The instrument in question, when executed, became a contract between appellants and each of the subscribers, and each became liable for the amount subscribed, without reference to whether the others paid their subscriptions or not. The mutual promises of the respective subscribers, each with the other, may have been a part of the consideration, but that was by no means all. It must be admitted that the promise of appellants to use the money in erecting a new church building, and to erect it upon a designated tract of land, would be a valid consideration. Each of the subscribers entered into a contract, whose validity was in no way affected by the contract of each of the other subscribers, and the instrument is to be construed without reference to whether it contains one or many names as subscribers. It is not material here what reason appellee may have had for making a subscription conditioned upon a particular location. The fact exists that it is a part of the contract between the parties. The condition is a reasonable one. The parties themselves have agreed to the contract, with its condition, and all the courts can do is to enforce it according to its terms and conditions. The demurrer to the first paragraph of answer was properly overruled.

Overruling the motion for a new trial is assigned as error. It appears from the record that the church was not erected on the premises described in the subscription paper, but was built on the opposite side of a public highway, and about 75 or 80 feet from the old church. It is argued that this was a substantial compliance with the contract. It appears from the evidence that the congregation decided to erect a new church, and that before the matter was finally settled a sharp contest arose whether it should be built on the old site or on the new one, and a number of meetings were held. There is some evidence that it was first decided to build on the old site, and that this was the decision of the church at the time the paper in suit was executed. The paper itself indicates that at that time the old site had been selected by the church. The congregation afterwards changed the location to that above named. Appellee was of the party de-

siring the new church to remain on the old site, and there is evidence that he never consented to the change, and refused to pay the subscription because the site had been changed.

There was no error in excluding evidence offered to show that appellants, on the faith of this subscription, had borrowed money in advance of the maturity of the payments, for the purpose of erecting the new church. They had no right to presume that appellee would do other than he had promised to do in his subscription contract, and they had no right to set aside the old contract, and make a new one, without appellee's consent.

The question controlling the other matters discussed by counsel is, was there a substantial compliance with the terms of appellee's contract? The contract of subscription provides, not only that the new church shall be erected "on the present site" of the old church, but it particularly describes the land upon which it shall be built. No discretion was lodged with any one as to location. The new church, when built, was not located on the site of the old one, nor was it located on any part of the land described in the subscription paper. The location mentioned in the paper was wholly abandoned. It is not a case where an attempt was made to carry out a contract, and its requirements substantially complied with, but the very terms of the contract were purposely abandoned. One of the substantive terms of the contract was disregarded. The facts show a decided purpose on the part of appellants not to perform the condition. The contract itself is perfectly plain, and, if appellants desired to substitute a new contract in its place, they should show that such new contract had been executed. That a substantial building was in fact erected upon other ground across the highway, and that it will in every respect subserve the same purpose as completely as if erected on the ground described, is not the question. When appellee signed the subscription paper, he clothed no one with any discretionary authority as to location. Appellants are not seeking to enforce a contract that has been substantially complied with, but are seeking, in effect, to enforce against appellee a contract which he never made. *First M. E. Church v. Sweny* (Iowa) 52 N. W. 546; *Railroad Co. v. O'Connor*, 40 Iowa. 477; *Dorris v. Sweeney*, 60 N. Y. 463; 1 Beach, Mod. Cont. § 111; 2 Beach, Priv. Corp. § 540; *Railroad Co. v. Holmes*, 101 Ind. 348; *Railroad Co. v. Shearer*, 10 Ind. 244; *Parker v. Thomas*, 19 Ind. 213; *Taylor v. Fletcher*, 15 Ind. 80; *Low v. Studabaker*, 110 Ind. 57, 10 N. E. 301; *Board of Com'rs of St. Joseph Co. v. South Bend & M. St. Ry. Co.*, 118 Ind. 68, 20 N. E. 499. In *Colvin v. Turnpike Co.*, 2 Ind. 511 (a subscription to build a turnpike road), there was no condition in the instrument subscribed that the road should be on any particular route. In *Railroad Co. v. Dunn*, 17 Ind. 603, a subscription was made

upon the condition that the road have a certain location. It was held that this was a condition upon which the party might stand, or he might waive it, and that afterwards giving a note for the amount of the subscription was a waiver of the condition. In *Beckner v. Turnpike Co.*, 65 Ind. 468, defense was made to the collection of a stock subscription on the ground that the route between the termini had been changed after the subscription was made; but in that case the articles of association authorized the corporation to change the line so as to obtain the best route, but not to change the termini. In *Board of Com'rs of Marion Co. v. Center Tp.*, 105 Ind. 422, 2 N. E. 368, and 7 N. E. 189, the principle is announced that, where the articles of incorporation authorize changes to be made in the line of a railroad, a subscriber will be held to have contracted with reference to such possible changes, and will not be released by any changes made, if they are within the limits fixed by the articles of incorporation. In *Cravens v. Mills Co.*, 120 Ind. 6, 21 N. E. 981, suit was brought on a stock subscription which was made upon condition that \$125,000 of solvent subscriptions, including \$60,000 promised by the Eagle Cotton Mills Company of Pittsburg, should be obtained, and that the contract with the above-named company for the purchase of its mills should be ratified by the votes of those holding a majority of the capital stock. It was claimed that the contract entered into with the Pittsburg corporation, and ratified by a vote of the stockholders, was not the one contemplated by the parties and referred to in the contract of subscription. The court held that as the subscriber had agreed that the board of directors might exercise their judgment in obtaining and agreeing upon terms of purchase, and as a contract of purchase had been agreed upon and ratified by a majority of the stockholders, it was too late to assail such contract in an action to collect the subscription. In *Suit v. School Tp.*, 8 Ind. App. 655, 36 N. E. 291, a subscription was made to build a school building, of certain dimensions, "at" a certain town. The general rule was announced that a literal compliance with the conditions precedent as to size and location was not necessary, but that a substantial compliance would suffice; but it was not decided whether there had been a substantial compliance with the conditions in that case as to location, nor did the court say that a building erected "near" a town would or would not comply with a condition requiring the building to be erected "at" a certain town. In *Petty v. Trustees*, 95 Ind. 278, there was no change in the location of the church building, but there was a change in its size. It was not decided whether or not there had been a substantial compliance with the terms of the subscription. But, the subscriber being one of the trustees of the church, nothing appearing to the contrary, the fair inference was that he consented to the change and

waived the condition of the contract. In *Landwerlen v. Wheeler*, 106 Ind. 523, 5 N. E. 888, no defense was made on account of the violation of any condition contained in the subscription paper. It appeared that, after the paper was signed, the words, "Payments to be made to John Wheeler, Esq.," were inserted, and the jury found that, after the subscriber had received notice of the change, he promised to pay his subscription, and acknowledged it as a debt due from him. In the case at bar the evidence is very conflicting, but, after a careful review of the record, we can but conclude that there is evidence to support the finding, and that no error was committed in overruling the motion for a new trial. Judgment affirmed.

(21 Ind. App. 547)

LEACH v. ADAMS.

(Appellate Court of Indiana. Feb. 14, 1899.)

DEMURRER—GROUNDS—JUDGMENT BY DEFAULT—
PROCESS—ELECTION OF REMEDIES—CONTRACT AND TORT.

1. The word "contains" is a substantial equivalent of the word "states," as used in *Horner's Rev. St. 1897*, § 339, cl. 5, declaring it a ground of demurrer that the complaint does not "state" facts sufficient to constitute a cause of action.

2. Service of process sufficiently appears from the record of a judgment by default, showing that defendant appeared to the original complaint, and failed to discharge a rule to answer an additional paragraph on which the judgment was rendered.

3. By suing *ex contractu*, a party is not precluded from afterwards filing an additional paragraph in tort, based on the same facts, and taking judgment thereon by default, process having been duly served.

Appeal from circuit court, Morgan county; George W. Grubbs, Judge.

Action by Francis M. Leach against Hugh Adams. From a judgment for defendant, plaintiff appeals. Affirmed.

N. A. Whitaker and Leach & Odle, for appellant. O. Matthews and A. M. Bain, for appellee.

COMSTOCK, J. Appellant brought this action against appellee to set aside a judgment and alleged default. An amended complaint in two paragraphs was filed, to each of which a demurrer was filed and sustained; and, the appellant refusing to plead further, judgment was rendered in favor of appellee for costs. This ruling is the only error assigned. In each paragraph appellee sets out in full the complaint and judgment in the case of Adams against Leach,—the judgment sought to be set aside. In the first he asks to have the judgment set aside because of his alleged mistake, inadvertence, surprise, and excusable neglect. In the second, in addition to the averments of the first, it is alleged that the first paragraph of appellee's complaint in the original cause was one for money had and received, and that the additional paragraph upon which the judgment was ren-

dered was for the unlawful conversion of money; that the appellee, having elected to sue upon contract in the first instance, had waived his right to sue in tort; that said paragraph for money had and received was pending; and that the judgment was null and void. Each paragraph states appellant's alleged meritorious defense to the cause of action for money had and received and for conversion. Appellant demands relief by the first paragraph of his complaint, under the last clause of section 396, Rev. St. 1881 (section 399, Burns' Rev. St. 1894), which provides that "the court shall relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect."

Appellant first contends that appellee's demurrer "raises no question, and is not known to the law of this state." The demurrer is in the following language: "The defendant demurs to plaintiff's amended complaint, and for cause of demurrer says that said amended complaint does not contain facts sufficient to constitute a cause of action." This, we think, sufficiently complies with the fifth clause of section 330, Horner's Rev. St. 1897. The word "contains" is a substantial equivalent for the words "states facts," used in the statute. The point is not well taken. The authorities cited by appellant's counsel do not sustain their claim.

Appellant next claims that the judgment should be reversed for the reason that the judgment record does not show service of process, the judgment having been taken on the additional complaint of appellee for conversion on default. It needs the citation of no authorities to show that when judgment is taken by default the judgment recovered should show that service of process has been duly made. In each paragraph of the complaint it is shown that the complaint in Adams against Leach, for money had and received, was filed in the Morgan circuit court at the September term, 1896; that on the 15th day of December, 1896, appellee filed his additional paragraph of complaint; and the judgment entered on the evening of December 25, 1896, shows that a rule was entered to discharge the rule of the court to answer said additional paragraph. Appellant's complaint shows that he appeared to the original complaint, and failed to discharge the rule to answer the additional paragraph. He was not, therefore, defaulted without service of process. The facts set out in appellant's complaint do not show a reasonable excuse for a failure to discharge the rule to answer the additional paragraph of complaint. They fail to show such mistake, inadvertence, surprise, or excusable neglect as, under the statute, entitled appellant to relief.

The last proposition argued by appellant's counsel in their able brief is that the second paragraph of appellant's complaint is based upon the theory that appellee, having originally elected to sue *ex contractu*, could not in

the same suit, or afterwards, sue *ex delicto*, the election of the one remedy being a waiver of the other; that the filing of the additional paragraph was illegal, and should have been stricken out, of the court's own motion; and that the judgment taken thereon is null and void. This proposition, we think, is not well taken. By appearing and answering to the original complaint, appellant was in court. He should have presented the questions then that he raises in this proceeding on demurrer. No motion was presented for the consideration of the trial court. Both paragraphs of complaint were pending at the time judgment was rendered, and, without objection, appellee elected to proceed upon the last one filed.

We do not question the correctness of the law set out in the cases cited by appellant, but they are not applicable to the facts. The conclusion reached renders it unnecessary to pass the merits of the defense set up to the original action. Judgment affirmed.

INCORPORATED TOWN OF ROCHESTER, IND., v. BOWERS.¹

(Appellate Court of Indiana. Feb. 14, 1899.)
ASSUMPSIT—COMMON COUNTS—APPEAL—PRESUMPTIONS.

1. A complaint alleging that defendant is indebted to plaintiff in a certain sum, for work done and materials furnished by plaintiff for defendant, at his special request, of the reasonable worth of said sum, which is due and unpaid, states a cause of action.

2. If there is one good paragraph in the complaint, and the record does not show on which paragraph the judgment was based, the court will presume that it was based on the good paragraph.

Appeal from circuit court, Fulton county; A. C. Capron, Judge.

Action by Abel F. Bowers against the incorporated town of Rochester, Ind. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker & Bibler, for appellant. Enoch Myers, for appellee.

HENLEY, C. J. This action was commenced by the appellee as plaintiff, against the appellant as defendant, by a complaint in three paragraphs. The appellant demurred to each of the paragraphs of the complaint, upon the ground that neither of said paragraphs stated facts sufficient to constitute a cause of action, which demurrers were severally overruled, and to these decisions of the court the appellant excepted. There was an answer filed in two paragraphs; a reply filed by appellee to the second paragraph of answer; and, the case being at issue, it was submitted to a jury, who returned a verdict in favor of appellee, upon which, over appellant's motion for a new trial, the lower court pronounced judgment.

The only question in this court arises upon the ruling of the lower court upon the de-

¹ Superseded by opinion, 55 N. E. 235.

murrers to the several paragraphs of the complaint. The evidence is not in the record, and we have no means of knowing upon which paragraph of the complaint appellee recovered his judgment. The first paragraph of complaint was a common count for work and labor done, and was in the following words: "Plaintiff complains of the defendant, the incorporated town of Rochester, Ind., and says that said defendant is indebted to him in the sum of one hundred ninety-three dollars and fifty-six cents, and interest thereon at the rate of six per cent. per annum from May 1st, 1896, for work and labor done and performed, and for material furnished for said defendant by plaintiff, at the special instance and request of the said defendant, an itemized account of which is herewith filed as a part hereof, marked, 'Ex. A.' That said work and material were reasonably worth the price charged therefor. Wherefore plaintiff says that said defendant is indebted to him in the sum of two hundred and twenty-five dollars, all of which is due and unpaid, for which sum, his costs, and all other proper relief he demands judgment." It is not necessary that we set out in this opinion the other paragraphs of complaint, or go into any discussion of the question as to their sufficiency. The first paragraph of complaint is undoubtedly good, and, under the well-settled rule established in this state, the judgment of the lower court will not be disturbed. Many cases in the supreme court of this state, and in this court, could be cited in support of this rule, but we content ourselves with the citation of one case. In the case of *Ferguson v. Hull*, 136 Ind. 839, 36 N. E. 254, the supreme court say, in passing upon an assignment of error like the one in the case at bar, where the sufficiency of the several paragraphs of complaint was attacked: "But, even if they were bad, this court is not informed upon what paragraph of complaint the court below found. It may be that the court found upon the third paragraph of complaint. Where the evidence is not in the record, and there is no showing as to what paragraph the court found upon, the court will presume everything in favor of the correctness of the decision of the court below." In this case there can be no objection to the sufficiency of the first paragraph of complaint. With whatever defenses appellant may have had to this paragraph of complaint, this court can have nothing to do. The paragraph as it stands is undoubtedly good, and contains every material allegation necessary in a complaint for work and labor done. This court has no means of knowing that the judgment rendered in this cause was rendered upon this paragraph of complaint, and the court must presume everything in favor of the correctness of the decision of the lower court; hence we must presume that the judgment of the lower court was in fact based upon this paragraph of complaint. We find no error in the record, and the judgment is affirmed.

(22 Ind. App. 354)

TIBBET v. ZURBUCH.¹

(Appellate Court of Indiana. Feb. 15, 1899.)

STATUTE OF FRAUDS — PROMISE TO PAY DEBT OF ANOTHER—CONSIDERATION—RECOVERY OF MONEY PAID — NOTES — ASSUMPTION BY THIRD PERSON—RIGHTS OF MAKER — APPEAL—THEORY OF CASE—PLEADING — COMPLAINT FOR GOODS SOLD — BILL OF PARTICULARS.

1. In consideration of a transfer of goods, the vendee, by an agreement which referred to the bill of sale, assumed to pay certain debts of the vendor, the total of the debts assumed by the agreement exceeding by one item the sum named in the bill of sale as a consideration. *Held*, that the agreement to assume the item in excess of the sum named in the bill of sale was not without consideration.

2. To recover on a complaint that plaintiff was compelled to pay his note which defendant had assumed, plaintiff must show that the note was paid by him, since the suit is for reimbursement for moneys paid for defendant's use, and not merely to recover on the agreement to pay the note.

3. The maker of a note can recover against a third person who had assumed it only after paying it himself, since, as between themselves, the maker, as against the person assuming it, is a surety.

4. After having tried his case on one theory, a litigant cannot, on appeal, shift, and rely on another.

5. A complaint that defendant is indebted to plaintiff in a stated sum for a stock of merchandise sold for a certain sum which defendant agreed to pay, and which was paid with the exception of such stated sum, is a good complaint on quantum meruit for goods sold and delivered.

6. A bill of particulars of the account sued on need not be filed where the sale was in bulk for a lump sum, without inventory, and where, before commencement of the action, the goods were resold to various persons.

Appeal from superior court, Allen county; C. M. Dawson, Judge.

Action by George Zurbuch against Harmon Tibbet. There was a judgment for plaintiff, and defendant appeals. Reversed.

Breen & Morris and Colerick & France, for appellant. Zollars & Worden, for appellee.

WILEY, J. Appellee was plaintiff below, and bottomed his action upon the following contract: "In consideration of the sale and delivery to me of the stock of goods and personal property by George Zurbuch, as evidenced by his bill of sale therefor to me given, the consideration thereof being stated as nineteen hundred and twelve dollars, I agree to and with the said George Zurbuch to assume the payment of the following described notes: Three notes, dated January 18, 1888, calling for \$500 each, and executed to Solomon Rothschild by said George Zurbuch, Francis J. Zurbuch, and Harmon Tibbet, as security; and one note dated October 23, 1888, for \$500, by the same payors to Solomon Rothschild, there being due \$1,887 on January 19, 1890, on said notes. And I further agree to pay William Pieper, of Avilla, Indiana, the sum of twenty-five dollars for rent due from said Zurbuch on December 22, 1889. I also further agree to assume the payment of one note of \$250, dated October 14, 1889,

¹ Rehearing denied.

given by said George Zurbuch to Barney Tibbet. Witness my hand, Dec. 14, 1889. Harmon Tibbet, by Barney Tibbet." The sole purpose of this action was to collect the last-described note of \$250, which note is as follows: "\$250. October 14th, 1889. One day after date, I promise to pay to the order of Barney Tibbet, at New Haven, Indiana, two hundred and fifty dollars. Value received, without any relief from valuation or appraisal laws, with interest at seven per cent. per annum until paid, and attorney fees. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest, and nonpayment of this note. George Zurbuch." The complaint upon which the case was put at issue, and tried, was in three paragraphs; and as the appellant has made a vigorous attack upon each paragraph, as not being sufficient, we deem it essential to state with some detail the material and important averments. The first paragraph avers the sale and delivery by appellee to appellant of a certain stock of goods for and in consideration of \$2,187; that, at the time of said sale, appellant, by his written agreement, and as a part of the consideration for said stock, assumed the payment of certain notes described in said agreement, which appellee had given to one Solomon Rothschild, and also assumed thereby the payment of one note for \$250, given by appellee to one Barney Tibbet, with seven per cent. interest and attorney's fees; that appellee turned over and delivered to appellant said stock of goods; and that appellant has violated his said agreement, in that he has failed and refused, and still refuses, to pay said note of \$250, together with the interest and attorney's fees; that, after the maturity of said note, appellee was compelled to pay, and has paid, said note, to his damage, etc. The second paragraph avers that appellant is indebted to appellee in the sum of \$400 for goods, merchandise, etc., sold by appellee to appellant, December 14, 1889; that said goods consisted of a general stock of merchandise; that the same was sold in bulk, without an inventory or itemized statement of the different articles constituting said stock having been made; that appellee sold the same to appellant for the lump sum of \$2,187; that, soon after said sale, appellant sold them to one Barney Tibbet, who sold said goods at retail to different purchasers, by reason of which appellee was unable to furnish a bill of particulars of said goods. It is then charged that appellant paid to appellee the amount he promised to pay for said stock of goods, except \$400, for which sum he demands judgment. The third paragraph avers the sale of a stock of goods by appellee to appellant in bulk, for \$1,912. It is then charged, as in the first paragraph, that, as a part of the consideration, appellant assumed, by written agreement, to pay certain notes, executed by appellee, including a note for \$250, which appellee had given to one Barney Tibbet; that appellant has not

kept his said agreement, in that he has not paid said \$250 note; and that he has allowed said Barney Tibbet, the payee of said note, to retain it unpaid. It is further charged that on October 26, 1891, appellee brought an action in the superior court of Allen county to recover from said Barney Tibbet money which he at the time owed appellee; that said Barney Tibbet, then having in his possession said note, pleaded the same as a set-off, including interest and attorney's fees, in the sum of \$315; that said cause was tried in May, 1892, and the amount of said note, interest, and attorney's fees, being \$315, was by the court and jury trying said cause deducted from the amount found due appellee from said Tibbet, and thereby they reduced the amount of his recovery in that sum, whereby appellee was compelled to, and did, pay said note, wherefore he was damaged, etc. The agreement of appellant, heretofore set out, is made an exhibit to the first and third paragraphs of complaint. A demurrer to each paragraph of the complaint was overruled, and an exception reserved. Appellee answered in five paragraphs. The first was a general denial. The second paragraph purports to answer only the second paragraph of complaint, and avers simply that the contract of purchase by him of appellee of the stock of goods, and also all negotiations relating thereto, were in writing, and said written agreements are made exhibits. The same instrument that is made an exhibit to the first and third paragraphs of complaint is one of the exhibits to this paragraph of answer, and the other is the bill of sale executed by appellee to appellant of the stock of goods. The third paragraph of answer also goes to the second paragraph of complaint, and it is therein averred that appellant paid appellee for all the goods, etc., purchased of him, by the execution of the written obligation made an exhibit to the complaint, which, it is charged, was accepted by appellee in full settlement, etc. The fourth paragraph of answer is addressed to the first and third paragraphs of complaint, and it is therein averred that, before this action was commenced, appellee did agree to pay the \$250 note mentioned in the agreement; that, long prior to the institution of this action, he held, treated, and regarded said note as paid, on account of a much greater indebtedness existing in favor of appellant and against said Barney Tibbet than the amount of said note, but that there was no actual delivery or surrender of said note to appellant until April 4, 1895, when the same was surrendered by said Barney, and delivered to appellant as paid, and that said note was never paid by appellee at any time. The fifth paragraph of answer is addressed to the third paragraph of complaint, in which appellant admits all the facts charged in said third paragraph of complaint, except such as he specifically denies; that he did assume the payment of said \$250 note, but that, prior to the institution of this suit, the

same was paid by a mutual outstanding indebtedness between appellee and said Barney Tibbet, on account of which a large sum was due appellant over and above the amount of said note; that on April 4, 1895, said note was by said Barney surrendered and delivered to appellant; that the cause of action as set out between appellee and said Barney was so instituted in said court, and so tried, in May, 1892, and that the said Barney did plead said note as a set-off in said action, offered the same in evidence, appellee having pleaded payment thereof; that said note was not taken into consideration by the jury in fixing and determining their verdict; and that the judgment in said cause in no manner involved said note, etc. A demurrer was addressed to the second, third, fourth, and fifth paragraphs of answer, and sustained as to the fourth, and overruled as to the others. A reply in general denial closed the issues, and, upon trial by jury, a general verdict for \$1 was returned for appellee, and with the general verdict the jury returned answers to special interrogatories. Appellee moved the court for judgment in his favor for \$346 on the answers to interrogatories, notwithstanding the general verdict, which motion was sustained. Appellant's motion for a new trial was overruled, and he has assigned errors in 10 specifications. The first, second, and third challenge the overruling of the demurrer to each paragraph of the complaint; the fourth, the sustaining of the demurrer to the fourth paragraph of answer; the fifth, the sustaining of appellant's motion for judgment; the sixth, in rendering judgment for appellee, and the seventh in overruling appellant's motion for a new trial. Some of the errors assigned are waived by appellant's failure to discuss them, and we will consider only those to which our attention has been called, both in oral argument and in the briefs.

We will take up the questions in the order in which appellant has discussed them, and this brings us, first, to the consideration of the third paragraph of the complaint. Appellant argues that the agreement upon which appellee sued shows on its face that the consideration therein expressed is \$1,912, as follows, the amount due on the Rothschild notes, \$1,887, and \$25 for rent; and that, therefore, there was no consideration for the agreement to pay the additional \$250 note that appellee owed to Barney Tibbet. It is also further argued that, though there is no averment to that effect, it must be presumed that appellant has paid the Rothschild notes and the rent, and having paid the entire sum, as expressed in the agreement as the consideration, he was under no obligation to pay the additional sum evidenced by the Barney Tibbet's note. Appellant has not cited us to any authorities in support of the objections urged, and we have given the substance of their argument in support thereof. The contract sued on refers to a bill of sale in which the consideration for the purchase of the

stock of goods by appellant from appellee is stated as being \$1,912, but there is no such a statement in the contract. The consideration expressed in the agreement sued on was the assumption by appellant to pay certain indebtedness of appellee, to wit, \$1,887 to Rothschild, \$25 rent, and the specific note of \$250, described, to Barney Tibbet. We are unable to see why the obligation resting upon appellant to pay the \$250 note, under his agreement, is not as binding upon him as his promise to pay the \$1,887 to Rothschild, and the \$25 rent. The one promise is as binding as the other, and we do not know of any rule of law by which we can single out of the agreement any particular sum embraced in it, and say that it is founded upon a valuable consideration, and any other sum, and say there is no consideration for it. There is no contention by appellant that he did not receive all the consideration for which he contracted. There was no legal inhibition against appellant assuming to pay the \$250 note, and by that assumption it became his original debt. The court did not err in overruling the demurrers to the first and second paragraphs of the complaint.

In his motion for a new trial, the appellant assigned 222 reasons, and the next question discussed by him is the alleged error arising under the 212th reason for a new trial, which is: "The court erred in giving instruction number fifteen (15), as asked by the plaintiff, and as modified by the court." That instruction is as follows: "If you believe from the evidence that in December, 1889, the plaintiff, Zurbuch, sold to the defendant, Harmon Tibbet, a stock of goods, and as a part of the consideration for the same, and in the way of part payment for the same, said Harmon Tibbet agreed to assume and pay a note of \$250, dated October 14, 1889, due one day after date, bearing 7 per cent. interest, executed by said George Zurbuch, and payable to Barney Tibbet, and that said Harmon Tibbet has failed and neglected to pay said note, then the plaintiff is entitled to recover from said defendant, Harmon Tibbet, the amount of said note, with interest, according to its terms, at the present time, whether said Zurbuch has paid said note himself or not." We should first consider this instruction in the light of the issues. The first and third paragraphs of the complaint, it seems to us, proceed upon the theory that appellant is liable under his agreement to respond in damages to appellee upon two grounds: (1) Because appellant had not performed his contract by paying the \$250 note; and (2) because appellee had been compelled to, and did, pay it. Appellant's alleged failure to pay the note, and his failure to reimburse appellee after he had been compelled to pay it, are the acts of which appellee complains. In this instruction the jury are told that appellee is entitled to recover if the jury find that appellant assumed to pay the \$250 note as a part of the consideration

for the stock of goods, whether appellee had paid the note himself or not. We must not lose sight of the fact that appellant's promise to pay the note did not relieve appellee from liability thereon. As between appellee and Barney Tibbet, the contract expressed in the note was not affected or in any way impaired by the assumption of appellant to pay it. As between appellant and appellee, when the former assumed and promised to pay the note, the relation of principal and surety was created with appellant as principal and appellee as surety. *Chaplin v. Baker*, 124 Ind. 385, 24 N. E. 233; *Jones, Chat. Mortg.* § 740. We must determine the theory of a pleading by its general scope and meaning, and the rule is firmly settled in this state that a pleading must proceed upon a definite and certain theory, and such theory will control to the end. The complaint must be construed upon the theory which is most apparent and clearly outlined by the facts stated therein. *Railroad Co. v. Sullivan*, 141 Ind. 83, 40 N. E. 138; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Batman v. Snoddy*, 132 Ind. 480, 32 N. E. 327. As was said by Comstock, J., in *Railroad Co. v. Dugan*, 18 Ind. App. 435, 48 N. E. 238: "As only one theory can be contained in a single paragraph, the court must construe the pleading most strongly against the pleader, and determine the theory from the prominent and leading allegations of the pleading." In *Sanders v. Hartge*, 17 Ind. App. 243, 46 N. E. 604, this court said: "It is of the highest importance to the administration of the law that courts should adhere most tenaciously to this rule of pleading, which requires the pleader to be bound by his cause of action as stated by him; otherwise, his adversary could have no assurance of the facts he would have to controvert to meet his attacks, and be taken unaware in the forensic encounter at the bar." In the recent case of *Richardson v. League* (decided by this court January 13, 1899) 52 N. E. 618, the above language was quoted approvingly. In *Railway Co. v. Levy*, 127 Ind. 168, 26 N. E. 773, it was said: "A complaint cannot be made elastic, so as to bend to the changing views of counsel as the case proceeds. It must proceed to the end upon the theory upon which it is constructed." It seems to us that the most prominent and leading averments of the first and second paragraphs of the complaint are those in which it is declared that the injury of which appellee complains resulted to him by appellant's failure to pay the \$250 note, and that he was compelled to, and did, pay it himself. There is a marked difference between the theory of proceeding to collect a note for the purpose of reimbursement for money paid for the use of appellant, and upon the theory that appellant is liable because he has not paid a debt which he assumed and agreed to pay. The complaint cannot proceed upon both of these theories, and it seems plain to us that it is upon the former theory that the appellee must succeed, if at all, for that is the

theory of his complaint. If he had proceeded upon the theory that the appellant was liable under his assumption, regardless of whether appellee had or had not been compelled to pay the note, the allegation that he had been compelled to pay it was wholly unnecessary, and has no place in the complaint. From the whole complaint (the first and second paragraphs) it seems clear to us that it proceeds upon the theory that appellee bottoms his right of recovery upon the ground that he has been compelled to pay a note which appellant assumed to pay, because of the latter's refusal to pay it; and a recovery is sought for the purpose of reimbursing appellee. It was therefore a material averment of the complaint that appellee had been compelled to pay the note himself, and it was vital to his right to recover that he prove such payment. Under appellant's assumption to pay the \$250 note, which was an evidence of a debt appellee owed Barney Tibbet, what damage, we suggest, has he sustained if he himself has not been required to pay the debt? Under the authorities, there is no question but what Barney Tibbet could have proceeded directly against appellant on his assumption, and recovered a judgment for the amount due, but, so far as the record shows, he did not do that. See *Hinkle v. Hinkle*, 20 Ind. App. 384, 50 N. E. 829, and cases there cited.

While we cannot look to the evidence to determine the theory of the complaint, we may consider it so far as it may throw any light upon the question to determine upon what theory appellee tried his case. Upon an examination of the record, we find that appellee attempted, by the introduction of much evidence, to establish the fact that he had paid the note in question. It seems to us that there can be no doubt but that this was the theory upon which he proceeded, and that it was the gravamen of his cause of action. Can he now shift, and say that he relied then, and still relies, upon the original agreement of assumption, regardless of the question as to whether he has or has not paid the note? We think not. If appellee had relied upon appellant's promise and his failure to pay the note, then his pleading would have been complete, as we have seen, without the averment that he had been compelled to pay, and his proof would have been ample by his establishing the first two material averments. But we cannot bring ourselves to the conclusion that appellee proceeded upon that theory; and construing the complaint as a whole, by its prominent and leading features, and most strongly against the pleader, we are led irresistibly to the conclusion that appellee relied upon the fact that he had been compelled to pay the note as a condition precedent to his right of recovery. Again, we have seen that as between appellant and appellee, by the former's assumption to pay the note, he became the principal, and the appellee his surety, and

hence appellee suffered no injury until he had paid the note. If our reasoning is correct,—and we have no doubt of it,—then the instruction quoted was radically erroneous, for which the judgment must be reversed. In so holding, we do not decide the question of appellee's right to recover upon appellant's assumption, regardless of whether appellee has or has not paid the note, for that question, upon the theory of the complaint, is not presented.

Opposing counsel have discussed at great length and with marked ability other questions arising on an instruction given by the court, and upon sustaining appellee's motion for judgment on the answers to interrogatories, notwithstanding the general verdict; but as the same questions are not likely to arise on a subsequent trial, and as the judgment must be reversed, for the reasons given, we do not deem it necessary to decide them here.

As the foregoing discussion touching the sufficiency of the complaint relates solely to the first and third paragraphs, and as the sufficiency of the second paragraph is also challenged by demurrer, it is proper for us to say that, in our judgment, the second paragraph is good. It states a good cause of action upon the quantum meruit, for goods sold and delivered, and shows a valid excuse for not filing a bill of particulars as an exhibit. As to the second paragraph, however, there was no evidence offered in support of it. There was no error in overruling the demurrer to it. Judgment reversed, with instructions to the court below to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

BLACK, J., did not take part in the decision of this case.

(21 Ind. App. 557)

McELFRESH v. ODD FELLOWS ACC. CO.
OF BOSTON.

(Appellate Court of Indiana. Feb. 15, 1899.)

INSURANCE—ACCIDENT—PLEADING—COMPLAINT—
STATEMENT OF DISABILITY—POLICY PRO-
VISIONS—CONSTRUCTION.

1. A complaint on an accident policy, stating plaintiff's disability in the language of the policy, is sufficient, since mere evidentiary facts should not be pleaded.

2. Provisions of an accident policy should be applied strictly against the insurer, in order that the indemnity purchased should not be defeated.

Appeal from circuit court, Dearborn county; A. C. Downey, Judge.

Action on an accident policy by Samuel McElfresh against the Odd Fellows Accident Company of Boston, Mass. From a judgment sustaining a demurrer to the plaintiff's complaint, he appeals. Reversed.

Roberts & Strapp, for appellant. Martin J. Givans, for appellee.

BLACK, C. J. The only question presented by this appeal is that of the sufficiency on demurrer of the appellant's complaint, which was based upon a policy of insurance. By the terms of the policy the appellee insured the appellant against loss of time resulting from external, violent, and accidental means within the terms and conditions of the policy, and which immediately, continuously, and totally disabled and prevented him from transacting any and every kind of business pertaining to his occupation, which was stated to be that of a general insurance agent, not to exceed 52 consecutive weeks, and provided further that the loss for which claim should be made was a total disability, resulting immediately and continuously from external, violent, and accidental means within the terms and conditions of the policy, and was not caused or contributed to by any form of disease or bodily ailment, but was caused exclusively by bodily injuries which left external and visible marks of contusion or wounds upon the body, effected by external, violent, and accidental means, occurring while the policy was in force. The sum insured for loss of time as aforesaid was \$25 per week. The complaint, setting up the policy, averred that on, etc., while the policy was in force, and while the appellant was engaged in lawful business, and not in any business or in doing any of the things prohibited by the terms and conditions of the policy, he, in running to the wreck of a train on a named railway track, at, etc., caught his foot in some concealed wires along the embankment of such railway track, and was thrown down such embankment, injuring, lacerating, and tearing the muscles and flesh of the palm of his right hand from the fingers back to the wrist thereof, bruising and jarring his right shoulder, straining the muscles and leaders thereof, causing the swelling of the same and stiffening of the joint, and "that from such injuries he was immediately, continuously, and totally disabled, and prevented from transacting any and every kind of business pertaining to his said occupation for six weeks, and that said injury was caused and resulted from external, violent, and accidental means, within the terms and conditions of said policy, and which left external and visible marks of contusion and wounds upon the body, effected by such external, violent, and accidental means," etc.

We gather from the briefs of counsel that the complaint was regarded as insufficient for the reason that it does not show with sufficient particularity such disability as was contemplated in the contract of insurance as sufficient and necessary for a recovery of the sum insured, and because it was assumed, as a matter of law, that the insured could not have been immediately, continuously, and totally disabled and prevented from transacting any and every kind of business pertaining to the occupation of a general insurance agent by the injuries suffered by the appel-

lant, as described in the complaint. We cannot adopt such a view. The complaint stated the existence of the disability in the language of the policy. While the disability might without impropriety have been more particularly described, it was not necessary, or, indeed, proper, to state facts merely evidentiary. The language of the policy, in its usual meaning, will control, though it will be applied most strictly against the insurer, keeping in view the manifest purpose, so that the indemnity purchased shall not be defeated. But we cannot know judicially whether or not the injuries described in the complaint actually disabled this policy holder so as to entitle him to recover. If they did disable him as stated in the complaint, he had a cause of action. The question in dispute is one of fact. The disability was sufficiently stated to put the appellee to its answer. No other feature of the complaint has been discussed. Judgment reversed.

(21 Ind. App. 596)

AMERICAN BREWING CO. v. JERGENS.

(Appellate Court of Indiana. Feb. 17, 1890.)

JUDGMENTS — SETTING ASIDE DEFAULT — INSUFFICIENT EXCUSE.

1. A defendant seeking relief from a default judgment under Burns' Rev. St. 1894, § 399 (Rev. St. 1881, § 396), providing that such relief may be granted where judgment is taken against a party through mistake or excusable neglect, must show a sufficient excuse for suffering the default, though he has a meritorious defense.

2. A defendant against whom a default is taken is not entitled to relief, under Burns' Rev. St. 1894, § 399 (Rev. St. 1881, § 396), where his excuse is that his attorney did not answer because the clerk informed him that the case was set for a day of the term, and he need not appear nor take any steps in the trial until the day it was set.

Appeal from superior court, Lake county; H. B. Tuthill, Judge.

Action by the American Brewing Company against John Jergens to set aside a default judgment. From a judgment for defendant, plaintiff appeals. Affirmed.

Bruce & Bruce and J. A. O'Donnell, for appellant. V. S. Reiter and W. B. Reading, for appellee.

HENLEY, C. J. This was an action brought by appellant, under section 399; Burns' Rev. St. 1894 (section 396, Rev. St. 1881), to set aside a judgment rendered against it by default. The motion and affidavit disclose the following facts, as relied upon by appellant to secure the setting aside of the judgment: That on the 7th day of January, 1898, the appellee recovered a judgment by default against appellant for \$247; that the default was taken by appellee on the 5th day of January, 1898; that appellant, by its agents and attorneys, was present at the court room and at the clerk's office of the Lake superior court, at Hammond, Ind., on Monday,

December 27, 1897, at 9 o'clock a. m., ready for trial in said cause; that one Frank Hess was in charge of the clerk's office and the papers in said office; and that said Hess informed the attorneys and agents of appellant that the clerk of said court was at Crown Point, Ind., and that the court had adjourned, and would not meet again until the 3d day of January, 1898, and that the clerk of said court would not be in Hammond until that time, and that appellant could not enter its appearance in said cause for the reason that the court was not in session, and on account of the clerk's absence; but that the cause was set for trial on Monday, January 17, 1898, and that it would be time enough then for appellant to appear; that the said Hess, at said time, showed to appellant's attorneys and agents a typewritten trial calendar, which was attached to the judge's desk in said court room, upon which calendar said cause was set for trial on the 17th day of January, 1898; that said Hess further informed said parties that appellant could be represented in court on the day the cause was set for trial, and that no advantage could be taken of appellant prior to that time; that appellant's attorneys and agents relied upon the information given them by said Hess, and returned to the city of Chicago, where they resided; that the affiant is the agent of appellant in the conduct of defendant's business in the district in which Hammond, Ind., is situated, and intended to come to Hammond on the 3d day of January, 1898, to engage a certain firm of lawyers residing in said city to attend to said suit, but that he was delayed, and was unable to be present at such time on account of being a witness in various other suits in which appellant was a party, and which were on trial at said time in the courts of Cook county, Ill., and said agent was unable to get to Hammond for said reason until the 7th day of January, 1898, when for the first time he learned of the default and judgment entered against appellant, whereupon he took immediate steps to notify appellant and to engage attorneys to represent its interests. It is also alleged in said affidavit that appellant has a meritorious defense to the entire claim and demand of the plaintiff in said action. This defense is fully and completely set out in the affidavit and motion to set aside the judgment.

There is no doubt but that appellant has set out in his affidavit a meritorious defense to appellee's cause of action, but a meritorious defense will avail nothing if a sufficient excuse, under the statute, is not shown for suffering the default. *Heaton v. Peterson*, 6 Ind. App. 1, 31 N. E. 1133. It has been uniformly held by the supreme court and by this court that where a party to an action, upon a proper showing, asks relief, under the statute, from a judgment taken against him "through mistake, inadvertence, surprise, or excusable neglect," it is the imperative duty of the court to grant the relief. *Smith v. Noe*, 30 Ind. 117; *Phelps v. Osgood*, 34 Ind. 150;

Bush v. Bush, 46 Ind. 76; Cavanaugh v. Railway Co., 49 Ind. 149; Decker v. Graves, 10 Ind. App. 25, 37 N. E. 550; Dallin v. McIvor, 12 Ind. App. 150, 39 N. E. 765.

The motion and affidavit of appellant were filed on the 12th day of January, 1898, five days before the time set for the trial of the cause, as appeared from the trial calendar, which was posted in a public place in the court room where the cause was pending. The whole trouble in this case grows out of the fact that appellant never appeared to this action, and appellee properly asked and had a default entered against it. It was of no consequence to appellant when appellee should appear and produce the proof upon which the court could render judgment, because the allegations of appellee's complaint were in no way denied or avoided by appellant. If the cause had been at issue and set for trial upon a certain day, we are inclined to think that appellant could have relied upon the statement of the man in charge of the books at the clerk's office, and could have relied on the date set down in the trial calendar as being the date when the cause would be tried. Attorneys know that causes cannot be tried until an issue is made; and a statement made to appellant's attorneys by the clerk of the court or his deputy to the effect that it would not be necessary for them to appear or take any steps in the cause until the day set for the trial would not be binding upon appellee, and would not be such a statement as would in any manner excuse appellant's neglect. See *Railway Co. v. Eggers*, 139 Ind. 26, 38 N. E. 466. So far as it appears by the record, the summons was properly served, and the court obtained complete jurisdiction of appellant. We do not think the court erred in refusing to set aside the default and judgment upon the showing made by appellant. The judgment is affirmed.

(21 Ind. App. 559)

INDIANA INS. CO. v. PRINGLE.

(Appellate Court of Indiana. Feb. 17, 1899.)

INSURANCE—PLEADING—COMPLAINT—PERFORMANCE OF CONDITIONS—ALLEGATION—REVIEW—PROOF OF LOSS—WAIVER—INSTRUCTIONS—CONDITIONS—BREACH.

1. Under Horner's Rev. St. 1897, § 370 (Rev. St. 1881, § 370; Burns' Rev. St. 1894, § 373), providing that it shall be sufficient for plaintiff to allege generally performance of conditions precedent, a general allegation that assured had performed all the terms of the policy is a sufficient allegation of performance of a condition precedent, obligating him to furnish proofs of loss.

2. Where evidence is admitted, without objection, showing a waiver by an insurer of a condition precedent to his liability, the sufficiency of the complaint alleging such waiver will not be considered on appeal.

3. After a loss, assured agreed that any action of the insurer in investigating and ascertaining the same should not waive any conditions of the policy. The amount of the loss was afterwards adjusted, when the adjuster stated that the one thing remaining in the way

of a settlement was the mortgage on the goods. Held a waiver of further proof of loss.

4. In an action on a policy, an instruction purporting to state the averments of the complaint necessary to be proved to entitle plaintiff to recover, which omits the averment of plaintiff's insurable interest in the property, is erroneous.

5. Where a policy provided that assured should notify the insurer of any incumbrance on the property either at the time the policy was issued or during its continuance, failure to give notice of an incumbrance existing at the time of issuance is a breach of condition avoiding the policy.

Appeal from circuit court, Johnson county; W. J. Buckingham, Judge.

Action by John W. Pringle against the Indiana Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Chambers, Pickens & Moore, for appellant. Shirley & Parks, for appellee.

COMSTOCK, J. This action was brought in the Marion circuit court by appellee against appellant on a policy of insurance against fire, and tried in the Johnson circuit court upon change of venue. The complaint is in one paragraph. A copy of the policy was made a part thereof. It was issued upon a stock of goods, wares, merchandise, and store fixtures. It contained, in addition to the usual averments in such cases, the further allegation of a written agreement entered into between the company, through its adjuster, and the appellee, of the amount of the loss. A copy of this agreement was made a part of the complaint. No demurrer was filed to the complaint, and its sufficiency is not questioned here. The defendant answered in four paragraphs. The first is the general denial. In the second it is averred that the property insured was incumbered by a chattel mortgage, and that the same remained in force and effect during the entire continuance of said policy, up to the date the property was alleged to have been burned, and that the defendant, at the time, had no knowledge or notice of the existence of said mortgage, nor at any time prior to said alleged loss by fire, and that the plaintiff (appellee) did not procure the written consent of the defendant to such incumbrance, as provided in said policy, and that the plaintiff violated the covenants and agreements of said policy at the time of making the insurance, in failing to notify it at the time, or at any time during the continuance of said insurance, of said mortgage incumbrance. In the third paragraph, defendant (appellant) avers the existence of the chattel mortgage; that the same remained in force during the existence of the policy; and that the defendant had no notice or knowledge of the existence of such mortgage at the time of its delivery, nor at any time since; and that the plaintiff (appellee) violated the covenants and agreements of said policy, in failing to notify the defendant company at the time of the making of such in-

cumbrance, or at any time during the continuance of said mortgage incumbrance, with the additional averment that the company would not have accepted said policy if it had known of the existence thereof. The fourth paragraph sets up the same facts, and charges appellee with fraudulently procuring said policy by withholding from the defendant all knowledge of the fact that the property therein insured was mortgaged; that, after said property was destroyed by fire, appellee fraudulently reported the value of the property to be greater than its actual value; that, by reason of the various facts set out in the several paragraphs of answer, said policy was void and of no effect. Appellee replied—First, by general denial; second, averring that the appellant had notice of the chattel mortgage when the policy was issued. Upon trial by jury, a general verdict was returned in favor of appellee for \$1,712.08. With the general verdict, answers were returned to several interrogatories. Judgment was rendered in favor of appellee for said amount.

The only error which is discussed by appellant's learned counsel in this appeal is the action of the court in overruling appellant's motion for a new trial. Ten reasons are set out in the motion for a new trial. The first four will be considered together. They are that the verdict of the jury is contrary to law; contrary to the evidence; contrary to the law and the evidence; is not sustained by sufficient evidence. The first reason urged upon this court is that the evidence failed to show that the conditions of the policy had been complied with, as averred in the complaint. The complaint avers that, immediately after said loss to plaintiff by said fire, he gave notice to said defendant of such loss; that he has on his part fully performed every act which by the terms of the policy he was required to do; that on the 24th day of March, 1897, one J. W. Williams, who was the legally acting and authorized adjuster for said defendant in cases of loss by fire, and this plaintiff, fully agreed upon the amount of plaintiff's loss by said fire, as covered by said policy, which was in the aggregate sum of \$1,712.08, which said amount of loss so agreed upon was reduced to writing, and signed by this plaintiff and said Williams, for and on behalf of said defendant as such adjuster, a copy of which agreement was filed with the complaint as an exhibit. Said exhibit is headed or entitled "Statement of John W. Pringle, Loss and Damage to Stock, Furniture, and Fixtures, as Agreed to This 24th Day of March, 1897." Then follow items of loss, signed at the bottom: "We agree to the above. John W. Pringle. J. W. Williams, Adjuster Ind. Ins. Co."

The following is one of the provisions of the policy: "As soon after the fire as possible, a particular statement of the loss shall be rendered to this company, signed and

sworn to by the assured, stating such knowledge or information as the assured has been able to obtain as to the origin and circumstances of the fire, and also stating the title and interest of the assured and of all others in the property, the cash value thereof, the amount of loss or damage, all other insurance covering any of said property, and a copy of the written portions of all policies and the occupancy of the certain premises." Appellant contends that this was one of the conditions of the policy which must be complied with before the bringing of suit, and which the appellee avers in his complaint he did comply with, because of the general averment; that the averment that he had performed all the conditions on his part to be performed included making proofs of loss as provided in the foregoing clause of the policy; and that he cannot avail himself of a waiver on the part of appellant of any of the terms and conditions in the policy in the absence of an averment of waiver. Under our statute (Horner's Rev. St. 1897, § 370; Rev. St. 1881, § 370; Burns' Rev. St. 1894, § 373), and a number of decisions, it is sufficient in an action of this character to aver, in general terms, the performance upon the part of the insured of all the terms of the policy. The complaint should affirmatively show a performance of the conditions upon which the claim is based, or that a performance has been waived. The proof of loss was a condition precedent. It was included in the general averment. Its proof was necessary to a recovery under the general averment. *Insurance Co. v. Capehart*, 108 Ind. 271, 8 N. E. 285; *Insurance Co. v. Vanlue*, 126 Ind. 410, 26 N. E. 119.

The complaint in this case states the facts attending the issuing of the policy; the destruction of the property by fire; the agreement as to the value of the property destroyed. It avers that "on the 24th day of March, 1897, one J. W. Williams, who was the legally acting and authorized adjuster of said defendant in cases of loss by fire, and this plaintiff, fully agreed upon the amount of plaintiff's loss by said fire, as covered by said policy," etc. Appellant was informed by this averment that appellee relied upon an agreement as to the amount of his loss. We do not deem it necessary to decide whether the allegations in the complaint before us set out a waiver. Upon trial of the cause, without objection upon the part of appellant, facts were testified to constituting a waiver of the condition of proof of loss. The evidence shows that the fire occurred between 10 and 11 o'clock the night of February 6, 1897. Appellee telegraphed King, the agent of the company, who had written the policy, on the morning of the 7th of February. King came to the scene of the fire that evening, and had a talk with appellee with reference to the fire. Four days afterwards, Williams, the adjuster, called on appellee, on which occasion he requested appellee to get the bills of his

goods purchased. He subsequently called on him also for the books and accounts. They were delivered to and examined by him. The adjuster made two or more visits to the insured, with a view of investigating the case. The company examined appellee under oath as to the fire and loss. Appellant claims, however, that the signed statement is only a statement of the amount of loss; that, prior to its execution, appellee and appellant entered into a "nonwaiver agreement," which was read in evidence, and is as follows: "It is hereby mutually understood and agreed between John W. Pringle, of the first part, and the Indiana Insurance Company of Indianapolis, and other companies signing this agreement, party of the second part, that any action taken by said party of the second part in investigating the cause of the fire, or investigating and ascertaining the amount of loss and damage to the property of the party of the first part caused by fire alleged to have occurred on February 6, 1897, shall not waive or invalidate any of the conditions of the policy on the part of the second party held by the party of the first part, and shall not waive or invalidate any rights whatever of either of the parties to this agreement. The intent of this agreement is to preserve the rights of all parties hereto, and provide for an investigation of the fire, and the determination of the amount of the loss or damage, without regard to the liability of the party of the second part." Appellant insists that, in the investigation that followed leading up to the execution of the agreement of loss, the company waived nothing, conceded nothing. It left the parties where they were as to their respective rights, except that it determined the amount of the loss. The proof of the waiver does not, however, depend alone upon the agreement as to the amount of loss. Appellee testified that, after signing said agreement fixing the value of the property destroyed, Mr. Williams, the adjuster, said to him that "there was one thing—only one thing—yet in the way of making a settlement, and that was a chattel mortgage on this stock of goods of mine." It was equivalent to saying that the loss would be paid but for the chattel mortgage. It was a clear and unequivocal waiver of further proof of loss. *Assurance Co. v. McCarty*, 18 Ind. App. 454, 48 N. E. 265, and authorities there cited. Without reference to the sufficiency or insufficiency of the complaint to authorize proof of waiver of loss, evidence without objection was admitted sufficient to warrant a finding of such waiver. We have said this much upon the question of waiver upon the presumption that the question is likely to arise upon a second trial.

Appellant's learned counsel objects to instruction No. 1, given by the court. It purported to state the material averments of the complaint. This instruction is as follows: "This is a suit upon a fire insurance policy to secure the amount due on the policy after

loss by fire. The plaintiff alleges, in substance, in his complaint, that the defendant, the Indiana Insurance Company of Indianapolis, Ind., is a corporation organized under the laws of the state of Indiana, and that on the 31st day of July, 1896, said defendant, by its legally appointed agent, in consideration of thirty dollars then paid to said defendant, issued to plaintiff a policy of insurance upon his general stock of merchandise, being such articles of merchandise as are usually kept for sale in a general country store, to the amount of \$1,900, against loss by fire, with \$100 on store furniture and fixtures, in the town of Mahanville, Morgan county, Indiana, for a term of one year; that plaintiff was in the possession of and the owner of the property insured by said policy, and said plaintiff accepted said policy, and the same was issued to plaintiff to secure him against loss by fire on said property for one year; that on the 6th day of February, 1897, the said property was totally destroyed by fire, without any fault or negligence of this plaintiff, and to the damage of this plaintiff in the sum of \$2,000; that plaintiff gave notice to said defendant of such loss immediately thereafter, and that the plaintiff has fully performed each and every act which by the terms of said policy he was required to do, and that on the 24th day of March, 1897, one J. W. Williams, who was the legally acting and authorized adjuster for said defendant in case of loss by fire, and this plaintiff, fully agreed upon the amount of said loss as covered by said policy, which was in the aggregate sum of \$1,708.12, which said amount of loss so agreed upon was reduced to writing, and signed by said adjuster and said plaintiff; that said defendant has wholly failed and refused to pay," etc. It is claimed that the omission in this instruction to state to the jury that one of the material averments of the complaint was the fact that at the time of the fire the plaintiff was the owner of the property insured and destroyed makes the instruction fatally bad. The learned counsel for appellee answer this objection with the proposition that if the instructions given to the jury, considered as a whole, state the law correctly, the case should not be reversed, though a single instruction alone might be incorrect; that "the whole instructions cover the case, and that the verdict and judgment are sustained by the evidence." The instruction set out is the only one in which the court undertakes to state the material averments of the complaint, the grounds upon which the appellee may recover, and omits a material averment. It is not an instance in which there is an inaccuracy of expression which would not mislead the jury, nor a failure to state fully the law upon all the issues in the cause (*Jones v. Hathaway*, 77 Ind. 24), but an attempt to inform the jury what appellee should prove to recover. One of the facts necessary to appellee's recovery was that he was the owner of the

property at the time it was destroyed by fire. *Insurance Co. v. Coombs*, 19 Ind. App. 331, 49 N. E. 471. This fact was omitted. This was a fatal defect in the instruction. *Voris v. Shotts*, 20 Ind. App. 220, 50 N. E. 484; *School Tp. v. Shera*, 8 Ind. App. 330, 35 N. E. 842; *Bridge Co. v. Eastman*, 7 Ind. App. 514, 34 N. E. 835. In *Railroad Co. v. Grantham*, 104 Ind., at page 358, 4 N. E. 51, the court, in passing upon an objection to an instruction given by the lower court, said: "So far as this instruction goes, it states the law correctly, as applicable to the first paragraph of the complaint, to which it was expressly limited. If it was objectionable at all, it was on the ground of what it omitted to state; and, if it had been the only instruction of the court in relation to the case stated in the first paragraph of the complaint, it would have been justly open to the contention of appellant's counsel."

Appellant also objects to instruction No. 137½, given by the court. It reads as follows: "The rule applicable is that a failure or neglect on the part of the plaintiff to make known facts which the defendant may regard as material to the risk is not a breach of a condition in the policy avoiding it in case of any omission to make known every fact material thereto, because the plaintiff has a right to suppose that the defendant, by its agent, will make proper inquiries concerning all facts, except such as are supposed to be known or are regarded as immaterial." The policy provides that it is issued subject to the following terms and conditions: "(1) The assured hereby covenants and agrees that no fact material to the risk or relating to its condition, situation, or occupancy has been concealed, and that the interest of the assured therein has been truly stated to this company; (2) to notify the company immediately if the above-mentioned premises shall become vacant or unoccupied, or of any change in the nature, character, or occupation, or of any increase of hazard within the control or knowledge of the assured, or if, being a manufacturing establishment, it shall be run at night or overtime, or shall cease to be operated; (3) to notify the company if, at the taking of the insurance, or at any time during its continuance, there shall be any mortgage or other incumbrance or any lien whatever, or any other insurance applied to the property herein described, or any part thereof, whether the same be valid or not; (4) to procure written consent of the company, or a commissioned agent thereof, to any change within the terms of this contract." Under the foregoing provisions of the policy, it was incumbent upon the insured to notify the insurer of the existence of an incumbrance. In the absence of any provision requiring the defendant to disclose the condition of the property as to the existence of the chattel mortgage, the insured would not have been required to make any

disclosure with reference thereto. *Burritt v. Insurance Co.*, 5 Hill, 188; *Insurance Co. v. Munns*, 120 Ind. 30, 22 N. E. 78; *Clark v. Insurance Co.*, 8 How. 235. The instruction therefore did not correctly state the law applicable to the policy in question.

The court refused to give the following instruction, requested by appellant: "This is an action upon a policy of fire insurance executed by the defendant, insuring the plaintiff against damage or loss by fire in the sum of two thousand dollars upon his general stock of merchandise, furniture, and fixtures contained in a certain building at Mahalasville, Morgan county, Indiana. You are instructed that the plaintiff, in accepting this policy of insurance, is bound, under the law, to know the terms and conditions of such contract, and is bound thereby. One of the conditions of said policy is that the assured covenants and agrees to notify the company if, at the making of this insurance, or at any time during its continuance, there should be any mortgage or other incumbrance, or any lien whatever, or any other incumbrance applying to the property herein described, or any part thereof, whether the same be valid or not. The defendant has set up in one of its answers that, at the time the policy was issued, there was a chattel mortgage incumbrance upon the property insured, in the sum of one thousand dollars, duly recorded in the proper office of Morgan county, executed by the plaintiff to one William W. Davis, and that the plaintiff failed to notify the company of the existence of said incumbrance at the time the policy was issued. If you should find by a fair preponderance of the testimony that such chattel mortgage existed at the time the policy was issued, and that the plaintiff failed to notify the company of the existence of such incumbrance, and concealed the knowledge thereof from the company, and the company had no knowledge of the existence of the same, it would then be your duty to find for the defendant upon this issue,"—but gave the same as modified. In the modification the court said: "If you should find, by a fair preponderance of the testimony, that such chattel mortgage existed at the time the policy was issued, and that the plaintiff failed to notify the company of the existence of such incumbrance, concealing knowledge thereof from the company, after the agent of the company had inquired of him as to the existence of the mortgage, and the company had no knowledge of the existence of the same, it would then be your duty to find for the defendant upon this issue." This modification disregards the provisions of the policy, and was therefore erroneous. The instruction should have been given as requested. We have passed upon the questions discussed. The judgment is reversed, with instruction to the trial court to sustain appellant's motion for a new trial.

(22 Ind. App. 309)

WATTS v. BOARD OF COM'RS OF GIBSON COUNTY.¹

(Appellate Court of Indiana. Feb. 17, 1899.)

DRAINS—FEES OF ENGINEER—LIABILITY OF COUNTY—TIME OF PAYMENT.

1. Act March 7, 1891 (Horner's Rev. St. 1897, § 4317c et seq.; Burns' Rev. St. 1894, § 5690 et seq.), requires petitioners for a drain to give a bond for costs, and that a dismissal of the petition shall be had, at the cost of petitioners, including the costs of the viewers and engineers. If it be granted, the viewers are required to make a second report, on which there is a final hearing, at which exceptions must be heard, and, if sustained, the cost of the hearing shall be paid out of the county treasury, and, if overruled, taxed against the parties excepting. All fees under the act are to be paid out of the county treasury, and the general county fund shall be reimbursed out of the money realized from the sale of bonds or collection of assessments. A petition for a drain having been granted, viewers and an engineer were appointed, and, before a hearing on their final report, the proceedings were enjoined. *Held*, that the county was liable for the fees of the engineer, with the right to reimburse itself from the proceeds of the sale of bonds or the collection of assessments, or, in lieu thereof, out of the bond of the petitioners.

2. An engineer may recover for services performed in proceedings to open a drain before such proceedings are terminated.

Appeal from circuit court, Gibson county; O. M. Welborn, Judge.

Action by Edwyn M. Watts against the board of commissioners of Gibson county. From a judgment for defendant on demurrer to the complaint, plaintiff appeals. Reversed.

Thomas Duncan, for appellant. M. W. Fields, for appellee.

BLACK, C. J. This cause comes to us by transfer from the supreme court. Each of the three paragraphs of the appellant's complaint was held insufficient on demurrer. We will first discuss the case presented by the third paragraph.

A proceeding for the construction of a drain more than five miles in length, the greater portion in Gibson county, and the remainder in Posey county, was instituted under the act of March 7, 1891 (section 4317c et seq., Horner's Rev. St. 1897; section 5690 et seq., Burns' Rev. St. 1894). The appellant, being duly appointed, rendered the services as engineer provided for by section 3 of that statute (section 4317e, Horner's Rev. St. 1897; section 5692, Burns' Rev. St. 1894). After the making of the final report in duplicate, as directed in sections 3 and 15, and before the joint meeting of the boards of county commissioners for the hearing of that report, all further proceedings in the matter were perpetually enjoined by the court below, in a suit brought for such purpose by one Warrick Armstrong and others. The case at bar was an action to recover for the services so rendered by the appellant, and the question for decision is whether or not, under such circumstances, the county is liable for the services of the engineer. It is a question of construc-

tion of statutes. It is very definitely settled that the board of county commissioners has no power to create a liability against the county, except such as may be found to have been conferred on the board expressly or impliedly by statute. It is also firmly established that all persons having dealings with such an official agency as the board of county commissioners must take notice of such limitation of authority. Comparing the various provisions of the act, and considering the statute as a whole, it would seem that the particular condition shown in this case was not distinctly contemplated and definitely embraced in the express provisions of the act. Certain instances are designated wherein the costs shall be paid by the petitioners, or by the remonstrants, or parties excepting to the report, or by parties appealing to the circuit court. The bond filed by the petitioners with their petition is to be conditioned for the payment of all costs "if the prayer of the petitioner be not granted or be dismissed for any cause by the board of commissioners."

Section 2. If, at the hearing of the first report of the viewers, the commissioners find against the improvement, they shall dismiss the petition and proceedings, at the cost of the petitioners; and they shall "assume" an itemized bill of all the costs, to be made up by the auditor for their examination and approval, which shall include the per diem of the viewers and engineers. Section 3. If, however, the board finds from the report in favor of making the improvement, the board directs the survey, etc. *Id.* Upon the filing of the second report of the viewers, there is a hearing, upon notice to interested parties (sections 4 and 5), at which the board may approve and confirm the report, or may amend it, and determine the apportionment (section 5). Before the time for such hearing, a party to the proceedings may file exceptions to the apportionment, or to any claim for compensation or damages, and the board will decide upon such exceptions. If the exceptions be sustained, "the costs of the hearing thereon" shall be paid out of the county treasury; but, if they be overruled, the costs shall be taxed against the party excepting. Section 6. Any person or corporation aggrieved by the decision may appeal to the circuit court, and provision is made relating to the costs accrued in the circuit court. After trial and judgment in that court, the board of commissioners must proceed with the petition in accordance with the judgment of the circuit court, which may result against the granting of the petition. Section 7. It is provided in section 12 that all costs not taxable to the "petitioners, remonstrances, or appellants" shall be paid out of the county treasury, and be refunded to the county out of the first money received from the sale of bonds. In section 26 it is provided that the surveyor or engineer shall be allowed three dollars per day for the time actually employed by him; and in section 27 it is provided that all

¹ Rehearing denied.

fees under this act shall be paid out of the county treasury, when claims therefor are allowed by the board of commissioners, and the general county fund shall be reimbursed out of the money realized from the sale of bonds or collection of assessments.

In the case presented by the third paragraph of the complaint, there were no exceptions to the report of the viewers, and there was no appeal from any decision of the board of commissioners. The case was not one wherein the board of commissioners found against the improvement, and dismissed the petition and proceedings. On the contrary, the board, having caused the viewers, including the appellant as engineer, to make the preliminary view, found from their report in favor of making the improvement, and caused them to proceed to survey the line and locate the drain, etc. After the filing of their final report, and before the hearing thereon, the proceeding was enjoined perpetually. There were no bonds, and the apportionment reported by the viewers was not adopted or rejected or amended. It seems to be contemplated that no part of the expenses shall ultimately fall upon the county, except when a public road is benefited. Sections 2, 3. There is found in the statute authority in the board of county commissioners to engage the services of the engineer or surveyor, and provision is made for his payment by the county. In the case at bar it appears from the bill of particulars filed with the complaint that the appellant received payments allowed at the June, September, and December terms, 1895, of the board, and his claim is for a balance subsequently accrued. We conclude that the statute should be construed as providing for payment of the surveyor's fees by the county, and its subsequent reimbursement; and if reimbursement by money derived from the sale of bonds or from collection of assessments be not available, as in this case, then the bond of the petitioners may be resorted to by the county commissioners; for it may be said that the prayer of the petitioner has not been granted, within the meaning of the provision relating to that bond interpreted with reference to the general intent of the entire statute.

The first and second paragraphs of the complaint did not show how the drainage proceeding ended, as did the third paragraph; but each paragraph showed the rendering of services by the appellant as engineer or surveyor, under the employment of the appellee, in the drainage proceeding; the same bill of particulars serving for all the paragraphs. In the bill of particulars there are some items which may be not allowable as proper charges, but concerning which there has been no argument before us. We think each paragraph of the complaint showed a right of action in the appellant for his fees provided for by the statute. The judgment is reversed.

ROBINSON, J., took no part in this decision.

(59 Ohio St. 350)

SMITH v. STATE.

(Supreme Court of Ohio. Dec. 13, 1898.)

RECEIVING AND CONCEALING STOLEN GOODS—INDICTMENT—DUPLICITY—PROSECUTION AGAINST THE THIEF—DISTINCT OFFENSES—CONVICTION ON AGGREGATE VALUE.

1. An indictment which charges that the accused, on a specified day, received and concealed different chattels, which had been stolen from different owners, is not bad for duplicity.

2. A prosecution under section 6858 of the Revised Statutes, for receiving and concealing stolen property, cannot be maintained against the thief, but may be against a confederate, who received and concealed the property stolen.

3. It is not necessary to a conviction under that section that the property be received from the thief.

4. Receiving or concealing different articles of property at different times, and on separate occasions, constitute distinct offenses, and cannot be prosecuted as one crime, though all the property be thereafter found in the possession of the defendant at one time and place; and, in such case, a conviction for a felony, based on the aggregate value of all the property, cannot be sustained, when the value of that received or concealed on each of such occasions is less than \$35.

5. This rule is unaffected by the fact that the property was stolen by the defendant and another jointly, and received or concealed in pursuance of an agreement to so commit the offenses. The only effect of such an agreement is to make each party to it responsible for the crimes committed by the other in pursuance of it, whether present at their commission or not.

6. Sections 5200 and 5201 of the Revised Statutes have no application in criminal cases, and upon the issue raised by the plea of not guilty the court is not required to direct the jury to return special findings.

Spear, C. J., and Minshall, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Erie county.

May Smith was convicted of the crime of concealing stolen property exceeding \$35 in value, and sentenced to imprisonment in the penitentiary for a term of years. That judgment having been affirmed by the circuit court, a petition in error, on leave granted, was filed in this court. The facts relevant to the questions upon which the case is reported are stated in the opinion. Reversed.

S. A. Court, for plaintiff in error. John Ray, Pros. Atty., for the State.

WILLIAMS, J. The indictment on which the plaintiff in error was put upon trial contained two counts, one of which charged her, jointly with her husband, J. C. Smith, Maggie Gaw, and Sarah Leuzler, with the larceny of the property in question, and the other count charged that she, with the persons named, did unlawfully and fraudulently buy, receive, and conceal the property, knowing that it had been stolen. The plaintiff in error, on her demand, was given a separate trial, in the course of which the state abandoned the count for larceny, and the case then proceeded on the other count. The property embraced in that count consisted of dry goods, shoes, jewelry, and other articles of merchandise which belonged to, and had been stolen

from, different merchants in the city of Sandusky. That count describes the various articles of stolen property, alleges their value, names the respective owners, and charges that all of the property was bought, received, and concealed by the parties accused on the 17th day of May, 1897. In the count for the larceny, there is the same description of the property and allegations of ownership and value, and the larceny is laid on the same day. A motion to quash each count for duplicity was overruled, and that action of the court is made a ground of error here; the claim being that, as the property of different owners was included in each count, there were as many offenses charged as there were owners of property.

While it is true that the stealing from different owners, at different times, however slight the interval, constitute several offenses, a larceny of several articles may be committed by the same act, so as to constitute but one offense, though they are the property of different owners. *State v. Hennessey*, 23 Ohio St. 339. And so with respect to receiving or concealing stolen property. Many articles stolen at different times from several persons may be received and concealed by the same act, and then there is but one offense. A motion to quash lies only when the objection is apparent on the face of the record. *Rev. St. § 7249*. And as the indictment in the one count avers that all the property described was stolen, and in the other received and concealed, by the accused parties on the same day, it may be treated as charging but one criminal act in each count. It does not affirmatively appear that more than one offense is charged in either count, and the motion was therefore properly overruled.

The evidence tended to prove that some of the goods had been stolen from the stores of the several owners in Sandusky before the day laid in the indictment, and were found on that day in the house where the plaintiff in error resided with her husband, which was in the country, some miles distant from Sandusky. It further tended to prove that the plaintiff in error had been in the habit of visiting these stores, where she carried on a species of theft commonly known as "shop-lifting," and on some occasions was accompanied by her co-defendant Leuzler, who engaged in a like mode of stealing, and the two, when together, acted in concert. We have discovered nothing in the evidence to show that any goods stolen by either were delivered to the other. On the day named in the indictment, the plaintiff in error and Mrs. Leuzler went together to Sandusky, where they visited several stores, from some of which each stole different articles. They were suspected, accused of the thefts, confessed their guilt, and put under arrest. The property that day stolen was recovered, and an officer sent to search the houses where the women resided, which were in the same neighborhood, but some distance apart. A considera-

ble quantity of goods of various kinds was found in each house, which the evidence tended to show had been stolen from the different owners named in the indictment, and from their respective places of business, in the manner already stated. All of these goods, together with those stolen on the 17th day of May, 1897, were included in each count of the indictment, and their aggregate value laid at \$240. The court directed the jury, in case they should return a verdict of guilty, to find the value of only so much of the property described in the indictment as had been found in the house of the plaintiff in error, and of that stolen on the 17th day of May, 1897, and to exclude all that had been found in Leuzler's house; and also to return a special verdict showing the value of each item included in the general verdict, and the name of its owner. That was done, the value returned in the general verdict being \$65, and the special verdict showing the value of each item of the property and the name of its owner. The value of no single article amounts to \$35, and the aggregate value of all the items of but one owner equals that sum.

Upon the conclusion of the testimony, the defendant, by her counsel, presented the following written instruction, which the court was requested to give in charge to the jury: "You must first find from the evidence that a crime has been committed,—that the goods alleged in the indictment, or some of them, were stolen from the owner or owners; and in so finding the jury must take into consideration all of the evidence submitted; and, having found that a larceny was committed, you will find from the testimony that some one other than the defendant here on trial stole the goods, before you can find that she can be guilty of buying, receiving, and concealing the same; for, if she alone shall have stolen the goods, she cannot be guilty, as charged under this indictment, of buying, receiving, and concealing the same, for the statute comprehends that the buying or receiving, and the subsequent concealing, shall have been from some one who is the thief, and not a receiving from the thief by the thief; the statute contemplates at least two persons in such transactions." This instruction was refused, and an exception duly entered. Several other instructions on the same subject were requested, all of which, like this one, made the receiving of the stolen property from the thief essential to a conviction. At the request of the state's attorney, the jury were instructed as follows: "If you find from the evidence, beyond a reasonable doubt, that the goods, or a part of them, were stolen, and that the defendant not only received the stolen goods, or a part of them, knowing them to be stolen goods, but also assisted in stealing them, or a part of them, she may still be convicted, provided some other person or persons assisted in the theft of each piece so received or concealed." The defendant excepted to this charge.

The crime of larceny is defined, and its punishment prescribed, by section 6856 of the Revised Statutes; and, by section 6858, the buying, receiving, and concealing of stolen property is made a distinctive and substantive offense, separate from that of the larceny of the property, though it is punished in the same way. The offense at common law was limited to the buying or receiving of stolen property; and the thief could not be convicted of that offense, because he could neither be the buyer nor receiver of the property from himself, and therefore did not come within the description. The change made by our statute consists in the addition of concealment of stolen property, with guilty knowledge, to the criminal acts of buying and receiving it. But the thief cannot be convicted of that offense, because there is present in the larceny a concealment of the property stolen, with intent to deprive the owner of it, which, whether of long or short duration, constitutes a part of that crime, and not the separate substantive one, under section 6858; and this is so, though he was assisted by another in the commission of the larceny. The purpose of that section was to provide for cases not included in the one against larceny, and to punish those who, when a larceny has been committed, receive or conceal the fruits of that crime, and to include the thief within that class would subject him to punishment twice or more for a single criminal transaction. We see no reason, however, why a confederate of the thief may not be guilty of both receiving and concealing the property which the latter has stolen, or of either; and it appears to be an established rule that a prosecution for receiving or concealing stolen property may be maintained against one who was present, aiding in the commission of the larceny and received the property from the principal. Many cases are found which declare that rule, among them *Jenkins v. State*, 62 Wis. 49, 21 N. W. 232, where a conviction was sustained; it appearing from the evidence that the defendant was not the principal, but was present when the latter, who understood the combination of a safe lock, unlocked the safe, and stole money from it, which the defendant received and concealed. The reason of the rule is that the receiving of the property is subsequent to the larceny in fact, and not a part of it. Hence the rule is inapplicable where the receiving or concealment of the property is embraced in its caption and asportation. In view of the case the jury had under consideration, they might reasonably have understood the charge to warrant a conviction of the defendant, if there was a confederate in the larceny of the property, though they should find she was the principal who actually committed the theft, and did not receive the property otherwise than in its commission; for, it will be observed, they were instructed they might convict if they should find either that she assisted an-

other in the larceny or was assisted by another in its commission. In this last respect the charge is objectionable.

But we find no error in refusing the instruction requested by the defendant. It is not necessary, in a prosecution under this statute, to show that the stolen property was obtained from the thief. The offense is made out by proof that, with the necessary knowledge, it was received from any one.

The defendant requested another instruction, which, in substance, was that, if different articles of the property described in the indictment were stolen at different times, and received and concealed by the defendant at different times and as separate transactions, each transaction would constitute a separate offense, and there could not be a conviction under the indictment, of more than one of such offenses. The court gave the instruction, but with the qualification that, if the various articles of property were stolen by the defendant and another person jointly, in pursuance of an agreement that they should be so stolen and received or concealed by the defendant, and they were so received or concealed, such receiving or concealing would be a continuous transaction, constituting but one offense, although the different articles were received and concealed at different times and on different occasions, and the total value of all the property should be found accordingly by the jury, as of one offense. To this exceptions were duly taken. It cannot be doubted that, in the absence of such an agreement as that referred to in the charge, the receiving or concealing of stolen property on separate occasions would constitute separate offenses; nor that the charge applied to the case authorized such offenses of an inferior grade to be united so as to form one crime of a higher grade, to be punished as such, if committed in pursuance of such agreement. The grade of the crime and the degree of the punishment is thus made to depend upon the agreement, and not on the facts of its commission. Such agreement is not an ingredient of the offense of receiving or concealing stolen goods, and its only effect, we apprehend, would be to make each party to it an accessory to the crimes committed by the other in pursuance of it. It could not affect the character of the crimes as actually committed, nor change those which, as committed, were separate misdemeanors, into one amounting to a felony.

And we believe there is no sound principle upon which it can be maintained that separate offenses, committed at different times, and each consisting of its own distinct facts, may be regarded as a continuing transaction, constituting one crime, equal in magnitude to them all combined, because of an agreement among parties that they would engage in their commission when and as opportunity might permit. Nor have we found any authority in point which sustains the proposition. The cases of *People v. Stein*, 1 Parker,

Cr. R. 202, *State v. Crawford*, 39 S. C. 343, 17 S. E. 799, and *Levi v. State*, 14 Neb. 1, 14 N. W. 543, cited in support of the charge, fail, we think, to sustain it. The only question raised or decided in the first of these cases was, as stated by the court, "whether, to convict all [who were jointly indicted for receiving embezzled goods], it was necessary that all should be present at one time and place, engaged in receiving." And the court held, in accordance with the well-established rule, that all who were proved to have confederated in the transactions could be convicted, though the receiving was at different times and places, and though the defendants were not present. The question we have here was not involved or passed upon. The case of *State v. Crawford* rests upon a peculiar statute of South Carolina, which, after defining the crime of receiving stolen property, contained a proviso that, when the chattels stolen were of less value than \$20, the punishment should not exceed imprisonment in the county jail for a specified period or a fine of a certain amount. There had been stolen at one time from a railroad car, goods of more than \$20 in value, parts of which were found in the defendant's possession at one time and parts at another. The defendant claimed that, as the value of the goods received by him at one time did not exceed \$20, he was not liable to punishment beyond that fixed in the proviso. But the court held that, under the statute, the degree of punishment did not depend on the amount of the goods received, but on the value of those stolen; "the test of the proper punishment," said the court, "being not the value of the property found in the possession of the defendant, but the value of the whole property stolen." In the other case (*Levi v. State*), the stolen goods were received at different times, but it appeared that the value of those received at each time was more than was necessary to support the conviction; and hence the charge to find the value of all the goods was immaterial, and was not excepted to.

While the concealment of stolen property is a continuing act, as long as the property remains in the control of the concealer, its continued control does not create new offenses from day to day, but relates back to, and is connected with, the original act of concealment, forming no part of an offense arising from the subsequent concealment of other property, though the property embraced in both offenses be found in the offender's possession at the same time and place. Being separate offenses when committed, they remain such notwithstanding the lapse of time or the commingling of the goods. Nor does a new act of concealment arise from the discovery of the property. Its being found in the possession of the accused is an important fact in the proof of the crime, and, in the absence of evidence showing that different parts of the property were received or concealed at different times, such possession, un-

explained, coupled with the necessary proof of the scienter, would be sufficient to warrant a conviction according to the value of all of the property. That, however, is not the purport of the charge. It warranted a conviction of an offense corresponding in degree with the value of all of the property, although it should be established to the satisfaction of the jury that different parts of it were received and concealed by the accused on separate and distinct occasions. It was a rule of the common law, and is now a statutory one, that, when the thief carried the stolen property from one county to another, he might be convicted in either, on the principle that, as the property remained that of the owner, each removal of it was a new taking; and now, by statute, that rule is applied to receivers of stolen property. Rev. St. § 7213. We know of no authority, however, statutory or otherwise, to the effect that each day of concealment in the jurisdiction where the offense was committed shall be treated as a new offense, or regarded as repeated whenever other stolen goods are added to those concealed, so as to form one crime, whose grade is to be determined by their aggregate value. It may be that legislation would be wholesome which would enable a series of petit offenses of this nature, when the total value of the property involved amounted to enough to constitute a felony, to be punished as such; but as far as our legislation has gone is to provide for cumulative sentences and increased punishment for petit larcenies and other misdemeanors after three convictions.

The court denied a request of the defendant to direct the jury to make special findings in answer to certain written interrogatories submitted, and that is assigned as error. Counsel rely on sections 5200 and 5201 of the Revised Statutes, but those sections are part of the Civil Code, and have no application in criminal cases. There appears to be no corresponding provision in the Criminal Code. The verdict on the issue of not guilty is regulated by the oath which the jury is required to take, and that is to well and truly try, and true deliverance make, between the state and the prisoner. Rev. St. § 7281. The court, therefore, properly denied the request. For the errors in the charge which have been pointed out, the judgment is reversed, and cause remanded.

SPEAR, C. J., and MINSHALL, J., dissent.

(59 Ohio St. 342)

GOODMAN v. HAILES.

(Supreme Court of Ohio. Dec. 13, 1898.)

ILLEGAL SALE OF INTOXICATING LIQUORS—LIABILITY OF OWNER OF PREMISES—JUDGMENT AGAINST SELLER—CONCLUSIVENESS.

1. In an action, under section 4304 of the Revised Statutes, to subject the premises where intoxicating liquors were sold to the payment of a judgment recovered against the seller for damages caused by such sales, that judgment,

when not impeached for fraud or collusion, is conclusive as to the facts (a) that the sales of the liquors which caused the plaintiff's injury were made by the defendant in the judgment, (b) that the sales were made in violation of law, and (c) that the plaintiff, in consequence of such sales, sustained damages to the amount of the judgment; and they are not open to dispute by the owner of the premises in the action brought against him.

2. But allegations that the premises were leased by the owner to the seller for the purpose of selling intoxicating liquors therein, or were permitted by him to be used for that purpose, and that the liquors which caused the plaintiff's injury were sold on the premises, may be put in issue by the owner; and when that is done the burden of proof is on the plaintiff.

3. A denial that the liquors were unlawfully sold on the premises tenders an issue only as to the illegal character of the sales, and not as to the fact of the sales, and upon the issue so tendered the judgment against the seller is conclusive.

(Syllabus by the Court.)

Error to circuit court, Hancock county.

Emma Halles, having recovered a judgment of \$500 and costs against Henry Umbrecht for damages resulting from the sales of intoxicating liquors to her husband, and having failed to make the judgment and costs on execution issued against Umbrecht, brought her action in the court of common pleas of Hancock county on the 31st day of August, 1895, against Lawrence Goodman, the owner of the premises where it is alleged the liquors were sold to the plaintiff's husband, to subject the premises to the payment of the judgment. To the petition, which contains all necessary allegations, the defendant filed the following answer: "The defendant, for answer to the plaintiff's amended petition, says: It is not true, and he denies, that Thomas Halles, the husband of the plaintiff, is, and for a long time prior to the commencement of the suit against Henry Umbrecht was, an habitual drunkard. And defendant denies that on or about the 1st day of July, and at various other times thereafter and up to the 14th day of October, 1893, said Henry Umbrecht did unlawfully sell intoxicating liquors in said building to said Thomas Halles, and denies that said Thomas Halles did thereby become intoxicated; and denies that plaintiff was thereby, by reason of any sales of intoxicating liquors made by said Henry Umbrecht, damaged in her person, property, and means of support in the sum of five hundred dollars, or in any other sum; and denies that defendant had any knowledge of said illegal sales; and denies that said judgment was for damages sustained by this plaintiff by reason of any unlawful sales of intoxicating liquors to said Thomas Halles. For a second defense defendant says he was in no way any party to the suit of Emma Halles against Henry Umbrecht, which is averred in the petition as the basis of this action, nor was the judgment in that case against this defendant, nor was this defendant in any way, either by summons or otherwise, notified of the pendency of that action, nor did defendant enter any vol-

untary appearance therein, nor did he have any knowledge thereof, nor did he make any defense thereto; and such judgment, as to this defendant, is without any due process of law, and of no effect. For a third defense the defendant says that the plaintiff, by her own wrongful act and negligence, caused and contributed to whatever injury she has suffered by reason of drunkenness of her said husband, if any, complained of in her amended petition, in this: that the plaintiff herself, at and during the times stated in her petition and before and since, did give and furnish to the said Thomas Halles intoxicating liquors, including lager beer, in large quantities, and did keep large quantities of intoxicating liquors in her house where she and said Thomas Halles lived, to be drunk by said Thomas Halles at will, and which the said Thomas Halles did drink at the solicitation and request of plaintiff, and with her consent and connivance, for which said Thomas Halles paid plaintiff in money in the same way as if such liquors were bought at any other saloon or drinking place, whereby he became frequently intoxicated, and by which plaintiff was solely injured, if injured at all, in her person, property, and means of support. For a fourth defense defendant says this court has no jurisdiction to declare the said judgment against Henry Umbrecht to be a lien against defendant's said real estate, nor to order any sale of defendant's real estate to pay the same, nor to sell such real estate to pay said judgment, all as prayed in the petition, because such action would deprive defendant of his property without due process of law, and of his remedy by due course of law. Therefore defendant prays he may be dismissed hence with his costs." The plaintiff filed a general demurrer to each of the defenses, which was sustained as to all of them except the first one. The cause proceeded to trial upon the petition and first defense contained in the answer, and judgment was recovered by the plaintiff. That judgment was affirmed by the circuit court. The record shows that on the trial the plaintiff put in evidence the record of the proceedings and judgment against Umbrecht, and rested. The defendant offered no evidence. The sustaining of the demurrer, and the want of sufficient evidence to sustain the judgment, were the errors assigned in the circuit court, and relied on here. Affirmed.

Jason, Blackford & Byal, for plaintiff in error. E. T. Dunn and George F. Pendleton, for defendant in error.

PER CURIAM. The action against Umbrecht was prosecuted under section 4357 of the Revised Statutes, which gives a wife who is injured in her means of support in consequence of the intoxication of her husband a right of action for damages against the seller of the liquor which caused the intoxication in whole or in part. The action

against Goodman was brought under section 4364, which contains the provision that: "If a person rent or lease to another, any building or premises to be used or occupied in whole, or in part, for the sale of intoxicating liquors, or permits the same to be so used or occupied, in whole or in part, such building or premises so leased, used, or occupied shall be held liable for, and may be sold to pay, all fines, costs, and damages assessed against any person occupying the same;" and that section authorizes proceedings to subject the building or premises to the payment of judgments for such damages recovered against the seller. In an action under this last section the judgment recovered against the seller of the liquor, when not impeached for fraud or collusion, is conclusive against the owner of the premises upon all questions involved in, and facts essential to, its recovery. These are: (1) That the sales of the liquor which caused the plaintiff's injury were made by the defendant in the judgment; (2) that the sales so made were in violation of law; and (3) that the plaintiff, in consequence of such sales, sustained damages to the amount of the judgment; and neither of these facts, nor questions concerning them, are open to dispute by the owner of the premises in the action brought against him. The place, however, where the liquors were sold, is not material to the recovery of the judgment, nor involved in its recovery; neither is the nature of the seller's occupancy of the premises, nor the owner's agreement with him or permission for the occupancy. Averments of these facts properly appear for the first time in the action to subject the premises to the payment of the judgment rendered against the seller, and may then be controverted by the owner. *Mullen v. Peck*, 49 Ohio St. 450, 460, 461, 81 N. E. 1077. The averments are, accordingly, contained in the petition against Goodman, and the question here is whether his answer raises a material issue. It is clear the second defense does not; for it was not necessary that he should be a party to the action against Umbrecht. The third defense has no other effect than to call in question the fact that the sales of the liquors which caused the plaintiff's injury and damage were made by Umbrecht; which, as has been seen, was adjudicated in the case against him, and cannot be questioned in this case. The fourth defense pleads no fact, but is in the nature of a demurrer to the petition. It is therefore clear that the demurrers to these three defenses were properly sustained. With respect to the first defense, it will be observed the defendant does not deny, and therefore admits, the allegation in the petition that Goodman was the owner of the premises in question, and leased the same to Umbrecht "for the purpose of selling intoxicating liquors therein"; nor does it deny the recovery of the judgment as alleged, against Umbrecht. The only other

issuable fact in the case was whether the liquors were sold by Umbrecht on the premises. The denial is that he unlawfully sold the liquors in the building leased to him by Goodman. This does not deny the liquors were in fact sold on the premises, but tenders an issue only as to the illegal character of the sales; and that, we have seen, was involved in, and conclusively settled by, the judgment against Umbrecht, as were all the other matters to which the denials in the first defense are directed. Judgment affirmed.

(59 Ohio St. 332)

TRAVELERS' INS. CO. v. MYERS et al.

(Supreme Court of Ohio. Dec. 13, 1898.)

SUPREME COURT—JURISDICTION IN ERROR—REVIEW OF JUDGMENT.

Section 6710, Rev. St., as amended April 25, 1898 (93 Laws, p. 255), does not affect the jurisdiction of this court to review a judgment of a lower court, where the right to prosecute error in this court existed at the time the amendment took effect. *Curry v. Homer*, 40 Wkly. Law Bul. 303, overruled.

(Syllabus by the Court.)

Action by J. W. Myers and others against the Travelers' Insurance Company. Judgment for plaintiffs. Defendant brings error. Motion to dismiss overruled.

Day, Lynch & Day, for plaintiff in error.
H. A. Mykrantz, for defendants in error.

MINSHALL, J. On April 30, 1897, J. W. Myers et al. recovered a judgment for \$283.75 against the Travelers' Insurance Company in the court of common pleas of Ashland county, which was affirmed by the circuit court, November 12, 1897, in a proceeding in error brought by the defendant, the Travelers' Insurance Company. Afterwards the plaintiff in error commenced a proceeding in this court to reverse the judgment of the circuit court and that of the common pleas. And thereupon the defendants in error filed this motion to dismiss the proceeding on the ground that this court, under the provisions of section 6710, Rev. St., as amended to take effect April 25, 1898 (93 Ohio Laws, p. 255), has no jurisdiction. The jurisdiction of the court in this case depends upon the construction required to be given the third section of the amendatory act, considered in connection with section 79, Rev. St., for the amount involved in the judgment sought to be reversed is less than \$300. Section 3 of the amendatory act provides that: "This act shall take effect from and after its passage, and shall apply to all causes of action existing, and to actions pending at that time in all courts, inferior to the supreme court." And section 79, Rev. St., provides that: "Where a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions,

prosecutions, or proceedings, unless so expressed; nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

It is manifest that the third section of the act amending section 6710, Rev. St., was inserted with reference to the provisions of section 79; and the only question that arises on this motion is whether the legislature intended the amendment to apply to proceedings in error that were then pending, and also to existing causes of such proceedings, or, in other words, to existing rights to prosecute error. It is evident that, if section 3 had been omitted, the act, being one relating to the remedy, would not have applied to this case; for by section 79 no amendment or repeal relating to the remedy applies to an existing cause of action, prosecution, or proceeding, unless otherwise expressly provided in the amending or repealing act. This section of the statutes was adopted for the reason that, though the legislature is denied by the constitution the power to pass retroactive laws, it had been held that this did not include laws relating to the remedy; and so to prevent abuses, of which there were many and somewhat discreditable instances, it was provided that, where laws relating to the remedy were adopted, they should not affect pending actions, prosecutions, or proceedings, nor existing causes of action, prosecutions, or proceedings, unless otherwise expressly made so in the amending or repealing act. The policy of the section suggests that it should receive a liberal construction, to the end that its policy be not subverted, and that an act within its provisions should by clear language express that it was intended to apply to each classification of section 79,—cause of action, prosecution, and proceeding; and, if it fails to apply to all, it should be applied no further than the language employed requires. *State v. Rabbitts*, 46 Ohio St. 178, 19 N. E. 437.

It will be noticed that the section designates existing causes of action, prosecutions, or proceedings. "It is a general presumption that every word in a statute was inserted for some purpose. Mere idle and useless repetitions of meaning are not to be supposed, if it can be fairly avoided." Per Thurman, J., in *Bloom v. Richards*, 2 Ohio St. 387. The terms used in this statute are not identical. They have a well understood and defined signification in the law and practice of the state. A cause of action embraces the facts that entitle a party to relief in an original action,—the facts ordinarily stated in a petition. A prosecution relates to criminal proceedings. A cause of action does not embrace within its signification a proceeding in error. The latter usually grows out of the proceedings had in a cause of action, and is distinguished from it by the name adopted. *Hobbs v. Beckwith*, 6 Ohio St. 252; *Bode v. Welch*, 20 Ohio

St. 19; *Lafferty v. Shinn*, 38 Ohio St. 46; *O'Donnell v. Downing*, 43 Ohio St. 62, 1 N. E. 438. So that the legislature, in providing that the amendment of section 6710, Rev. St., should simply apply to existing and pending causes of action, cannot be held to have intended more than it expressed; and so the amendment does not apply to a pending proceeding in error, nor to an existing right to prosecute error. If they had so intended, we are bound to presume that, with section 79 before them, they would have so expressly provided.

The limitation of the section as amended to existing and pending causes of action is, in the construction of the statute, very significant, and suggests that the limitation, as made, was purposely done to avoid objection, that would otherwise most likely have been made, to the adoption of the amendment, if intended to apply to any existing right to prosecute error. As adopted, the act applies to proceedings in error that may grow out of pending as well as out of existing causes of action, but does not apply to existing causes of proceeding in error, nor to such proceedings pending at the time the amendment took effect. There could be no objection, under the constitution, to making it apply to proceedings in error arising out of future causes of action. Such an amendment could in no sense be said to be a retroactive law; but as to causes of proceeding that may arise out of pending actions, or even existing causes of action, an amendment affecting such proceedings might be regarded as falling within the provisions of section 79, and not apply in such cases, without an express provision to that effect, and hence the reason the amendment is expressly made applicable to pending as well as existing causes of action, out of which proceedings in error may arise. The majority of the legislature may have been willing to go this far, and no further; and, presuming this to have been the fact, they have clearly expressed their intention to that effect in the amending act, by limiting the retroactive operation of the amendment to proceedings in error that may arise out of causes of action existing or pending at the time it took effect.

The dismissal of *Curry v. Homer*, heretofore made on the motion of the defendant, will be vacated, and the cause restored to its place on the general docket. The per curiam announced in that case (40 Wkly. Law Bul. 303) is overruled, and will not appear in the volume of Reports. Motion overruled.

(59 Ohio St. 336)

DRAPER et al. v. CLARK.

CALDWELL et al. v. HEINTZ.

(Supreme Court of Ohio. Dec. 13, 1898.)

SUPREME COURT—APPELLATE JURISDICTION—LIMITATIONS OF—JURISDICTIONAL AMOUNT
—PRACTICE ON APPEAL.

1. Under section 6710, Rev. St., as amended April 25, 1898 (93 Laws, p. 255), limiting the

appellate jurisdiction of this court, except as therein expressly provided, to the review of judgment in which is involved the sum or value of more than \$300, the effect of the judgment complained of on the claim of the plaintiff in error must be considered in determining the amount involved.

2. Where a plaintiff in the court of common pleas claims more than \$300, but recovers less, and is content with the judgment, this court has no jurisdiction in a proceeding in error prosecuted in this court by the defendant below; for the amount involved, as to him, is less than \$300.

3. Where, however, the plaintiff claims more than \$300, but recovers less, and prosecutes error to the circuit court, where the judgment is reversed and cause remanded for a new trial, in such cases, as to the defendant, the judgment of reversal involves the full amount of the plaintiff's claim, and he may prosecute error to this court for the reversal of the judgment of the circuit court.

(Syllabus by the Court.)

Action by Joseph Clark against Draper and others, and by Catharine Heintz against Caldwell and others. Judgments for plaintiffs, and defendants bring error. Dismissed as to first. Action on motion to dismiss overruled as to the second.

Frank M. Sala, for plaintiffs in error Draper and others. Johnson & Levy, for plaintiffs in error Caldwell and others. Byron F. Ritchie, for defendant in error Clark. Mortimer Matthews, for defendant in error Heintz.

MINSHALL, J. Both these cases are before the court on a like motion, and will be considered in their order. And first as to the case of Draper v. Clark:

By the amendment of section 6710, Rev. St., which was adopted and took effect April 25, 1898, the jurisdiction of this court to review a judgment of a lower court, except in certain specified cases, of which this is not one, is limited to a judgment or final order "in which is involved exclusive of interest and costs, the sum or value of more than three hundred dollars." In the action below, Joseph Clark recovered of the defendants the sum of \$225 damages for injuries received by him while in the employment of the defendants, caused by their negligence, and for which he claimed \$2,000 damages. The defendants prosecuted error in the circuit court, where the judgment was affirmed, and error is prosecuted in this court to reverse the judgments of both the lower courts; and the defendant in error, Clark, now moves to dismiss the petition on the ground that this court has no jurisdiction. We are of the opinion that the motion should be sustained.

The question is, what is involved in the judgment complained of? To determine this question, the statute must be construed with reference to the party complaining of the judgment. Either party has the right to prosecute error in this court for the reversal of a judgment against him, when, as to him, a greater sum than \$300 is involved in the judgment. It can make no difference to the

defendant, after judgment, that in the lower court a greater sum than \$300 was claimed against him, if the recovery was for a less sum, and the plaintiff is content therewith, for in such case the recovery of any greater sum is precluded by the judgment; hence no greater sum than the amount recovered is involved in the judgment so far as he is concerned, and by reason of the amendment this court has no jurisdiction to review the judgment at his suit. The case may be different, however, where the plaintiff below prosecutes error in this court for the reversal of a judgment for a sum less than \$300 on a claim for more, affirmed by the circuit court. As to him the whole amount of his claim in the lower court is, in such case, in dispute; for, if he can have the judgment of the circuit court and common pleas reversed, he may recover on a new trial a greater sum than on the former trial, if not the whole of his claim; and therefore, as to him, a greater sum than \$300 is involved in the judgment complained of, where the amount recovered is \$300 less than the amount claimed. This is the construction that has been placed on the provision in the judiciary act of congress limiting the appellate jurisdiction of the supreme court of the United States, and adhered to with great uniformity from an early day. That provision is, in substance, much the same as the provision now limiting the appellate jurisdiction of this court, except as to the amount adopted as the limit. In *Gordon v. Ogden*, 3 Pet. 34, it is said by Marshall, C. J.: "The jurisdiction of the court has been supposed to depend on the sum or value of the matter in dispute in this court, not on that which was in dispute in the circuit court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may still be recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. But, if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court, and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties." He further observes that: "The reason of the limitation is that the expense of litigation in this court ought not to be incurred, unless the matter in dispute in the circuit court exceeds two thousand dollars. The reason applies only to the matter in dispute in this court." And the same may be said with as much, if not more, propriety of the language used in our own statute, where it is the sum or value "involved" in the judgment complained of that determines jurisdiction. This case has been uniformly followed by the supreme court of the United States, as will appear from the following cases: *Smith v. Honey*, 3 Pet. 469; *Knapp v. Banks*, 2 How. 73; *Express Co. v. Malin*, 131 U. S. 394, 9 Sup. Ct. 792; *Walker v. U. S.*, 4 Wall. 163.

A like construction has been given to similar statutes by the courts of the other states. *Williams v. Wilson*, 5 Dana, 596; *Tipton v. Chambers*, 1 Metc. (Ky.) 565; *Winship v. Block*, 96 Ind. 446; *Railway Co. v. McDade*, 111 Ind. 23, 12 N. E. 135. See, also, 1 Myers, Fed. Dec., from section 541 to section 614, where the decisions on the question are collected. The Ohio cases cited by counsel do not conflict with the view here taken. The court of common pleas has jurisdiction in all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of justices of the peace, which is \$100; and it has been uniformly held that the amount claimed, and not the amount recovered, determines the jurisdiction of the common pleas. If it were otherwise, the absurd result would follow that the court would be compelled to hear and determine a case on its merits in order to determine its jurisdiction. So, here, under the amendment, this court determines its jurisdiction by considering the sum or value involved in the judgment complained of. The result is that where the plaintiff in error will, according to his claim, from the judgment complained of, sustain the loss of a sum or value greater than \$300, the court has jurisdiction to review it; and, as the only loss the defendant below can sustain is the amount of the judgment against him, where this is less than \$300 he cannot prosecute error to this court.

We have said that our statute and that of the United States are substantially alike. There is, however, one important difference in the language of the two statutes, that may, so far as a plaintiff is concerned, require a different construction. By the United States statute the jurisdiction is determined by the amount of "the matter in dispute"; in ours, it is determined by the amount "involved" in the "judgment" sought to be reviewed. The federal supreme court has held, as will appear from the cases cited, that the right of the plaintiff to a review depends upon the amount claimed in his declaration. If this should be held to be so under our statute, then, should a plaintiff sue for \$301, and recover \$300, he might prosecute error to this court, although the amount, as to him, involved in the judgment complained of, is but \$1. A more rational construction might be that where a plaintiff sues for a sum greater than \$300, and recovers less than that sum, he may prosecute error to this court, where the difference between the sum recovered and the sum claimed is greater than \$300. The difference between his claim and the sum recovered would seem to be the only sum involved in the judgment, and for which he could ask to have it reversed. Cases in which the plaintiff may desire to prosecute error from a judgment in his favor that is but \$300 less than his claim will probably seldom arise, and it is possible that no case of this kind has come before the supreme court of the United States for its decision. The question,

however, here mooted, in no way affects either of the motions before us, and is left for determination when it arises. Hence the motion to dismiss in this case must be, and is, sustained.

As to the motion to dismiss for want of jurisdiction in the case of *Caldwell et al. v. Heintz*, the action in the common pleas was brought by Catharine Heintz to recover of the defendants the sum of \$5,000. She recovered a judgment for only \$100. From this she prosecuted error in the circuit court, where the judgment was reversed, and a new trial granted. The defendants prosecute error in this court to obtain a reversal of that judgment. The motion must, we think, on the principles above stated, be overruled. By the reversal of the judgment of the court of common pleas the defendants below become again liable to a recovery for the full amount of the plaintiff's claim. Hence the sum involved in the judgment of reversal is greater than \$300, and may be reviewed by this court. Motion overruled.

(59 Ohio St. 216)

FIRST NAT. BANK OF CHICAGO et al. v.
F. C. TREBEIN CO. et al.

(Supreme Court of Ohio. Nov. 29, 1898.)

CORPORATION—ORGANIZATION—EFFECT OF FRAUD—FORMATION BY FAILING DEBTOR—TRANSFER OF PROPERTY FOR STOCK—FRAUDULENT CONVEYANCE—RIGHTS OF CREDITORS.

1. In contemplation of law, a corporation is a legal entity, an ideal person, separate from the real persons who compose it. This fiction, however, is limited to the uses and purposes for which it was adopted,—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members. But the fiction cannot be abused. A corporation cannot be formed for the purpose of accomplishing a fraud or other illegal act under the disguise of the fiction; and, when this is made to appear, the fiction will be disregarded by the courts, and the acts of the real parties dealt with, as though no such corporation had been formed, on the ground that fraud vitiates everything into which it enters, including the most solemn acts of men.

2. Where a failing debtor forms a corporation, composed of himself and certain members of his family, he taking substantially all the stock, and at once conveys all his property to the corporation in exchange for the stock by him taken, and for no other consideration; and immediately places all his stock, except one share, with certain of his creditors, who have knowledge of the facts, as collateral security to their claims; and, as president and general manager, retains control of the property, and manages it for his own use and benefit,—such a conveyance is a fraud on his other creditors, and may be set aside by a court at their suit, and the property administered for the benefit of all his creditors under the insolvent laws of the state.

3. The good faith of the parties to such a transaction must be determined by its legal effect on the rights of others. If its legal effect works a fraud on their rights, the finding of a court that the parties acted in good faith is simply an erroneous conclusion of law from the facts.

(Syllabus by the Court.)

Error to circuit court, Greene county.

The First National Bank of Chicago and the Rock Island National Bank, both of the state of Illinois, having recovered judgments, aggregating \$30,000, against F. C. Trebein, in the common pleas court of Greene county, filed their petition in that court against F. C. Trebein and the "F. C. Trebein Company," ostensibly a corporation under the laws of Ohio, to set aside a certain conveyance of real estate made by F. C. Trebein to the company, on the ground that it was made to hinder, delay, and defraud them. Upon issue joined as to these allegations, the court found in favor of the defendants, and dismissed the action. An appeal was taken by the plaintiffs to the circuit court. In that court an amendment to the petition was filed, alleging that the object and purpose of the formation of the F. C. Trebein Company, and the conveyance to it of the real estate and about \$20,000 of personal property, was, while securing certain creditors to the exclusion of others, to enable F. C. Trebein to retain for himself a beneficial interest in the property, real and personal, and asking that the conveyance of said property, real and personal, be declared to be a deed of assignment, and held in trust for the benefit of creditors. Issue was taken on these averments. On the trial the court found for the defendants, and dismissed the action of the plaintiffs. The judgment was, however, rendered on findings of fact made at the request of the plaintiffs, and an exception taken to the judgment on the findings. Plaintiffs bring error. Reversed.

The findings are as follows: "First. We find that, for many years prior to the formation of the corporation known as the 'F. C. Trebein Company,' the defendant F. C. Trebein carried on the business of buying, selling, and milling grain in Greene county, Ohio, under the business name of F. C. Trebein & Co.; that his property connected with this business consisted of the Excelsior Mills, at Trebeins, Ohio, including valuable water rights and real estate near by; also, the Shawnee Mill, in Xenia, Ohio, and the Jamestown Elevator, at Jamestown, Ohio, with the personal property used in the business. Second. We find that Mr. Trebein also owned prior to December, 1894, and January, 1895, a large amount of real estate and personal property, including common and preferred stock of the Columbia Straw-Paper Company. Third. We find that F. C. Trebein was on, and had been for several years prior to, January 22, 1895, an indorser, with six other directors of the Columbia Straw-Paper Company, of the notes of that company to the extent of about \$85,000, which sum includes notes to the City National Bank of Dayton, Ohio, for \$18,000; to the Xenia National Bank of Xenia, Ohio, for \$10,000; also \$25,000 to the First National Bank of Chicago, Illinois; and for \$5,000 to the Rock Island National Bank of Rock Island, Illinois.

Fourth. We find that not later than November, 1894, F. C. Trebein knew that the Columbia Straw-Paper Company was then, and soon would be, financially embarrassed, and not later than January, 1895, knew that said company would not further be able to take up or renew its obligations as they became due, and knew that upon January 19, 1895, there was a meeting of the directors, including F. C. Trebein, of said company; that the officers were authorized by a resolution to take such steps as might be necessary to put all of said company's property into the hands of a receiver; and that, pursuant thereto, a receiver was appointed by the circuit court of the United States, on the 24th day of January, 1895, to take charge of the property of the said company. Fifth. We find that Mr. Trebein, in December, 1894, and January, 1895, conveyed and assigned in payment, in part, of an alleged prior indebtedness to his wife, real and personal property to the value of \$40,900, and to his daughter real estate to the value of \$2,100, which he had promised to her as a wedding gift in June, 1894; and that he pledged a large amount of stocks, probably valueless, to his wife, as collateral for an alleged balance of about \$8,700 due her. But, for the reason that the validity of a number of these transactions is questioned in another action now pending a hearing in the common pleas court in this county, and because there is not sufficient evidence before us on which to predicate a finding of an intent to defraud in these contemporaneous acts, we do not so find, and therefore have not considered them in the determination of this action. Sixth. We find that when the directors of the said straw-paper company determined to borrow from the banks, upon their indorsements, they agreed together, among themselves, that, in case of necessity, each would protect the banks from which they obtained their loans upon the Columbia Straw-Paper Company's notes, with the indorsements of the directors, and that Mr. Trebein had stated to the three banks in his vicinity when he made loans for the Columbia Straw-Paper Company, with the indorsements of the directors, that he would protect them; but counsel for the defendants do not claim, for the purposes of this suit, that the plaintiffs knew of such agreement. Seventh. We find that on the 28th day of August, 1895, by the consideration of the court of common pleas of Greene county, Ohio, the First National Bank of Chicago, Illinois, recovered a judgment against the said F. C. Trebein for the sum of \$25,362.50, and that the Rock Island National Bank, of Rock Island, Illinois, by the consideration of the said court, recovered a judgment against F. C. Trebein for the sum of \$5,145.82; that executions were issued upon the said judgments, and levies were made upon the real estate described in the petition. Eighth. We find that upon January 22, 1895, all the residue of the property owned and

held by F. C. Trebein, remaining after the said conveyance to his wife and daughter, consisted of the real estate described in the petition, and the personal property, accounts, and merchandise connected with his milling business, and thereafter conveyed and transferred to the F. C. Trebein Company, and which was believed at the time by Mr. Trebein to be worth \$60,000, and this his attorney then thought to be too high a valuation. Ninth. We find that upon January 22, 1895, F. C. Trebein had not sufficient property to pay his outstanding obligations, including his liability as indorser for the Columbia Straw-Paper Company, and thereupon, for the purpose and with the intent in good faith to secure the City National Bank of Dayton, Ohio, the Xenia National Bank of Xenia, Ohio, and the Farmers' & Traders' Bank of Jamestown, Ohio, upon their claims against him as indorser and otherwise, did, with his wife, Joan Trebein, his daughter, Elizabeth T. Flynn, his son-in-law, P. H. Flynn, and his brother-in-law, Horace Ankeney, who acted with him for his accommodation, at his request and to carry out the purposes and object of the said F. C. Trebein, form and organize the 'F. C. Trebein Company,' with a capital stock of \$60,000, divided into 600 shares of \$100 each; that, pursuant to said intention, said corporation purchased all of the property of said F. C. Trebein connected with his said business, the same being all the property he then possessed, on the said 22d day of January, 1895, and on the same day the said Trebein conveyed and transferred said property to said corporation; that on the same day, in the further pursuance of said purpose, there were regularly issued certificates for 596 shares of stock in said corporation to said F. C. Trebein in payment therefor, which said stock, except one share, pursuant to said purpose, said Trebein placed as a general collateral with said three banks, as security upon their claims against him as indorser and otherwise; and, in pursuance of the further intention of the said Trebein in the formation of the said corporation, the said F. C. Trebein remained in the charge of the affairs of the said corporation as president, treasurer, and general manager, and continued the business theretofore conducted by him, and the remaining four shares of stock were taken by the said Joan Trebein, P. H. Flynn, Elizabeth Flynn, and Horace Ankeney, respectively, and paying \$90 a share therefor. Tenth. We find that, upon January 23d, the stockholders of the F. C. Trebein Company authorized, in writing, the president of the company to issue, without said company being liable therefor before said authority, its notes to the City National Bank of Dayton, Ohio, for \$23,000; to the Xenia National Bank of Xenia, Ohio, \$20,000; and to the Farmers' & Traders' Bank of Jamestown, Ohio, \$5,000,—in lieu of notes held by them on which F. C. Trebein and the firm of F. C. Trebein & Co. were liable as makers

and indorsers; and on January 23, 1895, the F. C. Trebein Company had a meeting, and gave this authority to the president of the company. We find \$12,000 of notes made by F. C. Trebein & Co. were, in pursuance to the resolution, taken up and replaced by the notes of the F. C. Trebein Company, as they respectively became due. We find that said action did not form a part of the intention of Mr. Trebein, or those acting with him, at the time of the formation of the corporation, or at the time of the conveyance of the property by Mr. Trebein to the corporation, but was the result of an afterthought. Eleventh. We find that none of said indebtedness of the said City National Bank of Dayton, the Xenia National Bank of Xenia, and the Farmers' & Traders' Bank of Jamestown has been paid, and said banks still hold said stock as collateral. Twelfth. We find that the directors of the said F. C. Trebein Company, since January 24, 1895, have held only one meeting, on March 10, 1896, and heard the report of the president, who reported that the profits to that date were \$1,062, and had been passed to the profit and loss account; that F. C. Trebein has had possession of all of the property since the organization of the F. C. Trebein Company; that none of the directors other than the said F. C. Trebein have taken any active part in the management of the affairs of the company, except to attend said meeting. Thirteenth. We find due and legal notice has been given of the pendency and object of this action, as provided by section 6344 [Rev. St.]; that no creditors have intervened or come into this action. To which findings of fact the plaintiffs except. On consideration whereof, the court finds that the equities in said action are with the defendants, and that they are entitled to be dismissed, with their costs."

A bill of exceptions was also taken, setting forth all the evidence, and a motion made for a new trial, which was overruled, and exception taken. The plaintiffs ask a reversal of the judgment on the findings, and that judgment be rendered in their favor.

Charles H. Kyle and Charles Darlington, for plaintiffs in error. John Little and F. N. Shaffer, for defendants in error.

MINSHALL, J. (after stating the facts). We are unable to see how, as against his creditors, the transaction by which F. C. Trebein, with his wife, his daughter, his son-in-law, and his brother-in-law, formed the F. C. Trebein Company, and then conveyed to it every vestige of property he had not before conveyed either to his wife or to his daughter, can be sustained, against the justice of their demand to have the property so transferred administered for the benefit of all his creditors, under the insolvent laws of this state. He was at the time liable in a large sum of money on indorsements he had made for the accommodation of the straw-paper company,

of which he was a member and one of its directors. He knew it was about to fail, and that he would have to respond to these indorsements. This fact induced the conveyances he had before made to his wife and to his daughter. Whether for a valid consideration, or not, was not considered by the court, for the reason, stated in its findings, that there were suits then pending to set them aside. The capital of the F. C. Trebein Company was fixed at \$60,000, divided into 600 shares of \$100 each; Trebein taking 596 of the shares, and each of the other persons named taking 1 share. It was formed on January 22, 1895, Trebein being made the president, treasurer, and general manager, and conveyed to the company the property in question, estimated to be worth \$60,000, and received therefor the shares above stated, and at once placed all of them, except one, in pursuance of his original purpose, with three of the banks who held his indorsements of the paper of the straw-paper company, for the purpose of securing them on his indorsements; and he continued in the control and management of the milling and grain business as he had before the corporation was formed and the conveyance made. The court found that this was all done in good faith. But, in view of the facts, we are unable to see how the court could have meant more than that he meant no wrong by it. Good faith in law, however, is not to be measured always by a man's own standard of right, but by that which it has adopted and prescribed as a standard for the observance of all men in their dealings with each other. When one conveys all his property to another with the intention of hindering and delaying his creditors, or a part of them, in pursuing their legal remedies against him and his property, his conduct in law is deemed fraudulent, however honestly he may have intended to deal with all his creditors in the future. *Trimble v. Doty*, 16 Ohio St. 118. The good faith of a party under such circumstances must be determined by the legal effect of what he deliberately does. *Brinkerhoff v. Tracy*, 55 Ohio St. 558, 45 N. E. 1100; *Lee v. Henrick*, 52 Ohio St. 177, 39 N. E. 473; *Gashe v. Young*, 51 Ohio St. 376, 38 N. E. 20. The formation of the corporation, and the conveyance to it by Trebein of all the property he then had, necessarily hindered and delayed all his creditors in the pursuit of their claims against him. The formation of the corporation in no way facilitated the transaction of his milling business and that connected with it. Nothing was added to his capital, unless we regard the few hundred dollars that may have been paid for the four shares of stock taken by the other members of his family such an addition. Evidently, an addition to capital was not the controlling object. The transaction cannot be likened to a conveyance to a third person for a valuable consideration. Considered in the light of the facts, it was no more than a conveyance from himself to him-

self. The corporation was, in substance, another F. C. Trebein. His identity as owner of the property was no more changed by his conveyance to the company than it would have been by taking off one coat and putting on another. He was as much the substantial owner of the property after the conveyance as before, and had substantially the same use of it as if the conveyance had not been made. The only purpose the creation of the corporation and the conveyance to it subserved was to hinder creditors in levying upon the property, and selling it on execution at law; and it is this hindrance the law will not permit, and, when ascertained in a proper proceeding, requires the conveyance to be set aside, and the property administered for the benefit of all the creditors of the fraudulent grantor.

It is suggested that the property may be levied on. This is true, but it cannot be sold on execution until the conveyance is set aside; for it is not the policy of the law to sell a lawsuit. It is also suggested that the stock of Trebein may be reached by a proceeding provided by statute. This is true, but it is not the simple proceeding of an execution at law. Besides, few persons, at this day, would care to take stock in a manufacturing or any similar company, with its statutory liability attached, as a substitute for tangible property. The fiction by which an ideal legal entity is attributed to a duly-formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application as frequently to induce the belief that it must be universal, and be in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text writers, confine the fiction to the purposes for which it was adopted,—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members,—and have repudiated it in all cases where it has been insisted on as a protection to fraud or any other illegal transaction. Thus, in *Brundred v. Rice*, 49 Ohio St. 640, 32 N. E. 169, where an incorporation had been formed for the purpose of giving effect to an illegal agreement between it and a railroad company for a discrimination in freights between it and other shippers, the fiction was disregarded, and a recovery allowed against the promoters by one who had been thus discriminated against, in like manner as if the corporation had no existence. See, also, the following citations: *Mor. Corp. §§ 1, 227*; *Railway Co. v. Miller (Mich.)* 51 N. W. 981; *Gas Co. v. West*, 50 Iowa, 16; *Booth v. Bunce*, 33 N. Y. 139; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279; *Bennett v. Minott*, 28 Or. 339, 348, 39 Pac. 997, and 44 Pac. 288. A like attempt has frequently been made of late to use this fiction in connection with a conveyance to the legal entity, as a means of defrauding creditors, but seems to

have uniformly failed. In *Web Co. v. Dienelt*, 133 Pa. St. 585, 19 Atl. 428, which was a suit by a creditor of one company to set aside a conveyance by it to another, as in fraud of his rights, it appeared that the latter was formed substantially by the stockholders of the former, who relinquished their stock in it for stock in the latter; this being substantially all the consideration given by the purchasing company. This was held to be a fraud on the creditors of the former company, called the Aronia. The case does not differ in principle from the one before us. Here the conveyance was by an individual, and in consideration of stock taken in the corporation formed. The judge, delivering the opinion, said: "Is the Montgomery Company so completely a new and different company from the Aronia Company that the law must close its eyes to the fact that the difference is a mere jungle of names? We do not think there is any compulsion to such legal blindness. Settled general principles, and the analogies of the law, are against such a contention. If the corporation had merely changed its name, there could have been no doubt of the continued liability of the property." As to the creditors of the old company who had taken stock for their claims in the new one, they were held bound to know the nature of the transaction, and that the property conveyed could be followed by the creditors of the old company for the satisfaction of their claims. *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.*, 13 Fed. 516, is a case of like character, and was decided in the same way. In *Bennett v. Minott*, 28 Or. 339, 44 Pac. 288 (a case quite similar to the one before us, in all its facts), the court held that "when a debtor, for the purpose of hindering and delaying creditors, organizes a corporation, and transfers to it all his assets, he himself being the owner of practically all the corporate stock, and continuing the business the same after as before the incorporation, using the proceeds for his own benefit, equity will set aside such transfer at the instance of creditors, notwithstanding the incorporation is valid, and the corporate stock subscribed by the debtor is subject to sale under execution." Under such circumstances, a court of equity will look beyond the legal forms, and decide the case on the rights of the parties. *Terhune v. Bank*, 45 N. J. Eq. 344, 19 Atl. 377, is another case where an insolvent debtor, with the members of his family, formed a corporation,—a manufacturing company,—and conveyed to it his property, real and personal, much as in the case under review. The conveyance was set aside at the suit of a creditor. It was there said that, in conveying his property to the corporation so formed, he simply "changed his habiliments." The fiction in regard to a corporation being a legal entity was not allowed to avail him. And *Kellogg v. Bank*, 58 Kan. 43, 48 Pac. 587, is a recent case of similar character. It was there held that "a fraud may be perpetrated by an insol-

vent merchant through the instrumentality of a corporation organized and controlled by himself, to which he transfers the bulk of his property, as well as by a transfer to an individual; and where it appears that this has been done for the purpose of hindering and delaying creditors, and enabling the debtor to retain the management and control of his property, and of depriving his creditors of an opportunity to collect their dues, and when such insolvent retains substantially all the stock in the corporation, and no innocent person contributes any substantial sum to its assets, the court, in sustaining attachments levied on the property, and directing the sale thereof to satisfy the claims of creditors, is warranted in treating the whole transaction as a sham."

We are so clearly satisfied that the conveyance by Trebeln of his property to the corporation was made to hinder and delay creditors, and should have been so declared by the court, and ordered administered for the benefit of all his creditors, under the provisions of section 6344, Rev. St., that we think it unnecessary to consider whether, upon the facts, it did not also constitute an assignment in trust, in contemplation of insolvency, to secure one or more creditors, within the meaning of section 6343, Rev. St., and for such reason should be ordered administered as before stated. There is no doubt that an insolvent debtor, when he acts in good faith, may prefer one or more of his creditors. *Cross v. Carstens*, 49 Ohio St. 548, 31 N. E. 506. But the way in which this may be done has been very clearly defined. He may pay any of his creditors in money, or may convey property in satisfaction of his claim, or may give him a mortgage on property to secure it. But he must deal simply with the creditor preferred, and the latter must deal with an eye single to himself; and, when property is conveyed, it must be no more than a fair satisfaction of the debt. *Jamison v. McNally*, 21 Ohio St. 295. If the conveyance or mortgage is to secure others than the particular creditor to whom the property was conveyed or mortgaged, and was made in contemplation of insolvency, it becomes in law an assignment, within the meaning of section 6343, Rev. St., and inures to the benefit of all the creditors of the grantor. *Pendery v. Allen*, 50 Ohio St. 121, 33 N. E. 716; *Gashe v. Young*, 51 Ohio St. 376, 38 N. E. 20. If, therefore, we regard a corporation capable of taking such an assignment, and holding the property for the benefit of one or more creditors of the assignor, it would seem to follow that in this case the conveyance of Trebeln to the F. C. Trebeln Company must be regarded as an assignment in trust for the creditors with whom he placed the most of his stock as "a general security" to their claims against him, and therefore, under the section just referred to, may be held to be an assignment for the benefit of all his creditors. The primary object was, as stated by the attorney who conducted the matter,

to give security to the three banks; and the plan of a corporation was adopted in preference to a mortgage, that Trebeln might remain in control of the business, and make money enough to pay their claims. Hence, if this be true, the corporation took the legal title in trust for the benefit of these three creditors and the grantor; and the case would, in principle, differ but little, if any, from that of *Loudenback v. Foster*, 39 Ohio St. 203. The law of *Hoffman v. Mackall*, 5 Ohio St. 124, and *Conkling v. Coonrod*, 6 Ohio St. 611, may be regarded as abrogated by the act regulating assignments for the benefit of creditors adopted in 1859, and carried into the revision of 1880. By this law all conveyances in trust for creditors are, by sections 6335 and 6336, required to be administered in the probate court, irrespective of fraud; and all conveyances, transfers, and assignments made to hinder, delay, or defraud creditors, when set aside at the suit of any creditor, and all assignments in contemplation of insolvency in trust to prefer one or more creditors, are declared to be for the equal benefit of all creditors, and are required to be administered in the same court. The decision, however, is placed on the ground that the conveyance by Trebeln to the company was fraudulent as to his other creditors, and should be set aside, and the property administered for the benefit of all his creditors. The judgment is reversed, and cause remanded to the court of common pleas for further proceedings, under section 6344, Rev. St.

(59 Ohio St. 228)

WAMBAUGH v. NORTHWESTERN MUT. LIFE INS. CO. et al.

(Supreme Court of Ohio. Dec. 13, 1898.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—SOLVENCY OF ASSIGNOR—FORM OF INSTRUMENT NOT MATERIAL—PROBATE COURT JURISDICTION AND PROCEEDINGS.

1. When any person makes a transfer of property, money, rights, or credits to a trustee in trust for the benefit of creditors, such transfer constitutes an assignment under chapter 4, tit. 2, pt. 3, of the Revised Statutes of this state.

2. Even though the maker of such transfer should be fully solvent, still the transfer will be held to be an assignment if it is made to a trustee in trust for the benefit of creditors.

3. Any instrument which by a transfer of property creates a trust in a trustee for the benefit of creditors is an assignment, and its form in other respects is not material.

4. A deed conveying real property to a trustee in trust for the benefit of creditors constitutes an assignment, and such deed, or a copy thereof, should be filed in the probate court of the county in which the grantor resided at the time of the making of such deed, within 10 days after its delivery; and, on failure to so file the same, the probate judge should remove the assignee, and appoint a trustee to execute the trust, under the direction of the probate court.

5. In such cases, no proceeding is necessary in the court of common pleas to declare such deed to be an assignment, but the legal effect of such deed may be determined by the probate court upon application by the assignor or a

creditor, subject to a review upon error in a higher court.

6. Upon the removal of the assignee named in the deed of assignment, and the appointment of a trustee by the probate court to execute the trust, the legal title to the assigned property will follow such appointment, and vest in the trustee, and upon a sale by the trustee, confirmation by the court, and deed of conveyance the purchaser will take a good title.

(Syllabus by the Court.)

Error to circuit court, Delaware county.

In the matter of the assignment of John W. Jones, the Northwestern Mutual Life Insurance Company filed application for the removal of Charles M. Wambaugh and others, trustees. From an order of removal, Wambaugh brings error. Affirmed.

On the 19th day of January, 1897, John W. Jones, of Delaware county, executed and delivered to James W. Gallant, Stephen C. Thomas, and Charles M. Wambaugh his certain deed of that date, conveying to them 480 acres of land in Delaware county, in this state, together with certain town property. The deed was upon the trust following, as expressed therein: "To have and to hold said premises, with all the privileges and appurtenances thereto belonging, to the said James W. Gallant, Stephen C. Thomas, and Charles M. Wambaugh, as trustees, their successors and assigns, forever; this conveyance being made to the said James W. Gallant, Stephen C. Thomas, and Charles M. Wambaugh, as trustees, for the following purposes, to wit: Said trustees to take immediate possession of said lands, subject to existing leases; to collect all rents, income, and profits arising from said lands and tenements; and to sell the same in such lots and parcels as they may deem best, whenever such sale can be made to the advantage and interest of my creditors; and said trustees are authorized and empowered to execute deeds to the purchasers of said lands whenever sales are made by them, with or without covenants of warranty, as they may deem best, and to give such time for the payment of the purchase money to the purchasers thereof as they may think proper, provided said deferred payments are secured by mortgage on the premises sold; and until said lands are so sold said trustees are hereby authorized to rent or lease the same in such manner as they deem best to secure the best income therefrom. Said trustees are hereby authorized to pay all taxes and assessments levied upon said lands and tenements, and to make all necessary and proper repairs thereon, and out of the proceeds arising from the rents and profits, and from the sale of said lands and tenements, said trustees are hereby authorized and directed to pay and distribute the same, as follows: (1) To pay all liens upon said premises in the order of their priority. (2) To pay all my individual creditors as their claims are properly proven to said trustees, making equal distribution among them, so that no preference shall be given to one individual creditor over another. (3) To pay to

the creditors of Miller, Jones & Co. the amounts which may be found due to them from me as a member of said firm, making equal distribution among them as their claims may be ascertained and determined. (4) Whatever surplus may remain after the payment of all the above claims, in lands or money, said trustees are to transfer or pay over to said John W. Jones, his administrators, executors, and assigns. The said trustees are to have a reasonable compensation for their services and expenses in the execution of this trust, the amount to be agreed upon by the parties hereto, or fixed by a court having proper jurisdiction in the premises, and the same to be paid or provided for before distribution or payment is made to my creditors, as herein provided for. This conveyance is made at the same time with other deeds for grantor's lands in Marion and Franklin counties, to the same grantees, so as to constitute one trust for said purposes of all of grantor's property."

A like deed, of the same date, was executed and delivered by him to the same trustees for 537 acres of land in Marion county, both of which deeds were duly left for record and recorded. While both deeds recite that a deed was also executed and delivered for lands in Franklin county, it appears that the deed for the Franklin county lands was never executed or delivered, and there is nothing to show whether Mr. Jones had any lands in Franklin county or not.

On the 15th day of October, 1897, the Northwestern Mutual Life Insurance Company filed the following application in the probate court of Delaware county: "And now comes the Northwestern Mutual Life Insurance Company, a corporation, and represents to the court that it is a creditor to said John W. Jones. That on or about January 19, 1897, the said John W. Jones, then a resident of Delaware county, Ohio, made and executed an assignment to James W. Gallant, Stephen C. Thomas, and Charles M. Wambaugh, as trustees, of all of his real estate, in trust for the benefit of his creditors, said assignment being made by three deeds, each bearing date January 19, 1897; one of said deeds conveying to said trustees real estate in Delaware county, Ohio, another of said deeds conveying real estate in Marion county, Ohio, and another of said deeds conveying real estate in Franklin county, Ohio. That said deeds of assignment were delivered to said trustees, and were filed for record, respectively, in the recorder's office of Marion, Delaware, and Franklin county, Ohio, for record, on or about January 9, 1897. That neither said deeds of assignment, nor any copy thereof, has been filed in the probate court of Delaware county, Ohio, wherein said John W. Jones resided at the date of the execution of said assignment, though more than ten (10) days have passed after the execution of the same, and have failed to give bond for more than ten (10) days after the execution of said

deeds of assignment to them. Wherefore the Northwestern Mutual Life Insurance Company, a corporation and a creditor as aforesaid, asks the court to make and enter an order removing said trustees, and to appoint a trustee in their place to administer said trust, under the statutes of Ohio relating to insolvent debtors."

The grantees in said deed filed a demurrer to this application, which was overruled, and exceptions taken; and thereupon they filed the following answer: "And now come the trustees named in the application herein filed, and for their answer herein say that they admit that the Northwestern Mutual Life Insurance Company is a creditor of the said John W. Jones, but they deny that said John W. Jones executed a deed of assignment on the 19th day of January, A. D. 1897, or at any other time, but, on the contrary, they say that said John W. Jones made deeds of trusts at the time named for certain lands and tenements for the purpose of paying all his creditors alike, without preference or priority, and that they accepted said trust, and have ever since been, and are still, proceeding to execute said trust under the control and direction of the court of common pleas of Delaware county, Ohio, and they deny all other allegations of said application not herein admitted to be true."

The matter was heard in the probate court, and the two deeds were introduced in evidence, and the court found that Mr. Jones, at the time of making said deeds, was a resident of Delaware county; that the Northwestern Mutual Life Insurance Company was and is a creditor of Mr. Jones; that neither said deeds nor copies thereof were filed in the probate court of Delaware county within 10 days after the execution and delivery of said deeds to said trustees; that the said trustees, being the grantees named in said deeds, did not file in the probate court, within 10 days after the execution and delivery of said deeds, their bond for the faithful discharge of their duties as trustees. And thereupon the probate court rendered judgment in favor of the said application, and removed said trustees, and appointed a trustee to execute said trust, treating said two deeds as a general assignment of said John W. Jones for the benefit of his creditors; which said trustee accepted the trust, and gave bond according to law, and entered upon the discharge of his duties. The grantees in said deed excepted to the ruling of the probate court, and filed a motion for a new trial, which was overruled; and they also took a bill of exceptions, setting out all the evidence that was offered on the hearing, and filed a petition in error in the court of common pleas to reverse the judgment of the probate court.

The court of common pleas affirmed the judgment of the probate court, and thereupon James W. Gallant and Stephen C. Thomas refused to prosecute the case further. And

Charles M. Wambaugh, trustee, filed a petition in error in the circuit court seeking to reverse the judgments of the lower courts, and made said James W. Gallant and Stephen C. Thomas defendants in error. The circuit court affirmed the judgments, and thereupon Mr. Wambaugh, as trustee, filed a petition in error in this court, still joining said James W. Gallant and Stephen C. Thomas as defendants in error, seeking to reverse the judgments of the courts below.

Powell & Minahan and John A. Cone, for plaintiff in error. Saylor & Saylor, J. D. Van Deman, and Wolford & Crissinger, for defendants in error.

BURKET, J. (after stating the facts). It is conceded by all parties that the conveyances made by John W. Jones to James W. Gallant, Stephen C. Thomas, and Charles M. Wambaugh are, in legal effect, conveyances of property to trustees in trust for the benefit of creditors. It is also conceded that the Northwestern Mutual Life Insurance Company, defendant in error, was at the date of said conveyance, and still is, a creditor of said John W. Jones. The insurance company claims that the conveyances are, in legal effect, an assignment to trustees for the benefit of creditors, while the plaintiff in error claims that the conveyances do not constitute such an assignment. All conveyances made to a trustee in contemplation of insolvency, or made with intent to hinder, delay, or defraud creditors, are assignments, under the provisions of sections 6343, 6344, Rev. St., as they stood before the amendment of April 26, 1898, and are to be administered as such. A conveyance in trust may therefore be an assignment when made in contemplation of insolvency. Can it be an assignment when not made in contemplation of insolvency?

While sections 6343 and 6344 provide that conveyances made in contemplation of insolvency, with intent to prefer one or more creditors, or made with intent to hinder, delay, or defraud creditors, shall be held to be general assignments, and shall inure to the equal benefit of all creditors, these sections do not provide what shall constitute an assignment when not made in contemplation of insolvency, and not with the wrongful intent mentioned in said sections, and we have no statute in this state defining what shall constitute a general assignment for the benefit of creditors. The statutes on the subject of such assignments assume that it is known what constitutes an assignment for the benefit of creditors, and treat the subject from that standpoint. Whatever constitutes an assignment for the benefit of creditors at common law will be held to be an assignment under our statutes, and in some respects our statutes are broader than the common law, but never narrower.

At common law, any person of sound mind could make an assignment of his property to

a trustee for the benefit of his creditors. 3 Am. & Eng. Enc. Law (2d Ed.) 22. And such assignment could be made at common law by a person fully solvent. *Hunter v. Ferguson*, 3 Colo. App. 287, 33 Pac. 82; *Ogden v. Peters*, 21 N. Y. 23; *Angell v. Rosenbury*, 12 Mich. 241; *Wolf v. Muldrow* (Ark.) 18 S. W. 55; *Penzel Co. v. Jett*, 54 Ark. 428, 16 S. W. 120.

The form of the instrument making the conveyance is not material. Any instrument which transfers the property to a trustee in trust for the benefit of creditors constitutes an assignment at common law. In such cases, the conveyance is in trust for the benefit of others, and such trust characterizes the transaction as an assignment rather than as a simple conveyance. It has been held that the form of the instrument is immaterial when the conveyance is made in contemplation of insolvency, and we hold the same to be true when the conveyance is made by a person fully solvent. *Lee v. Hennick*, 52 Ohio St. 177, 182, 39 N. E. 473.

The deeds in question in this case conveyed the property to trustees in trust for the benefit of creditors, and therefore, in legal effect, they constitute an assignment, even though Mr. Jones may have been fully solvent at the time of the making and delivering of the deeds. Whether he was then solvent or not does not fully appear in the record, but, for the purposes of this case, he is regarded as solvent.

As said deeds, in legal effect, constitute an assignment, it is clear that under section 6335, Rev. St., it was the duty of the trustees to file the deeds, or copies thereof, in the probate court of Delaware county, where Mr. Jones resided, within 10 days, as required by that section of the statute, which reads as follows: "When any person, partnership, association or corporation, shall make an assignment to a trustee of any property, money, rights or credits, in trust for the benefit of creditors, it shall be the duty of said assignee, within ten days after the delivery of the assignment to him, and before disposing of any property so assigned, to appear before the probate judge of the county in which the assignor resided at the time of executing the said assignment, produce the original assignment, or a copy thereof, cause the same to be filed in the probate court, and enter into a bond, payable to the state, in such sum and with such sureties as shall be approved by the court, conditioned for the faithful performance, by said assignee, of his duties according to law; and the court may require the assignee, or any trustee subsequently appointed, to execute an additional undertaking whenever the interests of the creditors of the assignor demand the same; any such assignment shall take effect from the time of its delivery to the probate judge, and the exact time of such delivery shall be indorsed thereon by the probate judge, who shall immediately note the filing on the journal of the court; and it may be delivered by the assignor to the probate judge either be-

fore or after its delivery to the assignee." The public policy established by this section regards a man who places his property into the hands of a trustee for the benefit of his creditors, and thereby deprives himself of the power of using his property for that purpose, the same as dead as to such property, and the trust a public one, in which the state is interested, because the state is always interested to see that creditors receive their just dues. Therefore the state requires that such a trust shall be administered under the direction of its courts, and bonds are required of the trustee for the faithful performance of his duties as such trustee; that is, for the faithful administration of the trust. The trustees in this case having failed for more than 10 days to file the said deeds or copies thereof, in the probate court, it became the duty of that court to remove said trustees, and appoint others, as provided in section 6336, Rev. St., which reads as follows: "If any such assignment or a copy thereof shall, for ten days after the execution of the assignment, not be filed in the probate court as aforesaid, or if the assignee named thereon fail for that time to give bond as aforesaid, the court shall, on the application of the assignor, or of any of his creditors, make an order removing such assignee and appoint a trustee in his place: provided, that if more than one assignee be named in the assignment, and some of them fail as aforesaid, the court may permit the assignee or assignees complying with the preceding section to qualify and enter upon the discharge of the duties of the trust."

The deeds were not made in contemplation of insolvency, with intent to prefer one or more creditors, nor with intent to hinder, delay, or defraud creditors, and therefore no action is required in the court of common pleas, as provided in section 6344, Rev. St., as it stood before the amendment of April 28, 1898. The object of the action provided for in that section is to set aside a fraudulent conveyance, and ascertain the trust, and declare it to inure to the equal benefit of all creditors. Here the deeds themselves declare the trust to be for the equal benefit of all creditors, and there is no action necessary to establish that which the deeds have already established. The effort here is not to set aside a conveyance, but to have the conveyance executed according to its terms, and administered under the orders and supervision of the probate court. All parties concede the deeds to be valid, and the only controversy is as to the manner of executing the trust thereby created.

Before the passage of the act of April 6, 1859, entitled "An act to regulate the mode of administering assignments in trust for the benefit of creditors" (56 Ohio Laws, p. 231; Swan & C. St. p. 709), such trusts were administered in the court of common pleas, which might, under former statutes, require security of the trustees for the faithful execution of the trust, or remove them and

appoint others, as justice might require. See Act March 14, 1853 (51 Ohio Laws p. 463; Swan & C. St. p. 712, note).

By the act of April 6, 1859, the jurisdiction, in matters of assignment, was vested exclusively in the probate court, where it has ever since remained, and now the court of common pleas has no jurisdiction in matters of assignments, except as provided in sections 6344, 6351, Rev. St.; and therefore the cases of *Hoffman v. Mackall*, 5 Ohio St. 124, *Conkling v. Coonrod*, 6 Ohio St. 612, and *Floyd v. Smith*, 9 Ohio St. 546, are not applicable here, because they all arose and were decided before the probate court obtained jurisdiction of assignment matters; and while such jurisdiction was exercised by the court of common pleas. The deeds in the above cases of *Hoffman v. Mackall* and *Conkling v. Coonrod* were very much like the deeds in the case at bar, and they were treated as assignments by the parties and by the court; and the effort in those cases was to set aside the conveyances as fraudulent, and not to execute the conveyances, as is the case here. The conveyances in both cases were upheld as valid, and no question was made as to the manner of administering the trust, as it had then to be administered in the court of common pleas, the probate court not yet having acquired jurisdiction. The above case of *Floyd v. Smith* was an action by Mr. Smith, to whom a transfer of personal property had been made in trust, against the sheriff who had taken the property in execution in a suit against the assignor, the sheriff claiming the transfer to be fraudulent and void. The question was as to the validity of the transfer, and the transfer was sustained. No question was made as to the manner of executing the trust. For the reason that the probate court had not then acquired jurisdiction, and the further reason that the questions presented and decided were entirely different from the question in this case, those cases are not applicable here, and throw no light upon the questions involved in this case.

All assignments, or copies thereof, are required, by section 6335, to be filed in the probate court; and it has been urged that, before such filing can be legally required, there must be an adjudication in the court of common pleas to the effect that the deeds in question constitute an assignment. That adjudication is not necessary, and is not required by any provision of the statute. The probate court, having jurisdiction in matters of assignment, can determine that question itself upon the application of the assignor or a creditor, subject to a review on error in the higher courts, as was done in this case.

It is contended by counsel for plaintiff in error that the deeds of conveyance vested the title to the lands in the trustees, and that their removal and the appointment of a trustee by the probate court cannot have the effect to vest title in such trustee, and that a purchaser from such trustee would not

take a good title. This contention is not sound. It was said in *McNeill v. Hagerty*, 51 Ohio St. 255, 263, 37 N. E. 526, that in such cases the legal title follows the order of the court and vests in the trustee appointed by the probate court. In this case, the title vested in the trustees under the deed in trust for the creditors, and such trust is under the jurisdiction and control of the probate court, and certainly the removal of the trustee by the order of the probate court, and the appointment of another trustee, has the legal effect, when a sale is made and confirmed by the court, and deed executed and delivered by the new trustee, to divest the legal title out of the original trustees, and vest the same in the purchaser as a good and indefeasible title. Such being the case, the purchaser will take a good title.

A persistent effort has been made by counsel for the insurance company to have this case disposed of on technical points of practice, without reaching the merits of the controversy between the parties, but we regard the points raised as not well taken, and have considered the case on its merits. Judgment affirmed.

(177 Ill. 538)

HALLISSY et al. v. WEST CHICAGO PARK COM'RS.

(Supreme Court of Illinois. Feb. 17, 1899.)

APPEAL—DECISION.

The only difference between two cases being that one is an appeal by part of the property owners from a judgment of confirmation of an assessment for street improvement, and the other a writ of error by the other property owners, the decision on the appeal already rendered must control the second case submitted on the same record.

Error to Cook county court; C. H. Donnelly, Judge.

Application by the West Chicago park commissioners for confirmation of an assessment for improvement of Warren avenue. There was a judgment of confirmation, and John F. Hallissy and others bring error. Reversed.

Prentiss, Hall & Gregg, for plaintiffs in error. Francis A. Riddle and H. S. Mecartney, for defendants in error.

PER CURIAM. This case is substantially like *Farr v. Commissioners*, 167 Ill. 355, 46 N. E. 893, and it was submitted on the same record. The only difference between the two cases is that the *Farr* Case was an appeal by a part of the property owners from a judgment of confirmation, while this is a writ of error by the other property owners. The cases being alike, this must be controlled by *Farr v. Commissioners*, supra. The judgment will be reversed, and the cause remanded, as to the property of plaintiffs in error J. F. Hallissy, A. C. Wakeman, T. C. Brockhausen, T. Kerndt, and G. M. Kerndt, with directions to reduce the assessment against their lands their proportionate shares of the

sums illegally included in the estimate aforesaid, as declared in *Farr v. Commissioners*, supra. Reversed and remanded.

(177 Ill. 606)

MUHLKE et al. v. TIEDEMANN et al.

(Supreme Court of Illinois. Feb. 17, 1899.)

WILL—CONSTRUCTION—DEVISE IN FEE.

Testator's wife takes in fee, and not for life only, the will providing: "All of the property * * * of which I may die seised or possessed * * * I give * * * unto my beloved wife, * * * to have, use, lease, dispose of, and convey at her own will and discretion, subject only to this restriction and prohibition: that she shall not mortgage or convey the same * * * without the written consent of H. and M. during their joint lives, or of the survivor of them during his life."

Appeal from superior court, Cook county; John B. Payne, Judge.

Bill for partition by Henry C. Muhlke and others against Louisa Tiedemann and others. Bill dismissed, and complainants appeal. Affirmed.

John H. Muhlke died testate in 1879, leaving a last will and testament, which is in the words and figures following:

"I, John H. Muhlke, of Chicago, state of Illinois, being of sound and disposing mind and memory, do make and publish this, my last will and testament:

"First. I direct that all my just debts be paid.

"Second. All of the property, real and personal, of which I may die seised or possessed, and wherever situated, I give, devise, and bequeath unto my beloved wife, Catharina Muhlke, to have, use, lease, dispose of, and convey at her own will and discretion, subject only to this restriction and prohibition: that she shall not mortgage or convey the same or any part thereof, without the written consent of John K. Harmon and Charles G. Muhlke during their joint lives, or of the survivor of them during his life.

"Third. I hereby nominate and appoint my said wife sole executrix of this, my last will and testament, and request that she be not required to give bond or security for the performance of her duties as such executrix.

"In witness whereof I have hereunto set my hand and seal this 29th day of April, A. D. 1879. John Henry Muhlke. [Seal.]

"The foregoing will was signed by the above-named testator in our presence, and at his request witnessed by us in his presence and in the presence of each other.

"George Atzel.

"Louis Hees.

"George Apfel."

Catharina Muhlke, widow of the said John H. Muhlke, died testate in 1895, leaving a last will and testament, which is in the words and figures following:

"I, Catharina Muhlke, of the city of Chicago, being of sound mind and memory, do

hereby make and declare this to be my last will and testament:

"First. I give and bequeath to the Uhllich Evangelical Lutheran Orphan Asylum of Chicago the sum of five thousand dollars (\$5,000).

"Second. I give and bequeath to Jacob H. Tiedemann, as a recognition of the able and faithful manner in which he has for many years managed my property, the sum of ten thousand dollars (\$10,000).

"Third. Subject to the payment of said legacies and my just debts and funeral expenses, I give, devise, and bequeath all my estate, real, personal, and mixed, to Jacob H. Tiedemann, John K. Harmon, and Joseph H. Muhlke, in trust, for the following uses and purposes: (a) They shall take possession of said estate, and manage the same; shall collect all rents, profits, dividends, interest, and other income arising from the same; they shall make all necessary repairs, and pay taxes, assessments, and insurance premiums; they shall have the power, in their discretion, to improve any portion of my unimproved real estate, by the erection of buildings thereon, and to add to or alter the improvements on such of my real estate as is already improved, or to replace improvements that may be destroyed by fire or otherwise, and, for the purposes above mentioned, said trustees may use the income of my estate, or a part of the principal of the same. They shall have full power to invest or reinvest all moneys that may from time to time belong to my estate, whether arising from the income or the sale of any part of the real or personal property belonging to the same, such investments to be in good, interest-bearing securities, giving the preference to first mortgages on real estate, United States government, state, municipal, or good local bonds; and, further, my said trustees shall have full power to sell and dispose of my personal property, to collect or sell my securities, and to give all proper receipts and releases therefor, and shall have full power, also, to sell and convey any or all of my real estate, for cash or on deferred payments, as they may deem best, and to give the necessary deeds of conveyance therefor, and also to lease all or any part of my real estate on ordinary, short-term leases, or on longer terms, commonly called 'ninety-nine year' leases. It is my intention to vest in my trustees the absolute management of my estate, and to give them full powers for that purpose, whether hereinbefore specifically set forth or not, with a view to its preservation, increase, and ultimate distribution, as hereinafter set forth. (b) My trustees shall annually make out a true statement of the income and expenditures of my estate, and shall furnish the beneficiaries with a copy of the same. They shall divide the net income annually into four (4) parts. One part thereof, or one-quarter, shall remain as part of my general estate, to be reinvested, and three parts thereof, or three-quarters, they shall divide equally between my children. In case of the death of any of my children leaving issue and a husband or

wife him or her surviving, then one-third of such child's share of the income shall go to such husband or wife so long as he or she remains unmarried, and the balance to the issue, and upon the death or marriage of such husband or wife the whole of the respective share to the issue. Should such deceased child leave a husband or wife, but no issue, then, in like manner, one-third of its share of the income shall go to the husband or wife during life, or so long as he or she remains unmarried, and the balance shall remain a part of my estate. (c) At the end of twenty (20) years from the date of my death my entire estate shall be partitioned, distributed, and divided in equal shares between my children then living and the issue of such of my children as may then be dead, such issue to take such share as the parent would have taken if living. Should there then be living a husband or wife of a deceased child entitled to a part of the income of my estate, as above set forth, his or her share of such income shall be capitalized according to the mortuary tables, and such capital sum paid to him or her in lieu of such annuity. (d) Should it appear at the time when my estate is to be distributed and divided that any of my children shall be without issue, either children or grandchildren, then the share of my estate to which said child shall be entitled shall not be paid to it, but my said trustees shall continue to hold said share in trust for said child, and to manage it, paying to it the net income of the same, and shall have all the powers hereinbefore granted to them for the management of my entire estate, and upon the death of said child its said share shall be distributed among my other children and the issue of any deceased child on the principles hereinbefore stated; the surviving wife or husband, if any, to be treated the same as the wife or husband of any child dying before the distribution of my estate, as hereinbefore set forth. Should such child have lawful issue after the distribution of my estate, then its distributive share of my estate shall be conveyed, delivered, and paid over to him or her, and the trust in this paragraph created shall terminate. (e) I direct that the income so to be paid annually to the beneficiaries under this will, as well as their distributive share of my estate, when the same is divided and distributed, as aforesaid, shall be paid, distributed, assigned, and conveyed to each of said beneficiaries in person, or to their lawful appointed guardian or other legal representative, and that in no event shall any or either of said beneficiaries have the right or power to anticipate his or her share of said estate, or its income, by any order on said trustees, assignment, conveyance, or other voluntary transfer, or by operation of law, by virtue of any attachment, judgment, decree, or other legal proceedings against such beneficiaries.

"Fourth. I hereby direct that, of the three trustees above named, Jacob H. Tiedemann shall be the managing trustee, and as such shall attend to the keeping of the books and

the usual office work, and shall receive a compensation of \$2,500 per annum; the other trustees not to receive any compensation for their services. In case of the resignation, death, inability, or refusal to act. of any of said trustees, the remaining two trustees shall choose a third trustee, and shall also choose from their number a managing trustee, if the vacancy so to be filled be that of managing trustee. Said remaining trustees shall file in the office of the recorder of deeds of Cook county, Illinois, a certificate of the appointment by them of a third trustee, which certificate shall be under their hands and seals, and shall be evidence of such appointment.

"Fifth. I nominate and direct, also, that said Jacob H. Tiedemann, John K. Harmon, and Joseph H. Muhlke be appointed the executors of this, my last will and testament, and that they be not required to give bond as such; and I hereby revoke all former wills by me made.

"In witness whereof I have hereunto set my hand and seal this 14th day of January, A. D. 1895. Catharina Muhlke. [Seal.]"

(Certificate of witnesses, etc.)

Each of these wills was duly admitted to probate in the probate court of Cook county, and each of said testators left surviving the same eight children as their respective heirs at law. Thereafter a bill for partition was filed in the superior court of Cook county by three of the heirs at law of said John H. Muhlke against the other heirs at law of said John H. Muhlke (all eight of said heirs being also devisees under the will of their mother, Catharina Muhlke), and also against the husbands and wives and children of such heirs and devisees, and against the trustees under the will of said Catharina Muhlke. The complainants in the bill (appellants here) claimed that the estate devised by their father to their mother was simply a life estate, with a power, under certain conditions and limitations, to mortgage or convey the fee, and that the fee in remainder descended to the heirs at law of said John H. Muhlke, and that their mother had no estate which she could devise, and that her only right to dispose of the fee was by virtue of the power conferred upon her, and not by virtue of any estate vested in her, and that she did not devise the fee under such power, but, if she did, the devise is void because it violates the rule against perpetuities. A demurrer to the bill was sustained and the bill dismissed for want of equity, and this appeal to this court was then taken by complainants.

Pence & Carpenter, for appellants. Sidney Smith, for appellees.

PER CURIAM. The first question to be determined in this case is, did Catharina Muhlke, widow of John H. Muhlke, deceased, take the absolute title to the property given and devised to her in the second clause of his will, or only a life estate with a restricted power of disposal? and if only the latter, and her will was a mere execution of the power

so far as it disposed of said property, the second question is, does her will violate the rule against perpetuities, and is it therefore void? The complainants in the bill, three of the heirs at law of John H. Muhlke, sought to partition the lands as intestate estate, Catharina Muhlke being dead. She died seised and possessed also of real and personal property not derived from the will of her husband, and which is not involved in this suit. The trustees named in her will claim to hold the property sought to be divided, in trust for the purposes mentioned in her will. From the view we take of the case, the second question does not arise. The clause of John H. Muhlke's will upon the construction of which must depend the answer to the first question, and the decision of the case, is as follows: "Second. All of the property, real and personal, of which I may die seised or possessed, and wherever situated, I give, devise, and bequeath unto my beloved wife, Catharina Muhlke, to have, use, lease, dispose of, and convey at her own will and discretion, subject only to this restriction and prohibition: that she shall not mortgage or convey the same, or any part thereof, without the written consent of John K. Harmon and Charles G. Muhlke during their joint lives, or of the survivor of them during his life." There is not, either in this clause or in any other part of the will, any limitation or devise over, or any intimation that any other person or persons shall thereafter, under any circumstances, have any right or interest whatever, of any kind, in the estate, or any part of it. In the construction of a will the primary consideration is the ascertainment of the real intention of the testator, and, for the purpose of such ascertainment, regard must be had to each and all of its provisions. It may well be that, under the rules of law, force, vitality, and effect cannot be given to some of them; but nevertheless, so far as they throw light upon the provisions of the will, and thus aid the expounder in ascertaining the testator's intention, they are to be regarded in its interpretation. It will be noticed that the will gives and devises to said Catharina all of the property, real and personal, of which the testator should die seised or possessed, wherever situated. There can be no doubt that this language, without the restrictive clause, would have been amply sufficient to pass the title to the realty in fee simple to the devisee, not only under our statute, but even at common law. While the technical words "heirs and assigns" were not used, still the entire right, interest, and title of the testator were included in the words employed, and would pass under them at common law. 4 Kent, Comm. *535; 2 Jarm. Wills, *283; *Lincoln v. Lincoln*, 107 Mass. 590. True, as contended by counsel for appellants, a part of the clause cannot be wrested from its connection with the rest, and construed separately, and from that a conclusion reached that a fee was devised, and the rest of the clause be then

rejected as repugnant to such fee. The entire clause, and even the rest of the will, if it throws any light on the subject, must be considered and construed together. Still, the comprehensive character of the language used in the first part of the clause cannot be lost sight of in the interpretation of the entire clause. If the devise of the property mentioned had been to Catharina Muhlke "in fee simple," or to her and "her heirs and assigns," "to have, use, lease, dispose of, and convey at her own will and discretion, subject only" to the restriction mentioned, there could be no doubt that the fee would have passed, and that the attempted restriction upon the right of alienation would not limit the estate. The only difference would seem to be that in such a case the intention to devise the fee would expressly and necessarily appear by the use of technical words having a definite legal signification, while as the clause was written such intention appears by necessary implication, unless, indeed, it can be said that such implication is controlled and defeated by the same attempted restriction. Without such restrictive clause there could be no more doubt in the one case that the fee would pass than in the other. What force, then, should be given to this restriction of the power of alienation of the fee?—for that is what the qualifying words of the clause mean. Appellants contend that they so control the rest of the clause as to limit the interest devised to a life estate, with a qualified power of disposal of the fee. There is, however, no language used by the testator denoting an intention to devise to his wife a life estate only. There is no devise over, and from the language used we cannot presume he intended to die intestate as to the fee. Such a presumption should not be indulged in any case where the will is open to any other reasonable construction. It was doubtless his wish, as expressed in his will, that she would not mortgage or convey the property devised to her without the written consent of the two persons named; but, as the will clearly devises the title in fee, the restriction upon the power of alienation of the owner in fee must be held to be without legal force, as the power of alienation is a necessary incident to absolute ownership. *Friedman v. Steiner*, 107 Ill. 125; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814; *Steib v. Whitehead*, 111 Ill. 247.

In so holding we do not overlook appellants' contention that there is a distinction between a technical devise of a fee and an indefinite devise in fee by implication, and that in the one case the fee would pass at common law, unless a contrary intention appears from the context, while in the other case it would pass even against the expressed intention of the testator, because, by virtue of the rule in *Shelley's Case*, the testator having designated the estate devised by technical words, the necessary legal operation of which is to pass the fee, the legal intention which they import cannot otherwise be contradicted.

Granting that such technical words were not used in the will in question, and that at common law, and without regard to the statute, the fee, if devised at all, is devised by implication only, and that such a devise should not be implied, unless such implication arises from a consideration of the whole instrument, still, where such implication is not overcome by the qualifying clause, it must prevail in the construction of the will, to the same extent as if there were a technical devise in fee, for otherwise the restrictive clause would be given more force than the rest of the will. True, as said by counsel, this court said in *Siddons v. Cockrell*, 131 Ill. 653, 23 N. E. 586, that "a devise of land without the use of the word 'heirs,' or other words necessary at common law to pass a fee, is only to be construed as a devise of a fee when it does not appear from the entire will that a less estate was intended"; but applying that rule here, as we have in the construction of the clause in question, the result contended for by appellants cannot be reached, and no such result can be reached without resorting to a strained and artificial interpretation and construction. After applying all appropriate recognized rules of construction, the will discloses no intention different from that which plain common sense would attach to the language used. The testator intended to devise, and did devise, the property to his wife absolutely, but, evidently desiring that she should avail herself of the judgment of the persons named, in the mortgaging or sale of the property, undertook to limit her power to convey by making their consent necessary. Whatever moral force such a restriction might have had on the devisee, it could not operate to limit what would otherwise be an estate in fee simple absolute to a life estate. In nearly all of the cases cited by the appellants there was a limitation over, or other qualification sufficient to rebut the implication that it was intended a fee should pass.

This construction of John H. Muhlke's will disposes, also, of all questions raised as to the construction of the will of Catharina Muhlke, for it is not contended that her will violates the rule against perpetuities, if she was the owner in fee of the lands which she devised in trust by her will, but only that it had that effect if her will disposed of lands which his will merely gave her a power to dispose of, and her will was made in execution of such power, the point being that if the estate appointed by her will in the execution of the power would have been void, as against the rule, had it been made by his will, it is void as made by her will. 4 Kent, Comm. *338; Gray, Perp. § 515. But, as we have held that her will was not the mere execution of a power given to her by her husband's will, no further attention need be paid to this branch of the case, it having been cut off by the construction given to the first will. The decree below dismissing the bill was correct, and it will be affirmed. Decree affirmed.

(176 Ill. 188)

HOUGH v. COLLINS.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

MECHANICS' LIENS—AGENT OF OWNER—EVIDENCE.

In a suit to establish a mechanic's lien it appeared that defendant contracted with D. to construct a building on defendant's premises, for which the latter was to pay the actual cost; that D., as owner, contracted with plaintiff to furnish the labor and material for certain work on the building, and that plaintiff, on discovering that defendant was the owner, requested a new contract with him, which was drawn up, and signed by plaintiff, but not by defendant; that during the progress of the work D. told others that he was acting as agent for defendant, and defendant also said that D. was his agent in the construction of the building, and that the architect and D. recognized plaintiff as working under the contract between defendant and D. *Held*, that D. was defendant's agent, and not the original contractor.

Appeal from appellate court, First district.

Bill by Thomas A. Collins against William Hough to establish a mechanic's lien. From a judgment of the appellate court affirming a decree of the circuit court for plaintiff (70 Ill. App. 661), defendant appeals. Affirmed.

Charles Pickler, for appellant. Sullivan & McArdle, for appellee.

PHILLIPS, J. Appellee obtained a decree for a mechanic's lien on the property of appellant, which decree was affirmed by the appellate court. If the contract upon which appellee's suit was predicated was made with the agent of appellant, then the decree should be affirmed; otherwise, reversed. Appellant contends he neither made nor authorized the contract with appellee; that he had made a contract with C. E. Dorn & Co., as original contractors, to construct the building, and that appellee was a subcontractor under them. The evidence shows that on September 29, 1892, C. E. Dorn & Co. and appellant made a contract, reciting that appellant was desirous of improving the premises described in the bill with a building suitable for a World's Fair hotel (to be afterwards remodeled into a flat or apartment building), and desired the aid and assistance of said Dorn & Co. in the erection of said improvement, and, after the termination of the World's Columbian Exposition, in the remodeling of said building into flats or apartments; that appellant would furnish the money to construct the same according to the design and plan, on presentation of the proper certificate of the architect; that he would also pay the cost of remodeling the same after the close of the Fair, together with the cost of plans and specifications and architect's commission, which reconstruction was to be done as soon as practicable after January 1, 1894, or after the close of the World's Fair. Another contract between the same parties, dated November 5, 1892, was made, by which Dorn & Co. were to furnish materials and construct a certain building,

according to certain plans, on said premises, for \$17,600, to be completed on or before April 15, 1893. On January 10, 1894, another contract between the same parties was made, by which Dorn & Co. were to construct a certain building on said premises according to certain plans and specifications, for which appellant was to pay the actual cost thereof as the work progressed, which building was to be completed by April 15, 1894. On February 14, 1894, C. E. Dorn & Co., as owners, made a certain contract with appellee, Collins, by which he was to furnish all the materials and labor necessary to complete all the carpenter work on said World's Fair hotel on said premises, known as the "Montreal," and one three-story World's Fair hotel known as the "Western Reserve," to be remodeled into apartments, according to plans and specifications made by the architect, Kennard, which work was to be done to the architect's satisfaction, and for which Collins was to receive \$9,600. Payments were to be made from time to time, on certificates of the architect, the entire sum to be paid within 30 days after acceptance. On the 20th day of February, 1894, a contract was prepared by said architect, by the direction of Dr. Dorn, one of the members of said firm (the other member being his wife), between the appellant, Hough, and appellee, Collins, by which Collins was to furnish the material and labor necessary to complete all carpenter work on said World's Fair hotel known as the "Montreal," to be remodeled into apartments according to plans and specifications of Architect Kennard, for the sum of \$3,450, payments to be made on certificates of the architect as the work progressed. The work was satisfactorily completed by Collins, and accepted by the architect, and a final certificate was issued January 31, 1895, for \$1,925, which has not been paid. The certificates were all issued by the architect "to C. E. Dorn & Co., account William Hough," for payment to T. A. Collins on contract for \$3,450. The evidence shows that after Collins made the contract of February 14, 1894, with C. E. Dorn & Co., which represented them to be the owners, he found that William Hough was the owner, and presented the facts to Dr. Dorn, a member of the firm, and, as appears, the active member, and requested, as a guaranty, a new contract with the owner; and by his direction the contract of February 20, 1894, was drawn up by the architect, and signed by Collins, but not by Hough. This was done before Collins began work. This contract of February 20, 1894, Hough, the appellant, repudiates as unauthorized.

It is not deemed necessary to review the evidence in detail, but the conclusion reached is that C. E. Dorn & Co. were the agents of Hough, and were not actually the original contractors of the work. It is not pretended that Dr. Dorn and his wife were in the business of making such contracts. In fact, they were not contractors. It seems they super-

¹ Rehearing denied December 13, 1898.

intended the construction and management of Hough's World's Fair hotel. The first contract between Hough and them shows that he simply desired their "aid and assistance," for which they were to get no compensation. He was simply to pay the actual cost. There was a price fixed in the second contract with them, but evidently that was set aside, and never carried out. In the contract of January 10, 1894, Hough was merely to pay the actual cost. Dr. Dorn told various parties, during the progress of Collins' work, that he was simply acting as Hough's agent. There is proof that Hough, the appellant, also said Dr. Dorn was his agent in the construction of that building; that he (Hough) was working for the Pullman Palace-Car Company, and had no time to attend to it, as he had to go to work early, and remained there until a late hour. Both the architect and Dr. Dorn recognized Collins was working under the contract of February 20, 1894, as the architect's certificate and order on Dorn & Co. for the payment of money referred to the contract price of \$3,450 for doing the work, etc. There was no such price fixed in any other contract. Further, there was no showing made that Hough paid Dorn & Co. money on their pretended contract; that is, no particular amounts were shown. Hough made some claim that he had paid them, but the evidence of it was not forthcoming. The architect states that all of the other contracts for plastering, plumbing, etc., were made directly with the owners, through Dorn & Co., their agents, and that his relations with Hough were through his agents, Dorn & Co., in remodeling the World's Fair hotel called the "Montreal." This is in accord with the spirit and language of the first contract, reciting that Hough desired the aid and assistance of Dorn & Co., which is further corroborated by the fact appearing on the face of the contract of January 10, 1894, that Hough was only to pay the actual cost of the work and materials. The facts and the law of this case are with appellee, and the decree, as affirmed by the appellate court for the First district, was not erroneous. Its judgment is affirmed. Judgment affirmed.

(177 Ill. 591)

MEYER v. ILLINOIS CENT. R. CO.

(Supreme Court of Illinois. Feb. 17, 1899.)

RAILROADS—CONDUCTORS—FELLOW SERVANTS—
VICE PRINCIPAL.

A conductor of a train is but a fellow servant of the fireman, and not a vice principal of the company; so that it is not liable for an injury to the fireman caused by neglect of the conductor to have the brakes set in time to stop the train at a station, and prevent collision with a train he was ordered to meet there; he having no right to employ or discharge the engineer or fireman, and only having such power as others had to report any dereliction of duty, and the rules, while providing that a train shall be run under the direction of its conductor, excepting the case where his directions conflict with the rules and involve risk

or hazard, in which case it is provided that the engineer will be held equally responsible.

Magruder, J., dissenting

Appeal from appellate court, Second district.

Action by Henry Meyer against the Illinois Central Railroad Company. From a judgment of the appellate court (85 Ill. App. 531) reversing a judgment for plaintiff, he appeals. Affirmed.

C. B. Morrison and Dixon & Bethea, for appellant. Wm. Barge and E. E. Wingert, for appellee.

PHILLIPS, J. This was an action on the case by appellant against appellee to recover for damages arising from an injury received by reason of a train on which he was firing coming in collision with a train running in an opposite direction on appellee's road, causing appellant, to save himself, to jump from his engine and injure himself. His left foot and leg were run over by the cars and crushed, so that amputation became necessary. The accident occurred at or near the station of Lead Switch, in Jo Daviess county, Ill. The first count in the declaration, and the only one on which appellant claimed the right of recovery, sought to recover on the theory and charge that the conductor of the train, George McDuff, was the superior servant in charge of the appellant as fireman, and had charge of the running of the train, and entire control and management of it; that he was representing appellee as vice principal in the running of the train; and that the accident was due to his negligence in not causing the train which he was running, and of which appellant was fireman, to stop, and not to run past Lead Switch station, where he was ordered by the train dispatcher to meet wild east-bound train No. 508. The train McDuff was running was No. 18, and was west bound. It is insisted by the appellant that the failure of the conductor, McDuff, to cause the brakes to be set in time to stop his train at Lead Switch, and prevent collision with the train he was ordered to meet there, was such negligence as rendered appellee liable for the injury done to appellant by reason of the collision. The declaration further avers that the conductor had control of the fireman, as well as of all other employes of his train, and had a right to report a disobedience of his orders to the company and have them discharged, if the company would discharge them for disobedience. The act of negligence alleged against McDuff was that of omission, and not of commission. The case was tried by a jury, and resulted in a verdict for appellant for \$9,000. A remittitur of \$3,000 was entered, and a judgment on the verdict for \$6,000 in favor of the appellant resulted. The defendant appealed to the appellate court for the Second district, where the judgment was reversed; and, as appears by the record, the court found "that the conductor, McDuff, mentioned in the declaration and evidence,

was the fellow servant of the appellee, both having the same common master, to wit, appellant (the Illinois Central Railroad Company), unless, under the evidence, and as a matter of law, said conductor stood in the relation of vice principal of appellant to appellee, which we find, as a matter of law, he did not."

There is no evidence tending to show that McDuff, as conductor, had any power, more than any ordinary conductor. He had no special supervision over other employes, more than ordinary conductors. He was running the train from point to point and station to station under scheduled time, and under orders, telegraphic or otherwise, of a train dispatcher, which he had no right to disobey, or command other employes to disobey. His power was limited. He had no right to employ either the engineer or fireman, or discharge either for any cause. He could report any dereliction of duty to headquarters, or to the superior officers of the road. So could any other employe report any other. Rule 41 of appellee reads as follows: "No train will leave a station without a signal from its conductor, nor before its time as specified in the time-table, without a direct and explicit order from the train master. Trains must be run under the directions of its conductor, except when his directions conflict with these rules or involve risk and hazard, in which case the engineer will be held equally responsible." It seems from this rule that he had partial control over the train and the train crew, but could not act contrary to the company's rules, or where his action involved risk or hazard, in which case the engineer was equally responsible. He had not the management of the train,—the full control,—as the principal officers of the company would have had, or that the train dispatcher had; and the engineer had a veto in case of risk, and must judge of when there was risk, as a matter of course. It may be admitted that it was the duty of the conductor to run the train inside the rules, and to so run it as to avoid injury to it and to every one connected with it and to the public; and the evidence tended to show that, while he was aware that he was to meet the other train at Lead Switch, he failed to keep his train under control, so as to stop at that station or avoid injury; but, under the circumstances, can he be regarded as the vice principal of appellee, so as to make it responsible for his negligent act, irrespective as to whether he was the fellow servant of appellant? If the conductor was not the vice principal of appellee in regard to the negligence charged, and which the evidence tends to prove, he was clearly the fellow servant of appellant. There is no dispute in this case, or claim by appellant, that the accident of the collision occurred in any other way than by the failure of the conductor to set the brakes himself, or to order the brakeman to do so, in time to stop the train at Lead Switch. The accident did not occur

on account of the conductor's exercise of any authority over the appellant which appellant, by virtue of his inferior position, was bound to obey under penalty of discharge; but the accident resulting from the negligence, if any, was one that might have happened if any other person than the conductor had been intrusted with simply running the train and setting the brakes in connection with the fireman and others, without any control over the fireman. The negligence was, then, that of a fellow servant, done in the performance of a fellow servant's duty, so far as the evidence shows. The fact that one of the number of servants is invested with power to control and direct the actions of others will not, of itself, render the master liable for the negligence of the governing servant. *Railroad Co. v. May*, 108 Ill. 288; *Railway Co. v. Hawk*, 121 Ill. 259, 12 N. E. 253; *Gall v. Beckstein*, 173 Ill. 187, 50 N. E. 711. In *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, it was held that an engineer who, under the orders of the company, was regarded as conductor, was not a vice principal. These cases tend to show that the control of the train and crew must be complete, to constitute a foreman a vice principal. We fail to see how the conductor may be held to be a vice principal, as a matter of law, when, as a matter of fact, he is a fellow servant.

The finding of facts by the appellate court, that the plaintiff and the conductor were fellow servants, is conclusive on this court on that question, unless it is qualified by the further finding, "unless, under the evidence, and as a matter of law, said conductor stood in the relation of vice principal of appellant to appellee, which we find, as a matter of law, he did not." With the facts found that the relation of fellow servants existed, it cannot, as a principle of law, be held the relation did not exist. There is no evidence in this record showing that a vice principal relation of fellow servants existed. Where the evidence for the plaintiff is absolutely conclusive of the relation existing between master and servant, and reasonable minds would not differ as to whether the relation of fellow servants existed, in such case the question becomes one of law. *Railway Co. v. Brown*, 152 Ill. 484, 39 N. E. 273. If this rule did not prevail, that a court could determine that the relation of fellow servants existed as a matter of law, and if a trial court, or court whose finding of facts must be held conclusive, could not adjudicate and determine that question of fact as a matter of law, then, where the facts are conceded or presented by the plaintiff alone, a court would be powerless to control the verdict, even though different minds would not differ as to the relation existing. *Railway Co. v. Brown*, supra. If it could not become a question of law under such circumstances, where it arises on the evidence introduced by the plaintiff alone, or where the evidence is not in conflict, then in no case could a trial court instruct the jury to find

for the defendant where the relation of fellow servants existed, however conclusive might be the evidence in that behalf. The holding of the appellate court on the question of law presented constitutes a holding of law on conceded facts. The finding of the appellate court, under the facts appearing in this record as the basis of its judgment, is conclusive on this point. *Butler v. Cornell*, 148 Ill. 276, 35 N. E. 767; *Smith v. Billings*, 169 Ill. 294, 48 N. E. 693; *Anderson v. Association*, 171 Ill. 40, 49 N. E. 205. The judgment of the appellate court is affirmed. Judgment affirmed.

MAGRUDER, J., dissenting.

(177 Ill. 572)

PEOPLE ex rel. LABAUGH v. BOARD OF EDUCATION OF DIST. NO. 2.

(Supreme Court of Illinois. Feb. 17, 1899.)

SCHOOLS—COMPULSORY VACCINATION OF PUPILS.

In the absence of smallpox in the community, or cause to apprehend its appearance, vaccination of a pupil cannot be compelled as a condition precedent to permitting him to attend a public school.

Error to appellate court, Second district.

Application by the people, on the relation of Maud I. Labaugh, an infant, by her next friend, for mandamus to the board of education, district No. 2, township 17 N., range 3 E., of the fourth P. M., to compel respondent to permit relator to attend the public schools. A judgment dismissing the petition was affirmed by the appellate court (66 Ill. App. 159), and relator brings error. Reversed.

William M. Smith and Geo. W. Shaw, for plaintiff in error. Dunham & Foster, for defendant in error.

PHILLIPS, J. Maud I. Labaugh, a pupil of about the age of 12 years, was expelled from the public schools at Geneseo, Ill., because she did not exhibit a certificate of vaccination done within the past year, and who had not been vaccinated, and she was forbidden to return until she should bring such certificate. She, by her next friend, applied to the circuit court of Henry county for a writ of mandamus to compel the defendant in error to admit her. The circuit court refused the writ, and the appellate court for the Second district, on appeal, affirmed the judgment of the circuit court.

It appears the petitioner resided in the district, and was of about the age stated, and entitled to the privileges of the public schools on the same terms and conditions as other children of the district, subject to lawful regulations. A resolution of the state board of health of November 2, 1891, required that, before being admitted into any public school, every child must present to his or her teacher a certificate, signed by a legally qualified physician, stating the name, age, residence,

date of vaccination, etc.; and a subsequent resolution of the state board of health of January, 1894, reaffirmed the above, and extended it to parochial and private schools. The state board of health further resolved that its power, under the statute, to order the vaccination of children, was clear and unquestioned. The city of Geneseo, by an ordinance passed by the city council on August 11, 1891, established a board of health, and appointed its members, and by an ordinance of October 12, 1893, further provided that the board of health might, at any time, after consulting duly authorized officials, declare it necessary to the public health to suspend from school any unvaccinated student attending the Geneseo schools, public or private, until such person should be able to produce a certificate that such person had been vaccinated. The board of health of Geneseo adopted a resolution prohibiting the attendance of unvaccinated pupils.

The contention of the defendant in error is that the state board of health is a quasi public corporation, and the legislature could delegate to it the right to make rules and regulations having the force of law as to the subject-matter involved, and that the action of the state board of health, of the Geneseo board of health, and the city of Geneseo was within the scope of their respective powers, and that their rules, regulations, and ordinances are of binding force and effect as preventive law, and that the board of education had full power to pass the rules complained of. The questions presented by this record, except so far as the ordinance of the city of Geneseo is concerned, are identical with the questions presented in *Potts v. Breen*, 167 Ill. 67, 47 N. E. 81, where it was held that a rule adopted by the state board of health compelling the vaccination of children as a prerequisite to their attending the public schools is unreasonable where smallpox does not exist in the community, and there is no reasonable cause to apprehend its appearance; that the power to compel the vaccination of children as a prerequisite to their attending public schools could only be derived from the general police power of the state, and can only be justified as a necessary means for preserving health. These questions were fully discussed in the *Breen* Case; and it is earnestly urged that we reconsider that case, by the brief filed by the defendant in error. We adhere to the principles announced in that case, and decline to further discuss the questions there determined. The only question in this case not presented in that is the action of the city council of the city of Geneseo; and we cannot hold that in the preservation of the public health, under the police power of the state, a municipality invested with police power may invoke such power for the purpose of invading the individual liberty of citizens of the community. Neither the city of Geneseo, nor its board of health, nor the board of health

of the state of Illinois, has power to require compulsory vaccination except in the public contingency stated in the Breen Case; and it was error in the circuit court of Henry county to refuse to issue the writ, as also it was error in the appellate court for the Second district to affirm that judgment. The judgment of the appellate court for the Second district and the judgment of the circuit court of Henry county are each reversed, and the cause is remanded. Reversed and remanded.

(178 Ill. 174)

LINDEMAN v. FRY et al.

(Supreme Court of Illinois. Feb. 17, 1899.)

ACTION FOR SERVICES—RECOUPMENT—INSTRUCTIONS.

1. In an action by an architect for services rendered, an instruction that if plaintiff did not use reasonable care in performing his work, and the buildings were not properly constructed, defendant might recoup damages sustained, was properly refused, as it allowed defendant to recoup, though the improper construction was not due to plaintiff's fault.

2. The instruction was also erroneous as it ignored evidence that defendant accepted the building knowing that the carpenter's and painter's work was incomplete.

Appeal from appellate court, First district. Assumpsit by Frank L. Fry and another against Henry Lindeman. From a verdict and judgment for plaintiffs in the superior court, defendant appealed to the appellate court, where judgment was affirmed (77 Ill. App. 89), and defendant again appealed. Affirmed.

Barker & Church, for appellant. Smith, Shedd, Underwood & Hall, for appellees.

PHILLIPS, J. By his brief, appellant presents but three points: That the verdict is contrary to the evidence; that it is excessive; and that there was error in refusing to give the fourth instruction asked by appellant.

Appellees, who are architects and partners, brought assumpsit against the appellant, by whom they were employed to prepare plans and specifications for, and superintend, the erection of a building. There is no denial of the rendition of services, but it is denied that there was proper supervision, and it is insisted that many things which were to have been put in the building were omitted, and different material was used, and it is claimed that appellant might recoup, etc. This question, and that presented claiming the damages are excessive, are questions of fact conclusively determined by the judgment of the appellate court.

The refusal of the court to give the following instruction is assigned as error: "The jury are instructed that if they believe, from the evidence, that the plaintiff in this case did not use reasonable care and diligence in the performance of his work as an architect, and the buildings of defendant were not properly constructed, then the defendant may

recoup or set off the damages he may sustain on that account; and if, from the evidence, the jury find the damages sustained are equal to or greater than the amount plaintiff might claim for services, then the jury should find for the defendant." On this question the appellate court held the instruction properly refused, saying: "If the jury had found that the buildings were improperly constructed, and that the plaintiffs had not exercised reasonable care and diligence, then, under the instruction, they must have found for the appellant, even though they believed that the improper construction was not the fault of appellees. The instruction is erroneous in another respect. Appellees' evidence showed that the carpenter's and painter's work was not complete, and that the appellant accepted the work with knowledge of its incompleteness. This evidence the court is, by instruction, asked to ignore, and in effect to exclude it from the jury." We concur in that view, and the judgment of the appellate court for the First district is affirmed. Judgment affirmed.

(178 Ill. 28)

ORDING v. BURNETT.

(Supreme Court of Illinois. Feb. 17, 1899.)

MORTGAGES—FORECLOSURE—EVIDENCE.

In foreclosing a trust deed, complainant makes a prima facie case by introducing the deed and the notes secured thereby.

Appeal from appellate court, First district.

Bill by William H. Burnett against Henry Oding, Jr. A decree for complainant was affirmed by the appellate court (77 Ill. App. 220), and defendant appeals. Affirmed.

Charles Pickler, for appellant. Oliver & Mecartney, for appellee.

CRAIG, J. This is an appeal from a judgment of the appellate court affirming a decree of the circuit court of Cook county in a proceeding instituted by William H. Burnett against Henry Oding, Jr., and others, to foreclose a deed of trust. The only ground relied upon in the argument to reverse the judgment of the appellate court is that the record contains no evidence as to the amount of money due. This is a misapprehension of the evidence heard in the circuit court. The cause was referred to the master in chancery to take and report the evidence. Two notes, of \$400 each, were produced before the master, and he found, and so reported, that there was due on the two notes, principal and interest, \$891.07. He also found that the notes were secured by a deed of trust on the premises described in the bill, and recommended the relief prayed for in the bill. The testimony introduced before the master was sufficient, in our opinion, to authorize the decree of foreclosure. The judgment of the appellate court will therefore be affirmed. Judgment affirmed.

(177 Ill. 618)

GEHRKE et al. v. FOREMAN.

(Supreme Court of Illinois. Feb. 17, 1899.)

SPECIAL DEPUTY SHERIFF—APPOINTMENT.

Hurd's Rev. St. 1889, p. 1275, § 10, provides that a sheriff may appoint a special deputy to serve a summons. Section 12 provides that deputy sheriffs may perform any and all duties of the sheriff in the latter's name. *Held*, that the appointment by a deputy sheriff of a special deputy to serve summons was authorized.

Appeal from circuit court, Cook county; John C. Garver, Judge.

Action of ejectment by Edwin G. Foreman against Julius Gehrke and others. From an order overruling a motion to vacate the default judgment, defendants appeal. Affirmed.

August Marx, for appellants. Rudolph D. Huszagh, for appellee.

CRAIG, J. This was an action of ejectment, but the only question presented by the record is whether J. C. Cooper, who served the summons on the defendants, was properly authorized to do so. The indorsement and return on the summons are as follows:

"Pd. 10. I hereby appoint J. C. Cooper my special deputy to serve the within writ, this 25th day of May, A. D. 1898. James Pease, Sheriff."

"Served this writ on the within-named defendants Julius Gehrke and Johanna Gehrke, by reading the same to each of them, this 25th day of May, 1898; also served this writ on the within-named defendants William F. Dahms and Leopold Bloch, by reading the same to each of them, this 25th day of May, 1898. James Pease, Sheriff, by J. C. Cooper, Special Deputy."

"State of Illinois, County of Cook—ss.: J. C. Cooper, being duly sworn, deposes and says he is the identical person mentioned in the above appointment, and the above return is true. Subscribed and sworn to before me, this 26th day of May, A. D. 1898. [Seal.] Charles W. Peters, Notary Public, Cook Co. Ill."

It was admitted in the application to set aside the default that Charles W. Peters, who was chief deputy sheriff in the sheriff's office on May 25, 1898, appointed J. C. Cooper, in the name of and for the sheriff, to serve the summons. Section 7 of the act relating to sheriffs (Hurd's Rev. St. 1889, p. 1275) provides: "Each sheriff may appoint one or more deputies, not exceeding the number allowed by rule of the circuit court of his county." Section 10 provides: "A sheriff may appoint a special deputy to serve any summons issued out of a court of record, by indorsement thereon substantially as follows: 'I hereby appoint * * * my special deputy to serve the within writ,' which shall be dated and signed by the sheriff." Section 12 provides: "Deputy sheriffs duly appointed and qualified may perform any and all the duties of the sheriff in the name of the sher-

iff, and the acts of such deputies shall be held to be the acts of the sheriff." Under section 7, *supra*, Charles W. Peters was duly appointed a deputy sheriff. He had qualified as such, and had power to act, and, by the express terms of section 12, he was clothed with power to perform, in the name of the sheriff, all the duties of the sheriff. Under section 10, the sheriff was authorized to appoint Cooper a special deputy to serve the summons in question; and as the deputy sheriff, Charles W. Peters, was authorized by the statute to perform any and all duties of the sheriff in the name of the sheriff, the appointment of J. C. Cooper a special deputy, in the name of the sheriff, to serve the summons, was authorized by the statute. No attempt was made to appoint Cooper deputy sheriff with authority to act generally as a deputy, but he was merely appointed a special deputy, with authority to serve the summons in question, and do nothing more. The general maxim, therefore, that "Delegata potestas non potest delegari," has no application here. *Hunt v. Burrell*, 5 Johns. 136. The judgment of the circuit court will be affirmed. Judgment affirmed.

(178 Ill. 199)

VAN EYCK v. PEOPLE.

(Supreme Court of Illinois. Feb. 17, 1899.)

CRIMINAL LAW—CONFIDENCE GAMES—EVIDENCE—SUFFICIENCY.

1. Conversations, in accused's absence, between prosecuting witness and those who assisted in the commission of the crime, are admissible, where accused was the principal or an accessory before the act.

2. Two men in a saloon threw dice in prosecutor's presence, and unsuccessfully tried to induce him to join in the game, but one of them obtained two dollars and a half from him, and then handed five dollars back, explaining that the two dollars and a half additional was for him. They then forcibly took his pocketbook, containing a large sum of money, and threatened to have him arrested for gambling; whereupon the barkeeper, who had witnessed the proceedings, told him of the danger of gambling in a saloon, it being a state's prison offense, and put him out at the back door, while the men who got the money remained in the saloon. The barkeeper subsequently offered him money to leave the city, stating that he was willing to give all that there was left, and he would see what the other men were willing to do. *Held* sufficient to sustain a conviction of the barkeeper, under Cr. Code, § 90 (Rev. St. p. 470), of obtaining money of another by means of a confidence game.

Error to criminal court, Cook county; Frank Baker, Judge.

Joseph Van Eyck was convicted of obtaining money by a confidence game, and brings error. Affirmed.

R. A. Wade and James Todd, for plaintiff in error. Edward C. Akin, Atty. Gen., Charles S. Deneen, State's Atty., and Ben M. Smith, Asst. State's Atty., for the People.

PHILLIPS, J. Plaintiff in error was convicted of being guilty of a violation of section

99 of the Criminal Code (Rev. St. p. 470), which defines and punishes the obtaining of money from another by means of the confidence game, and was sentenced to the penitentiary, under the indeterminate sentence act. This writ of error is sued out, and it is insisted there was error in allowing testimony as to conversations of one Williams and a stranger from Iowa with the prosecuting witness, L. E. Laun, before they arrived at the saloon of plaintiff in error; that the evidence does not show the plaintiff in error was either principal or accessory in the commission of any offense; and that, if any crime was committed, it was robbery, and not the confidence game; and that the court erred in refusing an instruction. The first and second points may be considered together.

If the plaintiff in error was a party to the act, as principal or as accessory before the act, then conversations between the prosecuting witness and others who aided in the commission of the crime, and induced the prosecuting witness to accompany them to the saloon, would be relevant and competent. The evidence shows Laun arrived in the city from the country, and was met by Williams, and a few moments afterwards by the Iowa man. The Iowa man, under pretense of taking Laun to a doctor for treatment, took Laun south under the viaduct, to a saloon at 1213 State street. No one was at the saloon except Van Eyck, who was tending bar, unless, perhaps, a cook in the back part of the room. Laun declined to drink, but, upon Van Eyck's suggestion, took a soda. Immediately after the Iowa man and Laun got to the saloon, one Patrick arrived. After buying drinks, Patrick and the Iowa man each produced a five-dollar bill to pay for the same. Van Eyck, it will be observed, was unable to change both of these bills, and furnished dice, and Patrick and the Iowa man proceeded to throw the dice to see who should pay for the drinks. There was some conversation with Laun in regard to dice, but he declined to have anything to do with the game. The Iowa man then explained to Laun what was meant by the top and bottom game,—that dice, however thrown, cannot count other than 21. The Iowa man and Patrick threw the dice, and then Patrick got \$2.50 from Laun, and returned him \$5, and explained that the \$2.50 additional was for Laun. These two men then took Laun's pocketbook from his pocket, opened it, and took from it \$20. All this took place while Laun, Patrick, and the Iowa man were standing at the bar, and the plaintiff in error behind the bar. Then the Iowa man and Patrick took hold of Laun, led him to a table in front of and only eight feet from the bar, and there took \$360 from him, and, immediately after securing the money, Patrick threatened to have him arrested for gambling. It is somewhat strange for Van Eyck to have stood behind the bar, witnessed the throwing of the dice, the explanation of the Iowa man to Laun in regard to the game, the taking of the pocketbook out of Laun's pocket, and the taking of \$20 from it, and then, after the balance was taken, amounting to over \$300, at this particular time admonish him of the danger resulting from gambling in his saloon, and to further add that "it is a state's prison offense to gamble." Van Eyck then put Laun out of the back door. Patrick, who got the money, remained at the table. This is most unusual conduct for an innocent man, when it is observed that afterwards Van Eyck offered Laun \$5, and gradually increased the amount to \$125, if he would quit and get out of the city; also, that, 10 days after, he offered Laun \$25 and a railroad ticket to Rockford or Dakota, and said that he was "willing to give all the money that's left, and I will see the other two fellows, and see what they are willing to give"; that, "if there is any more left, I am willing to give it." He also told Kiple, the chief of police, that Laun lost \$315, "because the money was counted three times." From this evidence, it is clear, the jury were authorized to find the defendant was a party aiding in the commission of the crime, and the admission in evidence of the conversations between Laun, Williams, and the Iowa man before arriving at the saloon of the plaintiff in error was not error.

As to whether the crime committed was robbery, or the obtaining of money by means of the confidence game, is not a proposition that will induce us to engage in a protracted discussion of these crimes. Inducing men to bet on top and bottom of dice, and procuring money from a man for that purpose, and getting possession of his pocketbook for the purpose of betting, even though fear is aroused in him for the loss of his money, is enough of a confidence game to sustain his conviction, and distinguish it from robbery.

In the abstract, it is not attempted to set out the instructions given by the court, but an instruction was asked by defendant which was refused, and its refusal is assigned as error. The court gave the full substance of the instruction in another, and was not required to repeat the instruction. We find no error in the record, and the judgment is affirmed. Judgment affirmed.

(178 Ill. 218)

VILLAGE OF NORTH CHILLICOTHE v. BURR.

(Supreme Court of Illinois. Feb. 17, 1899.)

BILL OF EXCEPTIONS—AMENDMENT—EJECTMENT—AFFIDAVIT OF COMMON SOURCE.

1. Bill of exceptions cannot be amended, at a term subsequent to the trial, to show that, pursuant to Ejectment Act, § 25 (1 Starr & C. Ann. St. p. 987), plaintiff or his agent or attorney stated on oath, on the trial, that he claimed title through a common source, where there is nothing on which to base the amendment except the affidavit of plaintiff's attorney that he read an affidavit as to common source of title on the trial; there being no mark on the affidavit of common source to show it had been read on the trial, and no notes or minutes of the judge or official stenographer to show

that it had been offered, though it appears that the trial was at the January term, and that the affidavit as to common source was filed on the last day of the month.

2. Under Ejectment Act, § 25 (1 Starr & C. Ann. St. p. 987), providing that if plaintiff or his agent or attorney shall state on oath, on the trial, that he claims title through a common source with defendant, and this is not denied by defendant, it shall be sufficient to show title from such common source,—it should be shown that one other than plaintiff, who makes an affidavit of common source, is his agent or attorney.

Appeal from circuit court, Peoria county; N. E. Worthington, Judge.

Action by Allston Burr against the village of North Chillicothe. Judgment for plaintiff. Defendant appeals. Reversed.

Covey & Covey and W. Evans, for appellant. H. C. Pettett and Stevens, Horton & Abbott, for appellee.

MAGRUDER, J. This is an action of ejectment, brought by Allston Burr, appellee, against the village of North Chillicothe, appellant, to recover the possession of certain streets claimed to have been opened up and worked by the village authorities. The village filed the plea of the general issue and two special pleas. The plaintiff joined in the issues tendered by the first and second pleas, and demurred to the third plea. The demurrer to the third plea was sustained, whereupon the village elected to abide by its said third plea. A jury was waived by agreement of the parties, and the case was tried before the court without a jury.

The court rendered judgment finding that the plaintiff was the owner in fee simple of the premises described in the declaration, and that the defendant was guilty of wrongfully taking and withholding from the plaintiff the possession of said premises. The village filed its motion to set aside the findings of the court and for a new trial, which motion was denied; and the denial thereof was excepted to. By its judgment the court adjudged that the plaintiff, Burr, as owner in fee simple, have and recover of the village the premises described in the declaration, and that the plaintiff have a writ of possession therefor. The present appeal is prosecuted from such judgment. The judgment was rendered at the January term, 1898, of the circuit court; and 60 days from the date of the judgment were given to the village to tender and file its bill of exceptions. The bill of exceptions was filed on February 22, 1898.

The plaintiff, to sustain his action, introduced in evidence a quitclaim deed from Samuel T. Howe and wife to E. B. Purcell, dated January 10, 1896, acknowledged and recorded on February 7, 1896; also a quitclaim deed from E. B. Purcell and wife to Howell Jones, dated January 20, 1896, recorded June 27, 1896; also a quitclaim deed from Howell Jones to himself, dated January 20, 1896, recorded June 27, 1896. The three deeds above described constituted the entire proof introduced by the appellee to

show title in himself. The record, as originally filed in this court, contained no oath or affidavit showing that complainant and defendant claimed from a common source of title. Section 25 of the ejectment act provides that, "if the plaintiff, or his agent or attorney will state on oath, upon the trial, that he claims title through a common source with the defendant, it shall be sufficient for him to show title from such common source, unless the defendant, or his agent or attorney, will deny, on oath, that he claims title through such source, or will swear that he claims title through some other source." 1 Starr & C. Ann. St. p. 987. Appellee claims that at the April term, 1898, of this court, he obtained leave of this court to file, and did file, herein, as an amendment to the record, an affidavit showing one Samuel T. Howe was the common source of title. It appears that, after the original record was filed in this court and the case had been docketed here, the appellee made a motion in the circuit court to amend the bill of exceptions. At the time when this motion to amend was made, the term at which the bill of exceptions had been tendered and signed had passed, and the 60 days allowed for filing the bill of exceptions had expired. The court below allowed the amendment upon an affidavit of one of the attorneys of appellee that he had read an affidavit as to the common source of title upon the trial of the case. Nothing, however, was shown to the court upon the motion to amend, from which it appeared that there was anything in the record to amend by. There was no mark upon the alleged affidavit as to the common source of title to show that it had been offered in evidence; and there were no notes or minutes of either the judge or the official reporter showing that such affidavit had been offered. Under this state of facts, the alleged amendment to the bill of exceptions was improperly allowed by the trial court, and the amended record filed herein is insufficient to justify us in basing any action upon it. "An amendment of a bill of exceptions, incorporating evidence alleged to have been omitted from the original bill of exceptions, should not be allowed at a term subsequent to that at which the trial was had, unless there is something in the record to amend by." Wallahan v. People, 40 Ill. 103. An amendment of a bill of exceptions, which is based upon an affidavit filed by counsel, and not upon the notes of the official stenographer, nor upon any minutes kept by the trial judge, should not be allowed. Railroad Co. v. Levy, 57 Ill. App. 365. The memorial paper or minute by which the record may be amended must be made, and preserved as a part of the record, pursuant to law. An amended record cannot be received here, which shows affirmatively that an amendment to a bill of exceptions in the court below was made upon the testimony of witnesses as to their recollection of what evidence was given on the trial. Dougherty v. People, 118 Ill. 160, 8 N. E. 673. An affidavit of one

of the attorneys for the appellee that he had made and read upon the trial an affidavit as to the common source of title amounts to nothing more or less than the testimony of a witness as to his recollection of the evidence which was given on the trial. An amendment, based upon such testimony or affidavit, is not sufficient. *Devine v. People*, 100 Ill. 290; *Railway Co. v. Walsh*, 150 Ill. 607, 37 N. E. 1001.

The mere fact that the affidavit as to common source appeared to have been filed on January 31, 1898, did not justify the amendment to the bill of exceptions. The question is, did the plaintiff or his agent or attorney state on oath upon the trial that he claimed title through a common source? The affidavit in the attempted amendment was not made by the plaintiff, and does not allege that the person making it was agent or attorney of plaintiff. If the affidavit made in support of the motion to amend was anything more or other than has been herein stated, then the order allowing the amendment was insufficient in not showing its contents. As, therefore, the appellee, upon the trial below, did not, so far as the record filed in this court shows, derail his title from the government, or from any source of title shown by affidavit or oath to be a common source of title, he is not entitled to recover; and the judgment of the trial court was erroneous. Accordingly, the judgment of the circuit court of Peoria county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(177 Ill. 626)

SCHUSTER et al. v. SANITARY DIST. OF CHICAGO.

(Supreme Court of Illinois. Feb. 17, 1899.)

EMINENT DOMAIN—PROCEEDINGS TO CONDEMN—SUBMISSION TO JURY—AMOUNT TAKEN—VALUE—AGREEMENT OF PARTIES—PROOF—EVIDENCE—CITY ORDINANCE—PHOTOGRAPHS—TRUST DEED—VERDICT—REVIEW.

1. Since the exercise of discretion by a corporation authorized to condemn property, as to the amount necessary for its purposes, cannot be reviewed, unless abused, it was not error to submit such proceeding to the jury without proof that the corporation needed the property.

2. Where parties to a condemnation proceeding proceeded to trial on the theory that they could not agree as to the compensation to be paid, and the whole contest was as to the value of the property, an objection on appeal that it was not shown by direct proof that they could not agree as to the price is unavailing.

3. Subsequent to the adoption of an ordinance for the condemnation of property, the owner divided and platted it into city lots to give it a fictitious value. There was evidence that the land taken, which was described in the petition as 18.1 acres, had value only as acre property, for agriculture, and the jury were permitted to view it. *Held* not error to allow evidence of its value per acre, appellant having been permitted to fix its value by the lot.

4. In proceedings to condemn land for a public improvement, the ordinance locating the line of such proposed improvement over the premises sought to be condemned is admissible.

5. Evidence of engineers that property sought to be condemned for public use was subject to inundation, and photographs of the premises at the time of an overflow, are admissible on the question of value, as tending to show its adaptability to the uses contended for by the parties.

6. In proceedings to condemn land, the amount paid other parties for adjoining land was properly excluded.

7. Where a trust deed was admitted in evidence on a hearing on the question of title to land sought to be condemned, prior to the submission of the issue of its value to the jury, and the facts of the sale and the description of the property were otherwise fully proven, it was not error to exclude the deed, on the issue of value.

8. Where, prior to submitting the issue of the value of property condemned to the jury, the court entered a preliminary decree finding the title to the property as laid out in city lots and blocks, and determining the amount due each lienor, and the respective lots on which each lien attached, to which all persons interested were made parties, and no one objected thereto, the verdict of the jury assessing the aggregate value of the lots in groups according to ownership and incumbrances thereon, instead of specifying the amount due each incumbrancer, was not erroneous, since the money paid could be properly distributed by the court according to the decree.

9. A finding of a jury as to the value of property in condemnation proceedings, based on conflicting evidence, will not be reversed on appeal.

Appeal from circuit court, Will county; John Small, Judge.

Condemnation proceedings by the sanitary district of Chicago against Mathias P. Schuster and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Meers & Barr, for appellants. Haley & O'Donnell, for appellee.

BOGGS, J. This is an appeal from the judgment of the circuit court of Will county awarding the prayer of the petition of the appellee district, under the eminent domain act, for the condemnation of certain real estate belonging to appellants.

It was ruled in *City of Chicago v. Wright*, 69 Ill. 318,—and that ruling was approved in *Chicago, R. I. & P. R. Co. v. Town of Lake*, 71 Ill. 333, *Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. Co.*, 97 Ill. 506, and *Smith v. Railroad Co.*, 105 Ill. 511,—that the courts will not inquire into the necessity or propriety of the exercise of the right of eminent domain by a corporation having the power to condemn property; and in *Smith v. Railroad Co.*, supra, it was decided a corporation having such power must be permitted to judge for itself what amount of land is necessary for its purpose, subject to the authority resting in the courts to restrain any abuse of the power in that respect. In view of the fact that nothing appeared to indicate there was such an abuse of the power, these adjudications answer the complaints of the appellants that the court allowed the case to go to the jury without proof that the district needed the real estate in controversy for the construction of the channel.

It is urged that it is not shown by direct proof that the appellee district could not agree

with the appellants as to the compensation to be paid for the property sought to be condemned. That was a preliminary question to be settled by the court in determining as to the right of the appellee company to condemn the property. The certificate of evidence only purports to show the testimony produced upon the issues submitted to the jury. It is therefore to be assumed that the finding and decree of the court that the appellee was entitled to condemn the property, and the order that a jury should be impaneled to determine the issues as to the amount of the just compensation to be paid for the property to be condemned, were authorized by adequate proof. Furthermore, the appellants filed a cross petition, in which they alleged that property belonging to them, but not taken, would be damaged, and prayed that the compensation therefor should be assessed; and it also clearly appeared from the testimony produced in behalf of the respective parties that there was such great divergence in the views entertained by the parties, respectively, as to the value of the property to be taken, as to unmistakably establish that they could not have fixed upon a price by voluntary agreement. Both parties proceeded in the trial upon the theory that they could not agree as to the compensation to be paid, and the whole contest between them was as to the value of the property, which they desired the jury to settle for them. As was said in *Ward v. Railroad Co.*, 119 Ill. 287, 10 N. E. 365, when the same point was urged upon a record in no material respect distinguishable from the record in this case, it would have been idle to offer direct testimony on the point.

The petition described the property to be taken by metes and bounds, and alleged that the premises described contained 18.1 acres, more or less. The appellants contended that the land described was a portion of an addition to the town of Lockport called "Rose-dale," and that the premises described were certain lots, blocks, streets, and alleys of the said addition. The appellee district adopted an ordinance March 30, 1892, locating its right of way over said premises; and the alleged subdivision of the premises into blocks, lots, streets, and alleys was made some two or more years thereafter. Appellee contends that the alleged subdivision was for the purpose of giving the property a fictitious value, and that it was in fact of value only as acre property. It is complained that the court allowed the appellee to inquire as to the value of the premises by the acre. The court also permitted the appellants to fix the value of the property by the lot, and the jury visited and inspected the premises. We find preserved in the record testimony tending very strongly to show that the property has value only as acre property, or for the purposes of agriculture or pasturage. In view of the fact that the property had been subdivided into lots and blocks after the appellee district had adopted an ordinance selecting it as for condemnation for the

uses and purposes of the district, and in view of the evidence tending to show that the premises were adapted only for other purposes than city or town lots, and in the further view of the contention of the appellee district that the ulterior purpose of the subdivision was to secure a fictitious valuation of the property when condemned, we think the court correctly ruled that the jury might hear and consider evidence as to the value of the land as acre property, as agricultural or pasturage lands, and as town and city property. The facts which such testimony disclosed to the jury legitimately bore upon a question of the actual value of the premises, and, when supplemented by a view of the premises by the jury, there seems no ground for the contention that the owners of the ground were prejudiced by the proof of which appellants complained.

In this same connection we may add, in view of the issue before the jury, that it was not error to receive in evidence the ordinance adopted by the appellee district March 30, 1892, locating the line of the right of way of the improvement the district was engaged in making over and on the premises here sought to be condemned.

Nor do we see any force in the objections interposed to the introduction of the testimony of engineers in the employ of the appellee district tending to show that the premises in question were subject to be overflowed by the Desplaines river, or to the introduction of photographs of the premises taken at the time of an overflow. That the premises were subject to inundation was an element proper for consideration upon the question of its value, whether devoted to the purposes of farming or grazing, or used as town or city lots, as sites for residences or business houses. While the question to be determined was the value of the property at the date of the filing of the petition, still it was proper to permit the introduction of proof that the waters of the river had spread over it, or portions of it, at periods either prior to or after the filing of the petition. Such proof tended to show the value of the property, and its adaptability to the uses contended for by the respective parties, at the time of the filing of the petition.

The court properly excluded proof as to the amounts paid by the appellee district to other parties for land adjoining the property sought to be condemned. To have admitted such proof would have brought into the case collateral issues as to the respective qualities, adaptability to different uses and purposes, situation as to overflow from the river of the respective tracts, and perhaps other collateral questions wholly foreign to those to be determined by the jury.

The court also properly excluded from the jury, as incompetent to be given in evidence on the issue before them, a trust deed or mortgage given by one of the appellants to another appellant for the amount of the unpaid purchase price of the greater number

of the lots. It is urged that this trust deed or mortgage was competent evidence of the sale, and to show the description of the property and the amount paid for it. The facts of the sale, and the description of the property sold, and its present ownership, were otherwise fully proven, even if the mortgage could be deemed competent evidence upon these points. Furthermore, the mortgagor testified as to the amount paid or contracted to be paid by him for the premises included in the mortgage, and that a deed and mortgage were executed in accordance with the contract. The trust deed or mortgage, and the notes thereby secured, were received in evidence by the court upon a hearing had upon the question of title and interest of the various parties in the premises, prior to the submission of the issue as to value of the premises to the jury. It had no legitimate office to serve in the hearing before the jury.

The instructions of the court are not open to the criticism that particular facts are singled out and given undue prominence.

Prior to the submission to the jury of the issue of value or compensation to be paid, the court heard the evidence of the parties as to the title to the premises and the incumbrances thereon, and entered a preliminary decree finding the title and ownership of the property as lots and blocks in Rosedale, and ascertaining and declaring the amount due, each lienor, and the respective lots upon which the lien attached. All parties in interest were parties to the cause, and no one objected to this finding and decree of the court. The verdict of the jury assessed the aggregate value of the lots in groups, according to ownership and incumbrances thereon, as directed by the court, without returning any finding as to the amount of the incumbrances or liens on any of the lots. The insistence that the jury should have determined, and in the verdict specified, the amount to be paid each incumbrancer or lienholder, is not tenable. The amounts fixed by the verdict, when paid, will stand as in place of the lots, and the liens upon the lots will attach upon the money as upon the lots. The money will be distributed by the court under the decree entered declaring the title of the owners and the interest of lienholders, and the money awarded as compensation for each lot or group of lots will be first applied to the discharge of the incumbrance or lien upon such lot or group of lots. *Railroad Co. v. Chamberlain*, 84 Ill. 333; *Commissioners v. Todd*, 112 Ill. 379; *Thomas v. Railway Co.*, 164 Ill. 634, 46 N. E. 8.

A number of witnesses were produced in behalf of the parties, and much conflicting testimony adduced bearing upon the question of value of the premises for any and every use to which it could be put, and the jury examined the property. The conclusion of the jury is fairly within the range of the evidence. It met the approbation of the trial judge, who saw the witnesses and heard

them testify, and there is no reason that we should refuse to accept the estimate and assessment made by the jury of the amount to be paid as just compensation for the lots. The decree preserves the rights of all parties in interest, is free from error, and is affirmed. Decree affirmed.

(178 Ill. 37)

CLARK v. PEOPLE.

(Supreme Court of Illinois. Feb. 7, 1899.)

HUSBAND AND WIFE—WITNESSES—COMPETENCY—EVIDENCE—SUFFICIENCY.

A witness appearing against accused testified that she had married him, but afterwards found a written admission of his that he had a wife living, which, being shown to him, he verbally admitted to be true. A witness who had known accused many years testified that he knew the wife, and learned from her neighbors that she was still alive. Accused testified, but did not deny having a wife living at his marriage with the witness. *Held*, that the fact of the former wife living was sufficiently shown, so as to render the second woman competent to testify against accused.

Error to criminal court, Cook county; A. N. Waterman, Judge.

G. B. Clark, alias M. M. French, was convicted of forgery, and he brings error. Affirmed.

Geo. E. Leonard, for plaintiff in error. Edward C. Akin, Atty. Gen. (C. A. Hill and B. D. Monroe, of counsel), for the People.

WILKIN, J. Plaintiff in error was convicted of the crime of forgery on the 30th day of March, 1898, in the criminal court of Cook county. The only evidence of his guilt was the testimony of a witness answering to the name of Mrs. Frances Green. Her competency was questioned, and her evidence objected to, on the ground that she was the wife of the defendant. The objection was overruled, and she was permitted to testify. The only error assigned is the correctness of that ruling.

It appeared from the witness' own statement that a marriage ceremony had been performed between herself and the defendant on the 1st day of November, 1897, he at that time assuming the name of George B. Clark. She further testified that she afterwards learned that his real name was George B. Van Fleet, and that he had, at the time of her marriage to him, a wife living in the state of Ohio; that about the 7th of December, 1897, she found in his trunk a paper, which she identified as being in his handwriting, as follows: "My name is George B. Van Fleet. Former residence, Wakeman, Ohio, Huron county. I left a wife and family there September 29, 1887, and have not heard from either since, up to this time. December 13, 1891. March 10, 1895. June 16, 1895. April 25, 1896." She also testified that upon her finding that paper he admitted to her that he was married in Ohio, and left a wife there. Martin Denman, a witness who had known

the defendant for many years in the state of Ohio, testified that the defendant was married there, that he knew the wife, that he had recently left the neighborhood in Ohio where that wife resided, and that he learned from her neighbors that she was still alive. The defendant was a competent witness in his own behalf, and testified upon the trial, but made no denial whatever as to his having a wife living in the state of Ohio at the time of his pretended marriage with the witness Mrs. Green. We think the evidence sufficiently established the fact that on the 1st day of November, 1897, when he entered into the marriage ceremony with the witness, he had a wife living, from whom he had in no way been legally separated. The law is that where parties enter into a marriage contract, and one of them has at the time a living spouse, from whom he or she has not been legally divorced, the marriage is, as to the other party, absolutely void. *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737. "Where the supposed marriage is void, the alleged husband and wife are competent witnesses for or against each other, even though they believe themselves to be lawfully married." 29 Am. & Eng. Enc. Law, 633. The case of *Lowery v. People*, 172 Ill. 466, 50 N. E. 165, cited by counsel for plaintiff in error as holding the witness incompetent, is not in point.

We think the court below committed no error in overruling the objection to the competency of the evidence of Mrs. Green. The judgment of conviction will accordingly be affirmed. Judgment affirmed.

(178 Ill. 225)

ZION CHURCH OF STERLING v. MENSCH.

(Supreme Court of Illinois. Feb. 17, 1899.)

RELIGIOUS SOCIETIES—MORTGAGE.

1. Where a mortgage on church property is executed by the trustees at the direction of the congregation, as provided by the general incorporation act relative to religious corporations (section 43), it is immaterial what faction members of the congregation voting therefor belonged to; the mortgagee having no notice of differences in theological views among the members.

2. A deed of premises to a church of a certain religious association, to be used and disposed of as a place of worship, "subject to the discipline, usage, and ministerial appointments of said church or association, as from time to time authorized and declared by the general conference of said association and the annual conference in whose bounds the said premises are situated," does not require the mortgagee in a mortgage given on the premises by the trustees, on direction of the congregation, as provided by statute, to take notice of any custom not spread on the records of the denomination, requiring the permission of the annual conference before a loan could be made by the congregation.

3. A note and mortgage given by trustees of a church being an indebtedness of the corporation, and not that of the trustees, as shown by resolution of the congregation authorizing the trustees to make the loan, will be treated as such, in a proceeding in equity to foreclose; equity looking to the substance rather than the form.

Appeal from appellate court, Second district.

Suit by Clara A. Mensch against the Zion Church of Sterling. From a judgment of the appellate court affirming a decree for complainant (74 Ill. App. 115), defendant appeals. Affirmed.

This is a bill filed on October 7, 1895, by the appellee, Clara A. Mensch, against the Zion Church of Sterling, Ill., to foreclose a mortgage given by said church to secure a loan for \$1,000 made by her to it June 24, 1893. The bill avers that the Zion Church of Sterling, Ill., became indebted to appellee in the sum of \$1,000, and thereupon, by its trustees (naming five persons), by the authority given them under the statute, executed under their hand a promissory note for \$1,000, due in two years, with interest at 6 per cent. per annum; that, to secure the said note, said Zion Church by its trustees, under the authority given by the statute, by a mortgage dated June 24, 1893, conveyed to appellee the land in question, which mortgage was recorded on June 26, 1893; that said sum of \$1,000, with interest, is due and unpaid; that by the terms of the mortgage it was provided that, in case a suit should become necessary to foreclose the mortgage, appellee should be allowed a reasonable solicitor's fee in such suit, to be a further lien upon the premises, and the bill avers that by the filing of the bill a certain amount has become due for such solicitor's fee. The bill avers that five persons (naming them) are the board of trustees of the church,—made such by the church in pursuance of the statute. The bill makes, as parties defendant, the Zion Church of Sterling, Ill., and the five trustees of the church (naming them). The answer, not under oath, denies the indebtedness and execution of the note and mortgage by the church, or any one authorized by it, and furthermore denies the power of the church to make said note and mortgage, except with the consent of what is called the "Evangelical Association of North America." Certain exceptions were filed to the answer and sustained. After evidence heard and hearing had, the court rendered a decree on October 20, 1896, granting a foreclosure, and finding the amount due to be \$1,300, for principal and interest and for solicitor's fees, and awarding costs against appellant. An appeal was taken to the appellate court. The appellate court has affirmed the decree of foreclosure entered by the trial court. The present appeal is prosecuted from such judgment of affirmance.

Ritchie, Esher & Woolley, for appellant. A. A. Wolfersperger and John G. Manahan, for appellee.

MAGRUDER, J. (after stating the facts). The property upon which the mortgage here sought to be foreclosed rests was conveyed on May 13, 1869, by one Mary Wallace to three persons (naming them), "trustees of Zion Church of Sterling, Illinois, of the Evangelical Association of North America, and their suc-

cessors in office," for an expressed consideration of \$400. The deed of May 13, 1869, recites that the property therein named is conveyed "in trust that said premises shall be used, kept, maintained, disposed of as a place of Divine worship for the use of the ministry and membership, and as a place of residence for the use and occupancy of the preachers, of the Evangelical Association of North America, subject to the discipline, usage, and ministerial appointments of said church or association, as from time to time authorized and declared by the general conference of said association and the annual conference in whose bounds the premises are situated." On October 22, 1874, the church or congregation named in the deed executed by Mary Wallace on May 13, 1869, became incorporated in accordance with sections 35, 36, and 37 of the general incorporation act in reference to religious corporations. On the day last named there was filed for record in the recorder's office of Whiteside county an affidavit by Christ. Eisle, subscribed and sworn to on October 21, 1874, in which said Christ. Eisle did solemnly swear that at a meeting of the members of Zion Church held at Sterling, in the county of Whiteside and state of Illinois, on the 7th day of October, A. D. 1874, for that purpose, the following persons were elected, Christ. Eisle, John Meister, Christ. Schraeder, Gottlieb Vetter, John Yetter, trustees, according to the rules and usages of such church, and that such church adopted as its corporate name "The Zion Church of Sterling," and that at such meeting the affiant acted as secretary. The appellant remained a corporate body, organized in the manner aforesaid, from October 22, 1874, up to the date of the execution of the mortgage herein sought to be foreclosed, to wit, June 24, 1893. No objection to such organization appears to have been made by the general or annual conference of the Evangelical Association of North America. Section 41 of the general incorporation act provides that "upon the incorporation of any congregation, church or society, all real and personal property held by any person or trustees for the use of the members thereof, shall immediately vest in such corporation and be subject to its control, and may be used, mortgaged, sold and conveyed the same as if it had been conveyed to such corporation by deed; but no such conveyance or mortgage shall be made so as to affect or destroy the intent or effect of any grant, devise or donation that may be made to such person or trustee for the use of such congregation, church or society." By virtue of section 41, as above quoted, the property conveyed by Mary Wallace to the trustees of Zion Church on May 13, 1869, immediately vested in such church, as a corporation, under its corporate name, "The Zion Church of Sterling." It is also true that by virtue of said section 41 the corporation had the right to mortgage the property in question, the same as though it had been conveyed to it by deed, instead of having been conveyed originally to the trustees

of the church. The only restriction upon the power of the corporation to convey the mortgaged property so deeded to it is that no such conveyance or mortgage shall be so made as to affect or destroy the intent or effect of any grant made to a person or trustee for the use of such congregation, church, or society. The deed executed by Mary Wallace on May 13, 1869, is claimed by the appellant to have been a grant, not for the use of the congregation, church, or society known as "The Zion Church of Sterling," but for the benefit of the Evangelical Association of North America. Section 43 of the general incorporation act provides as follows: "The trustees shall have the care, custody and control of the real and personal property of the corporation, subject to the direction of the congregation, church or society, and may, when directed by the congregation, church or society, erect houses or buildings and improvements, and repair and alter the same, and may, when so directed, mortgage, encumber, sell and convey any real or personal estate of such corporation, and enter into all lawful contracts in the name of and in behalf of such corporation: provided, that no mortgage, encumbrance, sale or conveyance shall be made of any such estate, so as to defeat or destroy the effect of any gift, grant, devise or bequest which may be made to such corporation; but all such gifts, grants, devises and bequests shall be appropriated and used as directed or intended by the person or persons making the same."

The testimony shows that the persons who executed the present mortgage, being the five trustees of the church, had the care, custody, and control of the real estate which was mortgaged to appellee. It is claimed on the part of the appellant that there was some disagreement between the members of the church; that some of the members of the church belonged to what is known as the "Esher Faction," and other members of the church belonged to what is known as the "Dubs Faction," as explained in *Schweiker v. Husser*, 146 Ill. 399, 34 N. E. 1022; that the "Esherites," so-called, were decided by this court, in *Schweiker v. Husser*, supra, to be the legal members of the Evangelical Association of North America, but that those members who authorized the making of the mortgage here in controversy belonged to the Dubs faction, and were therefore not of the party which the courts had held to be the legal denomination. It appears from the evidence that appellee and her agent who made the loan for her had no notice of these differences in theological views among the members of the congregation. Appellee loaned her money to the trustees of this congregation to make improvements upon the church building. The church building belonging to appellant had been burned down in January, 1893. A small amount of insurance money was collected, and \$1,000 was borrowed from appellee. The money so borrowed and the insurance money were used in making improvements on the building, and in re-

plenishing and refurnishing the church. The loan was made by appellee and her agent in good faith, and they were not bound to take notice of theological differences existing among the members of the church, when the church building was controlled by an apparently well-organized congregation which worshiped there. Section 43 provides that the trustees may, when directed by the congregation or church, erect houses or buildings and improvements, and repair and alter the same, and may, when so directed, mortgage any real estate of the corporation. In view of this provision of the statute, it was undoubtedly the duty of appellee to see to it that the trustees executed the mortgage to her in pursuance of a direction to that effect given to them by the congregation. The proof shows that the pastor of the church gave notice on the Sunday preceding June 4, 1893, that on the next Sunday there would be held a meeting of the congregation to determine the question whether the trustees should be authorized to make a loan for the re-erection and improvement of the church building. In pursuance of the notice thus given, a meeting of the congregation was held on June 4, 1893. The testimony shows that the congregation consisted of only about 50 members when all were present, and that at the meeting held on June 4, 1893, more than one-half of the congregation were present, and that among those present were adherents of the Esher faction as well as of the Dubs faction. The minutes of the board of trustees show that at the meeting of the congregation held on June 4, 1893, one William Haglock offered the following resolution, which, on motion, was adopted: "Resolved, that we authorize the board of trustees to make necessary loans for improvements, and give a mortgage on the church property as security." When, therefore, appellee or her agent examined the minutes of the board of trustees of the congregation, they found that the trustees were expressly authorized and directed by the congregation to make the loan in question.

This would seem to settle the validity of the mortgage here sought to be foreclosed, and the justice of the claim of the appellee to the money secured by that mortgage. But appellant claims that the mortgage, under the terms of section 43 aforesaid, could not be given upon the property, so as to defeat or destroy the effect of any grant made to the corporation. It is said by the appellant that under the deed executed to the trustees of the church on May 13, 1869, by Mary Wallace, the trustees held the property in trust for the use of the ministry and preachers of the Evangelical Association of North America; that appellee was bound to take notice that the property was thus held in trust for the benefit of said Evangelical Association, and not exclusively for the benefit of the particular congregation authorizing the loan; and that the mortgage was made without reference to the rights of the said association. The particular ground upon which appellant bases the contention

that the rights of the Evangelical Association were ignored is the alleged existence of a church usage. It is claimed that, according to the usage thus contended for, no congregation had a right to place a mortgage upon any of its property without permission of the annual conference of the association within whose bounds the property was located. The statute authorizes the loan when the congregation directs the trustees to make the loan. But, in addition to the requirement of the statute, counsel for appellant say that appellee should have seen to it that the annual conference of the Evangelical Association of North America had given its permission to the trustees to make the loan from her. The evidence is conflicting as to whether or not there was any such usage as is claimed, which required the granting of permission by the annual conference before any church property could be mortgaged. The circuit court evidently found that no such usage was established by the testimony, and we are inclined to regard the finding of the court upon this question of fact as conclusive, it not appearing that such finding is against the weight of the evidence. It clearly appears, however, that neither appellee nor her agent had any notice or knowledge of any such usage as is here contended for. The provisions of the deed of May 13, 1869, did not contemplate a usage which depends upon oral proof for its establishment. The language of the deed is, "Subject to the discipline, usage, and ministerial appointments of said church or association, as from time to time authorized and declared by the general conference of said association, and the annual conference in whose bounds the said premises are situated." The usage here contemplated is a usage fixed and declared by the annual conference or the general conference. The book of discipline of the Evangelical Association of North America was introduced in evidence in this case, and is set out in the record. We have been pointed to no provision in that discipline which requires the permission of the annual conference before a loan could be made by a congregation for the improvement of church property. If any such usage had been authorized and declared by the annual conference of the denomination, there would be a declaration of it in the established book of discipline. Indeed, parties dealing in good faith with a congregation of this kind cannot be required to take notice of any existing usage which is not spread upon the records of the denomination itself. As no such usage was declared by either the general or annual conference, appellee was not bound to take notice of it. It follows that the execution of the mortgage cannot be said to have had the effect of defeating or destroying the effect of the grant contained in the deed of May 13, 1869. The discipline authorizes each society to elect a board of trustees every one, two, or three years, to consist of not less than three nor more than nine persons. It will be presumed that the general or annual confer-

ence, having authorized the election of trustees, intended them to be such trustees as should have the usual statutory powers, among which is the power to mortgage the church property when directed by the congregation.

The proof clearly shows that the note and mortgage given by the trustees was the indebtedness of the corporation, and not of the individual trustees. This is established by the testimony already referred to, in regard to the adoption of the resolution by the congregation authorizing the trustees to make the loan. This is not an action at law upon the note given by the trustees, but this is a proceeding in equity to foreclose a mortgage executed by the corporation through its trustees. Equity looks to the substance, rather than the form, and will here consider the evidence which shows that the corporation was intended to be bound, and not that the trustees were intended to be bound. *Scanlan v. Keith*, 102 Ill. 634; *Hypes v. Griffin*, 89 Ill. 134; *Bank v. Gillet*, 100 Ill. 254. The judgment of the appellate court is affirmed. Judgment affirmed.

(177 Ill. 587)

ILLINOIS WATCH-CASE CO. v. ECAUBERT.

(Supreme Court of Illinois. Feb. 17, 1899.)

PATENTS—PAYMENT OF ROYALTIES—ESTOPPEL—LICENSEE—EXCESSIVE VERDICT.

1. Where a person manufactured an article under a patented process, and apparently under the patent, and paid royalties to the patentee, he cannot be heard to say he was not a licensee, but a mere infringer.

2. Where, in an action for royalties, defendant could show the exact amount due, but offered no evidence, and permitted a witness to testify thereto from an examination of its books, it cannot complain of a verdict based thereon being excessive.

Appeal from appellate court, Second district.

Action by Frederic Ecaubert against the Illinois Watch-Case Company. From a judgment of the appellate court affirming a judgment for plaintiff (75 Ill. App. 418), defendant appeals. Affirmed.

Botsford, Wayne & Botsford, for appellant. A. J. Hopkins, F. H. Thatcher, and F. A. Dolph, for appellee.

PER CURIAM. The following is the opinion of the appellate court in this case, delivered by Mr. Presiding Justice Crabtree:

"This was an action of assumpsit, brought by appellee against appellant, to recover the amount alleged to be due him for royalties upon the manufacture of watch cases under certain letters patent owned by appellee. It appears that appellee is an inventor, and was the owner of certain patents relating to the manufacture of watch cases; that on September 1, 1888, M. C. Eppenstein & Co. were manufacturers of watch cases, and, desiring to use the processes covered by the pat-

ents owned by appellee, a written contract of license was entered into between appellee and said Eppenstein & Co., whereby the latter acquired the right to use the patents of appellee from and after September 1, 1888, during the life of the patents, upon the payment of certain royalties provided in the contract. Shortly after making this contract, M. C. Eppenstein & Co. removed their manufacturing business from Chicago to Elgin, where they formed a corporation under the laws of this state, under the name and style of 'Illinois Watch-Case Company,' being so incorporated on November 24, 1888. The corporation thus formed is the appellant herein. With the consent of appellee, appellant took from said M. C. Eppenstein & Co. all its tools, machinery, stock, and good will, and also all the rights in the aforesaid licenses, and proceeded to manufacture watch cases according to appellee's system, and apparently under his patents. Appellant also from time to time remitted to appellee amounts it claimed was due him as royalties. Appellee claims a subsequent agreement (called a 'substitute agreement') was entered into between appellant and himself for the payment of royalties on watch cases manufactured by appellant under appellee's patents, and such an agreement in writing was produced upon the trial, signed by both parties, and dated January 1, 1894. There is a dispute as to whether this agreement was ever in force, for the reason that after it had been signed in duplicate by appellant both copies were sent to appellee, who never returned a copy to appellant signed by him. Nevertheless, appellant continued to manufacture watch cases and remit for royalties as before, until appellee claimed he had discovered that appellant was not properly accounting for and paying royalties on the number of watch cases manufactured. After that time he did not use or procure to be cashed the checks or drafts sent him for royalties, but brought this suit to recover for such royalties upon watch cases manufactured by appellant, and which he claimed it had not properly accounted for. The cause was tried by a jury, and a verdict returned in favor of appellee for \$3,220.07. Motion for new trial being overruled, there was judgment on the verdict, and appellant prosecutes this appeal.

"We understand the position of appellant to be that it was not a licensee of appellee, but a mere infringer of his patents, and that this suit cannot be maintained. Upon this point we think the evidence is ample to show that in the manufacture of watch cases under appellee's system and machinery it acted as a licensee under appellee's patents, and was so recognized by him. We think both parties have so acted as to be now estopped from disavowing or disclaiming the positions of licensor and licensee. Certainly appellee could not go into the federal courts, and maintain a suit against appellant for infringement of his patents, after receiving

license fees or royalties; and after paying such fees and royalties, and having had all the benefits of a right to manufacture under the patents, appellant cannot be heard to say it was not a licensee, but a mere infringer of appellee's patents.

"Complaint is made as to the introduction of evidence, as incompetent; but we think, as to this point, there was no serious error.

"It is also insisted that the damages are excessive; but inasmuch as it was in appellant's power to show the exact number of watch cases manufactured upon which royalties were due, and it saw fit to put in no evidence whatever upon the subject, it should not now be heard to complain. The verdict was based upon a computation made by a witness upon an examination of appellant's books by agreement of the parties, and it is not in a position now to question the correctness of the computation, nor the basis upon which it was made. We are not disposed to interfere with the judgment on the ground that the damages are excessive. Finding no serious errors in the record, the judgment will be affirmed."

We have given this case a careful examination, and cannot agree with counsel for the appellant that the judgment should be reversed for erroneous rulings of the trial court. The rulings complained of consisted, in the main, of admission of evidence offered by the plaintiff below, and were, in our opinion, substantially correct. The objections urged are numerous, but an enumeration of them would serve no useful purpose. Appellant offered no evidence on its part, although the matters complained of were peculiarly within the knowledge of its officers and employes. No complaint is made of any ruling of the court in instructing the jury, except in its refusal to give an instruction asked by appellant (the defendant below) to find the issues for the defendant. It is apparent that this instruction was properly refused, there being sufficient evidence upon which to base a verdict. We are satisfied with the opinion of the appellate court, and adopt the same as an expression of our own views. The judgment of the appellate court is affirmed. Judgment affirmed.

(173 Ill. 64)

**HOME INS. CO. OF NEW YORK v.
PEORIA & P. U. RY. CO.**

(Supreme Court of Illinois. Feb. 17, 1899.)

FIRE INSURANCE—CONSTRUCTION OF POLICY.

A fire policy, providing a certain amount of insurance "on freight cars, * * * the property of other roads, * * * for which the assured are or may be liable, while on the line of their road," insures the cars, and not the liability thereon of assured, a railroad company doing a terminal business, taking cars over its tracks in a city to manufactories and elevators; the words, "for which the assured are or may be liable," being descriptive of the cars, and meaning such cars of other companies on as-

sured's tracks as it had such control of, or such connection with, as that a liability might accrue against it to account therefor.

Appeal from appellate court, Second district.

Action by the Peoria & Pekin Union Railway Company against the Home Insurance Company of New York. From a judgment of the appellate court, affirming a judgment for plaintiff (78 Ill. App. 137), defendant appeals. Affirmed.

Samuel E. Hall and Jack & Tichenor, for appellant. Stevens, Horton & Abbott, for appellee.

BOGGS, J. The appellee company brought assumpsit on an insurance policy made and delivered by the appellant company, insuring certain cars and other property against loss or damage by fire, and recovered a judgment in the circuit court in the sum of \$8,502.90. The judgment was affirmed by the appellate court for the Second district on appeal. This is an appeal to bring the judgment of affirmance into review in this court. In the trial court the cause was submitted to the court without a jury. The judgment was for the value of 38 freight cars which were destroyed by fire while on the tracks of the appellee company during the period covered by the policy.

Appellee, a railway corporation, was the owner of certain railroad yards in and near the city of Peoria, with tracks leading to certain breweries, elevators, etc., and was engaged at the time of the delivery of the policy, and at the time of the destruction of the property by fire, in doing a switching and terminal business in the city of Peoria, receiving the cars of other companies consigned to and from industries and elevators on its tracks, and carrying and storing such cars, for charges to it paid, as well as doing a general railroad business. All of the railroad companies hereinafter mentioned in a quotation from the policy, except the Chicago, Burlington & Quincy Railroad Company, ran their trains into the city of Peoria on the tracks of appellee, and their cars and contents were delivered to appellee on the arrival of such trains, to be by it transferred or stored, as directed, for certain charges to it paid. The railroad of the Chicago, Burlington & Quincy Company connects with that of appellee, and the latter received and carried the former's cars consigned to it, from or to any industry or elevator on appellee's tracks, making a charge therefor. What was known as the "Iowa Elevator" was on the tracks of appellee, and was one of the elevators to and from which it carried cars for other companies. The cars destroyed by fire were brought into the city of Peoria, and delivered to appellee by the companies mentioned in the stipulation, to be transferred or stored, as directed, in the customary and usual manner.

The particular provisions of the policy re-

lied upon by the appellee are as follows: "(44) \$50,000 on freight cars of every description, the property of other roads, firms, individuals, or corporations, *for which the assured are or may be liable*, while on the line of their road; the limit of loss, if any, on any one freight car not to exceed \$500. (45) \$20,000 on passenger cars, the property of other roads, firms, individuals, or corporations, for which the assured are or may be liable while on the line of their road; the limit of loss, if any, on any one passenger car not to exceed \$2,500. Names of roads owned or operated by the assured on the lines of which the above-described rolling stock is to be covered, viz.: Peoria and Pekin Union Railway; and upon the tracks of the Iowa Elevator Company at Peoria, Ill.; and also on tracks known as Nos. 5 and 6, on property of the Iowa Elevator Company, said tracks owned by the Iowa Central Railway Company and operated under lease by the Peoria and Pekin Union Railway Company; and also on tracks of Toledo, Peoria and Western Railway Company in Peoria."

The contention is as to the true interpretation of these items, particularly Item No. 44, as the cars which were burned were freight cars. The position of the appellant company is that its undertaking, according to the true interpretation of the policy, is not to insure the appellee company against loss or damage to the cars, but only against loss by reason of a liability legally accruing against the appellee company, if any, to account to the owners of the cars for the loss of or damage to the cars by fire; and that, in order to entitle the appellee company to recover, it was essential that the liability of the company to account and pay to the owners of the cars should be made to appear by the proof in the same manner as would be necessary in an action by the owners of the cars against it to recover upon such liability. We do not so construe the policy. The words and phrases employed in insurance policies are chosen by the insurance company. For this reason, and perhaps also for other reasons, it has become the settled rule of construction that the language of a policy shall be interpreted most strongly against the author of the instrument. The words in item 44, "*for which assured are or may be liable*," which we have caused to be italicized, were not, according to our interpretation, incorporated into the item for the purpose of indicating that it was the liability of the assured to account to the owners for the cars that were the subject of the indemnity, but for the purpose of restricting the obligation of the insurer with regard to the class of cars to be covered and protected by the policy. It was not the intention of the insurer to insure any and every freight car belonging to "other roads, firms, individuals, or corporations" which might be on the line of appellee's road, but only such cars belonging to

porations" on appellee's line of road as assured had such control of or such connection with as that a liability might accrue against such appellee company to account for such cars to the owners thereof. The phrase is properly construed to be descriptive of the cars to be insured. Had it been the intention of the insurer to insure the liability, only, of the assured to respond to the demands of the owners of the cars, this intention could have been readily and unmistakably manifested by the use of apt words and phrases. It was a part of the same contract of insurance to insure the liability of the assured to respond to the claims of owners of freight, merchandise, baggage, etc., in transit in and on cars on its line of road, against loss by fire, and the insurer found no difficulty in clearly expressing the obligation so assumed. Item No. 46 in the same policy is as follows: "(46) \$20,000 on the liability of the assured as common carriers and warehousemen, including their interest as owners for freight, merchandise, baggage, and all other property (excluding cotton on open flat cars or petroleum in tank cars) while in transit in or on cars on the line of the road hereby insured, and its branches, spurs, side tracks, and yards, owned or operated by the assured at the date of this policy," etc. So, if the undertaking sought to be expressed in item 44, under consideration, had been to insure the liability of the assured to account to the owners of cars for any loss or damage which might come to such cars while on the line of appellee's road, it is clear the author of the policy had the requisite command of language to enable him to set forth such undertaking in clear and unambiguous terms.

Nor is the right of recovery limited to such cars as it should be made to appear by evidence the appellee company was absolutely legally liable to account and pay for to the owners thereof. The proper construction of the policy in this respect is that all freight cars consumed by fire while on the line of the appellee's road, and in its care and custody, with respect to which it had some duty to perform of such nature that it might be charged with legal liability to account to the owners thereof, or to be subjected to claims and demands to so account, and to possible litigation growing out of such claims and demands, were protected by the policy. The contention that the word "liable," incorporated in item 44, means an absolute legal and fixed liability, is not tenable. In Webster's Dictionary the word "liable" is said to refer to a future possible or probable happening which may not actually occur. And the same lexicographer further defines the word as follows: "Exposed to a certain contingency or casualty, more or less probable." The word, as used in the policy, does not signify a perfected or fixed legal liability, but rather a condition out of which a legal liability may arise. The word, as most frequently used, does not necessarily exclude the idea of a con-

tingency. An assignor of a negotiable note may, with no incorrectness of speech, be said to be liable upon his assignment; but his obligation is not an absolute fixed legal liability, but is contingent upon the financial condition of the maker, and the exercise of diligence on the part of the assignee, if diligence could avail to secure payment of the note from the maker thereof. Law writers and courts, without improper use of language, may and do declare the liability of a warehouseman begins when the goods are delivered, etc., and such liability ends on the delivery of the property to the person rightfully entitled to it, without being understood to assert that an obligation on the part of the warehouseman to answer in any manner has become fixed and absolute. The correct meaning of such expressions is that the warehouseman has such connection with the property as that a fixed liability may arise. The italicized phrase in said item 44 was intended to indicate that the policy was to protect cars to which the appellee should bear such relation as to become charged with the performance of duties which might involve a fixed legal liability. All cars as to which appellee owed such duty were covered, and no more was required than that the evidence should establish the existence of such relation of the appellee company to the cars. That relation established, it is well settled that an insurable interest rested in the appellee company; that it might lawfully insure the cars in its own name, and sue for and recover the value thereof if destroyed by fire, holding the excess over its own interest in the property for the benefit of those who had intrusted the cars to it. *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 66 Md. 347, 7 Atl. 905; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *Siter v. Morris*, 13 Pa. St. 218; *Hope Oil Mill Compress & Mfg. Co. v. Phoenix Assur. Co.*, 74 Miss. 320, 21 South. 132; *Snow v. Carr*, 61 Ala. 363; *Hough v. Insurance Co.*, 36 Md. 432; *Baxter v. Insurance Co.*, 11 Biss. 306, 12 Fed. 481. The trial court ruled correctly in passing upon the propositions of law applicable to the case. The judgment of the appellate court is conclusive on all questions of fact, and that judgment is affirmed. Judgment affirmed.

(178 Ill. 187)

NORTH CHICAGO ST. R. CO. v. BROWN.

(Supreme Court of Illinois. Feb. 17, 1899.)

CARRIERS — STREET RAILROADS — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS — ERROR CURED — DAMAGES — PLEADING.

1. Where plaintiff did not begin to alight from defendant's car until it had stopped, and when it stopped she was holding on with both hands, and had one foot to the ground, and the car jerked after she put the foot on the ground, and before she had time to lift the other foot, she exercised ordinary care.

2. If an instruction that if plaintiff, while alighting from defendant's car, was using rea-

sonable care, and defendant negligently caused the car to be set in motion, and plaintiff was thereby injured, the jury should find defendant guilty, is objectionable in omitting the question whether the negligence of plaintiff was the proximate cause of the injury, the objection is obviated by a subsequent instruction that, if plaintiff was negligent in alighting, and such negligence was the cause of the injury, a verdict of not guilty should be returned.

3. If such instruction is objectionable in not defining "reasonable care," the objection is obviated by a subsequent instruction that a person attempting to alight from a street car is bound to use ordinary care to avoid injury, under any and all circumstances, and if she fails to use such care, and is injured by reason thereof, she cannot recover.

4. In an action for personal injuries, a recovery for any disability rendering plaintiff less capable of attending to her business may be had without an averment of special damage, where plaintiff is a common laborer, since the damages necessarily result from the injury.

Appeal from appellate court, First district.

Action by Sarah B. Brown against the North Chicago Street-Railroad Company. From a judgment of the appellate court (76 Ill. App. 654), affirming a judgment for plaintiff, defendant appeals. Affirmed.

Egbert Jamieson and John A. Rose, for appellant. Lynden Evans and Arnd & Arnd (Frederick Arnd, of counsel), for appellee.

CRAIG, J. This was an action brought by Sarah B. Brown to recover for a personal injury alleged to have been sustained through the negligence of the North Chicago Street-Railroad Company. The declaration contained one count, in which it was, in substance, alleged that on February 15, 1891, the plaintiff was a passenger on one of the defendant's Lincoln avenue cable cars, and that upon its arrival at Larrabee street, while the plaintiff, who was exercising all due care and diligence on her part, was about to alight, the defendant negligently caused the car to be suddenly started, throwing her to the ground, whereby she was greatly cut, bruised, hurt, and wounded, and her hip was broken, and she became sick, sore, lame, and disordered, and so remained from thence hitherto, during all of which time she suffered great pain, and was prevented from attending to the transaction of her affairs, and was obliged to lay out, and did lay out, large sums of money in and about endeavoring to be healed, to the damage, etc. To the declaration the defendant pleaded the general issue, and on a trial plaintiff recovered a judgment for \$5,000, which, on appeal, was affirmed in the appellate court.

The court gave three instructions for the plaintiff, and a reversal of the judgment is asked on the alleged ground that the first and third instructions are erroneous. They are as follows: "(1) If the jury believe, from the evidence in this case, that the defendant controlled and operated, for the purpose of carrying passengers for hire, certain street cars upon Lincoln avenue, in the city of Chicago, Cook county, Illinois, and that the plaintiff, on or about the 15th day of February, 1891, was a passenger for hire on one of the said cars

of the defendant, and that the defendant, by its servant, caused the said car to be stopped for the purpose of allowing passengers to alight therefrom, and the plaintiff was in the act of alighting from said car while said car was so stopped, and while in the act of alighting from said car was using all reasonable care and caution to avoid the injury complained of in the declaration, and that the defendant, through its servant, negligently and carelessly caused said car to be set in motion while the plaintiff was so alighting from said car, and that thereby the plaintiff was injured; then the jury should find the defendant guilty. (3) The court instructs the jury that if, under the evidence and the instructions of the court, the jury find the defendant guilty, then, in assessing the plaintiff's damages, the jury may take into consideration, not only the loss and immediate damage arising from the injury received at the time of the accident, but also the permanent loss and damage, if any is proved by the evidence, arising from any disability resulting to the plaintiff from the injury in question, which renders her less capable of attending to her business than she would have been if the injury had not been received."

It is insisted in the argument that there is no evidence whatever in the record tending to prove that the plaintiff was in the exercise of ordinary care at the time of the accident, and for this reason the first instruction was erroneous. It may be conceded that plaintiff could not recover unless she was in the exercise of ordinary care at the time of the accident, and, if there was no evidence whatever in the record tending to show ordinary care on her part, the argument that there was no evidence upon which the instruction could be predicated might be regarded as well taken. But, upon an examination of the record, it will be found that there is evidence tending to prove ordinary care on the part of plaintiff. She testified that, when the conductor called out Webster avenue and Larrabee street, she got up, and stepped out on the platform, with a view to getting off the car. "The car had crossed Webster avenue when I went out on the front platform. Then it came to a stop. I was on the lower step of the grip when it stopped. When I saw that the car was stopped, I got off. There was no motion of the car. I was particular. When the car stopped, I was holding with both hands, and I had one foot to the ground. Just as soon as the car stopped I put my foot on the ground. When I put my foot on the ground I did not release my hold with my hands, but when I was about to lift the other foot the car jerked before I had time to lift it." If the car stopped as the witness testified it did, she had a right to presume it would not start up until she had sufficient time to get off, and, acting on this presumption, she was justified in stepping off as she did.

It is also claimed that the instruction entirely omits the question as to whether the negligence of plaintiff was the proximate

cause of the injury; also that it requires of plaintiff reasonable care, but does not instruct the jury as to what is reasonable care. If the instruction was not technically accurate in the respects mentioned, the objections are obviated in other instructions given by the court. In defendant's instruction No. 6 the jury were plainly told that if they believed from the evidence that the plaintiff was negligent, and such negligence was the cause of the injury, they should return a verdict of not guilty. In instruction No. 7 the jury were told that "a person attempting to alight from a street car is bound, under any and all circumstances, to use ordinary care and caution to avoid injury to herself, and if she fails to use such care, and is injured by reason thereof, the owner of the car cannot be held liable for such injury."

In regard to the third instruction, it is said there is no allegation in the declaration of special damage resulting to plaintiff from her incapability of attending to her business, and hence it is claimed that the instruction was erroneous in informing the jury that they might take into consideration, in assessing plaintiff's damages, her permanent loss and damage resulting from the injury, which rendered her less capable of attending to her business than she would have been if the injury had not been received. We do not regard the instruction erroneous. The plaintiff was a common laborer. The declaration avers that plaintiff was prevented "from attending to the transaction of her affairs," and plaintiff testified that she was housekeeper for Mr. Thomas, doing washing, scrubbing, baking, and ironing, and that she received for the same \$10 a month and her board. No objection was made in the trial court to the introduction of this evidence. The damages which plaintiff sustained because of her incapacity to continue work were such as necessarily resulted from the act complained of, and in such a case special damage need not be averred. As is properly said in appellee's brief, it is only in that class of cases where the damages are not the necessary result of the act complained of, and are therefore not implied in law, that they must be specially averred, such as loss of profits, a particular engagement, etc. In *Railroad Co. v. Meech*, 163 Ill. 305, 45 N. E. 290, in discussing a similar question, we said (page 314, 163 Ill., and page 293, 45 N. E.): "The rule deducible from the cases in this state is that, in order to recover compensation for inability to work at the plaintiff's ordinary and usual employment or business, all that is necessary in the declaration is the general averment of such inability caused by the injury, and consequent loss and damage, and that proof of his particular employment or business, and of his ordinary wages or earnings therein, is admissible in evidence under such general averment; but that, when it is sought to recover for loss

of profits or earnings that depend upon the performance of a special contract or engagement, then these special and particular damages, and the facts on which they are based, must be set out in the declaration. The distinction we have noted may be a relaxation of the common-law rule, but it is founded upon the precedents to be found in our Reports." The judgment of the appellate court will be affirmed. Judgment affirmed.

(176 Ill. 501)

CICERO & P. ST. RY. CO. v. CITY OF CHICAGO.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL IMPROVEMENTS—ASSESSMENT—PROPERTY SUBJECT.

1. Under City and Village Act, art. 9, authorizing special assessments for local improvements on property contiguous thereto, the tracks and right of way of a street-railroad company in a public street may be assessed for contiguous local improvements therein; and this, even where its franchise is only an easement for a term.

2. Revenue Law (Rev. St. 1893, c. 120) § 15, providing that the track, road, or bridge of street-railroad companies shall be deemed personal property, and assessed as such in the town or district where located or laid, does not prevent the assessment of the track and right of way of a street railroad for contiguous local improvements.

Appeal from Cook county court; Robert H. Lovett, Judge.

Proceedings by the city of Chicago against the Cicero & Proviso Street-Railway Company to confirm a special assessment for a local improvement. From a judgment of confirmation, objector appeals. Affirmed.

Egbert Jamieson and John D. Adair, for appellant. Charles S. Thornton, Corp. Counsel, and John A. May, for appellee.

ORRIG, J. This is an appeal from a judgment of the county court of Cook county confirming a special assessment levied by the city of Chicago to pay the cost of an improvement for constructing a vitrified tile-pipe sewer in (among other streets) West Lake street, from South Forty-Eighth avenue to South Fifty-Second avenue, in the city of Chicago, as part of a connected system of sewers. The commissioners assessed upon "the right of way, right of occupancy, franchise, and interest of the Cicero & Proviso Street-Railway Company in West Lake street, from South Forty-Eighth avenue to South Fifty-Second avenue," the sum of \$120.67. The Cicero & Proviso Street-Railway Company appeared in the county court, and filed several objections to the confirmation of the assessment; but, on the hearing, but one objection was relied upon, viz. that the right of way was not assessable under the laws of the state of Illinois; and that is the only question relied upon here.

It appeared on the hearing that the street-

railway company had constructed its tracks in the street in question under an ordinance passed by the town of Cicero on April 27, 1889, whereby it was authorized to construct its tracks and operate its line of road in the streets for a period of 20 years. It is conceded in the argument that the street-railway company is not exempt from the levy of special assessments upon its right of way for local improvements by any provision of its charter, or by the ordinance under which it constructed its line of road; but the broad claim is made that neither the right of way, right of occupancy, franchise, or interest of appellant is assessable for the local improvement, because the right of way, right of occupancy, franchise, and interest in the street are not such property as falls within the provisions of the constitution or of article 9 of the city and village act. The city and village act authorizes corporate authorities of cities and villages to make local improvements by special assessment of contiguous property, and section 9 of article 9 of the constitution declares that the general assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment of contiguous property. It is not, nor can it be successfully, denied that the ties and track of appellant constructed on the street, and the right to operate its line of railway, are property of a valuable character; and it is also true that the property is contiguous within the meaning of the constitution and the statute; but it is said that appellant's property in the street is not real estate, and hence not liable to be assessed. It is true that the street-railway company did not acquire the fee in the street, but, by the ordinance, the street-railway company obtained the right to occupy and use the street for a period of 20 years. Under that grant, it took possession of the street, constructed a road-bed, laid down its ties, and fastened thereon its rails, and thus acquired the possession and use of the street for the purpose of operating its line of road. The franchise and the right of user constituted property of a fixed and immovable character, like real estate; and, so far as that property is benefited, no reason is perceived why it should not bear its just proportion of the cost of an improvement in the same manner and to the same extent as any real estate which may be contiguous to the improvement.

The question is not, however, a new one in this court. In *City of Chicago v. Baer*, 41 Ill. 306, it was held that a street-railway company occupying a portion of a street with its tracks, and the use thereof, was liable to be assessed for an improvement in the same manner as other adjacent property. It is there said (page 312): "Now, it is true, as urged by counsel, that the railway company has not become the owner of any portion of these streets in fee, but it has certainly, through its charter from the legislature and its contract with

¹ Rehearing denied December 13, 1898.

the city, acquired a property in them of the most valuable character, which neither the legislature nor the city can take away without the consent of the company, and capable, like other property, of being sold and conveyed. The city council has made a contract with the company, by which it has granted to the latter what is substantially a leasehold interest in a portion of this street, for a term, by the original ordinance, of twenty-five years; * * * that this franchise and this right of occupancy together constitute a property, fixed and immovable in its character, like realty, and recognized and protected by the law as fully as a fee simple in land; that this property is of a character to be substantially and directly benefited by the proposed pavement; and that, in proportion as it is thus benefited, it should contribute its share to the cost of the improvement in common with the other property upon the street." The rule laid down in the Baer Case was approved in *Parmelee v. City of Chicago*, 60 Ill. 267. The question again arose in *Chicago City Ry. Co. v. City of Chicago*, 90 Ill. 573; and it was there contended, as here, that the street-railway company had no such property or title to property as would authorize an assessment upon it to pay the cost of an improvement; but the court approved the doctrine laid down in the Baer and Parmelee Cases, *supra*, and held that the street-railroad company was liable to be assessed in like manner as other property owners. In *Kuehner v. City of Freeport*, 143 Ill. 92, 32 N. E. 372, in the discussion of the same question, it is said (143 Ill. 104, 32 N. E. 376): "The difficulty apprehended by counsel in levying a special tax upon the railway in the street proposed to be improved does not exist. It is said that the railway 'has no frontage' upon the street, and therefore no tax can be levied thereon when the levy is according to frontage of contiguous property. The railway is contiguous to the proposed street improvement, and falls within the designation of property that may be specially taxed for the making of the local improvement. Special taxation should be based upon, and is justifiable only upon, the basis of benefits to the property taxed by the making of the improvement for which it is levied." In *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69, this court again passed upon the question, and it was said (150 Ill. 83, 37 N. E. 70): "That the right of way of the railways in the street proposed to be improved is contiguous property, and falls within the designation of property that may be specially taxed, was held in *Kuehner v. City of Freeport*, 143 Ill. 92, 32 N. E. 372." See, also, *Freeport St. Ry. Co. v. City of Freeport*, 151 Ill. 451, 38 N. E. 137, and *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731, where the same doctrine is recognized and approved.

Under the cases cited, we regard the question settled that a street-railway occupying a public street is liable to be assessed for a local improvement in the same manner as oth-

er property owners. Reliance is, however, placed on section 15 (Rev. St. 1893, c. 120) of the revenue law, which provides as follows: "The personal property of street-railroad, plank-road, gravel-road, turnpike or bridge companies shall be listed and assessed in the county, town, district, village or city where the principal place of business is located. The track, road or bridge shall be held to be personal property, and listed and assessed as such in the town, district, village or city where the same is located or laid." The fact that the track of a street-railroad company may be required to be assessed as personal property for general taxation has no bearing on the question. No question in regard to the assessment and collection of general taxes under the revenue law of the state is involved in this case. The legislature, no doubt, had the right to provide, in the assessment of property for state, county, and city purposes, that the track of a street-railroad company might be assessed as personal property, without changing the nature or character of the property when a proceeding might be instituted to make an assessment on contiguous property to pay for a local improvement. No reason is perceived why for one purpose it might not be treated as personal, and for the other as real, property. But, however that may be, we are satisfied that the property of appellant was, within the meaning of the law, contiguous property, and, as such, was properly assessed. The judgment of the county court will be affirmed. Judgment affirmed.

(177 Ill. 575)

GROSS v. ARNOLD et al.

(Supreme Court of Illinois. Feb. 17, 1899.)

VENDOR AND PURCHASER—PROPOSAL—WITHDRAWAL—NOTE—DELIVERY.

1. Prima facie, a contract to buy land was not completed where complainants, before notification of acceptance, withdrew an offer to buy from defendant, which they had embodied in a writing and left with his employes.

2. Leaving a note with the payee's employé, as part of an offer to buy land from the payee, is not a delivery thereof.

Appeal from appellate court, First district.

Suit by Mary E. Arnold and others against Samuel E. Gross. From a judgment of the appellate court affirming a decree for complainants (77 Ill. App. 33), defendant appeals. Affirmed.

Young, Makeel, Bradley & Frank, for appellant. Strong, Milsted & Ehle, for appellees.

BOGGS, J. The superior court of Cook county granted the prayer of a bill in chancery by appellees to cancel a judgment entered by confession on a note given by appellees to appellant, which contained a warrant of attorney to confess judgment thereon. The note, together with other notes, was on the 4th day of August, 1896, executed, and left with certain employes of the appellant, as part of a proposition on the part of the appellees to

purchase two lots from appellant, at the price of \$3,100. The superior court found, and the appellate court affirmed the finding, that the appellees withdrew the offer to purchase the lots before same was accepted. The determination of this question of fact is all that is necessary to the decision of the controversy. We think the chancellor and the appellate court entertained the correct view as to it.

The notes and writing mentioned constituted a proposal on the part of appellees to buy the lots at \$3,100, to be paid partly in cash, balance on proposed deferred payments. Appellant was not present, and had instructed his employes to ask \$3,500 for the lots, and the notes, and a writing in the nature of a proposition to buy the lots at \$3,100, were prepared for appellant, and left with his employes in his office. McDonald, appellant's general superintendent of sales of lots, refused to accept the offer, but held it for presentation to appellant. Whether one Sandford, another of appellant's agents, had power to accept proposals for the sale of lots need not be considered, for the reason we do not find in the record any proof that Sandford did accept the offer. On the contrary, Sandford drew the writing signed by the appellees to be presented to appellant, and which was to be signed by appellant if he decided to sell at the price offered. Sandford did not assume to sign the writing for appellant, but, as notary public, certified that appellees acknowledged the execution of the instrument before him. This writing was indorsed "Approved" by appellant, but not until after the bill herein had been filed and while the cause was pending for hearing. The name of appellant, by one "Moore, as his agent," appeared to this writing; but the record does not disclose when it was written there, nor is there any proof tending to show that the appellant ever considered or acted on the offer, unless the fact he caused the judgment to be entered on the note should be considered as an act of acceptance.

As stated, the notes, and the writings which constituted the proposition to purchase the lots, were left with appellant's employes on the evening of the 4th day of August, 1896. We think it was satisfactorily proven that the appellees, during the night of the 4th, decided to abandon the proposed purchase of the lots, and that the agents of appellant were so notified at an early hour on the morning of the 5th. We think it very clear the proposition to purchase had not received the attention of appellant prior to the withdrawal of the proposal. It is not contended there is any proof tending to show it had been acted upon by the appellant. We attach but little weight to the contention that the appellees did not, on the morning of the 5th, positively withdraw the offer, but only expressed an inclination to do so, and left the matter open for another day. The better view of the testimony on the point is that appellees had reached a definite conclusion to abandon the proposed purchase, and that they so notified appellant's agents. The

testimony of appellant's agents tends in some degree to show that appellees agreed to consider the matter for another day, but we think the view of the evidence most favorable to be taken for the appellant is that appellees consented to his agents to consider for another day whether they would come to appellant's office and renew their offer. Appellant's agents visited appellees on the morning of the 6th, and urged them to buy one of the lots if they were not willing to take both; but appellees, as we think the evidence shows, declined to proceed any further in the matter. We do not find in the proof anything to indicate that appellant had been, even on the morning of the 6th, advised that the offer had been made for the property. The agent of appellant, who testified as to the interviews with appellees on the 5th and 6th of August, did not state that appellant had or would accept the proposition, or even that he had been advised that the offer had been made.

It is familiar law that an offer to enter into an agreement may be withdrawn at any time while it remains unaccepted. The proof here shows a proposal by the appellees, and a withdrawal thereof before notification of acceptance. This prima facie establishes that a contract was not completed. If the appellant, in any binding way, accepted the proposal before it was revoked, it devolved on him to prove such acceptance. We find no proof of that character in the record. It was shown that Sandford indorsed the letters "O. K." on the application for the purchase of the lots, but that such indorsement was not on the paper on the evening of the 5th of August was very satisfactorily proven. It is true, appellees placed in the hands of the appellant's agent a written proposition to buy the lots, and also executed and placed in the hands of the same agent the notes to be given as specified in the written proposition, one of which notes was the note upon which the judgment sought to be canceled was entered; but the notes were not delivered absolutely, as in fulfillment of a completed contract, but only as part of the proposal to buy the lots, the delivery to become operative only in the event the proposition should ripen into a contract. The placing of a note or other instrument in the hands of another, though the payee of the note, does not conclusively establish a "delivery" of the note or instrument, within the legal meaning of that word. Delivery is a question of intent, and depends on "whether the parties at the time meant it to be a delivery to take effect at once." *Jordan v. Davis*, 108 Ill. 336; *Wilson v. Wilson*, 158 Ill. 567, 41 N. E. 1007.

The finding of the chancellor that the appellees withdrew the offer to buy the lots before the appellant became bound to accept the offer is correct. Whether the chancellor erred in decreeing that the appellant should return the sum of \$10 paid his employes by appellees when the notes and application for the pur-

chase of the lots were left with such employes is obviated by a remittitur of the amount, entered by appellees. The decree of the superior court, affirmed by the judgment of the appellate court, is, except as to the amount remitted, affirmed. Decree affirmed.

(178 Ill. 250)

FROST v. CITY OF CHICAGO.

(Supreme Court of Illinois. Feb. 17, 1899.)

ORDINANCES — REASONABLENESS — COVERING FOR FRUIT.

An ordinance making it unlawful to cover any package of fruit with any colored netting, or other material having a tendency to conceal the true color or quality of any such goods which may be offered for sale, is void, as unreasonable and oppressive.

Error to criminal court, Cook county; A. H. Chetlain, Judge.

David Frost was found guilty of violating an ordinance of the city of Chicago, and fined, and brings error. Reversed.

A. E. Gammage (Stedman & Soelke, of counsel), for plaintiff in error. Howard S. Taylor, Pros. Atty., and George McA. Miller, Asst. Pros. Atty., for defendant in error.

CARTER, C. J. Plaintiff in error was found guilty in the court below of violating an ordinance of the city of Chicago, and fined \$15 and costs. The ordinance provided: "Sec. 1000. Colored Netting for Covering. It shall be and is hereby made unlawful to cover any box, basket, or any other package or parcel of fruit, berries or vegetables of any kind, with any colored netting, or any other material which has a tendency to conceal the true color or quality of any such goods which may be sold, offered for sale or had in possession for the purpose of being sold or offered for sale. Any person who shall violate the provisions of this section shall, upon conviction, be fined not less than \$10 or more than \$25 for each offense." The testimony tended to show that the defendant below sold peaches in baskets covered with red tarlatan,—a perforated cloth,—and that these baskets of peaches had been shipped to him from the state of Michigan, put up in the same manner in which he sold them. There was some evidence to the effect that this colored netting tended to conceal the "true color or quality" of the fruit, and some to the contrary. It appears from the record that large quantities of fruit put up in this manner are shipped and sold; that a covering of some kind is necessary to prevent loss of the fruit by pilfering and other means, and to protect it from insects; that such fruit requires ventilation; and that experience has demonstrated that a covering of netting is better than one of wood, paper, or other material, because it allows free access of air, does not bruise the fruit, and affords better means of inspection. The case seems to have turned below upon the color of the netting used, although there

was testimony to prove that white, green, or blue netting (sometimes, but less frequently, used) would also conceal to some extent the true color or quality of the fruit. The case assumed some importance, as it appeared from the evidence that red tarlatan manufactured for the purpose has come into general use by packers and shippers of and dealers in fruit, and counsel say that many other cases are pending, to be finally determined by the decision of the case at bar.

Some minor questions have been raised, having reference to the admission or exclusion of evidence, and also to the point that as the evidence showed that plaintiff in error did not himself cover or cause to be covered with the colored netting the baskets of peaches which he had for sale, but merely offered them for sale as he had received them, he did not come within the ordinance. These minor questions may well be waived, and the case considered on more meritorious grounds, involving the validity of the ordinance. Nor have we thought it necessary to consider the point made by the plaintiff in error, that the ordinance is not a mere local inspection law, but is an attempt to regulate interstate commerce, and to restrict the sale of goods in the original packages in which they were shipped from other states, and is therefore void, but are of opinion that the objection that it is void for unreasonableness was well made, and should have been sustained. We have reached the conclusion that the ordinance is a vexatious and unreasonable interference with and restriction upon the rights of dealers in certain articles of trade and commerce. The only valid basis upon which such a regulation can rest is that its purpose is to prevent deception, and imposition upon buyers of such articles as are named in the ordinance. The evidence shows, as common observation would teach, that such packages must have some covering, and shows, also, that tarlatan has been found the best and most suitable covering for the preservation of fruit so packed and sold; and the validity of the ordinance is made to depend, and indeed its validity is defended only, upon the question of the color of the material. It is not pretended that there is anything in red tarlatan which is deleterious to health, or which imparts to the fruit any noxious material or quality, but only that it tends to impart to the fruit beneath a more wholesome tint or appearance than it would otherwise have. It is natural, and not unlawful, for the packer and dealer to put up and offer for sale his goods in an attractive form; and a regulation would not seem to be reasonable which would prevent the dealer in certain commodities from offering for sale his goods in packages tinted so as to correspond in some degree with the color of the goods themselves. No buyer who is ordinarily careful and intelligent is deceived by such devices of tradesmen. He may examine what he buys, and no law can protect him from the consequen-

ces arising only from his own folly. At most, the colored netting would tend to conceal the true color or quality of only the top layer of the fruit in the package, leaving the same latitude for deception as in cases where no covering is used. It will be noticed that the provision in question of the ordinance does not make it unlawful to sell decayed or unwholesome fruit, or to practice deception on the public by methods employed in packing or displaying it. From whatever view the ordinance is regarded, it is difficult to see how it can be of any public benefit whatever; and while, ordinarily, that is a question for the municipal legislature, it may be considered by the courts in determining the question of reasonableness. It is not contended by counsel that the power to pass such an ordinance is in terms conferred on the city council by any act of legislature (*City of Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791), but the power to enact it is referable to the general police power of the city; and it is conceded that the question of its reasonableness is open for decision, and is the subject of fair contention in the case. It was shown, and is a matter of common knowledge, that much fruit is shipped and sold wrapped up in tissue paper and in tinfoil, and in packages and baskets covered with wood, all of which material effectually conceals the "true color and quality" of the fruit, until removed. It would be as reasonable to prohibit the one as the other. Fruit dealers would be subjected to unjust and oppressive discrimination by the enforcement of such an ordinance. Being unreasonable and oppressive in character, the ordinance is void, and should have been so declared by the court below. The judgment is reversed. Judgment reversed.

(173 Ill. 158)

WAHL et al. v. ZOELCK.

(Supreme Court of Illinois. Feb. 17, 1899.)

MORTGAGES—MERGER.

Complainant in a bill to foreclose a second mortgage can, after filing the bill, though before entry of decree in that suit, become assignee of the first mortgage, without its merging in the one foreclosed; neither he nor any one owning the first mortgage having bought the premises at the sale under the decree foreclosing the second mortgage.

Error to appellate court, First district.

Suit by Frank Zoelck against Mary Wahl and others. From a judgment of the appellate court affirming a decree for complainant (77 Ill. App. 226), defendants bring error. Affirmed.

M. Salomon, for plaintiffs in error. Walther & Lanaghen, for defendant in error.

CARTER, C. J. This is an appeal from a decree foreclosing as a mortgage a deed of trust given by John Wahl and his wife, Mary Wahl, to secure a note for \$1,300, dated August 7, 1885, to Barney McGough, for borrowed money. The bill, which was filed Oc-

tober 4, 1894, alleged that after deducting payments of interest, and upon the principal, there remained due \$834, with interest from July 21, 1891. John Wahl died November 6, 1893, leaving his widow, said Mary Wahl, and children, who, with her and Moses Salomon, are the plaintiffs in error. The appellate court affirmed the decree of foreclosure.

The defense made below, and sought to be maintained on this writ of error, was and is that a subsequent mortgage on the property was foreclosed on a bill filed September 14, 1892, by Henry Zoelck, and decree entered March 12, 1895, and that, under that decree, the property was sold, and plaintiff in error Salomon purchased and obtained a deed for it; and the contention seems to be that the purchaser at the sale, who had obtained his certificate of purchase, obtained the superior title; that, before the decree in that case was entered, Henry Zoelck acquired the note and deed of trust given to McGough, and should have brought it forward and included it in the decree in that case, and, failing to do so, his assignee of the note, Frank Zoelck, the complainant in this bill, cannot now assert his lien as against Salomon. In support of this contention, plaintiffs in error cite *Welner v. Heintz*, 17 Ill. 259, and *Mines v. Moore*, 41 Ill. 273. Those cases are not in point. There the holder of the other lien bought the property at the sale, and it was held that it should be presumed he bought it at its value, diminished by the lien still resting upon it; and for that reason he could not thereafter enforce payment of the debt secured by such lien. It certainly is not the law that the complainant in a bill to foreclose a second mortgage cannot afterwards become the assignee of a first mortgage, without having it merged in the one foreclosed. Nor is there any evidence, if it were important to inquire into that question, that Henry Zoelck is the real owner of the note and mortgage here sought to be foreclosed, instead of the complainant, Frank Zoelck. Neither of the Zoelcks bought the property at the sale, and the prior incumbrance was not merged.

It is next contended that, as against the interest of the widow and children of John Wahl, the right to foreclose is barred by laches or limitation by the lapse of nine years after the maturity of the note before the filing of the bill. Why this should be so, no sufficient reasons are urged or appear from the record. No meritorious defense to the bill appearing, the judgment of the appellate court will be affirmed. Judgment affirmed.

(177 Ill. 599)

COOK & RATHBORNE CO. v. SANITARY DIST. OF CHICAGO.

(Supreme Court of Illinois. Feb. 17, 1899.)

EMINENT DOMAIN—DAMAGES—EVIDENCE—ORDINANCES—REPEAL.

1. A section of a later ordinance repeals a section of an earlier ordinance, both relating to the piling of lumber for seasoning it, and

being in identical language, except that the later inhibits such piling within 50 feet of woodworking manufactories, while the earlier inhibited such piling within 100 feet of such manufactories, though the later ordinance is termed the "Building Ordinance," and the earlier the "Fire Ordinance," the object of each being the same.

2. Testimony, in proceedings for damages for condemnation of part of premises used as a box factory, that it costs more for insurance to pile lumber nearer the mill, is improper, as coming under the head of imaginary or speculative and remote damages.

3. Damages for condemnation of part of a tract of land, depending on the probable difference in freight which the lessee will have to pay in the next five years for hauling lumber by rail rather than by water, cannot be considered, being contingent and speculative.

Appeal from Cook county court; John H. Batten, Judge.

Petition by the sanitary district of Chicago for the condemnation of land. The Cook & Rathborne Company filed a cross petition asking for assessment of damages, and from the judgment allowing it less than claimed it appeals. Affirmed.

This was a petition filed in the county court of Cook county by appellee, the sanitary district of Chicago, to condemn a strip of land on the Chicago river. The land proposed to be taken contained about 8,900 square feet, a part of which was submerged land. Henry A. Du Pont was the owner of the property, but the appellant, the Cook & Rathborne Company, held a lease of a large tract of land from Du Pont, of which the property sought to be condemned was a part. The Cook & Rathborne Company carried on a box manufactory on the premises leased by it, and it filed a cross petition, in which it alleged that its lease covered, not only the premises sought to be condemned, but other property (describing the same), and contended that the remainder of its property and its business would be injured by the taking away of the strip in question, and asked for an assessment of damages to the portion not taken. The appellant, during the progress of the trial on the questions involved in its cross petition, introduced in evidence section 668 of the Revised Code of the City of Chicago for the Year 1897, in reference to piling lumber near a woodworking manufactory or planing mill, which reads as follows: "Sec. 668. Piling Lumber. No lumber shall be piled, for the purpose of storing, seasoning or drying the same, within one hundred feet of any planing mill or woodworking manufactory, nor within one hundred feet of any private residence, unless the same has been erected since the establishment of such yard. Any person, firm or corporation violating any of the provisions of this section shall be fined in the sum of not less than \$10 nor more than \$100, and every day that lumber shall remain piled, or any place kept for the storage or piling of lumber in contravention of any of the provisions of this section, shall be deemed a new and distinct offense." During the progress of the trial, ap-

pellee, over the objection of appellant, offered and read in evidence section 208 of an ordinance passed by the city council of the city of Chicago on March 29, 1898, bearing on the same question as the ordinance above introduced by appellant, which is in words as follows, to wit: "No lumber shall be piled, for the purpose of storage, seasoning or drying the same, within fifty feet of any planing mill or woodworking manufactory, nor within one hundred feet of any private residence, unless the same has been erected since the establishment of such yard." The court, at the request of petitioner, gave to the jury, among others, the following instruction: "(12) The court instructs the jury that under the ordinances of the city of Chicago the defendant, Cook & Rathborne Company, are permitted to pile lumber, for the purpose of storage, seasoning, and drying, up to fifty feet of any woodworking manufactory." The jury returned a verdict that the just compensation to be paid by the petitioner for the land taken was \$8,965,—\$7,395 to the landowner, Henry A. Du Pont, and \$1,570 to the tenant, the Cook & Rathborne Company,—and assessed the damages accruing from the temporary occupation of a portion of the premises in question not taken, while replacing the dock according to the stipulation of petitioner filed therein, at \$400. The court entered judgment on the verdict, and the Cook & Rathborne Company appealed.

Hamlin & Boyden, for appellant. F. W. C. Hayes and Seymour Jones, for appellee.

CRAIG, J. (after stating the facts). The first or principal ground of reversal insisted upon by appellant is the admission in evidence by the trial court of the foregoing ordinance (section 208) by appellee, passed by the city council of the city of Chicago March 29, 1898. Previous to the introduction of this ordinance by appellee the appellant had introduced in evidence, in support of its cross petition, section 668 of the Revised Code of the City of Chicago for the Year 1897, for the purpose of showing that it could not utilize the space nearer its box manufactory than 100 feet, because of this ordinance, and was thereby deprived of this amount of space for piling lumber. A comparison of the two ordinances shows the one passed March 29, 1898, introduced in evidence by appellee over the objection of appellant, is identical in language with the ordinance published in the Revised Code of 1897, introduced by appellant, except that the words "fifty feet" are used instead of the words "one hundred feet." While section 208 (the later ordinance) is a portion of what is termed the "Building Ordinance," and section 668 (the earlier ordinance) is part of what is termed the "Fire Ordinance," they are both on the same subject. Both relate to the piling of lumber for the purpose of storing, seasoning, and drying the same. Both, in effect, are fire ordinances, and their only ob-

ject is to limit the piling of lumber within a certain distance of woodworking manufactories, and thereby lessen as far as possible the spread of fire and disastrous conflagrations in the manufacturing lumber districts of the city of Chicago. What was the effect of this later ordinance of March 29, 1898, on the ordinance of 1897? That the two are inconsistent with each other is clearly apparent, and, while there is no express language repealing the earlier ordinance, the rule is that, where there are two ordinances relating to the same subject-matter which are repugnant and inconsistent with each other, the later ordinance repeals the former. In *Dutton v. City of Aurora*, 114 Ill. 138, 28 N. E. 461, this court said, "Where the provisions of a former and a later statute are inconsistent and repugnant in respect of the same subject-matter, the latter is a repeal of the former to the extent of the inconsistency or repugnancy." See, also, *Trust Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24; *Korah v. City of Ottawa*, 32 Ill. 121; *Dwar. St.* 673; *Culver v. Bank*, 64 Ill. 528. The ordinance of 1897 being repealed by the ordinance of 1898, the giving of the instruction to the jury, that under the ordinances of the city of Chicago the Cook & Rathborne Company was permitted to pile lumber up to 50 feet of its woodworking manufactory, was not error.

It is urged that the court should have permitted the witness W. W. Rathborne, in rebuttal, to answer the question, "Does it cost you any more insurance to pile inside of eighty feet towards the mill,—more than you now pay?" The cases cited by appellant in support of its position are cases in which railroad companies have exercised the right of eminent domain; and this court has held it is competent to show that there is danger of fire from passing engines to buildings and property not taken, and that the market value is depreciated, not only for the present, but the future. The case of the petitioner, the sanitary district of Chicago, does not increase the danger from fire to the property not taken. It merely seeks to condemn a strip of land bordering on the South Branch of the Chicago river, of about 8,900 square feet, of which more than 1,100 square feet is submerged land, to provide a sufficient capacity in the river channel for carrying the required flow of 300,000 cubic feet of water per minute, the capacity being now only about 150,000 cubic feet per minute. This testimony does not appear to have been in rebuttal of anything brought out by the appellee, and as was said by this court in *Mueller v. Rebhan*, 94 Ill. 142, it being "a question of practice, must, to a greater or less degree, be left to the discretion of the court trying the case." But the testimony was improper because it comes under the head of imaginary or speculative damages. It may be classed as remote damages, and amounts to nothing more than a mere apprehension of danger, and under the ordinance, which only permitted the piling of lumber within 50 feet of

a wood manufactory, cannot be regarded as a real danger.

The evidence as to the location of appellant's customers at the stock yards was irrelevant, as well as speculative in its character, and was properly excluded.

Appellant claims that the verdict is contrary to the evidence. The jury awarded \$8,965 as total compensation for the land proposed to be taken,—\$7,395 to Du Pont, the owner of the fee, and \$1,570 to the Cook & Rathborne Company, the tenant and appellant, for the present worth of the rent to accrue upon the premises up to 1903, when a revaluation of the same was to be made. They also awarded the sum of \$400 to the Cook & Rathborne Company for damages accruing from the temporary occupation of a portion of the premises not taken, by the sanitary district, while replacing the dock, according to its stipulation introduced in evidence, whereby the sanitary district of Chicago agreed to build at its own expense a substantial dock, to be in condition substantially as good as the present dock on the property in question, and to be constructed between the 1st day of December, 1898, and the 1st day of April, 1899. Appellant says that the value of the rent due under the terms of the lease for the property actually taken was admitted by all parties to amount to \$1,570,—the amount awarded by the jury in their verdict.

Much of the testimony of appellant related to the amount of lumber used per month, and the probability of appellant being compelled to bring in lumber by rail after the close of navigation on the lake, and if appellant had to bring in 1,080,000 feet by rail, instead of by water, how much it would cost to do it each year during the lease. The testimony of appellant on the question of damage to its business depended upon this difference between freight rates by water and freight rates by rail for a period of five years in the future, which is contingent and speculative in character, and cannot be considered in estimating the compensation to be paid for taking this strip of land. In the case of *Braun v. Railroad Co.*, 166 Ill. 434, 46 N. E. 974, in which damages were claimed which would result to appellant's goods by being moved from the building, and interruption to the business of appellant by packing, moving, and re-establishing his business, and the number and value of certain catalogues of the goods bought by appellant, this court used the following language (page 437, 166 Ill., and page 975, 46 N. E.): "The general rule is that just compensation to the owner of private property taken or damaged for public use is to be measured by its fair cash market value. We said in *Dupuis v. Railway Co.*, 115 Ill. 97, 3 N. E. 720 (on page 99, 115 Ill., and page 721, 3 N. E.): 'The fair market value would always give the owner just compensation, and that is all he is entitled to receive, under the law. If

the lots were devoted to some particular use, and in consequence of such use had an intrinsic value, the owner, in such case, in order to get just compensation, would be entitled to recover whatever the lands were worth for the use or purpose to which they might be devoted.' See *Lewis, Em. Dom. § 478*. This rule excludes all evidence as to the amount of business done, or which could be done, in the property, or the probable profits arising therefrom. *Railway Co. v. Walsh, 106 Ill. 253*. It is a general rule that damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid." Appellant's own witnesses varied as to the difference in freight rates by rail and by water, some fixing the rate at \$2 per 1,000 feet of lumber. One witness fixed the rate at \$1.75 by boat, and said, by rail, that it figured up sometimes to \$2.50 per 1,000.

There was a conflict in the testimony as to the value of the leasehold interest. The estimates by real-estate dealers varied materially. One of appellant's witnesses testified that he considered that the Cook & Rathborne Company had a yearly profit of over \$2,000 over the \$6,500 it was required to pay under its lease, while one of appellee's witnesses, also a real-estate dealer, testified that in his opinion the lease could not be sold in the market at a profit; and after taking the strip that the sanitary board proposed to take, and assuming that the tenant and landlord would be paid for the actual market value, the witness thought that the leasehold interest on that part taken would not be injured. The jury saw the premises, and as this court said in *Mitchell v. Coal Co., 85 Ill. 566*, "under the statute the jury had a right to view the premises, and draw their own conclusions from such observations, as well as from other testimony offered in the case." *Railroad Co. v. Hopkins, 90 Ill. 316*; *Green v. City of Chicago, 97 Ill. 370*. With such a diversity of opinion among the real-estate dealers, and such a conflict in the testimony, this court would not be justified in saying that the evidence does not support the verdict, and especially when the verdict is undoubtedly based upon an examination of the property by the jury, as well as the other testimony in the case. The judgment will be affirmed. Judgment affirmed.

(178 Ill. 176)

HOWELL v. PEOPLE.

(Supreme Court of Illinois. Feb. 17, 1899.)

FORGERY—EVIDENCE—NEW TRIAL.

1. On trial for forgery of a bond given by a traveling salesman, it appeared that it purported to be signed by one K. K. denied the signature. Accused testified that it was signed in his presence. It was witnessed by a lawyer, who testified that it was brought to him by accused, who called him to witness the signature of K.; that he met K. on the street,

and asked him if he had signed a bond for the accused, and he said that he had. It appeared that K. had signed two other bonds for the accused, and at the time was in trouble because of a shortage of the accused under one of such bonds. Experts testified that the signature was not in the handwriting of K. Held, that a verdict finding accused guilty was not contrary to the evidence.

2. A motion for new trial for newly-discovered evidence is properly refused, where the affidavit does not show that accused used reasonable diligence to discover the witness, and a mere statement in the affidavit that accused used every effort to find him is insufficient for that purpose.

Appeal from criminal court, Cook county; O. H. Horton, Judge.

George W. Howell was convicted of forgery, and appeals. Affirmed.

Grant Newell and Julius N. Heldman, for appellant. Edward C. Akin, Atty. Gen. (Charles S. Deneen, State's Atty., Harry Olson, Asst. State's Atty., Chas. A. Hill, and B. D. Monroe, of counsel), for the People.

MAGRUDER, J. This is an indictment against the plaintiff in error for forging a bond. The plaintiff in error pleaded not guilty, and was tried by a jury, who returned a verdict finding him guilty of forgery, and fixing his punishment at imprisonment in the penitentiary. After the jury was polled and the verdict was entered of record, the defendant made a motion for a new trial, supported by affidavits. This motion for new trial was overruled, and exception was taken by defendant's counsel.

No objection is made to the action of the court below in admitting or refusing to admit evidence, or in giving or refusing to give instructions. The sole grounds upon which it is sought to reverse the judgment are—First, that the verdict is contrary to the law and the evidence; and, secondly, that a new trial should have been granted on the newly-discovered evidence, as shown by the affidavits filed on the motion for new trial.

1. As to the point that the verdict is not sustained by the evidence. In March, 1896, plaintiff in error, George W. Howell, entered into the service of Merriam, Collins & Co., wholesale grocers in Chicago, as a traveling salesman. Plaintiff in error then was or had been a resident of the state of Michigan, and was, by the terms of his employment, to sell goods and collect accounts for said firm. To secure the faithful performance of his contract with said firm, he was required to give a bond. He entered into the employment at once, and, in the prosecution thereof, traveled in the northern part of Michigan. He executed the bond required of him on June 23, 1896, and delivered the same to Merriam, Collins & Co. about June 24, 1896. The bond sets forth that Howell had been assigned to the position of salesman by Merriam, Collins & Co., and in such capacity might, during the term of his employment, handle money or other valuables belonging to said firm, and, in order to secure them

against loss, furnish them a bond for \$2,000. The bond is signed by "George W. Howell" and "Benj. D. King," with a seal opposite each name. The signatures to the bond purported to have been witnessed by one Frank Joslyn. The indictment alleges that Howell, on June 23, 1896, feloniously, fraudulently, and falsely forged and counterfeited said bond. After giving the bond, plaintiff in error continued to perform services for the firm until about the month of August, 1897, at which time it appeared that he was in default on the bond to the amount of \$700. Plaintiff in error, however, denied that he was in default and refused payment of the bond. Thereupon the firm notified the surety on the bond, Benjamin D. King, of Muskegon, Mich., and demanded from him payment of the sum due. When the bond was given to the firm, with the name of King upon it as surety, they made inquiries as to the responsibility of King, and, finding that he was responsible, accepted the bond and filed it away. When demand was made upon King by the firm for the amount of the shortage incurred by Howell under the bond, King replied that he had never executed any such bond, and refused payment thereon. It is conceded that the bond was executed in Muskegon, Mich., and that King was a physician in active practice in that place, and had been the family physician of Howell prior to the time of the alleged making of the bond. King swore upon the trial that he never made any such bond, and never signed his name to the same. Six witnesses living in Muskegon swore that they were acquainted with the handwriting of King, and that the signature to the bond, purporting to be the signature of King, was not in his handwriting. One of these witnesses was the cashier of a bank in Muskegon where King had done business. Another was the teller of a savings bank where King had done business. Two of these witnesses were druggists in Muskegon, who had put up prescriptions for King as a physician. One of them was the secretary of a building and loan association in which King was a director; another was the secretary of the Curtis Automatic Gate Company of Muskegon, of which King was the president. The defendant took the stand, and swore that the bond was signed by King in his presence. Joslyn, a lawyer in Muskegon who signed the bond as a witness to the signatures, swore that Howell came into his office, and handed him the bond, with his own name and that of King attached to it, and asked him to witness the signature of King. Joslyn says that he took the bond, and told Howell that he would see King about it. Joslyn's office was just across the street from King's, in Muskegon. Joslyn says that when he met King in the street, and asked him if he had signed a bond for Howell, King answered, "Yes." The evidence shows that, before the time when the bond in question is alleged to

have been executed, King had signed two other bonds for Howell. One of these other bonds had been given by Howell to a firm in Chicago by the name of Puhl & Webb. The other of the prior bonds, signed by King, had been given to a party by the name of Lynch, and is spoken of in the testimony as the Lynch bond. Howell had become liable on the Lynch bond on account of a shortage incurred thereon by him, and King, in June, 1896, had been called upon to make up the shortage upon this Lynch bond, and at that time was having trouble in reference to the same. The matter of the Lynch bond, it appears, was settled in some way by King. Dr. King swears that, when Joslyn asked him if he had signed a bond for Howell, he supposed he referred to the Lynch bond, about which he was at that time having trouble, and that he answered "Yes" for that reason, knowing nothing at that time about the Merriam, Collins & Co. bond. King swears that he never heard of the Merriam, Collins & Co. bond until he was called on by Merriam, Collins & Co. in August, 1897, to pay the shortage upon that bond. The defense sought to show by the testimony of two witnesses, to wit, a brother and a brother-in-law of Howell, that Dr. King had made admissions prior to August, 1897, tending to show that he had knowledge of the bond given to Merriam, Collins & Co. The object of this testimony was to contradict the statement of King that he never heard of the latter bond until August, 1897. It clearly appears, from the cross-examination of one of these witnesses, that the bond referred to in his conversation with Dr. King was not the bond here in question, but one of the previous bonds that had been given by King. We do not regard the testimony of these witnesses, introduced for the purpose of contradicting King by showing prior admissions inconsistent with his testimony on the stand, as establishing the admissions claimed. We have thus stated the material portions of the testimony in the case. We are unable to say that the verdict is so clearly contrary to the weight of the evidence as to justify us in setting it aside. The jury are the judges of the facts and of the weight of the evidence. They saw the witnesses, and heard their testimony, and evidently believed that the bond was not executed by the surety, as claimed by the plaintiff in error. "The question of the credibility of witnesses is one peculiarly for the jury, and we think their finding in that respect must in this case be accepted as final." *Bean v. People*, 124 Ill. 576, 16 N. E. 656. The objection that the verdict is contrary to the law and the evidence cannot be sustained.

2. As to the overruling of the motion for new trial upon the ground of newly-discovered evidence. Upon the trial the plaintiff in error, in his testimony, did not say that any other person was present when, as he claims, the bond was signed by Dr. King.

except Dr. King and himself. Upon the motion for new trial he filed an affidavit that one Chadwick went with him to Dr. King's office when the bond was signed, and stood there and saw King sign the bond. He gives, as a reason why Chadwick was not produced upon the trial, that he had forgotten the name of the person who went with him to King's office, and at that time was unable to recall the name of such person. His affidavit is a singular one, in view of the fact that he had known Chadwick for a number of years. He also says that he had some business with Chadwick at that time at his mother's house with reference to the purchase of some property by Chadwick from his mother. He produces the evidence of four persons in Muskegon, who swear that Chadwick is a reliable person, while the state produced the evidence of nine persons in Muskegon, who swear that Chadwick rented rooms in Muskegon for gambling and assignation purposes, and was a man whose reputation for truth and veracity was very bad, and whom they would not believe under oath. We pass no opinion upon the truth or falsity of these affidavits filed by the plaintiff in error upon the motion for new trial, and do not wish to be understood by anything here said as indorsing the practice of filing affidavits attacking the character or credibility of persons whose affidavits are submitted to the court upon a motion for new trial. In this case we are of the opinion that the court committed no error in overruling the motion for new trial, upon the ground that the affidavit of the plaintiff in error, filed upon that motion, does not show that he used reasonable diligence to discover the witness Chadwick, with a view of presenting his testimony upon the trial of the case. Plaintiff in error states in his affidavit that he made every effort to find Chadwick, but could not do so. This averment in the affidavit was not sufficient to show diligence in the matter of procuring Chadwick's testimony upon the trial. Application might have been made to the court for a continuance of the cause, in order to give time for the ascertainment of the name of the person who is alleged to have been present at the alleged time of the signing of the bond. No such application was made. "All due diligence must be exacted of parties in making preparation for trial. If a party, before trial, knows of the existence of needed testimony, he should exhaust all reasonable means in his power to secure the evidence upon his trial. If he fails to do so, and chooses to take the risk of going into trial in the absence of the testimony, and there be an adverse verdict, he should be left to abide the consequence, and not have granted to him a new trial for the purpose of the procurement of such testimony upon another trial. Any other practice would be pernicious in its operation." *Bean v. People*, supra. In the application for a

new trial upon the ground of newly-discovered evidence, the affidavit of the plaintiff in error, alleging that he had made every effort to find Chadwick before the trial, fails to show of whom he made inquiry, and for this reason is not sufficient to establish the exercise of due diligence. *Smith v. Wagaman*, 58 Iowa, 11, 11 N. W. 713. The court was justified in refusing to grant a new trial upon the ground of newly-discovered evidence, for the insufficiency of the affidavit in the respect above indicated. Accordingly, the judgment of the criminal court of Cook county is affirmed. Judgment affirmed.

(178 Ill. 532)

STEVENS et al. v. HADFIELD.

(Supreme Court of Illinois. Feb. 17, 1899.)

RECEIVERS — ORDER — FINALITY — MORTGAGES — FORECLOSURE — RENTS DURING REDEMPTION PERIOD — WHO ENTITLED.

1. An order of court passing on a receiver's account, and commanding him to hold the balance found due from him subject to order of the court, is final as to the receiver, unless he appeals therefrom; and hence he cannot afterwards reassert the propriety of disbursements passed on by the order.

2. Rents after foreclosure during the redemption period belong to the owner of the equity as against the purchaser, there being no deficiency.

Appeal from appellate court, First district.

Foreclosure by William Fleming and others against John J. Shutterly and others. There was a decree of sale, and from an order finding Abram H. Hadfield, the owner of the equity, entitled to the balance of rents and profits collected by the receiver during the period of redemption, and directing it to be paid to him, Julius H. Stevens, the receiver, and Charles B. Eggleston, purchaser at the foreclosure sale, appealed to the appellate court (76 Ill. App. 420); and, from a judgment of affirmance, they appeal to this court. Affirmed.

On June 15, 1894, a bill was filed by William Fleming and others against John J. Shutterly and others to foreclose a trust deed upon certain improved property in Cook county. Appellee was the owner of the equity of redemption, and was made a party defendant. An order was entered in the cause appointing appellant Julius H. Stevens receiver of the premises, with the usual powers of receivers in such cases. A decree of sale was entered on November 13, 1895, and the premises were sold. There was a deficiency and a decree for the same. Appellant Charles B. Eggleston purchased at the foreclosure sale, and, after the period of redemption, received a deed. The receiver remained in possession, and collected rents, during the period of redemption. There were two other incumbrances, evidenced by trust deeds upon the property, one prior and one subsequent to the trust deed upon which suit was brought. The third trust deed secured an indebtedness due F. P. Burgett; and on February 25, 1896, a bill was filed by

him, which was consolidated with this cause. An intervening petition was filed by Eggleston on October 20, 1896, setting up that he had purchased the premises at master's sale; that the receiver had made his report on April 20, 1896, showing disbursements of \$3,735.54; that objections were filed to the report by Burgett and Hadfield; that Hadfield had purchased the premises, and, as part of the purchase, he assumed and agreed to pay the various incumbrances thereon; that any sums paid by the receiver upon interest due on the first mortgage, if held by the court to have been improperly paid, should be ordered paid to petitioner, and not to Hadfield; and praying that the petition be referred to the master in chancery, to whom the receiver's accounts and reports had been referred. The petition was so referred; and on March 5, 1896, the master made his report, in which he states that a warranty deed was introduced in evidence, dated March 1, 1894, from Shutterly to Hadfield, conveying the premises in question, subject to an incumbrance of \$20,000, secured by trust deed to Aaron B. Mead, and another incumbrance, for \$3,600, secured by trust deed to Nathaniel M. Jones, which incumbrances said Hadfield assumed and agreed to pay. Exceptions were filed to the master's report by the receiver, Stevens, and Hadfield and Burgett; and, upon the hearing of the exceptions, an order was entered by the court on April 5, 1897, approving the receiver's account in part, allowing some of the items of disbursement, and disallowing others. The order concludes as follows: "The court further finds that the total sum collected by the receiver as the revenue from said premises is the sum of \$3,421.76. Deducting above payments allowed leaves balance of \$1,882.16. It is further ordered that the above balance of \$1,882.16 be held for the further consideration of the court." Afterwards, on May 25, 1897, Hadfield, appellee, filed his petition in said cause, setting forth that he was the owner of the equity of redemption from the time of the foreclosure until the expiration of the period of redemption; that the deficiency had been paid, and the deficiency decree satisfied; and praying that the receiver be ordered to pay the petitioner the balance which had been found by the court on April 5, 1897, to be in his hands. Stevens, the receiver, and Fleming, answered the petition. The substance of the answers was to reassert the propriety of the receiver's disbursements which had been passed upon and disallowed by the order of April 5, 1897. On September 3, 1897, the court entered an order finding that Hadfield was the owner of the equity of redemption, and, as such, entitled to the balance of rents and profits, and directing that the balance in the hands of the receiver be paid to Hadfield, less \$50 allowed for costs of this proceeding. From that order, Stevens, the receiver, and Eggleston, the purchaser at the foreclosure sale, appealed to the appellate court, where the judgment was affirmed, to

reverse which they have appealed to this court.

N. M. Jones, for appellants. B. W. Ellis, for appellee.

CRAIG, J. (after stating the facts). It will be observed that in the order or judgment of April 5, 1897, the entire account of the receiver as to all moneys received and paid out was considered and passed upon by the court, and that after charging him with all moneys received, and allowing him for all moneys properly paid out, the court found that he had a balance of \$1,882.16 in his hands, to be paid out as the court might thereafter direct. So far as the receiver was concerned, this was a final adjudication, and would be conclusive on him, unless he appealed or sued out a writ of error. But no appeal was taken or writ of error sued out. To whom the court should ultimately order the balance in the receiver's hands paid was a matter of no consequence to him. He therefore cannot complain of the judgment of September 3, 1897, from which he appealed.

The only remaining question to be considered is whether the judgment of September 3, 1897, in which the court determined that the balance in the hands of the receiver should be paid to Hadfield, was erroneous as to the purchaser at the foreclosure sale, Charles B. Eggleston. As a general rule, the mortgagor or owner of the equity of redemption, where there is no deficiency, is entitled to the possession of the premises, and to receive the rents, issues, and profits, after the sale on foreclosure, until the time of redemption expires. *Davis v. Dale*, 150 Ill. 239, 37 N. E. 215. Here, Hadfield was the owner of the equity of redemption. At the foreclosure sale the mortgaged premises were sold for the entire amount of the mortgage debt and costs, except \$227.54, for which a deficiency judgment was rendered. This deficiency judgment had been paid by the receiver, and he was credited for the amount in the judgment of April 5, 1897. Whatever amount of rents, therefore, was left in the hands of the receiver after the payment of the deficiency judgment, and such other disbursements as the court allowed in its judgment of April 5, 1897, properly belonged to Hadfield, as owner of the equity of redemption. The appellant Eggleston, the purchaser at the foreclosure sale, had no claim to the rents by virtue of his purchase. He purchased the property subject to all prior incumbrances upon it. He knew, or was bound to know, that his purchase would not ripen into a title until the expiration of 15 months from the date of sale, and that during that period the owner of the equity of redemption was entitled to the possession and rents of the premises.

Some importance seems to be placed on the fact that Hadfield, in his purchase of the premises, had assumed and agreed to pay the mortgage debt in question, and also a prior mortgage on the premises of \$20,000, running

to Aaron B. Mead, trustee. If the holder of the prior mortgage had intervened in the foreclosure proceeding, and prayed for any relief as against Hadfield, who had assumed the payment of the prior mortgage, the position of counsel might be regarded as plausible. But such was not the case. The holder of the prior mortgage has asked no relief, nor is he here complaining of the judgment rendered by the court, and the purchaser at the mortgage sale cannot complain for him. Whatever liability Hadfield may have assumed as purchaser of the equity of redemption of the premises in question may be enforced in an appropriate action, but we perceive no ground upon which appellants can call in question that liability in this proceeding. The judgment of the appellate court will be affirmed. Judgment affirmed.

(177 Ill. 579)

DANFORTH et al. v. VILLAGE OF HINSDALE.

(Supreme Court of Illinois. Feb. 17, 1899.)

MUNICIPAL IMPROVEMENT—ORDINANCE—CERTAINTY—EXCESSIVE ASSESSMENT—VALIDITY.

1. A local improvement ordinance, providing that the assessment shall be divided into a stated number of installments, the first to include a certain portion and all fractional amounts, and the remainder to be in equal amounts and multiples of 100, is not void as failing to specify the amount of the installments.

2. Since any excess of an assessment for a local improvement over its cost must be returned to the property owners, the fact that a contract to construct it was let for less than the total assessment is, in the absence of fraud, no ground for refusing to confirm the assessment, where the improvement has not yet been made.

Magruder, J., dissenting.

Appeal from Dupage county court; John H. Batten, Judge.

The cost of a local improvement in the village of Hinsdale was assessed against Jerome J. Danforth and others, and from an order confirming the assessment they appeal. Affirmed.

W. B. Wilson, for appellants. Linus O. Ruth, for appellee.

CRAIG, J. This is an appeal from a judgment of the county court of Dupage county confirming a special assessment levied by the village of Hinsdale to pay for the improvement of Second street, in the said village, from the west line of Garfield avenue to the east line of Lincoln street, by draining, grading, curbing, and paving the same. On June 9, 1897, the commissioners appointed to make an estimate of the cost of the proposed improvement made a report in writing to the president and board of trustees, estimating the total cost of the improvement at the sum of \$4,200. This report was, on the last-mentioned date, duly adopted and approved by the president and board of trustees of the

village. A petition was then filed in the county court praying for the appointment of commissioners to make an assessment upon the property benefited to pay for the cost of the improvement. Commissioners were appointed, and they made and returned an assessment roll in conformity to the statute. On the 6th day of July, 1897, the court entered an order requiring all objections to the assessment roll to be filed on or before July 8th. Within the time required by the order of court, the three appellants, J. J. Danforth, John B. Jarrett, and Emma A. Cowles, filed objections to the confirmation of the assessment roll. On July 12th a hearing was had, and all objections were overruled except those to be tried by a jury. On July 9th the assessment was confirmed except as to the premises of appellants. Nothing further was done until October 9, 1897, when appellants moved the court for leave to file additional objections. This motion was denied. The parties then, by agreement, waived a jury, and agreed that the issues to be submitted to a jury should be tried by the court. On the hearing upon the evidence introduced, the court entered judgment confirming the assessment on the appellants' property, and they appealed.

Section 3 of the ordinance read in evidence was as follows: "That the special assessment herein ordered to be assessed and levied shall be divided into seven installments, the first of which installments shall include one-seventh of said assessment, together with all fractional amounts, and each of the remaining installments shall be equal in amount and multiples of one hundred (100) dollars,—first installment payable at the confirmation of the assessment, the other installments annually thereafter, with six per cent. interest after thirty days from the confirmation." It is insisted in the argument that the ordinance is void, because it fails to specify the amount of each or any of the installments. The same objection was interposed to a similar ordinance in *Latham v. Village of Wilmette*, 168 Ill. 153, 48 N. E. 311, and we held the ordinance valid. The decision in that case is conclusive of the question here raised.

It appears from the record that on the 3d day of August, 1897, a contract was entered into between the village of Hinsdale and one Olaf Vider, a solvent and responsible person, for the construction of the improvement provided for in the ordinance. It also appears that on the 4th day of October, 1897, before the hearing was had, the appellants entered a motion for leave to file further objections to the confirmation of the assessment, one of which was that the assessment was for a greater amount than the actual cost of the improvement. This application was denied by the court; and the court also, on the hearing, refused to admit the contract in evidence. The ruling of the court on this branch of the case is relied upon as error. The contract offered in evidence, as set out

in the abstract, was as follows: "Agreement entered into this third of August, 1897, between Olaf Vider and the village of Hinsdale: That Vider should furnish the labor and material and make the improvements provided for in the ordinance, according to the specifications attached, and be paid as follows: For each cubic yard of excavation, seventeen cents; for each lineal foot of curb constructed, fourteen cents; for each square yard of pavement, complete, seventy-six cents; for each lineal foot of 12-in. diameter drain, with manholes and catch-basins complete, seventy-five cents; for each lineal foot of 9-in. drain, with manholes and catch-basins complete, sixty cents. Specifications part of this contract. Improvement requires the following approximate quantities: Wooden curb, 1,780 lineal feet; earth excavation, 1,060 cubic yards; cedar block paving, 2,630 square yards, including 100 feet 12-in. drain, with four manholes and four catch-basins and iron covers; weight of manholes 470 pounds, and of catch-basin covers 325 pounds. The price per square yard for pavement complete must include the grading of grass plots and all necessary work on manholes and catch-basins." It will be observed that the contract does not show the amount to be paid the contractor for the work to be done. Whether the amount was less or more than the assessment would have to be determined from other evidence. But, conceding that the work to be done at the prices specified in the contract would not amount to as much as the assessment, would that fact, of itself, authorize the court to refuse to confirm the assessment? The village had appointed three competent persons to estimate the cost of the improvement, as provided by the statute. The persons appointed had discharged their duties, so far as appears, honestly and conscientiously. A report had been made to the village authorities, which had been approved as required by the statute. Indeed, no fraud or misconduct on the part of the persons appointed to estimate the cost of the improvement is claimed or charged. While it was the duty of the persons appointed to estimate the cost of the improvement to agree upon such an amount as would neither exceed nor be less than what the improvement would actually cost, yet the fact that the amount agreed upon might be too small or too large ought not to be a sufficient ground to defeat the assessment, in the absence of fraud or misconduct on the part of those appointed to estimate the cost of the improvement. If a rule of that character were adopted, no assessment could be sustained, as it would be in many cases impossible for the persons appointed to estimate the cost of the improvement to determine that fact with absolute certainty. Indeed, the fact that the statute requires any and all excess which may be collected above the cost of the improvement to be returned to the property owner would seem to indicate that it was not within the

contemplation of the legislature that the exact amount of the cost of an improvement could be determined before the improvement had been made. After the improvement has been made, and the actual cost has been ascertained, no greater sum can be collected from the property owner, although the estimated cost may be for a larger sum. But in an application to confirm a special assessment, where all the proceedings have conformed to the statute, and no part of the assessment has been collected, we do not think the property owner can interpose as a defense that the actual cost of the improvement will be less than the estimated cost made by the persons appointed to make an estimate of the cost. The judgment of the county court will be affirmed. Judgment affirmed.

MAGRUDER, J. (dissenting). I cannot agree with the view of this case taken by the majority of the court, for the following reasons: The commissioners appointed to estimate the cost of the improvement reported \$4,200 as the estimated cost thereof. Commissioners were appointed by the county court to assess the amount of the estimated cost, as so reported, upon the property subject to assessment. The court overruled all objections except those triable by jury, and, as to the questions proper to be submitted to the jury, a jury was waived, and the cause was submitted to the court for trial without a jury. Upon the hearing of the cause on October 18, 1897, the objectors below, the present appellants, offered in evidence a contract, dated August 3, 1897, entered into between the village of Hinsdale and one Olaf Vider, a solvent and responsible person, for making the improvements provided for in the ordinance set out in the petition to the county court, at an actual cost of \$2,698.20, as is easily seen by calculation, the contract giving the number of feet and yards to be improved, and the prices per foot and yard. By the terms of this contract the improvement was to be made at an actual cost of from 25 to 30 per cent. less than the estimated cost as fixed by the commissioners appointed by the village board. The court refused to admit the contract in evidence. The main question presented for consideration is whether or not the court erred in thus excluding the contract. The petitioner below (appellee here), the village of Hinsdale, objected to the introduction of the contract, upon the ground that there was no objection pending before the court under which the evidence was admissible. This was the only ground upon which the contract was excluded, and, in order to understand it, it is necessary to refer to some of the proceedings which took place prior to the hearing before the court on October 18, 1897. A rule was theretofore made by the court that all objections to the assessment roll should be filed by July 8, 1897. On July 3, 1897, the present appellants filed their objec-

tions to the confirmation of the assessment. On July 12, 1897, the appellee, by its attorney, moved that all of the objections so filed, except those triable by a jury, should be overruled; and such objections were thereupon overruled. Afterwards, on October 4, 1897, the appellants moved for leave to amend their objections, and for leave to file additional objections; but this motion was denied, and leave to file such additional objections was refused. All except the last of said additional objections were merely a more explicit and detailed presentation of the questions involved in the objections as originally filed. But the last of the additional objections, which was not embraced in the objections originally filed, was that the assessment was for a greater amount than the cost of the improvement provided for, and all items that might lawfully be included in said assessment.

The court erred in refusing to allow the last of the additional objections, as above stated, to be filed, and also in refusing to admit the contract offered in evidence. Section 23 of the practice act (chapter 110, Rev. St.) provides that "at any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, * * * in any matter, either of form or substance, in any process, pleading or proceeding which may, enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense." In *Misch v. McAlpine*, 78 Ill. 507, where leave was asked by a defendant, who had filed the general issue, to file an additional plea, which was indispensable to enable him to make a legal defense, and where it appeared that the defendant had been guilty of no culpable negligence in asking for such leave, it was held that the trial court erred in refusing to grant the leave, such refusal having been based upon terms that were not just and reasonable. *Drake v. Drake*, 83 Ill. 526; *Chandler v. Frost*, 88 Ill. 559. Filing additional pleas comes within the meaning of amendments as specified in the statute. It is the right of a party at any time before judgment to make any amendment which is necessary to present a defense, subject to the imposition by the court of reasonable terms. It is manifest that in the present case the additional objection here under consideration could not have been filed on July 3, 1897, when the original objections were filed. The contract with Vider was not let until August 3, 1897. It was this contract which showed that the levy of the assessment was excessive. Application to file an objection under which it was proper to introduce the contract in evidence was made before the hearing, to wit, on October 4, 1897, and at as early a date as it was possible to make it. The defense sought to be made by the introduction of the contract of August 3, 1897, was a good one. The property owners should not have been assessed

\$4,200 to pay for the improvement when the contract let by the board of trustees for the making of the improvement involved an expenditure of only \$2,698.20. It is true that under the statute it would have become the duty of the village to return the surplus over and above the actual cost of the improvement to those who paid it as soon as such surplus should be received. But it is difficult to see why it was necessary to collect such surplus when a contract was already made for the making of the improvement at a figure which would leave no surplus on hand. The county court had the power, under section 33, art. 9, City and Village Act (chapter 24, Rev. St.), at any time before final judgment, to modify, alter, change, or annul the assessment which had been returned, or to cause the same to be recast by the commissioners. This could have been done in the present case if the contract had been admitted, and it had thereby become apparent to the court that justice required the reduction of the amount of the assessment. In *City of Bloomington v. Blodgett*, 24 Ill. App. 650, the facts showed that the commissioners in the proceeding there made a report, estimating the cost of the improvement at \$3,900, and that afterwards a contract was let for the construction of the improvement for the sum of \$2,900, or \$1,000 less than the estimated cost of the assessment. In that case the court say: "If the excessive and unnecessary levy was known to appellee at the time or before the judgment of the county court confirming the assessment of the commissioners, as provided in sections 30, 31, art. 9, c. 24, Rev. St., he should then and there have made his defense. * * * The city may undoubtedly proceed to assess and collect special assessments based upon the estimate made in conformity with sections 20, 21, art. 9, c. 24, although such estimate may exceed the actual cost of the proposed improvement. Hence, so long as it is not known that such assessment is too large, no one would be permitted by the county court, either when confirming the assessment or in rendering the judgment upon which the lands are to be sold, to interpose as a defense the mere possibility that the assessment may ultimately prove larger than is needed. But from the moment that it clearly appears there is an excessive levy, either from letting the contract for the proposed work or otherwise, we think such excess should not be collected, and becomes a legal defense pro tanto, which the county court should recognize, as, arising at the time, it can be shown in the manner above stated that the levy is excessive and unnecessary." In *Boynton v. People*, 150 Ill. 553, 42 N. E. 342, we referred to the foregoing case of *City of Bloomington v. Blodgett*, and approved of it, and indorsed it as announcing "sound doctrine." The same case was also referred to with approval in *People v. McWethy*, 165 Ill. 222, 46 N. E. 187.

(177 Ill. 624)

DEAN v. GORTON.

(Supreme Court of Illinois. Feb. 17, 1899.)

EJECTMENT—EVIDENCE.

Where plaintiff in ejectment establishes his own title, and that both he and defendant claim under a common source, he can rest his case; and a right to possession will result, without proof of possession by defendant, or any title or interest in him.

Appeal from superior court, Cook county; Jonas Hutchinson, Judge.

Action by Edward F. Gorton, trustee, against Isaac Dean. Judgment for plaintiff. Defendant appeals. Affirmed.

Charles Pickler, for appellant. Edward F. Gorton and George W. Brown, for appellee.

PHILLIPS, J. Appellee brought his action of ejectment against appellant, who pleaded not guilty. On trial without a jury, finding and judgment were in favor of appellee. Motion for new trial was overruled, and this appeal is prosecuted. The contention of appellant is that the appellee did not prove the time when appellant took possession. It appears from the evidence that both derived title from a common source. That common source made a trust deed conveying to appellee, as trustee, the land in controversy, to secure certain notes and coupon notes. Default was shown in the payment of interest, and a foreclosure was had, and a decree of sale entered. "It is a familiar principle that, after condition broken, ejectment may be maintained by the mortgagee against the mortgagor, or those to whom he may have assigned the equity of redemption." *Taylor v. Adams*, 115 Ill. 570, 4 N. E. 837; *Pollock v. Maison*, 41 Ill. 516; *Hall v. Lance*, 25 Ill. 250. With evidence of the title of both being derived from a common source, and plaintiff's title from that source being shown, plenary proof is made under a plea of not guilty only. Neither possession by defendant, nor any title or interest in him in the property, need be proved by the plaintiff. *Commissioners v. Gavin*, 139 Ill. 280, 23 N. E. 826. Appellee, having established his own title, and that both claimed the land in the declaration described from a common source, could rest his case, and a right to possession would result, and the facts would warrant judgment in his favor, without further evidence. The character of appellant's title was matter of defense. The judgment of the superior court of Cook county is affirmed. Judgment affirmed.

(176 Ill. 253)

CHICAGO GEN. RY. CO. v. CITY OF CHICAGO.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL CORPORATIONS—ORDINANCES—CONSTITUTIONALITY—CONTRACTS—ULTRA VIRES—STREET RAILWAYS.

1. Under Rev. St. p. 571, § 3, providing that a city may permit the construction of a street

railway upon such conditions as it deems best for the public interest, a city may require a street railway to pay an annual tax on each mile of its track as a condition to its right to construct and operate its line.

2. It will not be presumed that because an ordinance, authorizing the construction and operation of a street railway, requires the payment of a license fee on each car, that another provision, requiring the payment of an annual tax on each mile of its track, is an improper attempt to raise revenue for the municipal government.

3. An ordinance requiring defendant street railroad to pay an annual tax on each mile of its road, as a condition to its right to construct and operate its line, does not deprive defendant of its property without due process of law, in contravention of the fourteenth amendment to the constitution of the United States and section 2 of the bill of rights of the state constitution.

4. An ordinance requiring defendant to pay an annual tax on each mile of its track is not in conflict with Const. art. 4, § 22, prohibiting the enactment of special laws where a general law is applicable, though the ordinance applies only to defendant, and not to other street-railway companies.

5. Defendant, who accepted a license to construct and operate a street railway, and received its benefits, cannot, as against the city, avoid payment of an annual mileage tax on the ground that the license imposing it was ultra vires of the city.

Error to circuit court, Cook county; R. S. Tuthill, Judge.

Action by the city of Chicago against the Chicago General Railway Company. There was judgment for plaintiff, from which defendant brings error. Affirmed.

Jesse B. Barton and Chas. L. Bonney, for plaintiff in error. Charles S. Thornton, Corp. Counsel, for defendant in error.

WILKIN, J. This is an action of debt brought by the city of Chicago against plaintiff in error to recover damages on its bond in the sum of \$25,000. Damages were assessed at \$2,250, and judgment rendered for that amount and costs, from which plaintiff in error prosecutes this writ.

The facts in the case are uncontroverted. In February, 1892, the city passed an ordinance granting to plaintiff in error authority to construct, maintain, and operate a street railway on Twenty-Second and other streets in the city, upon certain terms and conditions, among which was the following:

"Sec. 8. Per Mile Tax. The rights, privileges and franchises herein conferred are granted upon the further condition and consideration that on or after December 1, 1895, the said company or their legal assigns, or any person, firm, company or corporation in any way claiming under or through them, or operating the road herein authorized, shall pay into the city treasury of the city of Chicago, annually, for each and every lineal mile of their track laid under the provisions of this ordinance, and a proportionate amount of any fraction of a mile laid as herein authorized, the sum of five hundred dollars (\$500)," etc.

Section 11 required the company to give bond in the sum of \$25,000, conditioned for the

¹ Rehearing denied December 14, 1898.

faithful observance and performance of the conditions of the ordinance. Plaintiff in error accepted the ordinance, and, in pursuance of its terms, caused the bond sued on to be executed. Four and a half miles of track were laid by it, but it refused to pay the sum provided by section 8 when due, and thereupon this suit was brought.

The principal question to be determined in the case is whether the city had the power to impose the condition prescribed in section 8 of the ordinance granting the right to the defendant railway company to occupy the street with its tracks. Our constitution (article 11, § 4) provides: "No law shall be passed by the general assembly granting the right to construct and operate a street railway within any city * * * without requiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad." The twenty-fourth clause of section 1 of article 5 of the city and village act (then in force) gave the city power "to permit, regulate or prohibit the locating, constructing or laying a track of any horse railroad in any street, alley or public place; but such permission shall not be for a longer time than twenty years." Rev. St. p. 219. Section 3 of the horse and dummy act provides that no company shall have the right to construct its road along any street or alley, etc., without the consent of the corporate authorities of such city, and that "such consent may be granted for any period not longer than twenty years, on the petition of the company, upon such terms and conditions, not inconsistent with the provisions of this act, as such corporate authorities or county board, as the case may be, shall deem for the best interest of the public." Id. p. 571.

It is not denied that the city had the power to impose a money condition as a license fee, or to protect it against liabilities and expenses occasioned by reason of the construction of the railroad in its streets, or for expenses and the like of defendant in error; but it is earnestly insisted that this ordinance shows an unlawful attempt on the part of the municipality to sell its license, and that it is also an unauthorized attempt to raise revenue for the purposes of municipal government; also that, because the ordinance contains other terms and conditions for the protection of the city against loss or disbursements, such as a license fee of \$50 per annum for each car operated, there is no room for the presumption that the condition for the payment of this amount per mile was with a view to such purposes. We are unable to agree with counsel in these contentions. It was clearly within the power of the council, by its ordinance, to make this additional condition if it so desired, and the courts cannot indulge the presumption that the act was done for an illegal purpose, it being apparent that it could be done legally. It is not claimed the condition is unreasonable or against public policy, and therefore void. It is not for this court to review the acts of

the city council which are within its discretion and within the grant of power to it. *People v. Railway Co.*, 118 Ill. 113, 7 N. E. 116.

But if it were true, as contended by counsel, that the purpose of the mileage tax was to compensate the city for granting the privilege to the plaintiff in error to lay down its tracks and operate its street railway, it is still, in our opinion, a valid condition, and comes fully within the scope of the power granted to the city by section 3 of the horse and dummy act, *supra*. In *City of Providence v. Union Railway Co.*, 12 R. I. 473, it is said: "The defendant corporation also contends that it is not liable because the city had no power to exact a pecuniary compensation for the use of the streets. We do not think this defense is tenable. The charters of the horse-railroad companies contain a provision that nothing in the charters shall be construed to allow the companies to construct, use, or continue their roads into, over, or through any street or highway of the city, unless with the consent of the city council of said city, and upon such terms and conditions, and under such rules and regulations, as said city council may impose. The defendant cites certain cases which hold that a municipal corporation has no right, under a simple authority to license, to demand money for the license beyond a small fee for incidental expenses. The ground of decision of those cases is that the power to license is a mere police power, and therefore cannot be exercised with a view to revenue, unless conferred in terms which plainly authorize it. But the power here conferred is not a police power. Evidently it was conferred, not only for the general good, but also to enable the city to protect itself as the body charged with the maintenance and repair of the streets, and it is to be construed fairly, in view of its purpose. Ralls in streets are a serious annoyance. They divert travel to other streets, and so necessitate an increase of care and expense, not only where they are laid, but also in such other streets. It is therefore not unreasonable to require the companies to pay something for their privileges. The city, in giving its assent, has required it; and the companies, in accepting the assent, have agreed to comply with the requirements. We think the agreement binds them." The following cases, under statutes not materially different from ours, are to the same effect: *City of Allegheny v. Millville, E. & S. St. Ry. Co.*, 159 Pa. St. 411, 28 Atl. 202; *Federal St. Ry. Co. v. Allegheny*, 14 Pittsb. Leg. J. (N. S.) 259; *Covington St. Ry. Co. v. City of Covington*, 9 Bush. 127.

Booth, in his work on *Street Railways* (section 284), deduces from the authorities the conclusion that the municipality has a right to exact a money consideration for its consent to the occupancy of its streets, and says: "The right to exact compensation in money, otherwise called a bonus, is justified on the ground

that the right to use a street already graded as a roadbed is a valuable privilege, and because the occupation of the streets by cars interferes to some extent with their use by other travelers. Where the enjoyment of the franchise depends upon the consent of the local authorities, their right to impose conditions authorizes them to exact the payment of a bonus." Judge Elliott, in his recent and able work on Railroads (section 1081), lays down substantially the same doctrine.

It is said the public, for the best interests of which the city council must act, is not the public within the limits of the city, but that by the term "public" is meant "the body of the people at large; the people of the neighborhood; the community at large, without reference to geographical limits,"—citing *Baker v. Johnston*, 21 Mich. 319. We do not deem it important to here determine the meaning of the word "public," as used by the legislature. Certainly there is nothing shown in this record to justify the presumption that the city council used the word in a sense other than that placed upon it by the legislature.

It is again insisted that the condition embodied in section 8 of the ordinance is violative of the fourteenth amendment to the constitution of the United States, of section 2 of the bill of rights of the constitution of this state, and of section 22 of article 4 of the latter constitution. The position is that each of these is violated because the railway company is, by the condition, denied the equal protection of the laws of its property without due process of law; that a general law may be made applicable to all street railways in the city, but no special ordinance can be enacted; and it is insisted that, because other ordinances have been adopted by the city granting privileges to other railway companies to occupy the streets without exacting this condition, the latter provision has been violated. We think, with counsel for the city, that, the statute having given the municipality power to grant or withhold its consent as "it shall deem for the best interest of the public," the power being discretionary, it is manifestly not to be exercised by a general ordinance applicable alike to all cases, but each case must be acted upon with reference to its peculiar conditions and circumstances. If, in the exercise of its sound discretion, the city council shall determine that the best interests of the public do not require the imposition of any conditions whatever, it may grant its license without qualification; but if, on the other hand, the public interest requires that the occupancy of particular streets, under peculiar conditions, demands that certain exactions shall be made of the company for the privilege conferred, then the city council has a right to so provide, and no constitutional right or privilege is interfered with. There is no general law of the state of Illinois, nor is there an ordinance

of the city of Chicago, requiring all street-railway companies to pay a mileage tax; but, as we have before said, discretionary power is conferred by the legislature upon the city council to impose such a condition upon giving its consent to any particular company to occupy its streets.

We are also of the opinion that, even though it might be held that the condition upon which the permit or license was granted to the defendant railway company was ultra vires, the city not having the power to impose it, nevertheless, the ordinance having been accepted by the company with the condition attached, agreeing thereby to perform it, it became a valid contract between it and the city, the validity of which the defendant is now estopped to deny. The act of the city in imposing the condition cannot be treated as against public policy or prohibited by statute, and void, and therefore, having accepted the contract in its entirety and enjoyed the benefits for which it agreed to pay the amount prescribed, it cannot now repudiate that contract. *Kadish v. Association*, 151 Ill. 531, 38 N. E. 236; *Cook Co. v. City of Chicago*, 158 Ill. 524, 42 N. E. 67; *City of Fulton v. Northern Illinois College*, 158 Ill. 333, 42 N. E. 138.

It is well settled in this state that while the granting of authority to occupy the public streets of a city for other than the ordinary purposes of a street is, in the first instance, a mere license, still, when that license is granted upon conditions, and the licensee has accepted the privilege and performed the conditions, it becomes a contract between the parties. Here it must be admitted that the defendant could only occupy the streets of the city with its tracks by the consent of the municipal authorities. That consent could be given or withheld, as these authorities deemed proper, and, upon such conditions as they considered for the best interests of the public, they granted the privilege and named the conditions. The defendant accepted without qualification. It has availed itself of the benefits of the contract, and now seeks to repudiate the conditions. We are unable to see upon what principle, under the law of contracts, it can be allowed to do so. We think, however, that the liability of the defendant upon its bond may be properly placed upon the broad ground that the city council was vested with full power and authority to impose the condition and require the bond for its faithful performance. The judgment of the circuit court will be affirmed. Judgment affirmed.

(178 Ill. 202)

MOORE et al. v. CHICAGO GUARANTY FUND LIFE SOC. et al.

(Supreme Court of Illinois. Feb. 17, 1899.)

INSURANCE—BENEFICIARIES' RIGHTS—RETROSPECTIVE LAWS—ASSIGNMENTS—CONDITIONS.

1. The rights to a death benefit on a policy issued in 1892 by a life insurance society or

ganized under Hurd's Rev. St. 1885, p. 732 (Act July 1, 1883), will be determined wholly by that act, and not by 2 Starr & C. Ann. St. 1896, p. 2278 (Act June 22, 1893), under which the society reorganized, because the latter statute could have no retrospective effect on the contract.

2. Hurd's Rev. St. 1885, p. 732, c. 73, par. 125, providing for the incorporation of insurance societies to furnish benefits to widow, heirs, devisees, or legatees of deceased members, permits a policy holder to name as beneficiary one who has no insurable interest, by assigning to such person a policy payable to insured; since he might have bequeathed the benefit, and the result accomplished is the same.

3. A life insurance policy provided that no assignment should be valid unless approved in writing, and that claims made by the assignee should be subject to proof of interest, and the recovery should be limited to the value of the interest proven. An assignment of the policy had indorsed on it the insurer's consent, subject to the conditions that a legal insurable interest must be shown by all claimants at the time of claim, and claims made by any creditor or assignee should not exceed the amount of actual bona fide indebtedness of the member to him. Another condition of the policy provided in terms the manner of changing beneficiaries. *Held*, that the former provision referred only to assignments for security, and not to assignments changing the beneficiary, and the conditions in the consent indorsed on the assignment were ineffective to defeat the right of an absolute assignee who was not a creditor, an insurable interest not being essential to entitle such assignee to the benefit.

Appeal from appellate court, First district.

Bill of Interpleader by the Chicago Guaranty Fund Life Society against W. J. Moore and others, executors, and Minnie Zollinger. A decree for defendant Zollinger against defendants Moore and others was affirmed in the appellate court (76 Ill. App. 433), and they appeal. Affirmed.

Beach & Beach, for appellants. Walter Olds and Charles F. Griffin, for appellee Daniel O. Lantz.

PER CURIAM. After a careful examination of the record in this case and the briefs and arguments of counsel, we are satisfied the judgment of the appellate court is correct, and it will be affirmed. All questions involved have been fully considered in the opinion of the appellate court, and that opinion will be adopted as the opinion of this court. It is as follows (ADAMS, P. J.):

"The Chicago Guaranty Fund Life Society, a corporation organized under an act of the legislature of this state in force July 1, 1883, entitled 'An act to provide for the organization and management of corporations, associations or societies for the purpose of furnishing life indemnity or pecuniary benefits to the widows, orphans, heirs, relatives and devisees of deceased members,' etc. (Hurd's Rev. St. 1885, p. 732), and reorganized under an act entitled 'An act to provide for the organization and management of fraternal beneficial societies,' etc., approved and in force June 22, 1893 (2 Starr & C. Ann. St. 1896, p. 2278), issued to James E. Moore, December 17, 1892, a certificate or policy of insurance

insuring him in the sum of \$5,000; the said sum to be paid to his estate in the event of his death and satisfactory proof thereof. December 24, 1892, James E. Moore assigned the certificate to the appellee Minnie Zollinger. The Guaranty Fund Life Society indorsed on the instrument of assignment the following: 'The Chicago Guaranty Fund Life Society hereby consents to the above assignment, subject to the following conditions: That a legal insurable interest must be shown by all claimants at time of claim hereunder, and claims made by any creditor or assignee shall not exceed the amount of the actual bona fide indebtedness of the member to him, together with any payments made to the society under the certificate of policy of said creditor, with interest at six per cent. Chas. I. Westerfield, Secretary. Chicago, —, 18—.' The charter of the society contains the following: 'The object for which this corporation is formed is to furnish life indemnity or pecuniary benefits to widows, orphans, heirs, or relatives by consanguinity or affinity, and devisees or legatees of deceased members, and to raise funds for the payment of such benefits, in whole or in part, by assessments on the surviving members.' November 21, 1895, James E. Moore died, and the company received satisfactory proofs of his death. It appears from the evidence that, deducting from the amount of the sum insured certain sums due the company, there was due on the policy \$4,214.30. This amount was claimed by the appellants William J. Moore and Cornelia Moore, as executor and executrix of James E. Moore, deceased, and by Minnie Zollinger, as assignee of the policy; and March 15, 1897, the society filed a bill of interpleader, making appellants and Minnie Zollinger defendants, praying, among other things, that they should set forth their claims, respectively, and offering to pay the amount due on 'the certificate to whomsoever the court should decree was entitled to the same, etc. The defendants answered the bill. Issues were made up, and the cause referred to a master to take proofs and report the same, with his opinion as to the law and the evidence. The master reported that at the time of the assignment of the certificate to Minnie Zollinger, James E. Moore was not indebted to her, and that she had not at that time any insurable interest in his life, but that in his opinion it was not necessary to the validity of the assignment that she should have had such insurable interest; that the assignment was valid and effectual, and that she was entitled to the insurance money as against appellants; and he so recommended. Exceptions were filed by appellants to the master's report, which the court overruled, affirmed the report, and rendered a decree as recommended by the master.

"The mainly contested question of fact between appellants and appellee Zollinger was as to whether James E. Moore, at the time of the assignment of the certificate, was or

not indebted to appellee Zollinger. We will not discuss the evidence on that question, for reasons which will hereinafter appear.

"Appellants' counsel, in their argument, advance the following propositions: 'As there was no consideration for the alleged assignment of the policy or certificate, and no indebtedness existing on the part of James E. Moore, deceased, to the defendant Minnie Zollinger, and the defendant Minnie Zollinger had no insurable interest in the life of the deceased, James E. Moore, the alleged assignment was invalid, null and void, for the reason that the defendant Minnie Zollinger is not one of the persons named by the statute under which the complainant company was organized, nor in the articles of incorporation of the said society, for whose benefit the funds of said society were to be raised.' These propositions involve two questions, viz.: Was it necessary to the validity of the assignment that Minnie Zollinger should have had, at the time of the assignment, an insurable interest in the life of James E. Moore? Was the assignment to Minnie Zollinger in violation of the law under which the society was organized? Appellants' counsel, in support of the proposition that the assignment was in violation of the statute, cite and rely both on section 1 of the act of 1883 and section 1 of the act of 1893,—this, doubtless, for the reason that it is admitted by the pleadings that the society was organized under the former and reorganized under the latter act. But we deem the latter act inapplicable to the certificate in question. The certificate was issued, as before stated, December 17, 1892, and, as the act of 1893 did not take effect until June 22, 1893, the society could not have reorganized under the latter act until after that date. It does not appear, either by the pleadings or the evidence, when the society reorganized under the act of 1893, and nor constat but that such reorganization was subsequent to the assignment in question. In *Volgt v. Kersten*, 164 Ill. 314, 45 N. E. 543, a certificate was issued January 14, 1893, by the High Court of the Independent Order of Foresters, to one Paul Anton Fischer, who subsequently, and about October 19, 1894, applied to the society for permission to substitute Anna Rosina Kersten for Fischer as the beneficiary in the certificate, which permission was refused. Fischer died October 30, 1894, and, *Volgt* and Anna Rosina Kersten both claiming the insurance money, the society filed a bill of interpleader making them defendants. The society was originally organized under an act in force July 1, 1887, and under that act and the by-laws of the society either *Volgt* or *Kersten* might have been a beneficiary. After the issuance of the certificate, and after the act of 1893 was passed, the society adopted the provision of the latter act, under which neither *Volgt* nor *Kersten* could be a beneficiary, neither of them being of the description of persons described in that act, and to whom death benefits were

limited by the act. The court held that the act of 1893 was not intended to have a retrospective effect, and did not affect certificates issued prior to its passage, saying: 'At the time the contract was made between the deceased and the complainant order, this right to appoint the beneficiary or change the name existed, and, we think, was an important part of the contract entered into. It would seem that the construction of the act passed in June, 1893, giving it the effect to destroy that right of appointing a beneficiary or naming another beneficiary which existed in favor of the deceased under his contract prior to the passage of the act, would be to give the act a retrospective effect, and destroy the obligation of the contract entered into between the deceased and the complainant,' etc. This eliminates from consideration the act of 1893.

"Section 1 of the act of 1893 is as follows: 'That corporations, associations, or societies for the purpose of furnishing life indemnity or pecuniary benefits to the widows, orphans, heirs or relatives by consanguinity or affinity, devisees or legatees of deceased members, or accident or permanent disability indemnity to members thereof, and where members shall receive no money as profit, and where the funds for the payment of such benefits shall be secured, in whole or in part, by assessment upon the surviving members, may be organized subject to the conditions hereinafter provided.' 1 Starr & C. Ann. St. 1885, p. 1348, c. 73, par. 122; Hurd's Rev. St. 1885, p. 732, c. 73, par. 125. It will be perceived that devisees or legatees are among the classes named who may be beneficiaries. This section has been construed by the supreme court in several cases. In *Association v. Blue*, 120 Ill. 121, 11 N. E. 331, the contest was between *Blue*, the beneficiary named in the certificate, and the benefit association. It appears from the brief filed for the benefit association that its counsel urged as grounds for the reversal of the judgment that the contract was void for the reason that *Blue* had no insurable interest in the life of the assured, and that he could not be a beneficiary, he not being within any class named in the statute. Paragraph 122, *supra*. The court held, citing a number of cases, that it was not necessary that *Blue* should have had an insurable interest in the life of *Bailey*, the insured; that *Bailey* had an insurable interest in his own life, and had a right to procure a policy on his life, and also, unless some principle of public policy was violated, to make it payable, in case of his death, to any person whom he might desire. The court also held that it was not contrary to public policy for *Bailey*, the assured, to make the policy in question payable to *Blue*, saying: 'The first section of the act under which the defendant is organized in express terms authorizes the organization of such associations for the purpose of furnishing life indemnity or pecuniary benefits to devisees or legatees. If, as is plain from the language of the statute, a person may take out a policy

on his own life, and devise such policy to a stranger, what principle of public policy would be violated by a provision in the policy making it payable to a stranger, in lieu of doing the same thing by will? If the policy may be made payable to a stranger who has no insurable interest in the life of the insured,—as it may be by statute,—we perceive no reason which will prevent the same thing being done by a clause the insured may have inserted in the policy at the time the insurance is procured.' The court further held that, as between Blue, the beneficiary, and the association, the latter, having received the full benefit of the contract, was estopped to claim that Blue was not within any of the classes named in the statute, and that the contract was ultra vires; which last holding has no application to the present case. In *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, however, the court went further. The contest in that case was between Mrs. Martin, the widow of the assured, who was named in the certificate as beneficiary, and Stubbings, an assignee of the certificate, they having been made parties defendant to a bill of interpleader filed by the Knights Templars and Masons' Life Indemnity Company, which company had issued a certificate to Neal K. Martin, deceased. The court says: 'The assignment of the certificate of membership to Stubbings is not within the strict letter of the statute, but, in the absence of all negative words forbidding the appointment of a beneficiary in any other mode than the one prescribed, the assignment to him is not necessarily unlawful, and therefore void. He was a person capable, under the statute, of becoming a beneficiary, and the absolute right of naming him as such was in Martin. His failure to adopt the mode prescribed by the statute—that is, by executing a will making Stubbings his legatee—was doubtless a matter of which the society could probably object, but Mrs. Martin had no rights in the certificate which could justify her in interposing an objection. She was, to all intents and purposes, a stranger to the transaction. Her rights could arise only upon the death of Martin, and then only in case he had wholly failed to make a valid and effectual appointment of another beneficiary in her place.' In the last case, while the court held that there was a consideration for the assignment by Martin to Stubbings, namely, an indebtedness of the former to the latter, the court also held that an insurable interest in Martin was not essential to the validity of the assignment. 126 Ill. 406, 18 N. E. 657. And this is clearly so, because, by the letter of the statute, any legatee may be a beneficiary, and a testator's power to name his legatees who may be beneficiaries is not limited by the statute. *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412, and *Alexander v. Parker*, 144 Ill. 355, 33 N. E. 183, relied on by appellants' counsel, are not in the least inconsistent with the prior cases cited, nor is either of them in point. In both cases the society which issued the benefit cer-

tificate was organized under and by virtue of a statute of the state of Massachusetts, and the court, in determining the rights of the parties, applied the Massachusetts statute as construed by the supreme court of that state.

'Appellants' counsel also rely on a condition annexed to the certificate, and the conditional approval of the assignment heretofore quoted. The condition is as follows: 'No assignment of this policy shall be valid unless approved in writing by the secretary, and a duplicate copy filed at the home office. Claim made by the assignee shall be subject to proof of interest, and the amount recoverable thereunder by such assignee shall be limited to the value of the interest proven. The society shall not be responsible for the validity of any assignment.' On the hypothesis that this is a part of the contract, the question is, to what character of an assignment does it refer? Does it refer to an assignment made for the purpose of changing the beneficiary? The language, 'claim made by the assignee shall be subject to proof of interest, and the amount recoverable thereunder by such assignee shall be limited to the value of the interest proven,' clearly shows that the character of the assignment contemplated and intended by the parties was an assignment by the assured to a creditor to secure the claim of the latter, and that an assignment for the purpose of changing the beneficiary was not contemplated or intended by condition 20. This view is strengthened by condition 19, which is as follows: 'The insured may, with the approval of the secretary, upon surrendering this policy, change the beneficiary hereunder to any person having a legal insurable interest in the life of the insured, in which event the within-named beneficiary shall have no claim whatsoever on the society.' The assignment is absolute, and does not purport to be as security. Condition 19 is not, in terms, prohibitory of a change of the beneficiary in another mode than that mentioned in it, nor of the naming a beneficiary who has no legal insurable interest in the life of the assured; and, the supreme court having held that a person having no insurable interest may be made a beneficiary, and that within the spirit of the statute this may be done by assignment of the certificate, and that the society only could object to the mode of changing the beneficiary by assignment, and the society not objecting to that mode in the present case, we are of opinion that objections to the assignment based on condition 20 are untenable. The conditions annexed to the approval of the assignment evidently refer only to an assignment as security to a creditor. The language is: 'That a legal insurable interest must be shown by all claimants at time of claim hereunder, and claims made by any creditor or assignee shall not exceed the amount of the actual bona fide indebtedness of the member to him,' etc. These conditions of approval of the assignment are the act of the company, are no part of the contract with the assured, and cannot have the effect of

limiting the right of the assured to change the beneficiary. The society could not, after the issuance of the certificate, curtail this right. *Volgt v. Kersten*, 164 Ill. 314, 45 N. E. 543. The master found, and appellants' counsel insist, that appellee Zollinger was not a creditor of the assured, and had no insurable interest in his life, which being true, neither condition 20 nor the conditions of the approval of the assignment could apply to her. The decree will be affirmed."

The judgment of the appellate court will be affirmed. Judgment affirmed.

(176 Ill. 298)

ARMSTRONG v. DOUGLAS PARK BLDG. ASS'N.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

APPEAL—DECREE PRO CONFESSO—REVERSAL—PLEADING—CONSTRUCTION—BUILDING AND LOAN ASSOCIATIONS—STOCK—FORFEITURE—FINES.

1. A decree entered pro confesso will be reversed on appeal, if it is not justified by the averments in the bill.

2. The allegations in a bill to foreclose a mortgage are controlled by the bond and mortgage which are by reference made a part of the bill.

3. Where a building and loan association declares stock in the association forfeited because of the holder's failure to pay interest on money borrowed by him, it releases him from the obligation to pay any fines thereafter.

4. The fact that a mortgagor paid an excessive decree to secure possession of his property does not preclude him from assigning error on the decree.

Appeal from appellate court, First district.

Bill by the Douglas Park Building Association against Mary G. Armstrong. From a judgment of the appellate court (60 Ill. App. 318) affirming a decree for complainant, defendant appeals. Reversed.

John G. Manahan and Charles H. Roberts, for appellant. Lyman M. Paine, for appellee.

PHILLIPS, J. On April 29, 1893, the appellant gave her bond and mortgage to the appellee, the mortgage reciting that it is conditioned on the payment of \$2,300 borrowed on 23 shares of stock, which is to be paid in monthly installments, from May 1, 1893, of principal \$11.50 and interest \$15.34, and to continue until said shares shall attain the value of \$100 each. The mortgage is also conditioned as follows: "It is expressly agreed that, * * * for six months' default in the payment of any of the sums of money payable by the terms of said bond, the above-mentioned stock may be forfeited, and said loan declared due, and this mortgage foreclosed." It also provides for the payment of fines for nonpayment of monthly installments when due; for taxes, assessments, insurance, and an attorney's fee of \$50 in case of foreclosure. No principal or interest having been paid, on November 29, 1893, the board of directors of appellee declared the loan due, and

directed a foreclosure of the mortgage. On January 4, 1894, the bill to foreclose the mortgage was filed in the usual form, averring a failure to pay fines assessed and any installment of principal or interest; a declaration of the maturity of the debt; and reciting that the by-laws of appellee provided for a fine of 5 cents on each share for default in the payment of either the subscription or interest installment as it falls due, which fines were assessed, whereby the mortgagor was indebted on the bond and mortgage \$2,300, for interest \$138.06, for fines \$18.40,—making, in the aggregate, \$2,456.46. The bill also alleges that appellee had to pay \$150 for taxes and insurance, and was entitled to \$50 attorney's fee. The bill also alleges the insolvency of defendant, that the property was scant security, and prayed for the appointment of a receiver, etc. The defendant was personally served, and, for want of answer, was defaulted, on January 17, 1894. The cause was referred to the master, who reported, finding the board of directors had declared the debt due; that there was due of principal \$2,300, interest \$138.06, and fines \$20.70; that the amount advanced for taxes and assessments was \$85.92, and a reasonable solicitor's fee was \$50,—making a total of \$2,594.68; for which amount a decree was recommended, which was entered on January 27, 1894, providing for a sale in five days, in default of payment. The decree did not provide for the appointment of a receiver. On February 24, 1894, a sale of the premises, which were the home of the defendant, was made, under the decree, to the complainant, for \$2,475. After the sale, the master, on March 10, 1894, reported a deficiency, including all costs, of \$205.58, for which a supplemental decree was entered, and an order made, without notice to defendant, appointing a receiver to take possession of the property, collect rents, and apply the same to keeping the premises insured and in repair, and to pay taxes and assessments against the same. The receiver, under such order, ousted the defendant and her tenants from the premises, and took possession thereof by one Wendroth, to whom, as appears by affidavits filed in support of the motion to discharge the receiver, the complainant had sold the property for \$2,250 on May 1, 1894. On May 28, 1894, the receiver was ordered by the court to deliver said premises to defendant on the payment of \$207.58, and costs, \$74.48, which amount was borrowed by defendant, and paid, as provided by such order, and some weeks thereafter she received possession. The appellate court has affirmed the decree, on the ground it was entered pro confesso. It may be shown by defendant, in such a decree, that it is not justified by the averments of the bill. *Gault v. Hoagland*, 25 Ill. 266. The bill was based on the bond and mortgage, which, as exhibits, were made a part thereof by reference. They control the allegations of the bill. *Greig v. Russell*, 115 Ill. 483, 4 N. E. 780; *North v. Kizer*, 72 Ill. 172. They show monthly pay-

¹ Rehearing denied December 20, 1898.

ments of interest and principal were to begin May 1, 1893. The maturity of the debt was declared by the resolution of the board of directors on the 28th day of November, 1893. There were only 6 installments due at that time. There were 23 shares of stock, and the by-laws provided for a fine of 5 cents on each share for default in monthly payment of subscription or interest installments, or 10 cents per month on each share for six months, which, from May 1 to November 1, 1893, would aggregate \$13.80, instead of \$20.70, as decreed. As stated heretofore, the contract in the mortgage was that for six months' default the association could forfeit the stock, and mature the debt, and then foreclose. The right to foreclose was dependent on the forfeiture and maturity of the debt. That was the agreement, and that was the effect of the action of the board of directors as the matter was treated in the arguments. If it did not have the effect to forfeit the stock and mature the debt, then there was no right to foreclose. The effect, therefore, of such action was to sever the relation of the appellant with the association as a member, and necessarily released her from the obligation to pay any fines thereafter. *End. Bldg. Ass'n*, § 102. The fact that the deficiency decree was paid under stress of the supplemental decree, in order to procure appellant's discharge and secure possession of her property, did not waive her right to assign error on such decree. *Page v. People*, 90 Ill. 418; *Richeson v. Ryan*, 14 Ill. 74; *Hatch v. Jacobson*, 94 Ill. 584. The decree was for too great a sum, and in this there was error. The judgment of the appellate court and decree of the circuit court are each reversed, and the cause remanded. Reversed and remanded.

(178 Ill. 260)

FIRST M. E. CHURCH OF CHICAGO v. DIXON et al.

(Supreme Court of Illinois. Feb. 17, 1899.)

RELIGIOUS SOCIETIES—RIGHTS IN REAL ESTATE—PUBLIC POLICY—BUILDINGS—POWER OF TRUSTEES.

1. *Purple's St. 1856, c. 25, div. 3, §§ 44, 46*, provide that associations created for purposes of religious worship may hold a certain amount of real estate, on which they may build houses necessary "for the purposes aforesaid," and that all lands possessed by such corporations shall be held for the purposes named, and no other. *Held*, that such an association cannot devote its lands and buildings to secular uses.

2. It is against the public policy of the state to allow corporations to hold real property beyond what is necessary for the transaction of the business or the specific corporate purposes of the corporation.

3. It is against the public policy of the state that any corporation shall receive a special or exclusive franchise by virtue of any special law.

4. Act Feb. 14, 1857, relating to the First Methodist Episcopal Church of Chicago, provides a method of electing trustees, and authorizes them to convey a certain lot to secure money to be borrowed, and apply the money to the erection on such real property of a place

of worship or such other improvements as may be desired. *Held* that, after buildings had been constructed in pursuance with such act, the act served all the purposes for which it had been enacted, and has no present use.

5. Sp. Act Feb. 13, 1865, authorized the church to secure the payment of any indebtedness owing, or, in cases of destruction of buildings on its property from any cause, to mortgage the lot owned by the society, and the buildings thereon, for money borrowed to pay such indebtedness or to re-erect or repair such buildings. The building then upon the lot was destroyed by fire, and the trustees, in pursuance of the power given them by the act of 1865, then erected a building on the premises. *Held*, that the power given was exhausted by its exercise.

6. Act Feb. 6, 1835, relating to religious societies, provided that the trustees should have power, under the direction of the society, to execute deeds and conveyances of the estate of the society, provided such deeds did not destroy the intent of any grant made to the society. *Purple's St. 1856, c. 25, div. 3, § 46*, gave the same power. Sp. Act Feb. 13, 1865, § 4, authorized the trustees of a certain society to convey the property by mortgage or deed, without the direction of the society, in order to secure loans made for improvements on the lot, but provided that the property should not be aliened or conveyed for any other purpose whatever. *Held*, that the authority given to the trustees by the general law to alien and convey, under the direction of the society or congregation, was not affected by the limitations expressed in the concluding clause of the act of 1865.

Appeal from appellate court, First district.

Bill by Arthur Dixon and others against the First Methodist Episcopal Church of Chicago and others. Decree for plaintiffs was affirmed by the appellate court (77 Ill. App. 166), and the named defendant appeals. Reversed.

The appellant is a religious corporation organized by virtue of a general statute adopted by the general assembly on the 6th day of February, 1835, under the corporate name of the "Methodist Episcopal Church of the town of Chicago." This corporate name was changed to the "First Methodist Episcopal Church of Chicago," its present name, by an act of the general assembly approved February 14, 1857. The appellees, who are the trustees of the appellant church, filed this their bill in chancery in the circuit court of Cook county against the corporation, a number of the members of the church, and the Trinity Methodist Episcopal Church. The bill alleged the appellant church was at the date of the passage of the said act of 1857, and ever since has been, the owner of a lot situated on the southeast corner of Washington and Clark streets, in the city of Chicago; that shortly after the great fire of 1871 it erected on said lot a four-story building, covering the entire surface thereof, the first and second floors of which the corporation has always rented for business and office purposes, and has appropriated the third and fourth floors to religious purposes, as an audience room for the congregation of the church, church parlors, and a lecture room; that the building is not fire-proof, and has no elevator; that it has a truss roof, constructed with wooden trusses, which

have largely decayed, and have had to be patched and re-enforced, and will have to be removed in the near future; alleges that adjacent to said building, upon the east side, there has been constructed, by the Chicago Title & Trust Company, a fireproof building 16 stories high, and this has rendered it very difficult to use the chimneys in the church building, by reason of the draft therein being rendered imperfect, and being interfered with by said building, and leading to the escape of gases and smoke; that the church building was erected shortly after the fire of 1871, in accordance with the methods of construction then in vogue; that since that day the methods of construction have largely changed; that elevators have almost universally been introduced in office buildings in Chicago; that the property is in the heart of the business district of the city; that many large, commodious, and fireproof structures have been erected in the immediate neighborhood of the property, in which there is good elevator service and vault room, and with these buildings the church property has to compete in the rental of its property; that by reason of the decay in connection with the roof of the building, and the depreciation of the building by ordinary wear and tear, it would be necessary, in the near future, either to tear down said building or to make extensive and costly repairs thereon, in order that the same may be available for use; that the audience room of the church building should not be situated higher than the second floor, and that if the building should be repaired, and a new roof placed thereon, it would still be wholly unsuited to the present requirements of the neighborhood in which it is situated, and the church would still be unable to compete with other business buildings in that immediate neighborhood, and it would produce no adequate returns, as compared with the value of the land upon which the building is situated. The complainants further say that at the date of the erection of the present building money was borrowed to pay, in part, the cost thereof, which indebtedness has since been paid in full, and the lot is now free from any mortgage or incumbrance; that, in order to secure any adequate returns from the lot, it will be necessary in the near future either to make a ground lease thereof for a term of not less than 99 years, or to tear down the present building, and erect a modern building, with elevators therein, and of the character of other buildings erected in the business part of Chicago within the last few years; that the said church has no considerable means available therefor, and, in order to enable it to erect any such building, it will be necessary to borrow money, and to secure the repayment thereof by mortgage or trust deed upon the lot. The bill set forth in full the special act passed by the general assembly in the year 1857, and also another special act approved February 13, 1865, but made no reference to the fact, which appears by way of recitation

in the act of 1857, that the said appellant was incorporated under a general act providing for the incorporation of religious societies approved February 6, 1835. The prayer of the bill is that the powers of the complainants and their successors, as trustees of the First Methodist Episcopal Church, under section 4 of the amendatory act, under the facts now existing, as stated in this bill, with reference to conveying, by way of mortgage or trust deed, said lot, for the purpose of securing money which may be borrowed by the complainants and their successors for the purpose of erecting a new building upon the lot, and also the powers of complainants and their successors with reference to making a long ground lease of the lot, may be construed by the court, and that the complainants or their successors be decreed to be vested with the power to convey said lot, by way of mortgage or trust deed, for the purpose aforesaid, and also, in their discretion, to make ground leases thereof for such term or terms as they may think best. The defendants entered their appearance, and default was allowed against all of them except the appellant corporation, in whose behalf answer was filed admitting the allegations of the bill, and submitting the question of the power of the trustees to incumber said lot, and erect a new building thereon, or make a ground lease thereon, as prayed in the bill. Proof was taken before a master, and a decree rendered to the effect the corporation might cease to use the lot as the site for a church house, and might procure another building elsewhere for the religious purposes of the corporation, and that the trustees were vested with power to execute a mortgage or trust deed on the lot to raise a fund to be used in the erection of a new building thereon of the character referred to in the bill, or might make a lease of said lot for business purposes for such term of years as might to said trustees seem best. The decree was affirmed by the appellate court for the First district, and the appellant corporation has perfected an appeal to this court.

Wm. D. Barge, for appellant. Wilson, Moore & McIlvaine, for appellees.

BOGGS, J. (after stating the facts). The appellant corporation was organized under a general act of the general assembly adopted in the year 1835, but by the provisions of a special act approved February 14, 1857, the powers possessed by religious corporations organized under the third division of chapter 25 of the statutes, as then revised (Purple's St. 1856, p. 187), were also granted to and conferred upon it. The general statute of 1835 and that of 1856 are not materially different. The statute in force in 1856 authorized religious corporations to receive land by "gifts and devises," which was not provided by the act of 1835, and to hold land in a quantity of ten acres, being five acres more than was provided by the act of

1835. Otherwise the powers conferred upon religious societies by the two statutes are the same.

Sections 44, 46, div. 3, c. 25, Purple's St. 1856, relate to the powers possessed by the trustees of religious corporations, and are as follows:

"Sec. 44. It shall be lawful for the members of any society or congregation heretofore formed in this state for purposes of religious worship, and for members of any society or congregation which may hereafter be formed for the purpose aforesaid, to receive, by gift, devise or purchase, a quantity of land not exceeding ten acres, and to erect or build thereon such houses and buildings as they may deem necessary for the purposes aforesaid, and to make such other use of the land and make such other improvements thereon as may be deemed necessary for the comfort and convenience of such society or congregation; and such society or congregation may assume a name and elect or appoint any number of trustees, not exceeding ten, who shall be styled trustees of such society or congregation by the name assumed; and the title to the land purchased and improvements made shall be vested in the trustees, by the name and style assumed as aforesaid."

"Sec. 46. The trustees elected or appointed under the provisions of this division, and their successors, shall have perpetual succession and existence; and the title to land herein authorized to be purchased, and to the buildings and improvements thereon, shall be vested in the said trustees by their assumed name, and their successors, forever, and the same shall be held for the uses and purposes herein named and no other; and such trustees shall be capable, in law, to sue and be sued, implead and be impleaded, answer and be answered unto, defend and be defended, in all courts of law or equity whatsoever, in and by the name and style assumed as aforesaid, and shall have power, under the direction of the society or congregation, to execute deeds and conveyances of and concerning the estate and property herein authorized to be held by such society or congregation; and such deeds or conveyances shall have the same effect as like deeds or conveyances made by natural persons: provided, that no deed or conveyance shall be made of any estate held as aforesaid, so as to defeat or destroy the interest or effect of any grant, donation or bequest which may be made to any such society or congregation, but all grants, donations and bequests shall be appropriated and used as directed by the person or persons making the same."

Other powers were conferred upon the appellant corporation by the act of 1857, as follows:

"Sec. 2. Said First Methodist Episcopal Church of Chicago shall have power to convey said property in fee, by deed or mortgage, in security for money loaned or to be

loaned thereon for the erection on such real property of a place of worship, or such other improvements as may be desired; but after the erection of such place of worship or improvements, if any surplus remain, the same, and any rents which may accrue from said property, shall first be appropriated for the payment of said loan and extinguishment of such mortgage, and any remainder to the purchase of a lot or lots in said city of Chicago and the erection of a place or places of worship to be under the control of the Methodist Episcopal Church, and for no other purpose whatsoever."

Acting upon the assumption that it possessed power so to do by virtue of the special act of 1857, the appellant corporation, on the 1st day of January, 1859, issued 20 interest-bearing bonds, of the denomination of \$1,000 each, and executed a deed of trust covering said premises to secure the payment of the bonds, and created other liens on the said property, and erected a building thereon, the character whereof is not disclosed, beyond the fact that the corporation derived income and profit from it by way of rents. On the 13th day of February, 1865, the appellant corporation obtained a second special act of the general assembly. The first section of this act provided the board of trustees of the corporation should consist of nine persons, to be elected by the religious society of the appellant corporation and the society known as the "Trinity Methodist Episcopal Church of Chicago," by joint ballot, and contained the following provision relative to the powers of such trustees: "Said trustees so elected shall have power to control and manage the real property belonging to said corporation, and to dispose of the rents accruing therefrom, in conformity with the provisions of this act and the act to which this act is amendatory." Section 2 referred to the bonded and other indebtedness of the corporation, and authorized the trustees, after the bonded indebtedness and interest thereon had been discharged, to apply the rents derived from the building on the said lot to the purpose of providing a parsonage for the use of the pastor of the congregation worshipping in the building on the said lot, and also to aid in the erection of church buildings in the city of Chicago for the use of the Methodist Episcopal Church. Section 3 authorized the trustees to appropriate out of the rents derived from the building on said lot an amount, not exceeding \$1,000 per annum, to the support of the minister who should preach the gospel to the congregation worshipping in the said building. Section 4 of the act is as follows: "In order to secure the payment of any indebtedness now owing by said corporation, or any part of such indebtedness, or in case of the destruction or serious injury of said building from any cause, the same and the lot on which it stands may be conveyed by said trustees, by mortgage or deed of trust, as security for

money borrowed to pay such indebtedness or to re-erect or repair said building, but shall not be aliened or conveyed for any other purpose whatever."

The building which the act of 1857 authorized to be erected, and which stood upon the lot at the time of the passage of the act of 1865, was destroyed by the fire of 1871. In pursuance of the power assumed to be conferred upon them by the provisions of said section 4 of the act of 1865, the trustees of the appellant corporation erected upon the lot the four-story building which now stands thereon, being the building referred to and described in the bill of complaint filed herein by the appellee trustees.

The theory of the bill, and that upon which the circuit and appellate courts have acted, is that the appellee trustees are now vested, by the provisions of said section 4 of the act of 1865, with power and authority to erect upon the lot another building of that character, proper and suitable to be rented for business purposes, and to produce income, by way of rents, in the event "of the destruction or serious injury, from any cause," to the building now upon the lot; and that the fact the present building is out of repair, is not fireproof, has no elevator, is not of modern construction, and, by reason of the many changes and improvements in the manner of constructing and equipping buildings to be used and rented for business and office purposes, cannot compete with many buildings more recently erected in the immediate vicinity, more modern in style and equipped with the latest conveniences and improvements, and that it is not adapted to the needs of the locality, and is dilapidated in a degree, amounts to the serious injury contemplated by the provisions of said section 4. Proceeding upon this theory and construction of the said section 4, the circuit court decreed it was not necessary that a place of worship should be maintained in any building on said lot, and that the appellee trustees had full power and authority to tear down and remove the building now on said lot, and to erect thereon a new building, not to be devoted, in any part, to the religious purposes of the corporation, but to be rented for office and business purposes, or that said trustees had ample power and authority to make a lease of said lot for the term of 99 years, or for a longer or shorter term, as might to them seem expedient, for the purpose of permitting it to be used and devoted wholly to purposes apart and distinct from the religious uses of the appellant corporation, and that the trustees might provide a place of worship for the congregation in some other place in the city of Chicago. This view as to the rights and powers of the appellant corporation and its trustees is not warranted by the correct construction of the general statute, or either special statute, by virtue whereof it is invested with corporate life or power, is unsound in principle, antagonistic to the set-

tled public policy of the state, and cannot prevail.

We will first consider the powers granted the appellant corporation and its trustees by the general statute in force at the time of the adoption of the special act of 1857. Sections 44, 46, div. 3, c. 25, pp. 188, 189, Purple's St. 1856, referred to in the special act of 1857 and hereinbefore set out, contain all provisions then in force relative to the powers to be possessed and exercised by incorporated religious societies. The express provision of said section 44 is that such associations are created "for purposes of religious worship," and the authority given them to receive and hold land is that they may receive a quantity not exceeding 10 acres, and as to the power of such associations to erect houses and buildings on the land owned by them the provisions of the section are they may build such houses as they may deem necessary "for the purposes aforesaid" (namely, the purposes of religious worship), and make such other improvements thereon as may be deemed necessary for the comfort and convenience of the society or congregation. The enactment is free from ambiguity, and its meaning is not doubtful. The power to construct buildings or make improvements of any kind is unmistakably restricted to such buildings as are directly and distinctly appropriate to the advancement of the cause of religion, and to such improvements as are necessary or appropriate to add to the comfort of the members of the society or association, and of others who may affiliate with members in the religious exercises of the association, while such members or other persons are engaged in religious duties, services, or worship, and to remove all that which tends to their inconvenience while so engaged. The building and improvements comprehended in the meaning of the statute are such only as pertain, not remotely and mediately, but directly and immediately, to the advancement of the purposes of a society whose sole object is to provide and maintain a place of religious worship. Section 46 expressly declares that the lands possessed by such corporations "shall be held for the uses and purposes herein named, and no others." This language is susceptible of but one meaning, which is that the corporations to be formed under the act shall confine their efforts to the precise purposes of their creation. To hold that such associations may devote their lands and buildings to secular uses is to pervert both the letter and the spirit of the statute. Corporations possess what are known as "incidental powers," but incidental powers are such as are necessary in order to enable a corporation to carry into execution the specific powers conferred upon it by its charter. "Implied powers exist only to enable a corporation to carry out the express powers granted,—that is, to accomplish the purpose of its existence,—and can in no case avail to enlarge the express powers, and thereby war-

rant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly, but only remotely, connected with its specific corporate purposes. A power which the law will regard as existing by implication must be one in a sense necessary,—that is, needful, suitable, and proper to accomplish the object of the grant,—and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect, or remote relation to the specific purposes of the corporation." *People v. Car Co.*, 175 Ill. 125, 51 N. E. 664, and cases and authorities there cited. The enumeration of powers in the charter of an incorporation, or in the act under which it is incorporated, implies the exclusion of all powers not enumerated. *Thomas v. Railroad Co.*, 101 U. S. 82.

It is, however, urged that the requisite authority to remove the building now upon the lot, and abandon the use of the lot for religious purposes, and erect a house thereon for commercial and business uses, or to make a long lease thereof to others for secular uses, is to be found in the special acts of the general assembly approved, respectively, February 14, 1857, and February 13, 1865. It may be well, before entering upon the discussion of the legal effect of these acts, to note some general principles governing and controlling the possession and use of real estate by corporations and the construction and operation of special franchises. It is against the public policy of this state to allow corporations to hold real estate beyond what is necessary for the transaction of the business or specific corporate purposes of such corporations. *Carroll v. City of East St. Louis*, 67 Ill. 568; *Trust Co. v. Lee*, 73 Ill. 142. "Irrespective of the operation of statutory restrictions, it is a settled principle of American jurisprudence that a corporation cannot take and hold land except in so far as reasonably necessary to carry out the objects of its creation. These bodies, which never die, are not allowed, against the objection of the state, to take and hold land for purposes wholly foreign to the purposes for which the state endowed them with corporate existence and the power of perpetual succession." 5 *Thomp. Corp.* § 5772. This public policy is further manifested by the express declaration found in section 1 of chapter 32 of the Revised Statutes, being the general act providing for the formation of corporations in this state, that charters shall not be granted to corporations to deal in real estate by virtue of the act, and the further fact that no enactment is to be found in the statutes of our state authorizing the formation of such companies. Also the policy is further evinced by section 5 of the same general act, which requires that real estate acquired by a corporation in the collection of debts, unless it shall be necessary and suitable for the chartered purposes of the corporation, shall be annually offered by the corporation for sale at

public auction, and shall be sold whenever any one will pay an amount not less than the debt for which the land was taken; and by the further provisions of the same section making it the duty of the state's attorneys in the various counties to enforce such disposition of the property through the medium of an information filed in the courts against the corporation so offending. Again, it is against the policy of this state that any corporation shall receive a special or exclusive franchise by virtue of any special law. Such was the policy of the state as to religious corporations when the act of 1835, under which this corporation was chartered, was enacted, as is manifested by the preamble to that act, which is as follows: "Whereas, petitions are frequently presented to the legislature of the state to incorporate religious societies; and whereas, if said acts of incorporation were granted it would lead to an endless system of partial legislation; and whereas, all religious societies of every denomination should receive equal protection and encouragement from the legislature and no one society be granted exclusive privileges: Therefore," etc. *Sess. Laws 1835*, p. 147. Speaking of the rule to be employed in construing a grant of special privileges or the claim of exemption from the operation of general laws, *Morawetz*, in his work on *Private Corporations* (volume 1, p. 307), says: "It should always be presumed that the legislature does not intend to confer franchises of this character unless a contrary intention be expressed in unambiguous terms. In *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, Mr. Justice Swayne said: 'The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. The doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court.' * * * Every presumption will be made against the existence of an exemption from taxation, or from the general laws relating to usury, or of a right to a monopoly, or special privilege, to the exclusion of others."

In construing and giving present effect to the special enactments under consideration, we are to bear in mind the well-settled public policy of this state as to the power of corporations to hold and possess land for purposes not directly appropriate to the specific chartered purposes of the corporation, and the other rule of public policy that the special privileges shall not be granted by local or special laws, and also the strict rule of construction to be applied to grants which are relied upon as authorizing the enjoyment of special privileges. Guided by these considerations, we may proceed to consider and determine the true meaning and effect of the special enactments of 1857 and 1865.

Section 1 of the former of these acts provides the mode of electing trustees for the corporation, and it is not contended that it adds to the power of such trustees. Section 2 of the act authorizes the trustees to convey the said lot, by deed or mortgage, in security of money to be borrowed, and to apply the money so secured to the "erection on such real property of a place of worship or such other improvements as may be desired." Assuming that the words "the other improvements" meant buildings of any character, whether suitable or appropriate to religious purposes or not, the trustees issued bonds of the corporation to the amount of \$20,000, executed a deed of trust to secure the same, and erected upon the lot a building, the character of which is not disclosed further than that it was devoted, at least in part, to the purposes of business, and that it produced rents which came to the hands of the trustees. Conceding, without deciding, the construction thus given to that special act was warranted, it need only be said that the act served all of the purposes comprehended in that construction and has no present effect. For the reason, in part, that that act had served the ends it was designed to effect, application was made for the special act of 1865. Section 1 of the act of 1865 changes the mode of selecting the trustees. Sections 2 and 3 relate to the disposition to be made by the trustees of the rents received from the building then on the lot. Section 4 is as follows: "In order to secure the payment of any indebtedness now owing by said corporation, or any part of such indebtedness, or in case of the destruction or serious injury of said building from any cause, the same, and the lot on which it stands, may be conveyed by said trustees, by mortgage or deed of trust, as security for money borrowed to pay such indebtedness or to re-erect or repair said building, but shall not be aliened or conveyed for any other purpose whatever." This section authorizes the trustees, "in case of the destruction or serious injury of said building from any cause," to re-erect or repair said building. The building then upon the lot, and the one to which the section had reference, was destroyed by the fire of 1871, and the trustees executed the power given them by that section by erecting the building now standing on the premises. The power given has been enjoyed, was not a continuous power, but was exhausted by its exercise. That such power should be deemed continuous and perpetual, and now existing, is not within the letter or the spirit of the enactment, is opposed to the settled public policy of the state as declared by the general act under which the appellant corporation came into existence, and evinced by the provisions of the general act now in force relative to the creation of corporations, and by the provisions of

the constitution of 1870, and by repeated decisions of this court. The acts of 1857 and 1865 granted special powers and privileges to the corporation and its trustees, for the purpose of enabling it to accomplish particular and specific ends. These ends have been accomplished, and the enactments have no virtue to invest the corporation with perpetual right to exercise such special powers and privileges in order to accomplish other ends and objects.

Nor is the appellant corporation, by reason of anything contained in section 4 of the act of 1865, deprived of the power to alien and convey the premises in question. Section 3 of the act of 1835 provides that the trustees "shall have power, under the direction of the society or congregation, to execute deeds and conveyances of and concerning the estate and property herein authorized to be held by such society or congregation, and such deeds or conveyances shall have the same effect as like deeds or conveyances made by natural persons," provided such conveyance should not defeat or destroy the intent or effect of any grant, etc.; and the same power, expressed in the same words, is given by section 46 of the general act of 1856, hereinbefore set out. Said section 4 of the act of 1865 authorized the trustees to convey the property, by mortgage or deed, for the purposes specified in the act, without the direction of the society or congregation; and the true meaning of the concluding clause of said section 4, "but shall not be aliened or conveyed for any other purpose whatever," is that the authority given the trustees by the section to convey the lot by deed or mortgage, without the direction of the society or congregation, should not be construed to invest the trustees with power to mortgage or convey the property for any other purpose than that contemplated by the section. Authority to alien and convey it "under the direction of the society or congregation" is in no wise affected by the limitation expressed in the concluding clause of said section 4.

The conclusion is irresistible that the appellant corporation and its trustees are without power to erect on the premises a building to be rented for business and commercial uses, and to engage in conducting and managing a structure of that character, or, by means of a long lease of the ground, devote the lot to a use entirely foreign to the objects that the corporation was chartered to advance and conserve. The decree of the circuit court, and the judgment of the appellate court affirming it, are each reversed. The cause is remanded to the circuit court, with instruction to that court to enter a decree denying the prayer of the bill and declaring the powers of the appellant corporation and its trustees in conformity with the views herein expressed. Reversed and remanded.

(178 Ill. 74)

TOWN OF KANKAKEE v. MCGREW.

(Supreme Court of Illinois. Feb. 17, 1899.)

TOWNS—CURRENT INDEBTEDNESS—SUPPLIES FOR POOR—CLAIMS AGAINST TOWN—ACTION ON WARRANT—EVIDENCE.

1. Const. 1870, art. 9, § 12, provides that no municipal corporation shall become indebted for any purpose above a certain amount, and that any such corporation, incurring any indebtedness as aforesaid, must provide for the collection of a tax to pay the interest and the debt. *Held* not to apply to current indebtedness or obligation of a town the payment of which had not been deferred to some fixed period, and was not bearing interest.

2. Hurd's Rev. St. 1889, p. 1393, c. 146a, §§ 1, 2, provide that a town cannot draw warrants on its treasurer when it has no money in its treasury, and no tax has been levied and is in the course of collection. *Held* not to affect the power of the town to buy supplies for the poor, authorized by Rev. St. c. 107, § 15, providing that every town in which the poor are supported by the town shall relieve and support all poor persons lawfully resident therein, except as otherwise provided.

3. In an action to recover on a warrant given in payment of claims against the town, plaintiff introduced the records kept by the board of auditors, showing various demands against the town, constituting, in the aggregate, the amount the warrant professed to order to be paid, audited by the board of auditors. The record of the board was offered as evidence of an accounting. *Held*, that it was not necessary to produce a certificate from the board of auditors as to the nature and amount of the claim, which, under Hurd's Rev. St. 1889, c. 139, par. 124, the board is required to deliver to the town clerk, to be kept on file for the inspection of the public.

4. A town overseer of the poor cannot refuse to assist a pauper because he has relatives who are liable, under Rev. St. c. 107, § 20, for his support, and has failed so to do.

Magruder, J., dissenting.

Appeal from Kankakee county court; Eben B. Gower, Judge.

Action by J. F. McGrew against the town of Kankakee. Judgment for plaintiff, and defendant appeals. Affirmed.

This was assumpsit by the appellee against the appellant town. The declaration contained the common money counts; a common count for goods, wares, and merchandise; a like count for work and labor done and material provided; and a common count in account had and stated. In addition to a breach in the ordinary form, the declaration alleged demand had been made on the treasurer of the said town for payment of the alleged items of indebtedness. The general issue, a special plea, and a plea of the statute of limitations were filed. The special plea was as follows: "(2) That the plaintiff should not have his aforesaid action against it, the defendant, because it says that, at the time and place when and where it is alleged the defendant became and was indebted to said plaintiff, said defendant then and there was a quasi public corporation, and then and there had no money in its treasury with which to pay the same; and defendant further avers that, before and at the time of incurring the said alleged indebted-

ness, said defendant had not provided, nor did then provide, for the collection of a direct annual tax sufficient to pay and discharge the said alleged indebtedness within twenty years, or any period of time, from the time alleged of contracting the same; and defendant further avers that said alleged indebtedness was not incurred by, nor in compliance with, any vote of the people of said town of Kankakee which may have been had prior to the adoption of the constitution of 1870 of said state of Illinois, in pursuance of any law providing therefor; and this the defendant is ready to verify; wherefore it prays judgment," etc. The court sustained a demurrer to the special plea, and the appellant town elected to abide the plea. The cause was submitted to the court without a jury. The issues were found for the appellee, and judgment entered in his favor for \$763.70, to reverse which this appeal is prosecuted.

William R. Hunter, for appellant. Granger & Davidson, for appellee.

BOGGS, J. (after stating the facts). The complaint that the court erred in holding that the special plea did not present a legal defense to the action involves the construction of certain provisions of the constitution and of certain statutes in relation to the power of the appellant town to incur indebtedness. It is urged that, under the provisions of section 12 of article 9 of the constitution of 1870, the town could not lawfully become bound for the payment of any indebtedness, unless it should, before incurring such indebtedness, or at the time of doing so, have provided for the collection of a direct annual tax for the payment of such indebtedness. Said section 12 of the constitution is as follows: "No county, city, township, school district or other municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness. Any county, city, school district or other municipal corporation incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district or other municipal corporation from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this constitution, in pursuance of any law providing therefor." While it may reasonably be insisted that the words "any indebtedness," employed in the construction of the second sen-

tence of this section of the constitution, are broad enough, in general meaning, to include every species of indebtedness within the legal capacity of the appellant town to incur, yet the further reading of the sentence renders it manifest that the annual tax required to be raised is only to be applied to the discharge of that character of indebtedness which does not fall due until a future time, and which bears interest. The constitutional intent is plain. It is to control towns with reference to that species or character of indebtedness the payment whereof has been deferred to a fixed time in the future, and which bears interest. As to such indebtedness, the provision of the sentence is that the payment of the principal thereof shall not be deferred beyond a period of 20 years, and that before or at the time of contracting any such indebtedness the town shall provide for a direct annual tax sufficient to pay the interest as such interest falls due. If carried into full operation, these requirements would have no application to current indebtedness or obligations of the town the payment of which had not been deferred to some fixed period and were not interest bearing. The true construction of the sentence, therefore, is that the words "any indebtedness," before referred to, mean any indebtedness of the character affected by the provisions of the sentence. The first sentence of the said section operates to prohibit a town from becoming indebted to an amount in the aggregate exceeding 5 per centum on the value of the taxable property within its limits, as ascertained by the last assessment for state and county taxes. Within that limit, debts within the lawful power of the town to incur may be contracted without providing for a direct annual tax, unless payment of such indebtedness is deferred to a fixed future period.

Nor is it true that the town may not become lawfully indebted at a time when it has no money in its treasury and no tax then levied and in the course of collection. In such condition, the town cannot draw warrants on its treasurer; for the issuing of warrants in that state of case is prohibited by sections 1, 2, c. 146a, p. 1303, Hurd's Rev. St. 1889. The law, however, charges upon towns such as the appellant corporation the performance of certain duties which involve the creation of obligations and indebtedness, and authorizes them to exercise powers which may result in the creation of legal demands against them. The performance of these duties may be imperative, and the exercise of such powers may be desirable and advisable, at times when the treasury of the town is empty and when there is no tax in process of collection; yet the town may not, for these reasons, avoid the performance of the duties legally cast upon it, nor is it deprived of the right to exercise powers of which it is legally possessed. In such cases, a town should discharge its legal duties, and may exercise its lawful powers, unless so doing would necessitate expenditures in an

amount which, together with existing indebtedness of the town, would exceed the limitation imposed by the constitution. The restrictions of said sections 1, 2, c. 146a, are upon the power of the town to draw warrants for the payment of money, not upon its power to incur obligations and indebtedness.

Some of the items included in the amount of the judgment here sought to be reversed were for supplies of coal, etc., for the poor of the town. Section 15 of chapter 107 of the Revised Statutes, entitled "Paupers," is as follows: "Every town in counties in which the poor are supported by the towns (as provided by law) shall relieve and support all poor and indigent persons lawfully resident therein, except as herein otherwise provided." A town having such duty to poor and indigent persons lawfully resting upon it could not refuse to discharge the duty upon the ground it had no money in its treasury and had no tax in course of collection, but, upon the contrary, should relieve and care for such poor and indigent persons, and in doing so may create obligations and indebtedness to enforce and collect which the aid of the courts of law may be successfully invoked. We are not aware of any provision of the statute which requires that a town, in such state of case, shall be authorized by a vote of the legal electors of the town to contract or incur indebtedness. That the aggregate indebtedness of the town shall not exceed the constitutional limitation is the only restriction upon the power of a town to become indebted to discharge such duties devolved upon it by law.

Upon the hearing of the case it appeared the appellee presented to the board of auditors of the appellant town, on the 1st day of April, 1898, accounts against the town in favor of divers persons, amounting in the aggregate to the amount of the judgment herein appealed from, and that the same were audited by the said board, and found to be correct, and a warrant for that amount was ordered to be drawn, and was drawn, in favor of the appellee, upon the treasurer of the said town, for the payment thereof. There was then no money in the treasury, and there was no tax in the course of collection, and for those reasons the warrant was void. It was stipulated between the parties that the fact that the total of appellee's claim was made up of demands of other persons against the town, transferred to him, should not be considered, but that the appellee should be conceded to be entitled to recover if the original holder of the claim could have recovered. The warrant was offered and received in evidence, but the appellee did not rely upon it as legal evidence of indebtedness, but introduced the record kept by the board of auditors showing that various accounts and demands against the town, which constituted, in the aggregate, the amount the warrant professed to order to be paid, were presented to the board of auditors, and found to be correct, and audited by

the board as just demands against the town, and that the total therefor was due and payable to appellee. The record of these proceedings of the board was offered as evidence of an accounting, and was accepted by the court as sufficient to sustain a right of recovery, under the count of the declaration averring liability by reason of an accounting between the parties.

The statute requires that the board of auditors shall make a certificate specifying the nature and amount of all claims and demands allowed at each meeting of the board, and shall deliver such certificate to the town clerk, to be kept on file by said clerk "for the inspection of any of the inhabitants of such town." Hurd's Rev. St. 1889, c. 139, par. 124, entitled "Township Organization." It seems such certificate was not made in this instance. Appellant contends that the certificate so required is the only legal evidence of the action of the board. This is a misapprehension. The purpose to be served by this certificate is to furnish information to the inhabitants of the town as to the indebtedness of the town. Paragraph 126a of said chapter 139 provides that a record of the proceedings of the board of town auditors shall be kept in a book to be provided for that purpose. This record constitutes the best evidence as to the proceedings of the board, and it was produced before the court. It established *prima facie* an accounting between the parties. We find no evidence in the record tending to overcome the *prima facie* case thus made by appellee.

It appeared that some of the demands included in the amount audited by the board in favor of the appellee were for coal, and perhaps other supplies, furnished to poor and indigent persons in the town. The third proposition presented by the appellant to be held as the law applicable to such demands was refused by the court. This action of the court is assigned as for error. The contention of the appellant upon the point is stated in the brief in its behalf as follows: "The third proposition presents the question whether the overseer of the poor can bind the town by giving orders to persons who do not come within the description of 'poor persons,' as defined by the pauper act of this state. Our position is that, when a party seeks to obtain a judgment against a town for goods furnished to residents therein, he must show that the goods were furnished to such persons as the law contemplates are proper subjects for public support." In the county of Kankakee, which embraces the appellant town, the duty of providing for the poor rests upon the various towns. Section 1 of chapter 107 of the Revised Statutes, entitled "Paupers," provides that every poor person who shall be unable to earn a livelihood, on account of idiocy, lunacy, or other unavoidable cause, shall be supported by certain specified relatives, in order as stated; but section 20

of the same act provides that the overseers of the poor shall have the care and oversight of all such persons in their towns as are unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, and as are not supported by their relatives or at the county poor house, and shall see they are suitably relieved, subject to such restrictions and regulations as may be prescribed by the town. The overseer cannot refuse to fulfill the duties thus cast upon him, upon the ground the unfortunate persons entitled to assistance have relatives who are liable, under the first section of the chapter, to provide and care for them. Section 3 of the same chapter makes it the duty of the state's attorney to enforce performance by such relatives of the duty cast upon them by law to assist such poor or indigent persons, and the succeeding sections, to and including section 12, direct, in detail, the course of procedure in the courts against such relatives and the manner of enforcing their obligation to their unfortunate poor kinsmen. The necessities of the unfortunate class designed to be relieved by the law do not, however, admit of delay. Pain and suffering must be relieved; food, fuel, clothing, and shelter must be furnished to those in need; the dead must be buried. Prompt relief is imperative, and the overseer of the poor may not await the action of the state's attorney, and the termination of proceedings in court, but, as the representative of the town, must care for those who are so unfortunate as to be entitled to assistance from the public. The express provisions of section 20 make it the duty of such overseer to relieve the wants of those who fall within the legal denomination of "paupers," and "as are not supported by their relatives or at the county poorhouse." If there be no funds for the purpose, the overseer must, of necessity, have power to pledge the credit of the town in that behalf, and may procure supplies for such poor persons from merchants, grocers, and tradesmen, who, in the absence of fraud or actual knowledge to the contrary, may deliver such supplies upon the order of the overseer, and hold the town liable therefor, without being required to show that such person so receiving support was in fact actually entitled thereto. It is the official duty of the overseer to determine as to that, and his action must conclude the town, so far as those who in good faith furnish supplies upon the faith of it are concerned. Board v. Plaut, 42 Ill. 325. The special plea did not present a good defense to the action, nor did the court err in ruling as to the admissibility of evidence or as to the rules of law applicable to the case. The evidence supported the finding and judgment of the court. The judgment must be and is affirmed. Judgment affirmed.

MAGRUDER, J., dissenting.

(178 Ill. 85)

WOLF v. McNULTA et al.

(Supreme Court of Illinois. Feb. 17, 1899.)

GAMBLING CONTRACT—CONDITION SALE—RECEIVERS OF NATIONAL BANK—JUDGMENT.

1. Provision in a contract of sale of bonds, made a condition of the purchase, that, if the buyer desire to resell to the seller at a certain time, the seller will buy them back at the price paid, with interest, merely makes the contract one of conditional sale, and not a gambling contract, within Rev. St. c. 38, § 130, declaring a punishment for whoever contracts to have or give to himself or another the option to sell or buy at a future time any stock, and declaring contracts made in violation thereof gambling contracts.

2. One becoming a receiver of a bank after it has sold bonds, with a provision that, if the buyer desire to resell to the seller at a certain time, it will buy them back at the price paid, and interest, can do nothing to impair the obligation of the contract, though appointed before the time provided for the resale.

3. It is proper in a suit on a contract of a national bank, after a receiver has been appointed for it, to render judgment against the bank only, and enter an order requiring the receiver to certify the claim in judgment to the comptroller of the currency of the United States, to be paid by him in due course of administration of the assets of the bank.

Appeal from appellate court, First district.

Action by Harris Wolf against John McNulta, receiver of the National Bank of Illinois, and another. From a judgment of the appellate court (77 Ill. App. 325) reversing a judgment for plaintiff, plaintiff appeals. Reversed.

The National Bank of Illinois, at Chicago, sold to Harris Wolf certain bonds known as bonds of the Chicago Auditorium Association, and, at the time of the several sales, entered into the following agreements and undertakings with appellant: "Chicago, June 22, 1896. H. Wolf, Esq., City—Dear Sir: We have this day sold to you \$11,000 of the five per cent. bonds of the Chicago Auditorium Association, at par, and interest. Should you desire to resell to us during the month of January, 1897, we will buy them back from you at same price. Yours truly, Wm. A. Hammond, Second Vice Prest." On July 9, 1896, in connection with the sale of others of the bonds: "Should you wish to sell these bonds back to us in the month of January, 1897, we will buy them back at par, and interest. W. A. Hammond, Second Vice Prest." On July 14, 1896, referring to the sale of others of the bonds: "Should you wish to sell us these bonds back during the month of January, 1897, we will repurchase them at par, and interest. W. A. Hammond." And on July 15, 1896, referring to another of the sales: "If you wish to sell these bonds back to us at par, and interest, during the month of January, 1897, we will repurchase them from you at the above price. W. A. Hammond, Second Vice Prest." The bank failed on the 21st day of December, 1896, and on that day John C. McKeon was appointed receiver. On January 16,

1897, appellant gave the following notice to the receiver: "Chicago, Ill., Jan. 16, 1897. Hon. John C. McKeon, Receiver Nat. Bank of Illinois—Dear Sir: I hereby tender you thirty-five bonds of the Chicago Auditorium Association, of \$1,000 each, making a total of \$35,000, and I hereby offer to sell said bonds to you, as said receiver, at their face value, with accrued interest. This tender and this offer to sell are made in pursuance of certain receipts and guaranties given me by said National Bank of Illinois at the time I purchased said bonds from said bank. Copies of said receipts and said guaranties are attached hereto, and made a part hereof, and your attention is specifically called thereto. You are further notified that, if said bonds are not repurchased by you in pursuance of above demand, I shall at once place them upon the open market, offering them for sale, and shall hold said bank, and you, as receiver thereof, liable for any loss incurred by me growing out of said sale, or I shall have said bonds appraised, and their present market value fixed, and hold you, as receiver of said bank, and said bank, liable for any difference between the face value and said appraised value. H. Wolf." The receiver refused to accept the bonds or to recognize any obligation by reason of the agreements to repurchase. This suit was brought to recover damages for breach of these several agreements by the bank to repurchase the bonds at the option of the appellant. A jury was waived, and the cause submitted to the trial court upon an agreed statement of facts. Among other items in the agreed statement is the following: "(8) That in all of said purchases said plaintiff informed the said bank, acting through said W. A. Hammond, its second vice president, that he would not make said purchases unless said bank would contract in writing to repurchase said bonds, as is in said several contracts more fully stated." It was further stipulated that all of said transactions were made between said parties in good faith, and that said plaintiff fully believed that said bank, acting through said Hammond, had full power and authority to enter into such contracts, and that said W. A. Hammond, acting as such second vice president of said bank, fully believed that said bank had the power and authority to enter into such contracts; that said W. A. Hammond, in his capacity as second vice president of said bank, exercised all the powers vested in the president and first vice president of said bank as a matter of fact, but, in the making of said contracts, the board of directors did not pass any resolution authorizing the execution and delivery of said contracts; that all of the said contracts recited herein shall be considered by the court as if they had been signed, "The National Bank of Illinois, by W. A. Hammond, Its Second Vice President;" that said bank had an authorized capital of \$1,000,000, and always did a very large com-

mercial banking business; that said auditorium bonds were not speculative bonds, but were and are, in the banking community of Chicago, recognized as good and valid staple securities, either for a loan of money or for the purchase and sale thereof; that such bonds mentioned in said contracts formed a part of a purchase of \$50,000 by said bank, the remainder of which were in the possession of the bank as a part of its assets at the time when the receiver took possession thereof under the orders of the comptroller of the currency. Item 14 of the stipulation was as follows: "(14) It is agreed that, in the making of this stipulation by the parties hereto, the power of the National Bank of Illinois, and that of William A. Hammond, its second vice president, to enter into said contracts in its behalf, is affirmed on the part of the plaintiff herein, and is disputed on the part of the defendants herein, and the judgment of the court is requested on the stipulated facts." The circuit court found the issues in favor of the plaintiff, and entered judgment against the National Bank of Illinois for the sum of \$35,257.61, but refused to enter judgment against the receiver, but entered an order "that John C. McKeon, receiver, certify this claim in judgment to the comptroller of the currency of the United States of America, to be paid by him in the due course of administration of the assets of said National Bank of Illinois at Chicago." To reverse the judgment, the defendants sued out a writ of error to the appellate court, where the judgment was reversed, and the plaintiff appealed to this court. McKeon, the former receiver of the bank, has since been succeeded in the receivership by John McNulta, the present appellee.

Moses, Rosenthal & Kennedy, for appellant. George M. Eckels, for appellees.

CRAIG, J. (after stating the facts). It is insisted in the argument, on behalf of appellees, that the agreements upon which a recovery was had in the circuit court falls within section 130 of chapter 38 (Criminal Code) of the Revised Statutes, and is void. On the other hand, it is first claimed by appellant that, under the stipulation of facts upon which the cause was tried, the criminal statute is not involved, and appellees cannot rely upon that statute as a defense. As has been seen, item 14 of the stipulation provides that "the power of the National Bank of Illinois, and that of William A. Hammond, its second vice president, to enter into said contracts in its behalf, is affirmed on the part of the plaintiff herein, and is disputed on the part of the defendants." Under this part of the stipulation, the defendants had the undoubted right to rely upon any ground which would disclose a want of power on the part of the bank to enter into the contracts; and, if the statute rendered the contracts void as gambling contracts, we perceive no reason

why the bank might not rely on the statute as well as any other matter which might disclose a want of power.

It is next contended that the contracts in question are not gambling contracts, and do not fall within section 130 of the Criminal Code; and this is the principal question presented by the record. The section of the statute in question is as follows: "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to any of such commodities, shall be fined not less than \$10 nor more than \$1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." It appears from the record that the National Bank of Illinois, at the time the contracts were made, had an authorized capital of \$1,000,000, and did a large commercial banking business. It also appears that the auditorium bonds were not speculative bonds, but were, in the banking community of Chicago, recognized as good and valid staple securities, either for the loan of money, or for the purchase and sale thereof; that the bonds mentioned in the contracts formed a part of a purchase of \$50,000 by the bank, \$15,000 of which remained in the possession of the bank as a part of its assets at the time the bank went into the hands of the receiver. It also appears that the contracts were made in good faith, and both plaintiff and W. A. Hammond, second vice president of the bank, fully believed the bank was clothed with power and authority to make the contracts. It further appears that plaintiff refused to purchase the bonds unless the bank would contract, in writing, to take them back at par, and interest, in case he desired to return them. These are the facts surrounding the transaction at the time the contracts in question were entered into between the bank and the plaintiff, and it is manifest that there was no intention on the part of the bank or the plaintiff, in making the contracts, to violate the criminal law of the state, or to enter into a contract prohibited by law. Are the contracts in question, when properly construed, "option contracts" or "gambling contracts," within the meaning of the statute?

It may be conceded that the contracts in question purport to be a sale of \$35,000 of 5 per cent. bonds of the Chicago Auditorium Association at par and accumulated interest from the bank to the plaintiff, with an option to resell during the month of January, 1897, at the price paid, with interest; but, when the different parts of the contract are construed as a whole, the sale of the bonds may be regarded as a conditional sale, with the

right reserved by plaintiff to return them during the month of January, 1897. Under the contracts, the amount to be paid by the bank to the plaintiff in case he desired to return the bonds was the face value and interest on the amount which the plaintiff had paid, and interest from the time of payment. The obvious intention of the parties was to make a conditional sale, and the condition upon which the purchase was made was that the bank should take the bonds back at the same price if within a specified time the plaintiff desired to return them. In other words, the bonds were turned over by the bank to the plaintiff at a certain stipulated price, with the distinct agreement that the plaintiff had the right, during the month of January, 1897, to elect whether he would keep them or return them to the bank, and, in case he concluded to return the bonds, he was entitled to receive his money back, with interest. The transaction was one both reasonable and proper, and one not within or prohibited by the statute. Indeed, it contains no element of a gambling contract. There was here no contract to have or give, to himself or another, the option to sell or buy at a future time, within the meaning of the statute; but, on the other hand, the appellant, as a part of his contract under which the bonds were delivered to him, reserved the right, at and within a specified time, to return the bonds, and receive back the money he had paid, and interest thereon. It is difficult to see how a contract of that character can be termed a "gambling contract" or one that should be prohibited by law. Is it contrary to law or justice, or does it violate any rule of public policy, for a person to sell a horse, a cow, a promissory note, or a bond for a specified sum, and agree to take the article back within a given time for the same price? If it is, this contract might be condemned; otherwise, not. A contract similar to the one involved here came before the court in *Richter v. Frank*, 41 Fed. 859, and the contract was held not to be within the statute. *Schneider v. Turner*, 130 Ill. 28, 22 N. E. 497, has been cited and relied upon by appellees as an authority that the contracts in question are within the statute, and void. The contract in that case, which was a mere option contract, was held to be within section 130 of the Criminal Code; but upon examination it will be found that the contract there involved was so different from the contracts in this case that the decision there cannot control here. In the case under consideration the plaintiff notified the bank, before he agreed to take the bonds, that he would not take them unless the bank would agree to take them back; and the bank agreed, as a condition upon which plaintiff parted with his money and received the bonds, that it would take them back in the following January, at the same price; and we see no reason why the bank should not abide by its contract.

It is, however, said in the argument that

the memoranda were mere offers, made without consideration, whereby the bank offered to buy during the month of January, 1897, in which case (the bank having been placed in the hands of a receiver, and the receiver having repudiated the offers upon his appointment, and prior to acceptance) the offer was of no binding force or effect. The agreement entered into between the appellant, Wolf, and the bank, was, at the time the receiver was appointed, a valid subsisting contract, which fixed the obligations, and determined the rights, of the respective parties; and the receiver was clothed with no power to do any act which might impair the obligation of that contract. *Chemical Nat. Bank v. Hartford Deposit Co.*, 156 Ill. 522, 41 N. E. 225; *Id.*, 161 U. S. 1, 16 Sup. Ct. 439.

As has been seen, the circuit court rendered judgment against the bank, but declined to enter a formal judgment against the receiver. The court, however, entered an order requiring the receiver to certify the claim in judgment to the comptroller of currency of the United States, "to be paid by him in due course of administration of the assets of the said National Bank of Illinois." This action of the court has been called in question by appellant by cross errors assigned in the appellate court. The rule adopted by the circuit court is sustained by *Merrill v. Bank*, 21 C. C. A. 282, 75 Fed. 148. We are inclined to the opinion that, under all the facts of the case, no such error was committed in the rendition of the judgment as should call for its reversal. The judgment of the appellate court will be reversed, and the judgment of the circuit court will be affirmed. Judgment reversed.

(178 Ill. 107)

**KNAPP, STOUT & CO. COMPANY v.
McCAFFREY.**

(Supreme Court of Illinois. Feb. 17, 1899.)

**CARRIERS—TOWAGE—BAILEES' LIENS—EVIDENCE
—WAIVER—EQUITY—JURISDICTION—ESTOPPEL—ADMIRALTY.**

1. A steamboat owner engaged in the business of towing is not a common carrier.
2. One towing a raft of lumber for another has a common-law bailee's lien on the lumber for his services while it is in his possession.
3. One contracting to tow a raft of lumber to a certain point has a lien on a half of the raft, which at the owner's request was transported only a part of the way, for the price agreed on for all his services.
4. One towing rafts of lumber under a contract making no provision for the time of payment is entitled to a lien on the lumber for his services, though customarily he received no pay until after delivery.
5. One towing rafts of lumber for another does not defeat his lien on one raft by delaying to enforce payment for towing the others.
6. One does not waive a bailee's lien on property of an insolvent by filing a claim for the amount of the lien in the insolvency proceedings, where the lien is asserted when the claim is filed.
7. One having a bailee's lien for towage on a raft of lumber floating in a river may sue in

equity to determine his possession, and lien, as against a pretended purchaser threatening to take away the raft, and an assignee for creditors of the bailor.

8. A purchaser of a raft of lumber obtaining an order, in a suit by a bailee of the lumber to enforce his lien for towage, giving the purchaser a right to take the lumber away on executing a bond to secure the bailee, and thereby rendering the bailee powerless to reclaim the lumber, is estopped from asserting that the admiralty courts alone have jurisdiction of the suit, though the bailee consented to the order, and it was stipulated when it was made that it should not affect the purchaser's right to question the court's jurisdiction.

9. Moreover, the obtaining of such an order so changed the suit as to make it not within the jurisdiction of an admiralty court.

10. Equity has jurisdiction to afford relief to a bailee of a raft having a lien for towage, where equitable circumstances exist, justifying the granting of relief on equitable principles, as against persons made defendants, though he might have obtained some relief by proceedings in admiralty against the raft.

Appeal from appellate court, Second district.

Bill by John McCaffrey against the Knapp, Stout & Co. Company and others. From a decree of the appellate court reversing the decree dismissing the bill (74 Ill. App. 80), the Knapp, Stout & Co. Company appeals. Affirmed.

This was a bill in equity filed in the circuit court of Mercer county by John McCaffrey against the Schulenburg & Boeckeler Lumber Company and its assignees and the Knapp, Stout & Co. Company. Said corporations, for brevity, will here be called the "Schulenburg Company" and the "Knapp Company." The object of the bill was to establish and enforce a bailee's lien upon a half raft of lumber at Boston Bay, in Mercer county. The Knapp Company applied for and obtained an interlocutory decree, under which it gave bond and took the raft away. Answers were filed, and replications thereto, and there was a hearing, and a decree dismissing the bill without prejudice, from which decree McCaffrey prosecuted an appeal to the appellate court. The appellate court reversed the decree of the circuit court, and remanded the cause, with directions to enter a decree for a particular amount, as hereinafter stated. On April 6, 1893, the Schulenburg Company and McCaffrey entered into a written agreement, by which, among other things, McCaffrey was to tow rafts of lumber from Stillwater to St. Louis for the Schulenburg Company, at certain prices therein fixed. There were many provisions of the contract not material to the present suit. McCaffrey towed many rafts for the company under said contract, and prior to October 6, 1894, the Schulenburg Company was largely indebted to McCaffrey for towing charges under said contract, which indebtedness is still unpaid. On October 13, 1896, McCaffrey's steamer, the Robert Dodds (George Tromley, Jr., master), left Stillwater with raft No. 10 of that year. The water was very low in the river, and the progress of the raft was slow. The Schulenburg Company was in haste for its lumber, and, pursuant to its direc-

tions, the raft was divided by Tromley at Boston Bay, and one half was taken into the bay and there fastened, and left in charge in the manner hereinafter stated, and the other half of the raft was taken to St. Louis, and there delivered on November 2d. The Schulenburg Company then paid the clerk of the boat \$1,250, without any directions as to its application, and McCaffrey applied it on the amount due him for towage of other rafts. The company then directed Tromley to leave the half raft in Boston Bay till spring, and delivered to him two additional lines, to be used by him in making the raft more secure to the shore. The steamer reached Boston Bay again on the morning of November 4th, and the captain and crew on that day did certain things and left certain directions for the care of the half raft during the winter, which will be hereinafter stated. On the next day, November 5th, at St. Louis, the Schulenburg Company sold said half raft to the Knapp Company for \$15,000,—part in cash, and part in a note due in four months, which was afterwards paid. On November 9th the Schulenburg Company made a voluntary assignment at St. Louis for the benefit of creditors. McCaffrey offered, both to the Schulenburg Company and to the Knapp Company, to tow said half raft to St. Louis under his contract; but the Knapp Company forbade his doing so, and informed him that it did its own towing. Finally McCaffrey, claiming still to be in possession of the half raft, but believing that the Knapp Company was about to seek to take it from him by force, filed this bill, with the results already stated.

Wise & McNulty and Bassett & Bassett, for appellant. Scott & Cooke and Brock & Graham, for appellee.

PER CURIAM. The opinion of the appellate court, as delivered by Mr. Justice DIBBLE, is in part as follows:

"The first question is whether McCaffrey had a lien on the raft for his towing charges while the raft was in his possession. He had no lien by contract, for that instrument gave him none. A common carrier has, at common law, a specific lien upon the goods carried, for his charges in transporting them (13 Am. & Eng. Enc. Law, 580), and our statute (Rev. St. c. 141) provides a means for enforcing it; but the weight of authority is that the owner of a steamboat engaged in the business of towing is not a common carrier (*Caton v. Rumney*, 13 Wend. 387; *Alexander v. Greene*, 3 Hill, 9; *Story*, Ballm. § 496; *And. Law Dict.* tit. 'Towboat'); and much more is this so where, as here, he tows only for a single party. Stephen thus defines 'bailment': 'Bailment is the delivery of goods for some purpose, upon a contract, express or implied, that after the purpose has been fulfilled they shall be redelivered to the bailor, or otherwise dealt with according to his directions, or kept till he reclaims them.' 3 Am. & Eng. Enc. Law (2d

Ed.) 733. The word 'goods,' in this and other like definitions, obviously includes every article of movable and tangible personal property. Among the purposes included within said definition of 'bailment' is 'the hiring of the carriage of goods from one place to another for a stipulated or implied reward.' Cow. Treat. (3d Ed.) 67; Story, Bailm. § 8. There is nothing in this definition which excludes carriage of goods by water, and that such carriage comes within the principles of bailment is evident from *Id.* §§ 496, 501, 504, and elsewhere. The carrier of goods has a lien thereon for his hire while he retains possession. *Id.* § 538. This lien 'extends to all the goods delivered under one contract, although they be delivered in different parcels and at different times; and the bailee may detain any portion of them as a lien upon the whole,' even if he has delivered a part. 3 Am. & Eng. Enc. Law (2d Ed.) 760; *Morgan v. Congdon*, 4 N. Y. 552; *Schmidt v. Blood*, 9 Wend. 268; *McFarland v. Wheeler*, 26 Wend. 467; *Potts v. Railroad Co.*, 131 Mass. 455; *Blake v. Nicholson*, 3 Maule & S. 167; *Chase v. Westmore*, 5 Maule & S. 180. Up to the time the whole raft reached Boston Bay, McCaffrey had a lien on each piece and parcel of lumber thereon for the carriage of the entire raft. The Schulenburg Company could not change or defeat that lien by directing him to divide the raft and bring half to St. Louis first. That direction was solely for its benefit. McCaffrey was ready and willing, and offered, to tow the half raft to St. Louis; but was refused permission, and his right to do so was denied, by the purchaser. This excused, and, indeed, prevented, his further performance. Therefore McCaffrey had a common-law bailee's lien on said half raft, while in his possession at Boston Bay, for the towing of the entire raft at the contract price. His claim is for \$3,795.82. This sum we consider established by the proofs, * * * for which, in our opinion, complainant had a bailee's lien on said half raft while he retained possession, and which would bear interest at five per cent. per annum from the date when the Knapp Company forbade McCaffrey to tow said half raft to St. Louis under his contract, which was November 12 or 13, 1894.

"It is suggested there is no lien because the practice had been not to pay till after delivery. But the contract does not provide when payments shall be made, and the price agreed was therefore due when the service was rendered. Delay in enforcing payment for other rafts, which was merely of favor to the owner, could not defeat the lien. McCaffrey filed a claim against the Schulenburg Company, insolvent, for nearly \$25,000, and included this claim therein, and it is argued he thereby waived his lien. But in the written claim filed he expressly asserted a lien on said half raft for these charges, and states therein that he retained the right to enforce said lien. It is not shown that said claim was ever allowed or put in judgment, and it has not been

paid. The mere filing of a claim thus guarded did not release the lien.

"The main question of fact in dispute is whether McCaffrey had possession of said half raft after he took it into Boston Bay. * * * We are of opinion McCaffrey had possession of the half raft till he surrendered it under the order of the court. He therefore had everything necessary to entitle him to a bailee's lien. McCaffrey has no adequate remedy at law. * * * He had a right to hold the raft till his charges were paid. But his possession and his lien were both disputed. The Knapp Company obviously intended to take the raft away. As it was upon the water, and near the channel of the river, the ropes could be cut or removed, and the raft taken away by a steamer, at any time, unless guarded by a force of men at much expense, and in a way likely to lead to a breach of the peace. Can a bailee in possession in such case have the aid of a court of equity, or must he be left either to maintain a small army at his own expense, or to let his rights be taken away from him, and then sue the tortfeasor at law? McCaffrey's position was in many respects similar to that of a pledgee or chattel mortgagee, and their right to foreclose their lien in equity is well established. *Dupuy v. Gibson*, 36 Ill. 197; *Cushman v. Hayes*, 46 Ill. 145; *Barchard v. Kohn*, 157 Ill. 579, 41 N. E. 902; *Charter v. Stevens*, 3 Denio, 33; Story, Bailm. § 348; 1 Pom. Eq. Jur. § 164; 3 Pom. Eq. Jur. § 1231. The right to enforce a bailee's lien in equity comports with equitable principles. 1 Pom. Eq. Jur. § 112, mentions 'those cases in which the relief is not a general pecuniary judgment, but is a decree of money to be obtained and paid out of some particular fund or funds. The equitable remedies of this species are many in number, and various in their external forms and incidents. They assume that the creditor has, either by operation of law, or from contract, or from some acts or omissions of the debtor, a lien, charge, or incumbrance upon some fund or funds belonging to the latter,—either land, chattels, things in action, or even money; and the form of the remedy requires that this lien or charge should be established and then enforced, and the amount due obtained by a sale, total or partial, of the fund.' In section 171 the same author classifies 'those remedies which establish and enforce liens and charges on property, rather than rights and interests in property, * * * by means of a judicial sale of the property itself which is affected by the lien, and a distribution of its proceeds, * * * until they satisfy the claim secured by the lien.' 2 Kent, Comm. 642, says: 'A lien is in many cases like a distress at common law, and gives a party detaining the chattel the right to hold it as a pledge or security for the debt, but not to sell it. * * * I presume that satisfaction from a lien may be enforced by bill in chancery.' Cow. Treat. (3d Ed.) 337, after stating that a

party detaining a chattel by virtue of his lien thereon for charges has a right to hold it, but not to sell it, says: 'It is supposed that the only way in which satisfaction from a lien can be enforced is by a bill in chancery.' In 2 Redf. R. R. p. 160, § 22, par. 14. that author says: 'Neither the carrier, nor any other bailee having a lien, can sell the goods at common law in satisfaction of the lien. The appropriate remedy in such case is in equity.' 2 Ror. R. R. p. 1268, discussing the carrier's lien on freight for charges, and that such lien only gives the right to retain and not to sell the property, further says: 'If the carrier will sell, other than when the statute allows it, he may find a remedy and means of selling by judicial proceedings to enforce the lien.' In *Gilchrist v. Railroad Co.*, 58 Fed. 708, the United States circuit court for Montana sustained a bill to enforce a lien. The relief was, in part, based upon the fact that the plaintiff had a lien, and had a right to have it enforced, but had no plain, speedy, and adequate remedy at law. *Fox v. McGregor*, 11 Barb. 41. 2 Jones, Liens, § 1038, states the contrary rule,—that a court of equity has no jurisdiction to enforce a common-law lien by a sale merely because there is no remedy at law, or because the retaining of possession under a passive lien involves expense or inconvenience. That author, in section 1041, recognizes Illinois as an exception, and as a state in which a court of equity has jurisdiction to enforce liens upon personal property generally; citing *Railroad Co. v. Fackney*, 78 Ill. 116. The court there said: 'Liens are enforceable in equity, unless the law has provided for another mode. This is true of vendors' liens, equitable and other mortgages, and all statutory liens, so far as they now occur to us, except in all cases where the lien is in the nature of a pledge, and possession accompanies the lien. If defendant in error had a lien, he should have resorted to equity for its enforcement.' The general principle and the reason there stated sustain the present suit, while the exception suggested by the court seems against it. See, also, *Cushman v. Hayes*, 46 Ill. 145.

"But, if a mere desire on the part of the complainant to collect his debt would not give jurisdiction to a court of equity to order the property held under the lien sold to pay it, there seem here to be other sufficient reasons for applying to equity. The Schulenburg Company claimed to have sold to the Knapp Company, and the latter claimed to have bought. Almost immediately after the alleged sale the Schulenburg Company made an assignment for the benefit of creditors. The pleadings show the assignees do not admit the sale from the Schulenburg Company to the Knapp Company, but deny it in general terms. McCaffrey had no other effective way of determining with whom he might safely deal. Both the Schulenburg Company and the Knapp Company have always denied

that McCaffrey had a lien, and that he ever had possession after the raft was laid up in Boston Bay. Both said defendants claim that the raft was by McCaffrey delivered to the Schulenburg Company when it was put into that harbor; that the Schulenburg Company thereafter remained in possession of the raft till it sold to the Knapp Company, and that it then put the Knapp Company in possession; and that the latter thereafter remained in possession. The Knapp Company declared, in its answer, its right and purpose to remove the raft, and it declared the same thing to McCaffrey before the bill was filed. The bill stated that the raft was so near the channel that, when the annual June rise in the Mississippi should take place, it would be likely to break up and destroy the raft, unless moved further inland, and that his right to move it was in dispute; and the answer of the Knapp Company makes it clear he could not have so removed it without resistance. It was his duty to protect this property while in his possession. It was valuable, and he would be responsible for any injury which could be traced to his neglect. He needed the help of a court of equity to keep him undisturbed in the control and care of the property. Such assistance could be afforded him under his prayer for general relief. It is plain from the pleadings that a large force of men was necessary to enable McCaffrey to retain the possession he had, and which he was entitled to retain. We are of opinion that under all these circumstances it was proper for him to resort to a court of equity, and bring all parties in interest before the court, to have the questions of his possession and lien, and the validity of the sale to the Knapp Company, and the rights of the assignees, determined by a decree binding upon them all.

"It is said the circuit court of Mercer county had no jurisdiction, because this was a maritime lien, and exclusive jurisdiction in such case is by act of congress vested in the courts of the United States sitting in admiralty. Can the Knapp Company now raise that question, in the condition of this record? On April 2, 1895, and before answer, the Knapp Company filed a written petition in this case, wherein it asked the circuit court either to require McCaffrey to give a bond, with sureties in the sum of \$25,000, conditioned to pay the Knapp Company whatever damage it might suffer if the case should be decided against McCaffrey, or else that, upon the said Knapp Company giving a bond in the sum of \$8,000 to pay McCaffrey any lien which might be established in his favor, 'then that this defendant shall have a right to take possession of said raft, and remove the same to St. Louis, Missouri.' As a reason the Knapp Company added: 'The defendant, being in a court of equity, and believing that it is but right that this motion should be granted, prays the court to grant the same.' Thereupon the court heard said petition, and by

consent of the parties ordered that the Knapp Company file a bond in the penal sum of \$6,000, with sureties, conditioned to pay 'McCaffrey all sums of money for which he has a lien upon the property described herein,' and that, upon the filing and approval of such bond, McCaffrey 'shall surrender the property above described to the Knapp, Stout & Co. Company.' Bond was so given, and the Knapp Company took the raft away. The order provided with great care that no one should be prejudiced by the order; that it should not be construed to be a confession of anything by anybody, nor an admission that the court had jurisdiction, etc. Nevertheless, the order was much to the detriment of McCaffrey, and took from him important rights. It is very earnestly argued here by the defendants that, if McCaffrey had any lien, it was but a passive lien, entitling him to retain possession of the raft till his charges were paid, but for which he had no other remedy. But, if so, his passive lien was destroyed under this order. He no longer had possession. The raft was gone. It is a fair presumption that when the Knapp Company got the raft to St. Louis the lumber was distributed in its yards, and no longer traceable, and that it was impossible for the complainant to repossess himself of the raft. It is also strongly urged here by defendants that, if any tribunal can enforce McCaffrey's lien, it can only be done by a suit in rem in admiralty. But the res—the thing—is gone, is dispersed, and McCaffrey's remedy in admiralty, if he ever had one, has been taken away from him under this order. True, McCaffrey consented to the order, but he was claiming a court of equity had jurisdiction, and it was in harmony with his position that the court should assume to dispose of the raft. The filing of the bill had not put the court in possession of the raft. It was the defendant, the Knapp Company, that appealed to the court to permit it to give a bond and take the raft away; and it expressly based its petition upon the ground that it was in a court of equity, and that it was equitable that the court should accept a bond, and order McCaffrey to surrender the raft to it. The Knapp Company asked and obtained this relief from a court of equity, and practically destroyed McCaffrey's security, unless his rights can be enforced in this cause. It is also true that in its motion the Knapp Company denied the jurisdiction of the court, and the court in its order provided that the order should not be construed as an admission of jurisdiction; but this only puts the Knapp Company in the position of denying the court's jurisdiction in one breath, and in the next breath asking the court to take jurisdiction and give equitable relief in a material matter. Having asked and obtained the exercise of jurisdiction, its denial of jurisdiction at the same time was idle. We think the Knapp Company should be estopped by that action from questioning the jurisdiction of the circuit court of Mercer county. As the proof

shows a valid sale by the Schulenburg Company to the Knapp Company before the assignment, the Schulenburg Company and its assignees have no further interest in the raft; and, as the Knapp Company is estopped from questioning the jurisdiction of the court below, that tribunal should have given McCaffrey a decree.

"Does he who, in the performance of a contract, renders services in towing a floating raft of lumber on a navigable river have a maritime lien thereon for such services? Is such a raft a proper subject for admiralty jurisdiction? Upon these questions the authorities are in conflict. The following tend to support the contention that such a raft is not within the jurisdiction of admiralty: *Tome v. Four Cribs of Lumber*, Taney, 533, Fed. Cas. No. 14,083; *The W. H. Clark*, 5 Bliss. 295, Fed. Cas. No. 17,482; *Jones v. Coal Barges*, 3 Wall. Jr. 53, Fed. Cas. No. 7,458 (Grier, J.); *Raft of Cypress Logs*, 1 Filp. 543, Fed. Cas. No. 11,527; *Raft of Timber*, 2 W. Rob. Adm. 251; Hen. Adm. § 52. See, also, *Gastrel v. Cypress Raft*, 2 Woods, 213, Fed. Cas. No. 5,266; *The Hendrick Hudson*, 3 Ben. 419, Fed. Cas. No. 6,355. The contrary doctrine, that a raft of lumber may in a proper case come within the jurisdiction of courts of admiralty, is supported by the following: *U. S. v. One Raft of Timber*, 13 Fed. 796; *Muntz v. Raft of Timber*, 15 Fed. 555; *The F. & P. M. No. 2*, 33 Fed. 511; *Seabrook v. Raft of Railroad Cross-Ties*, 40 Fed. 596; *Salvor Wrecking Co. v. Sectional Dock Co.*, 3 Cent. Law J. 640, Fed. Cas. No. 12,273; *Raft of Spars*, Abb. Adm. 485, Fed. Cas. No. 11,529; *Fifty Thousand Feet of Timber*, 2 Low. 64, Fed. Cas. No. 4,783. See, also, *Nicholson v. Chapman*, 2 H. Bl. 254, and an obiter dictum in *Rock Island Bridge*, 6 Wall. 213. Perhaps the sounder argument supports the position that such a raft on a navigable river is a proper subject of admiralty jurisdiction, but where the question is left in so much doubt by the conflicting decisions of the various courts of admiralty, and the opposite view is supported by so strong authority as Chief Justice Taney and Justice Grier of the United States supreme court, the state courts should hesitate to renounce jurisdiction in a case like this, where no proceeding affecting the rights of the parties has ever been instituted in any court of admiralty.

"The jurisdiction of the courts of the United States to administer relief by proceedings in rem in admiralty is unquestionably exclusive. Such proceeding, however, is against the property, only. 'The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of a suit in admiralty over the vessel or thing itself which gives to the title made under its decree validity against all the world.' *The Moses Taylor*, 4 Wall. 411. No person is a defendant in such a suit. Parties who have

real or possible interests determine for themselves whether they will appear and protect their interests: When a sale is made in such a proceeding it is good against the whole world. No such remedy was sought here. This was a suit against persons. No one would be bound by a decree herein, except those made parties. A sale, though purporting to be of the property, would really be only a sale of the interests of the defendants therein. A personal decree for the deficiency, if any, might follow. The equitable circumstances before mentioned, growing out of the sale and assignment, the denial of possession, the intention to seize the property, the duty of McCaffrey to protect it from a rise of the river, and the obstacles to so doing put in his way by the Knapp Company, all furnish ground for equitable cognizance. We cannot hold that, because a proceeding against the raft in admiralty might afford some relief, therefore a court of equity must keep its hands off, if equitable circumstances exist which justify its granting relief, on well-established equitable principles, against persons made defendants. Moreover, if the case had any likeness to a suit in rem in admiralty when it was started, it lost that distinctive character when the Knapp Company, at its own request, took the raft, and left a personal bond in its place. Thereafter the suit was wholly in personam. *Johnson v. Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. 254; *Gindele v. Corrigan*, 28 Ill. App. 476; *Id.*, 129 Ill. 582, 22 N. E. 518. Though the cases cited were at law, yet they are in point as to the effect of giving bond and taking away the property. By the action of the Knapp Company the raft was withdrawn from the suit, and a suit relative to liability upon a personal obligation was substituted therefor. The suit, as so changed by the act of the Knapp Company, was not within the jurisdiction of a court of admiralty.

"For the reasons stated the decree of the court below will be reversed, and the cause remanded to that court, with directions to enter a decree in conformity with the views herein expressed in favor of McCaffrey in the sum of \$3,643.17, with interest thereon from November 13, 1894, at five per cent. per annum."

We concur in the views above expressed, and adopt the same as those of this court. Accordingly the judgment of the appellate court is affirmed. Judgment affirmed.

(178 Ill. 320)

SCHINTZ v. PEOPLE.

(Supreme Court of Illinois. Feb. 17, 1899.)

EMBEZZLEMENT—INDICTMENT—DUPLICITY—MOTION TO QUASH—ELECTION—EVIDENCE—OTHER CRIMES—TRIAL—ARGUMENT—REMARKS OF COURT—INSTRUCTIONS—REASONABLE DOUBT.

1. An indictment charging embezzlement of property belonging to a decedent's estate is not subject to a motion to quash because the property is alleged to have been in the administrator to collect, and also in the administrator generally, where the conversion was a part of one transaction.

2. The court properly delayed compelling an election by the state until evidence was introduced covering the period of service of the administrator to collect, and the period of service of the administrator generally from thence until defendant made an assignment for creditors, and until the argument for the state was concluded.

3. In a prosecution for embezzlement of property belonging to a decedent's estate, evidence of a witness that defendant made a collection for him which he failed to turn over, and of conversations had with defendant and one in his employ in relation to a note and mortgage belonging to the estate, in which defendant promised to turn them over to him, was competent on the question of motive, and in explanation of the acts charged, though it tended to prove a distinct offense.

4. It is not error for the judge to go to an adjacent room, within hearing, and remain there during the argument for the defense.

5. In closing, the state's attorney said: "Lawyer-like,—and there are four lawyers on the other side, two in the actual service of the trial, and two of them defendants,—these lawyers have instructions, no doubt have a set of instructions; and let me tell you what that means. In the United States courts, and in the courts of some other states, the court gives instructions to the jury orally; but here, in this state, the court reads the instructions to the jury as handed to him by both sides." After an objection, he continued: "They are very much scared. Well, gentlemen of the jury, there are principles of law meeting the approval of the court as law, and they must be read to the jury; otherwise, on appeal, there is error. And many will agree that, if a certain set of facts are so, it is so and so, and is the law; and if I knew what the counsel for the defendant had handed to the court, and if I had an opportunity to meet it—" when he was again interrupted with an objection. *Held*, that the objections were properly overruled.

6. Before instructing the jury, the judge said: "I am sorry that the instructions I am to read to you are so long. It is not the fault of either the counsel for the people, the counsel for the state, or the court that they are so long. But I think it is a very foolish law that requires the matter and the manner of giving instructions." *Held*, that defendant was not prejudiced.

7. There is no error in refusing to repeat instructions already correctly included in those given.

8. Defendants requested an instruction that "the law presumes them innocent of the crime with which they are charged until they are proven guilty by competent evidence, beyond a reasonable doubt; and, if the evidence in this case leaves upon the minds of the jury any reasonable doubt of the defendants' guilt, the law makes it your duty to acquit them." *Held*, that it was correctly modified by striking out the words "beyond a reasonable doubt."

9. There is no error in refusing instructions not based on the evidence.

Error to criminal court, Cook county; A. N. Waterman, Judge.

Theodore H. Schintz was convicted under several counts of an indictment charging larceny, embezzlement, receiving stolen property, and larceny as bailee, and he brings error. Affirmed.

Scanlan & Masters, for plaintiff in error. Edward C. Akin, Atty. Gen. (Charles S. Deenen, State's Atty., and Harry Olson, Asst. State's Atty., of counsel), for the People.

PHILLIPS, J. This was an indictment against Theodore Schintz and Ernst Wedekind, containing 15 counts, severally charging

larceny, embezzlement, receiving stolen property, and larceny as bailee. These crimes were alleged to have been committed as to the property of Charles Eckstein as administrator to collect, and Charles Eckstein as administrator generally, of Franz Ertel, deceased. The evidence shows Franz Ertel died in Chicago on August 18, 1896, leaving as his only heirs a brother, Dr. Vampill, residing in North Carolina, and a niece, whose residence was unknown. Plaintiff in error had for some years been the attorney of the deceased, who was an old man, living alone. During his last illness, certain of his neighbors called the attention of plaintiff in error to his condition, and he sent his co-defendant, Wedekind, who was in his employ, to Ertel's house. Wedekind made arrangements for caring for the latter, and, after his death, arranged for the funeral, and also telegraphed the brother, who arrived in Chicago in time to attend the funeral. Ertel owned personal property, consisting of money and notes secured by mortgage, amounting to over \$35,000. Charles Eckstein was appointed administrator to collect, and subsequently administrator generally, of the estate; and it is apparent that his selection as such administrator in both capacities was at the suggestion and request of the plaintiff in error. The management and control of the estate was by the administrator confided to the plaintiff in error, with whom the moneys of the estate were deposited, and who converted into money the securities. It is clearly shown that the administrator in both capacities confided the entire business to the plaintiff in error, and indorsed notes without examination, signed papers, etc., and was absolutely guided by, and submitted himself in the management of the estate to the control of, the plaintiff in error, in whom he evidently had entire confidence. The plaintiff in error had charge of the moneys of the estate, and had converted into money a large amount of notes, amounting to several thousand dollars, which did not require the indorsement of the administrator. On October 26, 1896, the plaintiff in error, as attorney for the administrator, procured to be entered an order in the probate court of Cook county reciting and ordering that the inventory and appraisal of the administrator to collect be approved, and stand as and for the inventory of the administrator, and further reciting that the said administrator then, in open court, admitted possession of all the property belonging to the estate, and ordering the administrator to collect be discharged. Before this order was entered, the plaintiff in error had converted into money several thousand dollars in value of securities which did not require the administrator's indorsement. The plaintiff in error and Wedekind qualified as sureties on the bond of the administrator in both capacities,—the former in \$150,000, and the latter in \$5,000. The plaintiff in error made an assignment on July 19, 1897, and at that time was

in possession of the money and proceeds of this estate, or had disposed of the greater part of the same, so that the estate was almost entirely lost.

On the indictment so found, the defendants entered their motion to quash, insisting that in charging the property to be in Charles Eckstein, administrator to collect, and in Charles Eckstein, administrator generally, there was repugnant pleading, two separate and distinct crimes being charged. The court overruled the motion to quash, but held the proper practice would be an election by the state which phase of the indictment would be insisted on. Evidence was introduced covering the period of service of the administrator to collect, and from thence until the period of the assignment; and, after the concluding argument of the state's attorney, the court, of its own motion, instructed the jury to disregard the counts of the indictment charging crimes alleged as to Charles Eckstein, administrator generally. The trial resulted in a verdict of acquittal as to Wedekind, and finding the plaintiff in error guilty of larceny, and that the value of the property stolen was \$3,844.14. Motions for new trial and in arrest of judgment were overruled, and the defendant was sentenced under the indeterminate sentence act.

Plaintiff in error contends that it was error to overrule the motion to quash the indictment, and each count thereof. The offense charged was with reference to the property belonging to the estate of Franz Ertel, which the plaintiff in error wrongfully acquired and converted with a criminal intent. The property was alleged to be in the administrator to collect, and was also alleged to be in the administrator generally. The transactions were so interwoven that they cannot well be separated. The conversion of the several securities, if it could be claimed as constituting two offenses, yet formed a part of one entire transaction. The rule as stated in *Goodhue v. People*, 94 Ill. 37, is (page 51): "If two or more offenses form part of one transaction, and are such in nature that a defendant may be guilty of both, the prosecution will not, as a general rule, be put to an election, but may proceed under one indictment for the several offenses, though they be felonies. The right of demanding an election, and the limitation of the prosecution to one offense, is confined to charges which are actually distinct from each other, and do not form parts of one and the same transaction. * * *

In cases of felony it is the right of the accused, if he demand it, that he be not put upon trial at the same time for more than one offense, except in cases where the several offenses are respectively parts of the same transaction." Such being the rule in this state, unless the counts of the indictment are bad for form, where the several offenses are respectively parts of one and the same transaction it is not error to overrule the motion to quash. The court has the right

to compel an election if two or more offenses are joined, to the prejudice of the prisoner on trial. This right of compelling an election is in the discretion of the trial court, and does not belong to absolute law, but to discretion. *Bish. Cr. Proc.* § 454. The time at which an election will be required to be made is not uniform. *Id.* § 461. Says a judge: "I may suffer the prosecution to go a little way with his evidence, then, at what he deems a proper time, but, before all is in, require the election to be made. Another method is to wait till the evidence is fully in, and then compel the prosecution to point out the count on which he asks for a verdict. Another is to have the election made at the opening of the case, or, if not, to hold the prosecutor to have elected the first transaction which his evidence tended to prove. Another method is to order the election after the evidence on the side of the government is in, and before the prisoner is called on for his defense." The various methods in use are best determined by the trial judge, to be exercised with reference to the special facts of each particular case. Under the facts in this case, there was no error in not requiring an election at an earlier period in the trial than was done. Even if it be admitted that two distinct felonies are charged in the different counts of this indictment,—which we are not disposed to do,—it presents a different case from that of *Kotter v. People*, 150 Ill. 441, 37 N. E. 932, where there could be no question that three different offenses against different individuals were charged.

It is urged there was error in the admission of evidence over the objection of plaintiff in error. One Anton Temple was called as a witness in behalf of the state, and testified that he had a transaction with the plaintiff in error regarding a mortgage and trust deed and note; that he left with Schintz a mortgage in October, 1896; that the witness was going South, and directed Schintz to collect the note and mortgage, which was done, but the witness did not get the money; that subsequently a promise was made to turn over to witness a note for \$2,000, secured by mortgage made by one M. M. Keck, for which witness gave a receipt on June 8, 1897; that the conversations in reference to the Keck note and mortgage were with plaintiff in error and one Emil Schintz, who was in his employ. This evidence would have been improper but for the fact the Keck note and mortgage belonged to the Ertel estate. The entire transactions in reference to those notes were admissible, and the evidence was pertinent and competent. Any fact necessary to introduce or explain another which is in issue may be proven. Where necessary to show motive or intent, or to explain acts actually in issue, evidence tending to prove a distinct offense is sometimes admissible. *O'Brien v. Com.*, 80 Ky. 354, 12 S. W. 471.

It was next insisted that error was commit-

ted because the trial judge was absent from the court room during the argument of the attorneys for the defense. There is nothing in the abstract to show such to be the fact. We have referred to the record, from which it appears that, during the argument of the counsel who opened for the defense, the judge left the court room, and went to his chambers, a room adjacent to the court room, remaining there the greater portion of the time occupied by said counsel. The door was left open, and the argument could there be plainly heard. At the conclusion of the argument of counsel who opened for the defense, the judge returned, and the senior counsel began his argument for the defense, and again the judge returned to his chambers. It is apparent the judge was at all times during the argument for the defense immediately adjacent, and could hear the argument. This case differs in a material respect from *Thompson v. People*, 144 Ill. 378, 32 N. E. 908. In that case the judge could not, and, as appeared from the record, did not, hear the argument; and, during the closing argument for the state in the latter case, repeated objections were made by the defendant, and not passed on, because of the absence of the judge. In this latter case it was said (page 381, 144 Ill., and page 909, 32 N. E.): "Had the judge stepped out of the court room into his private room for a short time, where he could still hear the argument, and where he would have been in a position to pass upon any question which might properly arise in the argument, we are not prepared to say that an error would have occurred." The foregoing quotation is applicable to the facts in this case. The judge was within hearing, and no questions were raised to be passed upon by the judge; and, while not approving the practice of a judge absenting himself from the court room, we are not disposed to hold the facts here shown constitute error.

It is next urged that error was committed on the trial because of alleged improper remarks to the jury in the closing argument of the state's attorney. In his closing argument to the jury, the state's attorney used the following language: "Lawyer-like,—and there are four lawyers on the other side, two in the actual service of the trial, and two of them defendants,—these lawyers have instructions, no doubt have a set of instructions, and let me tell you what that means. In the United States courts, and in the courts of some other states, the court gives instructions to the jury orally; but here, in this state, the court reads the instructions to the jury as handed to him by both sides." Mr. Scanlan: "We object to that language, and ask to have the ruling of the court on that matter." Objection overruled, to which ruling of the court defendants, by their counsel, duly excepted. Mr. Olson: "They are very much scared. Well, gentlemen of the jury, there are principles of law meeting the approval of the court as law, and they must be read to the jury; otherwise, on appeal, there is error. And many will agree

that, if a certain set of facts are so, it is so and so, and is the law; and if I knew what the counsel for the defendant had handed to the court, and if I had an opportunity to meet it—" Mr. Scanlan: "I must object to that language, and ask for the ruling of the court." The objection was overruled, to which ruling the defendant, by his counsel, then and there duly excepted. Some latitude must be allowed counsel in argument, and a careful consideration of the foregoing remarks does not convince us they were improper or prejudicial. Counsel cannot be required to dispense with wit, sarcasm, or illustration in argument; and it is but in the last few years that questions of this character have been frequently brought before a court of review by exceptions. While counsel must argue only questions within the record, yet, where that is done, remarks within those limits cannot constitute error. The dead level of communism has no place among lawyers in practice, and resourcefulness, aptness, and repartee ought not to be circumscribed within too narrow limits.

It is assigned as error that the court orally instructed the jury, and made improper and injurious remarks to the jury with reference to the manner of giving instructions in this state. Before commencing to read the instructions to the jury, the judge said: "I am sorry that the instructions I am to read to you are so long. It is not the fault of either the counsel for the people, the counsel for the state, or the court that they are so long. But I think it is a very foolish law that requires the matter and the manner of giving instructions." This was in no sense an instruction to the jury, and could not have been so understood by that body. It was the expression of the individual view of the judge, in opposition to a method of practice adopted by the general assembly of the state. It had no place in the trial, was wholly unnecessary, and was improper. It was a criticism on the law by one whose duty it was to enforce the law. It was, however honestly believed, expressed at an inappropriate and inopportune time. It cannot, however, be held to have prejudiced plaintiff in error, and we cannot hold it was error in law, however much we may regard it so in fact.

The defendants asked certain instructions defining the term "unreasonable doubt," which were unobjectionable for form, but which were refused, and their refusal is assigned as error. The court gave, at the request of the people, two instructions on this subject, which fully and correctly defined the term. It is not necessary to repeat or duplicate instructions on this question. Where instructions are given correctly stating the law on a particular proposition, the court is not required to again correctly restate that instruction, at the request of the other side. The series of instructions are the charge of the judge to the jury, and, having once correctly charged the jury

on a proposition, that is sufficient, and it is not error to refuse to repeat or further charge on the proposition where the ground has been already covered.

Complaint is made that the court modified an instruction offered by the defendants, which is as follows: "The jury is instructed that it is incumbent upon the prosecution to prove every material allegation of the indictment as therein charged. Nothing is to be presumed or taken by implication against the defendants. The law presumes them innocent of the crime with which they are charged until they are proven guilty by competent evidence *beyond a reasonable doubt*; and, if the evidence in this case leaves upon the minds of the jury any reasonable doubt of the defendants' guilt, the law makes it your duty to acquit them." The modification consisted in striking out the words in italics. This in no manner destroyed the force of the instruction, and better expressed the rule of law. The modification was not error.

Defendants asked two instructions to the effect that if the administrator to collect indorsed or delivered certain promissory notes to the defendants merely for safe-keeping, and the defendants believed, as honest and reasonable men, that it was intended to pass the title to this plaintiff in error, then the defendants would not be guilty of embezzlement or any other crime. These were refused, and their refusal is assigned as error. It is apparent that the plaintiff in error, acting as attorney for the administrator, and relied on by the latter, had all the knowledge as to the facts that the latter had. He also was more conversant with and better knew the law as to the duties and powers of the administrator. There was nothing in their relation, and nothing in their respective knowledge as to their respective duties, which could have superinduced the belief in the defendants of a right in them to convert to their own use. There was no fact or circumstance to induce such a belief on the part of the defendants. Had the administrator attempted to do so, he could not have misled the defendants. They were not deceived or mistaken, and there is an absence of evidence to show they were. There was no evidence on which to base these instructions, and their refusal was not error.

Other instructions asked by the defendants and refused were properly refused, for the same reason as those last mentioned.

Plaintiff in error assigns error in the giving of certain instructions by the court of its own motion. We have carefully examined these instructions, and hold it was not error to give the same. It would unduly extend this opinion, and serve no good purpose, to take them up and consider the same separately. We find no error in giving, modifying, and refusing instructions. We have considered the errors assigned on this record, and, finding no error, the judgment of the criminal court of Cook county is affirmed. Judgment affirmed.

(176 Ill. 431)

RICHARDS et al. v. CLINE.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

ESTOPPEL—ACQUIESCENCE—EXECUTORS—LIS
PENDENS.

1. Where an owner of land had knowledge of another's transactions in reference to its disposition which he might have avoided, for reasons known to him, or in respect to which he might have required of such other an accounting, and yet, for more than 10 years thereafter, while possessing such knowledge, he did nothing, he was estopped, though there was no proof of express ratification.

2. Where a testator has by a course of conduct acquiesced in transactions which he might have avoided, or in respect to which he might have required an accounting, his executors are bound by such acquiescence, in the absence of the discovery of facts of which their testator was not informed.

3. Where one interested in a suit knows of its pendency, he is bound to inquire concerning it, and, failing to do so, is chargeable with knowledge of what the suit was about.

Error to appellate court, First district.

Bill by John R. Richards and others, as executors of the last will and testament of David G. Evans, deceased, against George T. Cline. From a judgment of the appellate court reversing the decree of the circuit court, and directing the latter court to dismiss the bill, plaintiffs bring error. Affirmed.

James D. Andrews, George M. Miller, and Arthur L. Gettys, for plaintiffs in error.
John C. Patterson, for defendant in error.

PER CURIAM. In the decision of this case the appellate court, speaking through Mr. Justice SHEPARD, delivered the following opinion:

"The appellees, as executors of the last will and testament of David G. Evans, deceased, late of Logan county, exhibited their bill in equity against the appellant, the main object of which was to compel an account by the appellant concerning a certain transaction had between the appellant and appellees' testator concerning an eighty-acre tract of land, situated in Cook county, and obtained a decree in personam against the appellant for \$18,465.65, from which this appeal is prosecuted. Appellees' testator died in April, 1881, and the original bill herein was filed February 23, 1893. A general demurrer to the original bill was confessed, and the amended bill was filed April 29, 1893. The contract out of which the controversy has arisen was as follows: 'Contract between George T. Cline and David G. Evans. In consideration of one dollar, in hand paid to me by George T. Cline, of the city of Chicago, county of Cook, and state of Illinois, I do hereby agree and do hereby grant him exclusive privilege and right to purchase of me, and I do hereby sell said Cline, the following described property, to wit, the W. ½ of the N. E. ¼ of section 32, in township 39, range 13, east of the Third principal meridian, lying and situated in Cook county, Illinois, by

said Cline or any person he may sell said land to, for \$10,000; payments to be made as follows: \$2,500 cash, \$2,500 in one year, \$2,500 in two years, and \$2,500 in three years, with interest at ten per cent. per annum, to be paid on or before the first day of January, 1869. If said Cline can sell or negotiate said property to any person, to any and all amounts over and above \$10,000, I do hereby agree to pay him as commission for negotiating sale for me for the property, as the payments are made to me under this agreement. In witness I have hereto set my hand and seal, this 31st day of October, 1868. David G. Evans. George T. Cline.' I have left with said George T. Cline a deed for the conveyance of said property, for him to fill in any name who may purchase the within-described land, on the terms specified in this agreement, said deed being acknowledged at Lincoln, Logan county, Illinois, the 28th of October, 1868, consideration of said deed being \$12,000; said Cline, or any purchaser he may find, to give me a good and sufficient mortgage for the securing of the payments as herein stated. If said sale is not consummated or made by January 1, 1869, said Cline agrees to return said deed and all papers connected with said described land. David G. Evans. George T. Cline.' It may be mentioned, incidentally, that the land described in the contract had been purchased by Evans in 1861, and that Cline, in the matter of such purchase, acted, in some respects at least, as the agent of Evans, and the evidence furnishes considerable presumption that, from the time of the purchase until the making of the above contract, Cline was the agent, in Chicago, of Evans, concerning the land; and it seems to have been established that Evans and Cline were distant relatives, and were, from the time of the purchase of the land until Evans' death, on friendly, if not intimate, terms.

"The contract of October 31, 1868, seems to be plain enough, and there is no evidence that any fraud was practiced by Cline in the procurement of it, except such as the law might perhaps imply from the circumstance that he had, previous to its execution and delivery to him, authorized a sale of the property, through one Baldwin, to Samuel S. Greeley, for \$12,000. The record discloses that said Baldwin did, under date of October 22, 1868, execute, in his own name, to Greeley, a receipt, in the nature of a contract for the sale of the land for said sum, payable in installments, wherein it was recited that it was made under the written authority given him (Baldwin) by George T. Cline to sell, as agent for the owner, the said eighty acres, for which tract Baldwin agreed to procure for Greeley, from the owners, a good and sufficient warranty deed, etc. The Baldwin-Greeley contract, although dated nine days before the Cline-Evans contract, was not recorded until November 2, 1868, and may not have been delivered until the date of its record.

¹ Rehearing denied December 13, 1898.

Greeley testified that he supposed he recorded it at once. Whether Evans knew of the contract given to Greeley by Baldwin, or that such a contract was contemplated when he made the contract of October 31st, is not known. There might be some presumption indulged in that he did know of it, or had reason to make inquiry that would have developed it, from the fact that in the last paragraph of the contract he recites that he has delivered to Cline a deed of the property, acknowledged three days before the date of the contract, expressing a consideration of \$12,000, the price Greeley was to pay, and had given Cline authority to fill in Cline's own name, or the name of 'any purchaser' he might find, as grantee, and, 'if said sale is not consummated or made by January 1, 1869,' the deed should be returned. We do not regard as being of much importance, except on the question of notice to Evans, the fact that controversies arose between Cline and Greeley whereby the contract between Baldwin and Greeley was not carried out, nor the further fact that Greeley subsequently purchased the premises for \$16,000, after he had failed in or abandoned a suit for specific performance begun by him. Such circumstances have but little, if any, bearing upon the relative rights of the parties to this suit, except in so far as they tend to establish that Evans had knowledge or notice of what Cline had done. Evans was a party defendant to the bill for specific performance brought by Greeley, and appeared by solicitor in the suit. The solicitor testifies that he was employed by Cline to defend the suit for Evans, and did so, and that he saw Evans once during the pendency of the suit, and had a conversation with him concerning the suit, but was not permitted to testify to the conversation. He also identified a letter that was written by him to Evans, and, although the date of the letter is not shown by the record, it is manifest from its contents that it was written while the suit was pending. Appellant's brief mentions May 28, 1870, as its date, and it is quite certain, from Cline's letter to Evans on June 4, 1870, that Evans received it before that letter was written. The letter, so far as is shown by either the transcript or the abstract, was as follows: 'Mr. D. G. Evans: Mr. Greeley cannot come to time, and therefore the sale of your land to him has fallen through. When the offer of \$15,000 was made, there was a party who stood ready to advance him the necessary funds. When a new arrangement was made, on basis of \$16,000, this party withdrew, and Mr. Greeley hoped to carry it through. I tendered him the deed, and this day his counsel was obliged to confess Greeley could not complete. I am of the opinion that it will pay you to hold on to the land, as in time it will be worth much more than \$200 an acre. There is an injunction against you staying the sale and incumbrance of the land, but it can be dissolved. They still cling to the idea that you can be made to come under the con-

tract made by Cline of \$12,000. This is folly. Now, my fee of \$500 must be paid, and you will at once send me that amount. Cline wrote me when he visited you that you was ready at any time to send me that amount, and now I wish it. I send an affidavit for you to swear to, which you will do, and return at once, in order that I may move at once and dissolve the injunction. Your property will sell, no doubt, in time, for \$200 to \$500 an acre, although it will not bring it now. This suit must be got out of the way in order to clear the title, as it prevents any transfer by you. My fees are due, and before moving further I wish my money, when I shall at once proceed. I have done a great deal in the case, and have a right to call for my \$500. It will pay you to clear the suit out of way, and hold your land. It is a dull time now.' Greeley's suit for specific performance of the Baldwin contract was begun on February 12, 1869, and was dismissed on October 15, 1870. Greeley testified that the litigation culminated in a settlement, in which he agreed to pay \$16,000 for the land, instead of \$12,000, as agreed with Baldwin. Just when the settlement took place is not certain, but probably it culminated in July, 1870, for on the 14th day of that month Greeley filed for record a warranty deed, dated May 5, 1870, from Evans to himself, of the premises, for an expressed consideration of \$16,000, and on the same day trust deeds from him to Cline were recorded to secure \$12,250, presumably a part of the purchase price.

"The uncertainty of much that is in evidence concerning transactions prior to the great fire of October, 1871, in Chicago, is due to the circumstance that most of the documentary evidence that once existed in relation thereto, excepting such letters and papers as Evans had at his home, were destroyed in that conflagration, and the testimony of witnesses a quarter of a century later was necessarily faulty in many respects. The deed from Evans to Greeley, in pursuance of the settlement that had been arrived at, was sent by Cline to Evans for execution, under cover of a letter dated May 8, 1870, as follows: 'I here inclose the deed to be acknowledged, as I mentioned when I last saw you. Consideration, I have \$16,000 in deed; whether I may get it or not is the question,—one-fifth cash; balance one, two, three, and four years; notes at seven per cent. I have strived hard to make sale, and will perhaps get one-half of the amount,—over \$10,000. My partner, Phelps, has worked vigorously, since I left last fall, to make the sale to his friends, and I think has succeeded at last. You can acknowledge before county clerk at Springfield, as the party says he would rather have it done at the capital. It makes no difference, I suppose,—anything to please him; as he says, it may give a better tone to the matter. The two deeds are all the same as you sent two years ago this fall. I will give them to you when you come here, or will send them

to you by express, as you wish. Tell the madam to send me a sample of dress pattern, so that I may know the kind she wishes. Will send it by express to Elkhart. Be sure and acknowledge deed. Send on as soon as possible, as the party may back out.' That letter of May 8th was followed by two letters from Cline to Evans, dated, respectively, June 3 and June 4, 1870, which, with the inclosure for \$7,500, were as follows: Cline to Evans, June 3, 1870: 'Yours received. In answer, will state the party I contracted with backed out, and, in order to get the land cheaper, commenced suit against you and me. This old Baldwin is at the bottom of it, to make something out of you and me. Keep cool. Do not give yourself any uneasiness, and pay no \$500 or nothing. I will be responsible for the sale. They cannot scare me nor you neither. Sign nothing until I tell you what to do. I thought I had the matter closed, and you would have had the money by this time. I will send you the obligation at once. Answer no letters to lawyers. I told them I would not pay him until all was fixed, and not \$500. He thought you would get scared and send the money. I paid him \$250. He is to fix up all this. Baldwin has bothered me much in the sale of the land. Answer no letters. Will write you again. You are all safe. P. S. I will send you the agreement of my own, and all will be right. Do not be any way alarmed, as I will bring all right. All this is gotten up by old Baldwin, the man who wanted you to join in the ditching and draining. I gave him a contract for commissions, which he did not fulfill, and I signed a paper. He commenced suit to make money out of you and me, but I will beat him. Only keep cool, and say nothing about it, as it is humbug. I here inclose my obligations, which will be paid when due, and do not mention to any one but that you own the land yet; and you really do, until paid for, as it still stands in your name on the record, as I wish it to stand until I sell it.' Cline to Evans, June 4, 1870: 'I just received your letter last night, on my return from Clark station, and wrote you a few hurried lines in relation to the lawyer claiming \$500 for fees. I told him I would not pay over \$250. He took the privilege to write to you, supposing he might get it. They commenced suit against me about a year ago, and made you a party to the suit. This they can do, whether right or wrong, but they know they can't do anything,—they only want to extort money out of us. I will here explain the whole matter. Last spring two years ago, I gave to old Baldwin an agreement to sell the land for \$12,000,—\$3,000 cash; balance in one, two, and three years; interest at six per cent. During the fall of 1868 he brought a man around who offered a check of \$3,000, provided I would give him the deed and take mortgage for balance. I told them to take the check to the bank, and bring me the money, then I would give the deed. They did not come around for about a

month after, and said, unless I would give them the deed for the same they offered, they would commence suit against the owner; and again, in the meantime, I had made a contract with a man named Phelps, thinking that they had entirely backed out; but Phelps goes on and negotiates with another party for \$14,000. After waiting a long time for the party to make the first payment, he finally backed out. After the extension of the city limits, Baldwin and Greeley raised the \$3,000 and tendered the money. I told them that I would not take less than \$18,000,—one-fifth cash; balance in four years; interest at six per cent. This they agreed to come up to, but finally backed out. Still they did not discharge the suit, which suit does not amount to anything. I would have told you about it when there, but thought it of no consequence. I wish you would send me the affidavit Bellows sent you, also the letter; and if they do not take the land I will instruct you what to do, and if necessary will send you the necessary affidavit to swear to. But Bellows tells me this morning he thinks they will take it on the terms they agreed upon. The trouble is, they can't raise the money; and, if they do not soon, we will dissolve the injunction, and throw them into the costs. You will have nothing to pay. I shall worry them out, and we will get all we can for the land, whether it is worth it or not. Give yourself no trouble about it. You are all safe, but you can help me out by saying, if required, you gave me the land to sell only during the month of May, 1868. As there is no one here knows anything about our arrangement, and as things are at present, I do not wish them to know, on any account, which would be a detriment to me in the suit, and it is highly necessary for you to know this part. Answer no letters in relation to the sale of the land to Bellows or any one else. I will work it all square if you will only stand by me. Until I make sale, there is no necessity of your being here, even if the suit should go on. Keep quiet, and say nothing about the matter to any one, as I mean to get all it is worth, and more, if possible. These sharks here are not going to beat me very much, I will assure you, and I can't trust any of them.' The obligation referred to was as follows: 'Know all men by these presents that I, George T. Cline, am justly indebted to David G. Evans for the sum of \$7,500, payments to be made as follows: \$2,750, July 1, 1870; \$3,000, July 1, 1871; \$3,250, July 1, 1872. Value received. Witness my hand, the 4th day of June, A. D. 1870.' We might quote many more letters, and recite many more circumstances, tending to show that Evans never claimed his probable right to terminate the contract he made with Cline on October 31, 1868, but, on the contrary, extended it, and acted under it as being binding upon him up to the very last; that he always treated Cline as his debtor, and not Greeley; that he knew, or was bound with knowledge, that Cline had sold the land

for \$16,000, and never claimed, as being his due or right, any more than the \$10,000 mentioned in his contract with Cline. It is quite certain that, before Cline gave to Evans his obligation of June 4, 1870, to pay \$7,500, with interest added in, all but that part of the \$10,000 had been paid by Cline, and the inference is strong that from henceforward Evans never claimed any more from Cline than the amount of that obligation and interest. It will be seen that \$2,750 of that obligation was payable July 1, 1870. On the 21st of July, 1870, Cline wrote Evans requesting a modification of the obligation to the extent of extending the dates of payment at ten per cent. interest, and there is nothing to show that Evans refused to assent to the extension. Subsequent letters show that Cline sent to Evans, in August, 1870, \$1,500; in June, 1871, \$2,500; and a claim, March 4, 1872, that he paid \$500 besides,—concerning all three of which payments Cline wrote Evans March 4, 1872, and asked for verification, because his books had been burned in the fire. Again, there was found among Evans' papers a receipt to Cline for \$1,500, under date of June 28, 1872, 'as part payment for land purchased from me, and situated,' describing the eighty acres. Letters of May 23, 1873, June 9, 1873, and June 17, 1875, show further payments by Cline, aggregating \$2,425.

"We do not intend to be understood as saying that the letters of Cline to Evans exhibit straightforwardness of dealing with or representations to Evans, but we quote and refer to them mainly for the purpose of showing, in part, the evidences that Evans had knowledge, or might have had knowledge, by the exercise of such reasonable diligence as every ordinarily prudent man is chargeable with, of the entire situation, and that he was not imposed upon, except by way of a tax upon his good nature and friendship. It seems to us clear enough that Evans never departed from his intention, as expressed in the contract of October 31, 1868, to, as between himself and Cline, treat Cline as the purchaser of the land, and as his debtor for it, at the price of \$10,000, leaving to Cline all that he might make above that figure. It should be borne in mind that Cline was held to be incompetent as a witness to most matters in controversy, and that because of the destruction by fire of all his papers pertaining to transactions that were had before October, 1871, and of the loss or destruction of his papers concerning subsequent transactions when he removed to Maryland, in 1883, his defense, so far as was permitted to him, was mainly confined to Evans' papers, produced by the appellees. It was offered to be proved by Cline that he and Evans had a final settlement in 1877, at the Tremont House, in Chicago, when, in consideration of a payment of about \$800 made by Cline to Evans at that time, Evans gave Cline a receipt in full, which was lost when Cline removed to Maryland, in 1883. Now, if Evans had knowledge, as we think he did, of all of

Cline's transactions with the land, and if such transactions might, for any reason known to him, have been avoided by Evans, or he might have required Cline to account to him, yet having knowledge during all the remaining years of his life, down to 1883, and doing nothing, he must be held to have acquiesced in them, even though he should not be held, under the evidence, to have expressly ratified them. What bound Evans has necessarily bound his executors, the appellees, unless something to avoid the effect of such conclusion has come to the knowledge of the executors that Evans was not informed concerning. All such matters as are relied upon to avoid such effect upon the executors were facts which Evans was informed of, or put upon such inquiry concerning as was equivalent to knowledge, by the suit for specific performance begun by Greeley against him and Cline, and by the letters of his solicitor and Cline. It would not have been permitted to Evans, if he had lived to the time when this suit was begun, to have avoided a plea of laches by saying that he did not know that Cline had previously sold the land for more than the price mentioned in the contract of October 31, 1868. The knowledge that Evans acquired of the pendency of Greeley's suit for specific performance bound him with knowledge of what the suit was about, or, at least, bound him to inquire concerning it; and if, having such knowledge, and failing to inquire further, he chose, as he clearly did, to go on and perform under the contract he entered into with Cline, his executors cannot, any more than he could, at this great lapse of time, come into equity and obtain an accounting from Cline for all that he obtained from Greeley. The doctrine of laches has especial application to the case, but we do not need to cite authorities. The decree is reversed, with directions to the circuit court to dismiss appellees' bill."

We concur in the views above expressed, and adopt the foregoing opinion as the opinion of this court. Accordingly, the judgment of the appellate court, reversing the decree of the circuit court, and directing the latter court to dismiss the bill of the appellees, is affirmed. Judgment affirmed.

(176 Ill. 165)

PEOPLE ex rel. DENEEN v. SIMON.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

TORRENS LAW — CONSTITUTIONALITY — JUDICIAL FUNCTIONS—DUE PROCESS OF LAW—LEGISLATIVE POWERS—DELEGATION—SPECIAL LAWS—LIMITATIONS.

1. Act May 1, 1897, §§ 47, 60, 68, 69 (Laws 1897, p. 141), directing the registrar of titles to determine whether a person intending to incumber or transfer land has a right to do so before registering an incumbrance or conveyance, and providing that the registration of a conveyance of land that had been subject to a trust, condition, or limitation shall be conclusive in

¹ Rehearing denied December 20, 1898.

favor of the grantee where two examiners are of the opinion that the conveyance is made in accordance with the trust, condition, or limitation, are not repugnant to Const. 1870, art. 3, prohibiting an executive officer from exercising judicial powers.

2. Conceding that Act May 1, 1897, § 16 (Laws 1897, p. 141), authorizes a finding respecting title to land before an initial registration, as against residents of the state notified only by publication, it does not invalidate the act as authorizing the taking of property without due process of law, as sections 11, 19-21 provide for personal service in certain contingencies, and empower a court to direct further notice than that of publication.

3. Act May 1, 1897 (Laws 1897, p. 141), providing for a judicial investigation as to all rights in land to ascertain the true state of the title, and thereafter making the tenure of the owner and the right of transfer and incumbrance to be determined in accordance with the rules prescribed by the act, is not repugnant to the constitutional prohibition against a deprivation of property without due process of law.

4. Conceding that Act May 1, 1897, § 26 (Laws 1897, p. 141), is repugnant to the constitution as taking property without due process of law, in so far as it makes a decree determining title to land, prior to an initial registration thereof, binding as against persons not parties in the suit, it does not render the whole act invalid.

5. Act May 1, 1897, § 26 (Laws 1897, p. 141), making a decree determining the title to land, prior to an initial registration thereof, conclusive as against all persons, after two years, whether they were made parties to the suit or not, is valid as a limitation law.

6. Act May 1, 1897 (Laws 1897, p. 141), providing that the act shall take effect only after a favorable vote by counties, is not unconstitutional as delegating legislative power.

7. Act May 1, 1897 (Laws 1897, p. 141), providing that the act shall take effect only after a favorable vote by counties, is not unconstitutional as being a special law.

Magruder, J., dissenting.

Appeal from criminal court, Cook county; Charles G. Neeley, Judge.

Quo warranto by the people, on the relation of Charles S. Deneen, against Robert M. Simon. From a judgment for defendant, relator appeals. Affirmed.

Pence & Carpenter and Shope, Mathis, Barrett & Rogers (Charles S. Deneen, State's Atty., of counsel), for appellant. Harvey B. Hurd, George W. Smith, Theodore Sheldon, and Oliver & McCartney (Robert S. Iles, County Atty., of counsel), for appellee.

WILKIN, J. This action originated in the court below upon an information in the nature of a quo warranto against appellee, requiring him to show by what authority of law he was exercising the powers and duties of the office of registrar of titles in and for the county of Cook. In answer to the information, the defendant set up the act of the legislature entitled "An act concerning land titles," approved and in force May 1, 1897, commonly known as the "Torrens Law." Laws 1897, p. 141. The relator filed a general demurrer to this answer, which was overruled, and the information dismissed. The ground of the demurrer was that the act under which the respondent sought

to justify is unconstitutional and void, and that is the question now presented for our decision. The act is very voluminous, and some of its provisions are not skillfully drafted. Its validity is attacked on numerous grounds, and the briefs and arguments on either side are very extended. We will endeavor to consider the objections raised to the law, in the order in which they are discussed by counsel.

It is first insisted that the act confers judicial powers upon the registrar of titles, or upon him and the examiners of title, in violation of the constitution of this state. A somewhat similar act, passed in 1895, was held invalid, on that ground, in *People v. Chase*, 165 Ill. 527, 46 N. E. 454. By the provisions of the law of 1895, the registrar was clothed with power to determine the ownership of land when application was made for the initial registration thereof, and to issue his certificate accordingly. The present act provides that the ownership shall be determined by a decree in equity entered in a court of competent jurisdiction, upon which decree the registrar shall issue the first certificate of registration. In this regard his duties under the present law are clearly ministerial only, and the fatal objection to the former act is therefore removed. But it is insisted that the law is still vulnerable, in that it vests judicial power in the registrar in the performance of his duties as to subsequent registrations. Waiving the question whether this would, if true, necessarily violate the whole act, is the position tenable? Like a mere recorder, the registrar is required to file all deeds, mortgages, leases, and other instruments affecting the title to land, and make proper notations upon the instruments and upon the record. He is to keep a record, to be known as the "Register of Titles," in which must be entered the original and all subsequent certificates of title, and such notations as to liens, incumbrances, and the like as are requisite to show the true condition of the title. When any instrument is filed with him which is intended to create a charge, lien, or incumbrance upon land, it is made his duty, by section 60, to enter a memorial upon the register, and also upon the original certificate. Thus far his duties are clearly and simply ministerial. But it is contended this section 60 authorizes him to determine the validity of liens, incumbrances, or charges, and the argument is that this is an exercise of judicial power, which, under our constitution, can be conferred upon no officer or tribunal save those which belong to the judicial department. The language of the section applicable to this question is as follows: "It appearing to the registrar that the person intending to create the charge has the title and right to create such charge, and that the person in whose favor the same is sought to be created is entitled by the terms of this act to have the same registered, he shall enter upon the

proper follum of the register, and also upon the owner's certificate, a memorial of the purport thereof," etc. It will be noticed that the provisions in case of a transfer of the property are substantially the same. Section 47 says: "Upon its being made to appear to the registrar that the transferee [evidently intending transferor] has the title or estate proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him, he shall make out and register as hereinbefore provided, a new certificate," etc. Article 3 of the constitution of 1870 reads as follows: "The powers of the government of this state are divided into three distinct departments,—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Rev. St. p. 60. The question, therefore, is, can the legislature devolve the duties named upon an officer not a member of the judicial department?

That the duties mentioned are judicial in their nature may be admitted, but it does not necessarily follow that their exercise is prohibited by the constitutional provision to all but officers belonging to the judicial department. Numerous instances may be cited, as is done in *Owners of Lands v. People*, 113 Ill. 296 (referred to in *People v. Chase*, supra), where executive and legislative officers are authorized to exercise powers which in a sense are judicial, and the laws imposing such duties held not to be in violation of the constitutional provision quoted. These duties or powers are generally and properly termed "quasi judicial," to distinguish them from those which are "judicial," in the sense of belonging to the judicial department exclusively. In theory, all governmental power is divided into the three named divisions, and upon a casual consideration the division would seem to present no difficulty, but in the practical application of the principles involved courts have been compelled to observe that the line of demarkation between the exclusive powers of the three departments is far from clear. 6 Am. & Eng. Enc. Law (2d Ed.) p. 1007. Judge Cooley, in his work on *Constitutional Limitations on the Legislative Branch of the Government*, has given a definition of "judicial power." It is this: "The power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws." Cooley, Const. Lim. p. 110. As a general definition of the functions of the judicial department, it is sufficiently accurate, and we adopted it in the case of *People v. Chase*, supra. We then thought, and are of the opinion still, that it was applicable to that case; the functions of the registrar, under the act of 1895, being not quasi judicial, merely, but strictly so, and such as are usually exercised by the courts alone,

constituting the exercise of judicial power within the constitutional prohibition. Under the present act, his duties more nearly resemble those frequently exercised by members of the executive department. The definition given by Judge Cooley does not attempt to mark the line between those quasi judicial functions, which may be vested elsewhere, and those strictly judicial, which can be reposed nowhere save in the courts; and for that reason it cannot be properly adopted in this case. As we said in another case: "It may in many cases be a matter of difficulty to determine the precise line which divides the executive and judicial functions. It has been said that, where the functionary hears, considers, and determines, then he performs judicial acts. This definition is not strictly accurate. * * * It embraces cases that are not judicial, and hence is too comprehensive." *Donahue v. Will Co.*, 100 Ill. 94, on page 108. And, appreciating the difficulty of defining the limits of the several departments of government, we also said, in an earlier case: "Nevertheless, when we come to apply them to actual controversies growing out of the varied relations which the citizens sustain to the state and to one another, we encounter doubts and difficulties of the gravest character. Just where the dividing line is to be drawn between judicial and legislative power, with respect to certain subjects, often presents questions about which enlightened courts and eminent jurists widely differ. So, while the powers of courts seem so very simple and clearly defined, yet, in the application of them to actual cases, their proper limits are often difficult to determine." *Dodge v. Cole*, 97 Ill. 338, on page 357. Also: "The first and second sections of the first article of the constitution [of 1818] divide the powers of governments into three departments,—the legislative, executive, and judicial,—and declare that neither of these departments shall exercise any of the powers properly belonging to either of the others, except as expressly permitted. This is a declaration of a fundamental principle, and, although one of vital importance, it is to be understood in a limited and qualified sense. It does not mean that the legislative, executive, and judicial power should be kept so entirely distinct and separate as to have no connection or dependence the one upon the other; but its true meaning, both in theory and practice, is that the whole power of two or more of these departments shall not be lodged in the same hands, whether of one or many." *Field v. People*, 2 Scam. 79, on page 83. Judge Story, in his work on the *Constitution*, says: "But when we speak of a separation of the three great departments of government, and maintain that their separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly separate and distinct, and have no common link of connection or dependence, one upon the other, in the slightest degree. The true

meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, and that such exercise of the whole would subvert the principles of a free constitution." 1 Story, Const. [5th Ed.] § 525. "Notwithstanding the memorable terms in which this maxim of a division of powers is incorporated into the bills of rights of many of our state constitutions, the same mixture will be found provided for, and, indeed, required, in the same solemn instruments of government. * * * Indeed, there is not a single constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it." Id. p. 305, § 527. In the case of *Murray's Lessee v. Improvement Co.*, 18 How. 272, in discussing whether the issuing of a distress warrant by the solicitor of the treasury was the exercise of executive or of judicial power, the supreme court of the United States (page 280) say: "It is not sufficient, to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. * * * That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. * * * We do not doubt the power of congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the accounting officers of the treasury, but until it is reviewed it is final and binding; and the question is whether its subject-matter is necessarily, and without regard to the consent of congress, a judicial controversy; and we are of opinion it is not."

From these authorities, it is apparent that the mere fact that the registrar is required by this act to inquire into the existence of certain facts, and to apply the law thereto, in order to determine what his official conduct shall be, and that his action may affect private rights, does not constitute the exercise of judicial power, strictly speaking. It is not the intention of these two sections (60 and 47) to provide a tribunal for the adjudication of disputes concerning land titles. The primary purpose is the issuing of the certificate, and the exercise of the judgment of the registrar is incidental. The prohibition in question "has never been held to apply to those cases where judgment is exercised as incident to the execution of a ministerial power." *Owners of Lands v. People*, supra. The powers exercised by the registrar under this law are analogous to those exercised by the commissioner of patents. A power of decision is given to that officer in many matters, not only between the government and the patentee, but

also between different claimants, as to priority, patentability, and like matters, and in the performance of these duties it has never been considered that he was encroaching upon the judicial domain. They are also, in a measure, like the duties performed by officers of the land office. Duties of a similar nature, involving judgment or discretion, and the application of the law to the facts, are devolved both under the state and federal laws upon many other executive officers, legally. In some instances, it is even held that in the exercise of such judgment the officer is free from judicial interference. But in the case of the registrar this act provides that any person feeling himself aggrieved by the act or neglect of this officer, in any matter pertaining to the duties required of him, may file a petition in equity in the proper court, making the registrar and other persons interested parties defendant, and that the court may proceed therein as in other cases in equity, and may make such order or decree as shall be according to equity in the premises and the purport of the act. This, with the well-known jurisdiction of the courts in mandamus, injunction, rescission, cancellation, bills of relief, and the like, will effectually protect the citizen against any arbitrary conduct on the part of the officer.

Recurring to the duties of the registrar, we find that in case of a tax sale or judgment, or levy under an attachment or execution, or in case of a mechanic's lien, the registrar, upon the filing of the proper certificate, enters a memorial thereof upon his record, and, in case the lien ripens into a title, the former certificate of title is canceled, and a new one issued to the proper party. These duties do not differ in character from those already mentioned, and what has been said is equally applicable thereto, also. Particular stress, however, is laid by counsel for appellant upon the contention that the duties of the registrar as to the subsequent registration of land held in trust upon conditions or limitations are the exercise of judicial power, in violation of the terms of the constitution. The act requires, where the land is subject to a trust, condition, or limitation, that the original certificate issued shall contain the words "In trust," "upon conditions," or "with limitations," as the case may be. When such land is to be transferred, it is provided that the registrar shall not issue a new certificate, nor shall any transfer of or charge upon or dealing with the land be made, unless pursuant to the order of some court, or upon the written opinion of the two examiners that such transfer, charge, or dealing is in accordance with the true intent and meaning of the trust, condition, or limitation, whereupon he shall proceed to register the title; and such registration is to be conclusive in favor of the grantee, and those claiming under him in good faith and for a valuable consideration, that such transfer, charge, or other dealing is in accordance with the true intent and meaning of the

trust, condition, or limitation. Sections 68, 69. If the registration be made pursuant to the order or finding of a court of competent jurisdiction, the acts of the registrar are purely ministerial; but, if made upon the opinion of the two examiners, he is required to exercise a judgment of his own. These duties do not differ materially from those already examined, except that here the decision is made conclusive, in favor of the person taking the transfer in good faith and for a valuable consideration, that the transfer or charge is in accordance with the true intent and meaning of the trust, condition, or limitation. This does no more than abrogate the rule in equity which requires the purchaser of trust property to see to the application of the purchase money, and the inclination of courts now is to withdraw from that rule. We recently said, quoting from Judge Story: "These are some of the most important and nice distinctions which have been adopted by courts of equity upon this intricate topic, and they lead strongly to the conclusion, to which not only eminent jurists but also eminent judges have arrived, that it would have been far better to have held in all cases that the party having the right to sell had also the right to receive the purchase money, without any further responsibility on the part of the purchaser as to its application." *Seaverns v. Hospital*, 173 Ill. 414, 50 N. E. 1079, on page 424, 173 Ill., and page 1082, 50 N. E. This statute also changes the rule of law as to notice. We know of no reason why the legislature might not change either or both of these rules without violating the constitution. Certainly, as to the future, all trusts could be entirely abolished by the legislature, as was done in cases of uses by the statute of uses. As the law now stands, cases frequently arise in which bona fide purchasers take property free from existing trusts, and are not held bound to see to the application of the consideration.

The second point insisted upon in the argument is that the provisions of the act permit the taking of private property without "due process of law." In the initial registration the provisions are for an application to a court of chancery, and that the fee must be first registered. To this application the following persons are to be made defendants: The occupant, if the land is occupied by any other person than the applicant; the holder of any lien or incumbrance; other persons having any estate or claiming any interest in the land, in law or in equity, in possession, remainder, reversion, or expectancy. Section 11. All other persons are to be made parties defendant, by the name and designation of "all whom it may concern." Section 16. Summons is to issue against all persons mentioned as defendants, and is to be served as in other cases in chancery. Notice is also to be published and mailed to such defendants, substantially as in other chancery cases, and the court may direct further notice to be given. Sections

19-21. Upon a failure to answer, default may be entered, and, upon the hearing, a decree entered, finding in whom the title is vested, and declaring the same subject to such liens, incumbrances, trusts, or interests, if any, as are shown to exist, and directing the registration to be made. Sections 23, 25. The exception taken to these provisions is that they authorize judgment to be taken against a resident of the state upon mere constructive service. It is certainly fundamental that no man shall be condemned unheard or without notice. While a substituted service is permitted in some instances, particularly in case of nonresidents, this is because of the necessities of the case. The act does contemplate, in some contingencies, at least, actual personal service, and the general law provides for publication as to unknown owners and persons in interest, and nonresidents. An applicant may proceed in this way, and in strict accordance with the act obtain a decree or finding as to his title which will be binding beyond all question, so that, even if the proper construction of the provision were that it attempted to authorize judgment against a resident notified only by publication, yet the law can be given practical effect, in which event only the particular provision would fail, and not the whole law.

It is further insisted that, by proceedings subsequent to the initial registration, an owner may be deprived of his property without due process of law. In the consideration of this point it must be remembered that the right to alienate or inherit property is always dependent upon the law. So long as vested rights are not disturbed, the law may at any time change the tenure upon which land is held, and may alter the conditions under which it may be alienated, and modify the rules of evidence by which the title is to be determined. The true theory of this act, as we understand it, is that all holders of vested rights shall be subjected to an adjudication in a court of competent jurisdiction, upon due notice, in order that the true state of the title may be ascertained and declared, and that thereafter the tenure of the owner, the right of transfer and incumbrance, and all rights subsequently accruing shall be determined in accordance with the rules now prescribed. "A state may, by statute, prescribe the remedies to be pursued in her courts, and may regulate the disposition of the property of her citizens by descent, devise or alienation." 3 Washb. Real Prop. (4th Ed.) p. 187. "The right of ownership which an individual may acquire must therefore, in theory at least, be held to be derived from the state, and the state has the right and power to stipulate the conditions and terms upon which the land may be held by individuals." Tied. Real Prop. (2d Ed.) § 19. "The power of the state to regulate the tenure of real property within her limits, and the modes of its ac-

quisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted." *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, on page 321, 134 U. S., and page 559, 10 Sup. Ct. "The power of the legislature in this respect [as to changing the rules of evidence as to the burden of proof], whether affecting proof of existing rights or as applicable to rights subsequently acquired or to future litigation, so long as the rules of evidence sought to be established are impartial and uniform in their application, is practically unrestricted." *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777, on page 455, 125 Ill., and page 779, 17 N. E. It being true that the law may prescribe rules of property and rules of evidence by which the title is to be shown, we see no reason why the transfer of real estate may not be made in the way contemplated, and why it may not be made compulsory to make it in that way, if the legislature so determines. In our view of the case, the indemnity fund feature of the law need not be considered. The law can, as we think, stand and accomplish its purpose without it.

Objection is also made that by section 28 any person who has any interest in the land, whether personally served, notified by publication, or not served at all, must, within two years after the entry of the decree, appear and file an answer, and that, after the expiration of that term of two years, the decree shall (with certain exceptions) be "forever binding and conclusive upon all persons." This provision seems to attempt to make a decree binding upon persons not parties to the suit, and, if given effect literally, would deprive persons of vested rights without due process of law. A limitation may be placed upon the time within which a person who has a mere right of action shall bring it, but "limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims." *Cooley*, Const. Lim. p. 366. To the extent that the act attempts to transfer property without due process of law, it cannot be upheld. On all parties to the suit properly before the court the decree may, after the lapse of two years, become conclusive and forever binding, and as to all who have merely a right of action the expiration of two years may complete the bar. Even though the language of this section may be broad enough to amount to an attempt to transfer an estate by the law or by decree, yet it is possible to carry out the purposes of the act without violating the constitution in the respect complained of. Such objectionable features, or those calling for construction, must be left to future legislation, or determination by the courts in cases where the conflict is apparent and the question directly involved. We are also of the opinion that sections 28 and 40 can be sustained by construing them as a limitation

law. "Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution, and give to it the force of law, such construction will be adopted by the courts. Therefore, acts of the legislature in terms retrospective, and which, literally interpreted, would invalidate and destroy vested rights, are upheld by giving them prospective operation only; for, applied to and operating upon future acts and transactions only, they are rules of property, under and subject to which the citizen acquires property rights, and are obnoxious to no constitutional limitation, but as retroactive laws they reach to and destroy existing rights, through force of the legislative will, without a hearing or judgment of law. So will acts of the legislature having elements of limitation, and capable of being so applied and administered, although the words are broad enough to, and do, literally read, strike at the right itself, be construed to limit and control the remedy,—for as such they are valid, but as weapons destructive of vested rights they are void,—and such force only will be given the acts as the legislature could impart to them." *Newland v. Marsh*, 19 Ill. 376, on page 384.

The recent case of *State v. Guilbert* (Ohio Sup.) 47 N. E. 531, is relied upon by counsel for appellant in support of the position taken by them on both of the above points. We have given that case careful consideration. With its conclusion, viz. that the Ohio statute was unconstitutional, we agree, but what is said in argument cannot be adopted as applicable to this case. The main ground upon which that decision rests is that the statute, in providing for the initial registration, attempts to give jurisdiction to the court without service of summons, and this, it is held, falls short of that due process of law guaranteed by the constitution. The only notice which that act required was to be given by the applicant himself, and in the application it was unnecessary to name any person claiming an adverse interest as party defendant. On the other feature of the case, viz. as to what constitutes the exercise of judicial power, the opinion is not clear. In the reasoning on that point, Judge Cooley's definition of "judicial power" is adopted, which we have seen does not serve to distinguish between such quasi judicial powers as may be properly exercised by executive or ministerial officers and those powers which belong solely to the judicial department.

The third point made against the law is that the provision which says that the law shall take effect only after a favorable vote by counties is an attempt to delegate legislative power; and the fourth is that the law is not a general, but special, law. It is unnecessary to discuss these points. It is sufficient to say that both have been decided adversely to the contention of appellants in the case of *People v. Hoffman*, 116 Ill. 587,

5 N. E. 596, and 8 N. E. 788. That decision has become the rule of law in this state, and we see no sufficient reason for overruling it.

We are not impressed with the soundness of the objections to those sections of the statute which relate to the descent of lands on the death of a registered owner, and to the sale and mortgage of real estate belonging to minors or others under disability. They are, however, objections which do not go to the validity of the entire law. They involve a construction of those sections, and can only be satisfactorily determined if cases shall arise involving their validity. It would be alike impracticable and unprofitable to attempt now to give a construction to every provision of this law. The question here is, does the act violate the constitution so far as to render it void, and therefore furnish no justification for the exercise of the acts of the respondent challenged? In the determination of that question every reasonable doubt must be resolved in favor of the validity of the law. We have endeavored to give the case that deliberate consideration its importance demands, and have reached the conclusion that the judgment of the criminal court should be affirmed. Judgment affirmed.

MAGRUDER, J., dissenting.

(176 Ill. 424)

CHICAGO & A. RY. CO. v. SWAN.¹
(Supreme Court of Illinois. Oct. 24, 1898.)

FELLOW SERVANTS—WHO ARE—PROVINCE OF
JURY—RAILROADS.

1. A declaration by a servant for injuries need not allege that he was not a fellow servant of another employé, through whose negligence he was injured, where the facts showing the relation of the parties are alleged.

2. Whether different servants of the same master are fellow servants is a question of fact.

3. The duties of a baggageman were to handle baggage, railroad letters, and anything pertaining to railroad business in his car. He had nothing to do outside of the car, and neither the conductor nor engineer had any control over him in the performance of his duties. He was hired by the general baggage agent, and instructed that his place was in the baggage car. He had never been required to go out and perform other duties for the trainmen, and it was not the custom for baggagemen to do so. *Held*, that he was not a fellow servant of the engineer on the same train.

Appeal from appellate court, First district.

Action by Walter R. Swan against the Chicago & Alton Railway Company. A judgment for plaintiff was affirmed by the appellate court (70 Ill. App. 331), and defendant appeals. Affirmed.

The declaration in case alleged that plaintiff was a baggageman on one of the passenger trains of the defendant running from the city of Chicago to the city of St. Louis, and that at Chappell Crossing, some 12 miles

from the union depot in Chicago, through the negligence of the engineer of the train in failing to regard signals, the train was derailed, and the car in which plaintiff was at the time, in the proper discharge of his duty as baggageman, turned over, and he was severely injured. A plea of the general issue being filed, a trial was had before a jury, resulting in a verdict and judgment for the plaintiff for \$14,000.

Monroe & Thornton (William Brown, of counsel), for appellant. F. H. Trude (Dennis & Rigby, of counsel), for appellee.

WILKIN, J. The first and principal contention of counsel for appellant is that the declaration is insufficient to sustain the judgment. It is objected that it fails to allege that the plaintiff and the engineer, through whose negligence it is claimed he was injured, were not fellow servants. Such an averment was unnecessary. *Cribben v. Callaghan*, 156 Ill. 549, 41 N. E. 178; *Railroad Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. 534; *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801. The facts showing the relation of the parties are stated in the declaration. It is never necessary to aver mere matters of conclusion. *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161.

But it is said the facts so alleged show the relation of fellow servants to have existed. This position is only tenable, if at all, upon the ground that the engineer of a passenger train and the baggage master on the same are, per se, fellow servants at all times and under all circumstances, which is not true. Taking the rule in this state for determining whether employes are fellow servants, in the sense which will relieve the common master from liability for an injury to one through the negligence of the other, to be as quoted in *Railroad Co. v. Kneirim*, 152 Ill. 458, 39 N. E. 324, two tests of the master's liability under that rule are assumed to exist: First, "where they are directly co-operating with each other in a particular business in the same line of employment"; and, second, "where their duties are such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution." As thus construed, the qualifying words, "so that they may exercise a mutual influence upon each other promotive of proper caution," have no application to the first, but are limited entirely to the second. Under this construction, and further assuming that an engineer and a baggageman on the same train do, as a matter of law, directly co-operate with each other in the business of running the train, in the same line of employment, the conclusion is reached that plaintiff and the engineer who negligently injured him are shown by the declaration to have been fellow servants of the defendant. Whatever may be said of the correctness of the construction, tested by

¹ Rehearing denied December 14, 1898.

strict grammatical rules, it is unsound in law, under the decisions of this court. The reason for the rule, definitely settled in this state since the *Moranda Case*, 93 Ill. 302, is wholly inconsistent with the restricted construction here contended for, as shown by the cases cited in the opinion of the appellate court by Justice Gary.

We do not understand that the *Kneirim Case*, *supra*, or *Leeper v. Railroad Co.*, 162 Ill. 215, 44 N. E. 492, in view of the matters there under consideration, conflict with this conclusion. The quotation from 53 Ill. 386, in the *Leeper Case*, was perhaps unnecessary, and more liable to mislead than make clear the point under consideration, but it sufficiently appears from the whole opinion that it was not intended, by the use of that language, to give a definition of the term "fellow servant." The same language had been criticised as such a definition in the *Moranda Case*, and was well understood as not conforming to the rule then announced and since adhered to.

Neither do we assent to the view that, under the facts stated in this declaration, plaintiff and the engineer in charge of the locomotive drawing the train were necessarily fellow servants, even under the rule as interpreted by counsel. Whether different servants of the same master are "fellow servants," within the legal signification of that term, is a question of fact, to be determined by the jury from all the circumstances of each case. *Railroad Co. v. Massey*, 152 Ill. 144, 38 N. E. 787; *Railroad Co. v. Hawthorn*, *supra*; *Railroad Co. v. House*, 172 Ill. 601, 50 N. E. 151; *Railroad Co. v. Middleton*, 142 Ill. 550, 32 N. E. 453. The definition of "fellow servants" is a question of law. Whether a given case falls within that definition is a question of fact. See the foregoing cases, and also *Mining Co. v. Grogan*, 169 Ill. 50, 48 N. E. 190, and *Bridge Co. v. Walker*, 170 Ill. 550, 48 N. E. 915. In determining whether the relation exists, it is often necessary to determine many facts, some of which are recited in the opinion in the *Morgenstern Case*, 106 Ill. 216.

It is difficult to see upon what theory it can be held that a baggageman, as such, has any control over the movements of the train upon which he is employed, or anything to do with the running of the same. Proof that one was a baggageman and the other an engineer would, of itself, justify the inference that they were not directly co-operating with each other in the business of running the train, and hence not fellow servants, under our rule. But in this case the plaintiff testified that his duties as baggageman were to handle baggage and railroad letters, and anything of that kind pertaining to railroad business in his car; that he had nothing to do outside of the car, and that the conductor or engineer had no control over him in the performance of his duties; also that he was hired by the general baggage agent, and instructed that

his place was in the baggage car; that he had never been required to get out and perform other duties for the trainmen, and that it was not the custom for baggagemen to do so. There was, as a matter of fact, no co-operation between him and the engineer. The declaration sustains the judgment, and the evidence supports the allegations of the declaration.

We have not, in the view taken of the case, deemed it important to inquire whether the objections urged against the declaration could be made after verdict, and without a motion in arrest of judgment, or whether the question of the sufficiency of the evidence to sustain the plaintiff's cause of action was properly preserved in the record as one of law, so as to be reviewable in this court.

It is urged that the trial court erred in giving the fourth and fifth instructions on behalf of the plaintiff, and refusing the third and fifth asked by the defendant. We think the fourth and fifth were properly given under the facts of the case, and were fair, to say the least, for the defendant. The third of defendant's instructions was substantially given in another asked by it. The fifth was properly refused, because it assumed that a baggageman and engineer on the same train are, as a matter of law, fellow servants. We have examined the instructions given to the jury both for the plaintiff and defendant, and are convinced that the defendant has no just grounds of complaint in that regard.

Other objections are made to the ruling of the circuit court on the trial, but we do not regard them as of substantial merit. We find no reversible errors of law in the record. The judgment of the appellate court must be affirmed. Judgment affirmed.

(176 Ill. 210)

SIEGEL, COOPER & CO. v. COLBY et al.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

LEASE—CONSTRUCTION—TERM—ESTOPPEL BY ANSWER.

1. A lease was from January 1, 1886, to December, 1889, for \$36,000, payable \$1,000 each month. It provided for renewal for two years from January 1, 1889, for \$24,000, payable \$1,000 each month, on one year's notice before expiration of lease. Notice was given December 8, 1887, and extension was made December 29th, "for the period of two years from December 31, 1889." * * * according to the terms of said lease." On December 31, 1889, the lessor assigned the lease, guaranteeing the rent for 1890. *Held*, that the lease was for three years, and expired December 31, 1888, notwithstanding the date given, "December, 1889," and the extension expired December 31, 1890, notwithstanding the date given, "two years from December 31, 1889."

2. Parties not being able to agree as to when a lease expired, the lessor sued for a construction of the lease, and the lessee answered, setting up a contrary construction. Complainant, without acquiescing in defendant's contention or defendant in his, dismissed. Afterwards defendant adopted complainant's view of the

¹ Rehearing denied December 14, 1898.

lease, which was the correct one, gave notice, paid up the rent, and moved out at its expiration. *Held*, that defendant was not estopped by his answer in the suit to claim that the lease should be construed differently than he had contended.

Appeal from appellate court, First district.

Action by Siegel, Cooper & Co. against John A. Colby & Sons. There was a judgment for defendants, which was affirmed by the appellate court (61 Ill. App. 315), and complainant appeals. Affirmed.

A. Binswanger and Elmer E. Jackson, for appellant. Wilson, Moore & McIlvaine, for appellees.

PHILLIPS, J. Appellant brought suit to recover rent for the month of January, 1891, under a lease of date August 7, 1885. The appellees contend there was no rent due for said month; that the lease expired December 31, 1890, and the premises rented had been surrendered by them at that date, all rent up to such expiration having been paid. The rent up to December 31, 1890, had been paid, but appellant insists the lease did not expire until December 31, 1891. The question primarily at issue is as to the proper construction of the language of the lease; then, whether the parties have construed it themselves and mutually acted thereon so as to estop them from setting up a different construction.

The lease provided that the lessees were to have and hold the premises from January 1, 1886, until December, 1889, for the consideration of \$36,000, payable in monthly installments of \$1,000 each. Immediately following the above is a provision granting the lessees the privilege of renting said premises for two years from January 1, 1889, by giving 12 months' notice before the expiration of the lease, for which the lessees agree to pay a rental of \$24,000, in monthly installments of \$1,000 each. The lease was to terminate if the building was destroyed or rendered untenable by fire. On December 8, 1887, the lessees gave notice that they desired to avail themselves of the privilege granted in said lease for renting said premises on the terms provided therein. In pursuance thereof, on December 29, 1887, an agreement signed by the parties was attached to said lease, extending the lease "for the period of two years from December 31, 1889, as provided in and according to the terms and conditions of said lease." On December 31, 1889, the original lessor, Kohn, assigned his interest in the said lease to Siegel, Cooper & Co., who afterwards incorporated under that name. This suit was brought in the name of Kohn, the lessor, for the use of the corporation, but, Kohn having died, by agreement the suit proceeded in the name of the usee. Afterwards, Siegel, Cooper & Co. filed their bill in chancery against John A. Colby & Sons, the lessees, alleging a mistake in the lease and the extension, and asking that it be construed, and decreed that the extension expired December 31, 1890. An answer was filed admitting a mistake was

made in the lease, but that in the agreement of extension it was understood by the parties that the lease should be considered as running for four years, instead of three years, and that the extension should be for two years after the expiration of such four years, or until December 31, 1891. On November 19, 1890, the bill was dismissed by complainant, and thereafter, on November 24, 1890, Colby & Sons, the lessees, gave Siegel, Cooper & Co. notice that they would surrender up possession of the said premises on December 31, 1890, which they did; but Siegel, Cooper & Co. declined to accept such surrender, claiming they had insisted that the lease, by the extension, did not expire until December 31, 1891, and that they would be held for the rent until the expiration of that time. Thereupon this suit at law was brought to the February term, 1891, to recover rent from Colby & Sons for the month of January, 1891. The circuit and appellate courts have held that the lease, with the extension, expired December 31, 1890, instead of December 31, 1891, and that, all the rent having been paid up to the former date, the plaintiff could not recover.

It is evident the parties intended a rental of three years from January 1, 1886, which would make the lease expire January 1, 1889, or December 31, 1888, as was intended to be expressed. This is shown by the facts that (1) the rent to be paid was \$36,000, to be paid in monthly installments of \$1,000 each, or for 36 months; (2) the provision for renewal was for two years from January 1, 1889, which would make the first term run for three years; (3) the lease provided that the notice requesting an extension for two years should be signed 12 months before the expiration of the lease, and it was given December 8, 1887, and the extension was made December 29th of that year, which clearly indicates the construction of the parties to the lease; (4) the written assignment of the lease by Kohn, the lessor, to Siegel, Cooper & Co., December 31, 1889, guarantying the payment of the rent for the year 1890, shows his interpretation and understanding of the time of its expiration. If the lease had been understood by him or Siegel, Cooper & Co. to have run till December 31, 1891, the guaranty doubtless would have covered that year as well.

There is no point of view from which this lease can be examined without reaching the conclusion that the original lease expired December 31, 1888, and, as the extension was in accordance with the provisions of the lease, it would terminate December 31, 1890. This suit for rent was brought on the lease and the extension as written, claiming, however, in the declaration, that it did not expire until December 31, 1891. The construction above placed on the lease, that it terminated December 31, 1890, ends that controversy.

It is insisted, however, that the defendants are estopped by their declarations verbally, and by their answer to the bill in chancery,

from claiming that the lease did expire before December 31, 1891. After plaintiff received the assignment of the lease, it or its representatives, in a conference with some one of the defendants, insisted the lease expired December 31, 1890, while the defendants contended it expired December 31, 1891. As they were not able to agree, plaintiff filed the bill referred to, in order to obtain a decree construing the lease according to its contention, while the defendants in the answer insisted it ran till December 31, 1891. Both parties took just the opposite position from that now occupied. This bill was dismissed with that issue presented, which left the parties in the attitude of opposition on this question. The dismissal was by the complainant, and did not involve mutuality between the parties or acquiescence in defendants' contention. Had the record of dismissal so shown, then there might have been some ground for this position. Before, however, there was any agreement between the parties as to the construction of the lease, the defendants adopted the legal construction heretofore stated, that it expired December 31, 1890, and gave notice of that fact, and acted upon it by leaving the premises at the expiration of the lease, with all the rent paid up, as is conceded, according to such construction.

There are no complicated questions of law involved in this case. It is well settled that a court of law may, where there is an obvious mistake made on the face of the instrument, which is corrected by other expressions therein, when the whole instrument is considered, construe it according to the evident intent of the parties, as manifested by all the language used. In *Packer v. Roberts*, 140 Ill. 9, 29 N. E. 668, it is said, in connection with a review of many authorities on this subject: "Inaccuracy of language which results from inserting a word not meant, or using the wrong word, will not be permitted to defeat the intention, when it can be distinctly ascertained."

There is no estoppel, for the reason that there is no evidence of mutuality in any act or acts that could constitute an estoppel. These parties did not agree about the construction, and mutually act thereon. The dismissal of the suit in chancery by complainant would not have been an estoppel to it bringing detainer for possession had defendants continued in possession after December 31, 1890. Any estoppel, to be binding, must be reciprocal, and conclude both parties, and, generally, when the avenues of information are equally open to both parties, there will be no bar. *Bigelow*, Estop. p. 47; *Mills v. Graves*, 38 Ill. 455. There is no estoppel by representations where both are equally in possession of all the facts pertaining to the matter relied on as an estoppel (*Knapp v. Jones*, 143 Ill. 375 32 N. E. 382), or where, with such knowledge, each acts on his own judgment. In *Bigelow*, Frauds, p. 438, the rule is laid down as follows: "In order to this estoppel (by words or conduct), all of the following elements must, generally speaking, have been present: (1) There must

have been a representation concerning material facts; (2) the representation must have been made with a knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matters; (4) it must have been made with the intention that it should be acted upon; (5) it must have been acted upon." The plaintiff was not ignorant of the truth of the matter, and it did not act upon the representations made or the conduct of the defendants before the defendants adopted the legal and proper construction of the lease. The judgment is affirmed. Judgment affirmed.

(176 Ill. 213)

CITY OF DUQUOIN v. KELLY.

(Supreme Court of Illinois. Dec. 9, 1898.)

MUNICIPAL CORPORATIONS—DEPOSIT OF FUNDS.

Rev. St. 1874, p. 228, § 9, requiring city funds to be deposited in a regularly organized bank, includes only banks incorporated under the state law or the acts of congress, and not a private bank, owned and managed by a private individual; and this, though such act provides that such banker or bankers receiving the deposit shall give bond.

Motion by the city of Duquoin for leave to file a petition for mandamus to compel Kelly, its treasurer, to deposit city funds in a certain bank. Denied.

Silas H. Reid, for relator.

CARTER, C. J. (orally). The city of Duquoin has entered a motion for leave to file a petition for mandamus to compel the city treasurer of that city to deposit the funds of the city in the Bank of Duquoin, this being the bank of one Henry Horn. The city council, it seems, passed an ordinance designating that bank as the depository of its funds, and directed the city treasurer to comply with the ordinance, and make the deposit. He declined to do so. The statute provides that city councils may, by ordinance, designate the place or places for the deposit of city funds, provided, however, that such moneys shall be deposited in a "regularly organized bank." Rev. St. 1874, p. 228, § 9. The question here is whether the bank of Henry Horn, in which the council directed the treasurer to make the deposit, is, within the meaning of this act, a "regularly organized bank." The petition alleges, in general terms, that it is such bank, but states specifically that it is the bank of Henry Horn; that he is the owner and proprietor of the bank. It therefore appears from the petition which the city asks leave to file that this is a private bank, owned, conducted, and managed entirely by Henry Horn as proprietor. The legislature has passed an act providing for the incorporation and organization of banks, and making the stockholders liable, over and above their stock, to an amount equal to the stock held by them. The act of congress providing for the organization of national banks contains similar pro-

visions. The state law provides that, in cities and villages having a population not to exceed 5,000, the capital stock shall be \$25,000, and it is graded up according to the population. It provides the manner of organizing banks, requires detailed reports from time to time of their resources and liabilities, and makes provision for their inspection and examination by competent persons, under the authority of the state auditor. We are of the opinion that the term "regularly organized bank," in the city and village act, means a bank organized either under the state law or the act of congress, and that it was not intended by the legislature that a city officer who has given bond for the safe-keeping of the funds in his hands should be required to deposit them in a private bank. There would seem to be no more reason for that than there would be for turning the funds over to a private individual. It is true, provision is made that such banker or bankers shall give bond; but we do not think this alters the case. We think the legislature intended that some bank regularly organized under the law should be designated. The motion for leave to file the petition will therefore be denied. Motion denied.

(176 Ill. 420)

TUSCHINSKI v. METROPOLITAN W. S. EL. R. CO.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

DEEDS — ACKNOWLEDGMENT — CANCELLATION — FRAUD — EVIDENCE.

1. An instrument from a vendor to the purchaser from the vendee, waiving all claims for damages to vendor's adjacent property, and containing covenants as to the manner in which the road of the purchaser should be built, is within Rev. St. c. 30, § 20, providing that "deeds, mortgages, conveyances, releases, powers of attorney or other disposition of real estate" may be acknowledged or proved.

2. The uncorroborated denial of a signature to an acknowledged instrument is insufficient to destroy its validity.

Appeal from circuit court, Cook county; M. F. Tuley, Judge.

Suit by Ignatz Tuschinski against the Metropolitan West Side Elevated Railroad Company and another. Decree for defendant company, and plaintiff appeals. Affirmed.

John W. Walsh, for appellant. Addison L. Gardner (William W. Gurley, of counsel), for appellee.

WILKIN, J. On December 16, 1896, appellant filed his bill in equity in the circuit court of Cook county, seeking to have the court declare fraudulent and void, as a cloud upon his title, three certain deeds, as follows: A deed from appellant to Harry D. Taylor, dated January 3, 1896, purporting to convey "the south 25.75 feet of lots 49, 50, 51, and 52 in the subdivision of block 52 of the division of section 19, township 39 north, range

14 east, of Third principal meridian, in Cook county, Illinois"; a deed to the same premises from Henry D. Taylor, dated January 3, 1896, to appellee; and a deed from appellant to appellee, dated January 7, 1896, purporting to be a release by him of all claims for damage to the remainder of his said lots by reason of appellee's proposed elevated railway, containing a condition as follows: "The above release is given by the said Ignatz Tuschinski, and is accepted by the said the Metropolitan West Side Elevated Railroad Company, upon the express condition that the said premises, to wit, the south twenty-five and seventy-five hundredths (25.75) feet of lots forty-nine (49), fifty (50), fifty-one (51), and fifty-two (52) aforesaid, shall be used by the said Metropolitan West Side Elevated Railroad Company as a part of its right of way for an elevated railroad, and for no other purpose, and that the space between columns and beneath girders shall be kept free and clear from all buildings and all other obstructions, so as to afford free access to the alley from adjacent property, subject only to such interruptions as may be necessary in constructing and maintaining said elevated railroad, and that the height of the lowest portion of the superstructure shall be in no case less than fourteen (14) feet above the present surface of the adjacent street or alley, and that the railroad so to be constructed shall be used only for passenger traffic." The bill sets forth that appellant was the owner of the lots in question, and during a large part of the year 1895 had been negotiating with appellee for the sale to it of the south 25.75 feet thereof; that appellee had caused a deed between appellant and wife, as grantors, and it, as grantee, to be prepared and delivered to appellant to be executed, which was not done; that appellant did not execute or acknowledge either of the three instruments mentioned, nor empower or authorize any person to do so for him, nor did he ratify or confirm the execution thereof in any particular; that the same are forged, a fraud upon him, and a cloud upon his title; that appellee has entered into possession of the land, and refuses to restore the same to appellant. Appellee answered, admitting the ownership of the lots by appellant, and the preparation of the deed, with appellant and wife as grantors, containing a release of all claims for damages to the remainder of the lots, and the agreement by appellee to use the premises as a part of its right of way, and for no other purpose, as stated in the deed of January 7, 1896, set forth in the bill, and expressly denying that the deeds in question, or either of them, are forgeries or in any respect fraudulent. It gives a detailed account of the transaction between appellant and appellee, setting forth that appellant, at the time of the execution of the deeds, was having difficulty with his wife, and divorce proceedings between them were then pending; that she refused to sign a deed with her hus-

¹ Rehearing denied December 14, 1893.

band, and, at the suggestion of appellant and his attorney, George Crawford, she executed a conveyance of said south 25.75 feet of the lots to Harry D. Taylor, who, in turn, conveyed the same to appellee; that appellant also conveyed the same to Taylor, who conveyed to appellee; that, by inadvertence and mistake, the deeds from appellant and wife to Taylor did not contain the release of damages bargained for between appellant and appellee; that when this was discovered, at the request of appellee, appellant executed the deed of January 7, 1896, to supply the defect; that the agreed price to be paid by appellee for the land was \$5,000, less certain incumbrances which were paid by appellee, at the request of appellant, to said Harry D. Taylor. The answer of defendant Harry D. Taylor shows that in accepting the deeds from appellant and wife, and in making the deeds to appellee, he merely acted as trustee to accommodate appellant's attorney, George W. Crawford, and that all the money paid him by appellee was delivered over to Crawford. On the hearing, the bill was dismissed, at the cost of complainant.

It appears from the evidence that Crawford absconded, without paying the purchase money over to appellant; but the act of appellant's attorney cannot prejudice the rights of appellee. The important issue presented by the bill and answer is whether the deeds in question were forged or obtained by fraud. The only evidence in the record tending to sustain the allegations of the bill in that regard is that of the complainant himself. It has long been the established doctrine of this court that in proving the execution of deeds, in the absence of proof of fraud, collusion, or imposition on the part of the officer taking and certifying the acknowledgment thereof, such certificate must prevail over the unsupported testimony of the grantor that it was false and forged (*Fitzgerald v. Fitzgerald*, 100 Ill. 385), and that the uncorroborated denial of one's signature to a duly acknowledged deed is insufficient to destroy its validity (*Kerr v. Russell*, 69 Ill. 606).

It is insisted by counsel that the instrument or deed of date January 7, 1896, releasing all claims for damages, etc., was merely a contract, and not required by statute to be acknowledged, and for that reason the rule does not apply that the unsupported testimony of the party purporting to have made the acknowledgment is insufficient to overcome the officer's certificate. The position is untenable. The statute provides that "deeds, mortgages, conveyances, releases, powers of attorney, or other writings of or relating to the sale, conveyance or other disposition of real estate, or any interest therein, whereby the rights of any person may be affected in law or in equity, may be acknowledged or proved." Rev. St. c. 30, § 20. It will be seen by reference to the deed or release that it is more than a mere contract waiving damages, but contains covenants affecting the

rights of appellant in the lands of appellee, and clearly comes within the above section of the statute.

Aside from the above-stated rules of evidence, the testimony of appellant is, in our opinion, too vague, uncertain, and unsatisfactory to sustain the charges made by his bill. He does not give a clear, satisfactory, and consistent account of his actions and conduct during the period covered by the transactions, which, in any view of the case, the rules of evidence require. The decree of the circuit court will be affirmed. Decree affirmed.

(176 Ill. 330)

CHICAGO & E. I. R. CO. v. DRISCOLL.¹
(Supreme Court of Illinois. Oct. 24, 1898.)

MASTER AND SERVANT—RAILROADS—NEGLIGENCE—BUTT POSTS—QUESTIONS OF LAW—FELLOW SERVANTS—SPECIFIC ALLEGATIONS OF NEGLIGENCE—KNOWLEDGE OF VICE PRINCIPAL.

1. The failure to put a butt post at the end of a stub switch in a switch yard is not, of itself, negligence.

2. Evidence that other railroad companies had in their switch yards butt posts or other obstacles at the ends of stub tracks is inadmissible to show negligence of defendant railroad company in failing to have them.

3. Where there is no dispute as to the facts, which clearly show that the relation of fellow servants existed, the question may become one of law.

4. Two switching crews were employed in the yards of defendant company. Their duties were of the same character, and nearly identical. They worked near each other, and often on the same track, and each crew consisted of the same number of men. *Held*, that the members of the crews were fellow servants.

5. A recovery, under a complaint alleging specific acts of negligence by certain agents of defendant, cannot be had on evidence of a breach of a general duty which defendant owed its servants or of the negligence of other agents.

6. An allegation that a vice principal of defendant railroad company knew, or in the exercise of ordinary care ought to have known, of the dangerous position of a car before the accident, must be proven by an affirmative showing of actual knowledge, or that the defect complained of had existed for such a length of time that he, in the exercise of ordinary care, should have discovered it.

Magruder, J., dissenting.

Appeal from appellate court, First district.

Action by Clara B. Driscoll, as administratrix of the estate of John Driscoll, deceased, against the Chicago & Eastern Illinois Railroad Company. From a judgment of the appellate court (70 Ill. App. 91), affirming a judgment for plaintiff, defendant appeals. Reversed.

Will H. Lyford, William J. Calhoun, and Albert M. Cross, for appellant. James C. McShane, for appellee.

PHILLIPS, J. This is an appeal from a judgment of affirmance by the appellate court for the First district of a judgment for \$5,000, rendered by the circuit court of Cook county

¹ Rehearing denied December 20, 1898.

against appellant and in favor of appellee, for causing the death of her husband.

The declaration charges that the defendant negligently maintained in its freight yard a certain track without any butt post or other obstruction at the end thereof, and because of such absence a car had been run off the track onto the ground before the accident, by a crew with which Driscoll, the deceased, had no connection; that the switching crew of which the deceased was a member coupled its engine to a train on this track, of which train this car was a part, and, in moving the train, the car, because of being off the track, was thrown against a standing train on an adjoining track, and Driscoll was caught between the moving and standing trains, and killed. Other counts of the declaration charge that defendant had in its employ an assistant night yard master, not a fellow servant of the deceased, who knew, or by the exercise of ordinary care might have known, this car was off the track, and knew, or might have known, that the deceased and his crew were ignorant thereof; but he negligently ordered Driscoll and his crew to attach their engine to and move the train without notifying the crew of the position of this car, whereby Driscoll was caught in a collision between a car off the track and a train on an adjoining track and killed. Another count alleges that a switching crew with which Driscoll was not connected was guilty of negligence in pushing this car off the track, etc.

Two switching crews were employed in the same switch yard, and both handled this train which caused the accident within a few minutes of its occurrence. One was known as "Hurd's Crew" and the other as "Ward's Crew." Driscoll had been a member of both crews, and was familiar with their work and the yard and tracks, but at this time was working with Ward's crew. Three of the tracks were used as repair tracks, and were stub tracks, at the ends of which no butt posts had ever been erected, but were left open, so that if a car was pushed too far it would run off onto the ground. It was the duty of Hurd's crew to switch cars on these repair tracks and remove cars therefrom, and to also transfer cars to other switch yards. Ward's crew also switched cars onto and removed cars from these repair tracks and made up and broke up trains. Both crews were at work in the yard, breaking up and making up freight trains, switching and removing cars, using the repair and yard tracks with equal frequency, often on the same track, constantly working near each other, with duties of the same character. Within the limits of the yard, the duties of the two crews were identical and performed at the same time. Each crew consisted of five men,—an engineer, a fireman, a foreman, and two helpers. One member had the duty of making couplings in the front part of the train, opening switches ahead of the engine, and repeating to the engineer signals from the rear. It was the duty

of another member of the crew to act as rear man. His duties were to go to the rear end of the train on a repair track to see that all cars were properly coupled and the train in proper condition to be moved, to give signals from the rear, and close switches behind the train. These duties were performed by the foreman and helpers indiscriminately. Driscoll had frequently acted as rear man, and was performing those duties on the evening of the accident. There is no dispute about these facts, and they appear from plaintiff's evidence and are uncontroverted. On the evening of the accident, Hurd's crew pushed all the cars together on the track on which the accident occurred, coupled them together, and left them standing with the rear wheels of the rear car about 10 inches from the end of the rails and on the track. His crew then pulled the cars from two other stub tracks, backed them onto the track where the accident occurred, and coupled the train of cars, and left it, and saw it no more until after the accident. There is no evidence in this record that Hurd's crew, in making up this train, pushed the car off the track. Ward's crew was ordered to take this train from the track from where it was so made up, and distribute it, but the time between the departure of Hurd's crew and the arrival of Ward's crew is not shown. After coupling onto this train, and attempting to pull out, the accident occurred as alleged. When and how this car became thus partially off the track, from this record, is unknown.

To meet the evidence of plaintiff that no butt post was placed at the end of the stub track on which the accident happened, the defense introduced evidence that when butt posts were placed at the ends of the tracks it frequently happened that a train would back in at considerable speed, and the momentum of a heavy train, moving rapidly, would, upon impact with the post, wreck cars of the train, but that without such posts switching crews would have to stop the train, and would be more watchful than if reliance would be placed on a butt post. Plaintiff introduced eight witnesses, who, over the objection of the defendant, were permitted to testify as to the number of years they had been in railroad service, and that they were familiar with the manner in which stub tracks were constructed, with reference to obstructions placed at the ends of such tracks, by reputedly well-regulated roads in Chicago. Each of these witnesses was then asked how stub tracks were constructed by railroad companies in this particular, and to this question, when put to each witness, defendant objected, its objection was overruled, and an exception was taken. Each witness then answered that obstructions of some sort were usually placed at the ends of stub tracks. At the close of the evidence for plaintiff, and at the close of the entire testimony, the defendant asked instructions to find for the defendant, which were refused, to which the defendant excepted.

From these facts these questions are presented: First, whether a failure to put a butt post at the end of a stub switch in a switch yard is such a showing of negligence in the construction of the track as should be submitted to a jury; second, whether it was error to admit evidence that other roads were constructed with butt posts at the ends of such stub tracks; third, whether members of two switching crews working in the same yard are fellow servants; fourth, whether, under the evidence, appellant is liable for the alleged negligence of Hurd's crew, or of Blake, the assistant night yard master.

With reference to the first proposition, it may be said that the manner of constructing a railroad is an engineering question. A railroad company cannot be required to adopt any particular method of construction, or any particular contrivance or device, in order to be in the exercise of ordinary care. Public policy does not require courts to lay down any rule as to the manner of construction of railroads. The hazardous character of the business of operating a railroad, and the danger to life, body, and limb of employes thereon, may well call for specific legislation having for its object the protection of the person of the employe and of the traveling public, and yet it is not a question for a court to submit to a jury whether the manner of construction of a railroad is proper or not. A verdict is not a precedent, and is not binding on another jury. One jury might find the construction a proper one while another jury might find it an improper one, and the important engineering question of the manner of constructing a railroad would thus be left to the varying and uncertain opinions of jurors. The only question proper to submit to a jury in such cases is whether the premises as they existed at the time of the injury were reasonably safe. *Twitchell v. Railway Co.*, 39 Fed. 419; *Railroad Co. v. Lonergan*, 113 Ill. 41, 7 N. E. 55; *McGinnis v. Bridge Co.*, 49 Mich. 466, 13 N. W. 819; *Hewitt v. Railway Co.*, 67 Mich. 61, 34 N. W. 659; *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. 1166; *Railway Co. v. Armstrong*, 62 Ill. App. 228. There could be no recovery for a failure to have a butt post or other obstruction at the end of the stub track. For the above reasons it was also error to admit evidence that other roads had in their switch yards butt posts or other obstructions at the ends of stub tracks.

The next question presented is whether the two switching crews are fellow servants of each other. In *Railway Co. v. Brown*, 152 Ill. 484, 39 N. E. 273, we held, in substance, that where the evidence is conclusive and uncontradicted, and reasonable minds must reach the same conclusion on the facts, then negligence would become a question of law. On the same principle, while, as a general rule, the question as to whether the relation of fellow servants exists is one of fact, yet where the facts are conceded, or where there is no

dispute whatever as to the facts, and they show, beyond question, that the relation of fellow servants exists, then the question may become one of law. *Railway Co. v. Brown*, supra; *O'Leary v. Railway Co.*, 52 Ill. App. 641; *Railway Co. v. Malaney*, 59 Ill. App. 114; *Klees v. Railroad Co.*, 68 Ill. App. 244. In this case, as regards the performance of the duties of the switching crews and the character of their work while in the yards, the service was almost identical, and shows beyond question the relation of fellow servants existed.

Under the counts charging negligence in failing to have butt posts or other obstructions placed at the end of the stub track, and under the count charging another switching crew in the same yard with negligence, the peremptory instruction to find for the defendant should have been given.

The declaration charges that the assistant night yard master was a vice principal, and not a fellow servant, with Driscoll; that he knew, or should have known, that the car was off the track; that he negligently gave an order to move the train without warning Driscoll and his crew of this danger. It is not alleged the defendant knew or did anything, but a named vice principal is alleged to have done or omitted certain acts. Such an allegation limits liability to the alleged acts of the vice principal so named. Under such a declaration, the defendant would not be liable for a breach of a general duty which it owes a servant, nor for the negligence of some other agent whose negligence is not specifically alleged. The rule is fundamental that a plaintiff must recover, if at all, upon the case made by his declaration, and in the application of this rule to actions for negligence plaintiff cannot allege a specific act of negligence and recover upon proof of negligence of a different character. *Railway Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Railroad Co. v. Bell*, 112 Ill. 360.

In *Railroad Co. v. Martin*, 154 Ill. 523, 39 N. E. 140, the plaintiff, a passenger, was injured in a collision. No count in the declaration charged the defendant, generally, with negligence. Each count charged that a certain servant in charge of the car was negligent in failing to keep a lookout, and in failing to go ahead to the railway crossing and look for approaching trains. An instruction was given to the jury stating the presumption of negligence which the law raises from the happening of an accident, and the consequent liability of the defendant unless it affirmatively disproved all negligence. It was held the instruction was improperly given, because plaintiff could not recover on any general theory of defendant's negligence, he having in his declaration limited the negligence charged to a particular one of defendant's servants. In this case, the allegation that Blake, the assistant night yard master, knew, or in the exercise of ordinary care ought to have known, of the dangerous position of this car

before the accident, must be shown by actual knowledge, or that the defect complained of had existed for such a length of time that Blake, in the exercise of ordinary care, should have discovered it. There is no proof of actual knowledge on his part; neither is there proof existing as to how long this car was actually off the track. Under the evidence in this record, it is as fair to assume that it was pushed off the track when Ward's crew coupled on for the purpose of pulling out the train as to assume that it was pushed back by Hurd's crew, the fellow servants of Driscoll. Notice must be affirmatively shown.

In *Railway Co. v. Troesch*, 68 Ill. 545, it was said (page 552): "The cases in this state and in sister states are with great unanimity to the effect, if injury arises from a defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given he was ignorant of the same through his own negligence or want of care."

In *Sack v. Dolese*, 137 Ill. 129, 27 N. E. 62, a brake gave way, throwing plaintiff from the top of a car to the ground. The nature of the defect or how long it existed was not shown. It was held that the burden of proof was on the plaintiff to show affirmatively that the defect complained of had existed for such a length of time that the defendant, in the exercise of ordinary care, should have discovered it, and, the proof failing to show this affirmatively, plaintiff could not recover. There is no evidence in this record to show that Blake was charged with the duty of examining the rear end of the train to see whether a car was off the track, but the evidence does show that it was the duty of the rear man of the switching crew to see that the cars were all right.

In *Railroad Co. v. Jewell*, 46 Ill. 99, a brakeman was injured by reason of a defective brake, and it was held the defect did not show such negligence as to charge the company, for the condition of the brake was a matter under the special care of the brakeman, whose business it was at all times to see that it was in a fit condition for use and report defects to the company, and the company should not be made to suffer for his negligence of a plain duty.

In *Railway Co. v. Eddy*, 72 Ill. 138, a brakeman was injured by a defective ladder on the car, and it was said (page 140): "It was the duty of appellee to see and know that the ladder was in repair, and, if not, to have reported it to the proper person for repair. He had no right to act with recklessness in using machinery out of repair, and, if he received injury thereby, to hold the company responsible for the injury resulting from his carelessness or neglect of duty in not reporting it out of repair."

In *Railroad Co. v. Bragonier*, 119 Ill. 51, 7 N. E. 688 (a suit by a brakeman who was injured by reason of the defective condition of

a brake), it was alleged that the defendant knew, or by the exercise of a high degree of care might have known, of the existence of such defect in time to have repaired it. A series of instructions was given for the plaintiff, to the effect that if defendant, by the exercise of ordinary care, might have discovered the defect, and if the plaintiff, in the exercise of ordinary care, could not have discovered it, defendant was liable. It was held error, for the reason that the duty devolved upon the brakeman to examine the brake, and, if he found it defective, to report it.

In these last three cases it does not appear that the brakeman had any previous knowledge of the condition of the brake. The principle on which those cases were based was that the duties of the brakeman brought him in connection with the brake, and the master could only become cognizant of a defective condition by a report made to him, and the proper person to so report was the brakeman. In this case the condition of the cars, and whether they were in a condition to be moved, could only be determined by an examination made by some employé. The employé designated to make such examination was the rear man of the switching crew,—the position filled by Driscoll at the time he was killed. No actual knowledge being shown to exist on the part of Blake, and no affirmative proof to show constructive or implied notice, plaintiff could not recover.

We hold that the instruction to find for the defendant under each count of the declaration should have been given, and it was error to refuse it. The judgments of the appellate court for the First district and of the circuit court of Cook county are each reversed, and the cause is remanded. Reversed and remanded.

MAGRUDER, J. (dissenting). I do not agree with the conclusion reached by this opinion, nor with the reasoning by which it is sought to sustain such conclusion. That portion of the opinion which holds that the relation of master and servant is, under any circumstances, a question of law, is opposed to many decisions made by this court. As is said in an opinion filed at the present term, it is for the court to define the relation as matter of law, and then for the jury to find whether the particular facts come within the definition given by the court.

(176 Ill. 603)

DOREMUS et al. v. HENNESSY.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

CONSPIRACY—DESTRUCTION OF BUSINESS—DAMAGES—CIVIL ACTION—APPEAL—REVIEW.

1. Plaintiff conducted a laundry business, engaging others to do the work, she receiving and delivering the same to her customers. Upon her refusal to increase the price for her work in accordance with a scale fixed by a laundry-

¹ Rehearing denied December 20, 1898.

men's association, defendants combined, and caused the parties who had contracted to do her work to break their contracts and refuse to do the same longer, and induced others to refuse to do the same, in consequence of which plaintiff's business was destroyed. *Held*, that an action would lie for the damages sustained.

2. In an action for damages sustained by plaintiff in her business by reason of defendants inducing others to break their contracts with her, whether defendants' acts were the proximate cause of the injury is a question of fact, and the finding of the trial and appellate courts thereon is not subject to review in the supreme court.

3. On appeal from the appellate court, excessive damages cannot be assigned as error.

Appeal from appellate court, First district.

Action on the case by Mary G. Hennessy against Abram F. Doremus and others. From a judgment for plaintiff, and orders overruling motions for a new trial and in arrest of judgment, affirmed in the appellate court, defendants appeal. *Affirmed*.

Howard Henderson and Francis W. Walker, for appellants. Tuttle & Grier, for appellee.

PHILLIPS, J. Appellee instituted an action on the case, alleging that in 1890, and several years prior thereto, she was conducting a laundry office in the city of Chicago, where she received clothing from various customers, to be laundered; that she did not own a laundry plant herself, but employed other operating laundries, who, when the work was done, returned the same to her for delivery to her customers; that she had built up a good and profitable business; that appellants conspired to injure her in her good name and credit, and to destroy her business, because she would not increase the price charged by her to customers in accordance with the scale of prices fixed by an organization known as the "Chicago Laundrymen's Association," and to that end willfully and unlawfully, by intimidation and unlawful inducements, caused parties who were doing her work (five of whom were mentioned in the declaration) to refuse to longer do the same, and by threats, intimidation, false representations, and unlawful inducements caused others who were operating laundries (who were specifically designated in a bill of particulars) to refuse to take or do her work; that this was done for no justifiable purpose, but to cause loss to the plaintiff, and injure and destroy her business; that various persons with whom she had engagements to so do her work, in consequence of the acts of the appellants, broke their contracts with her, and the business she had built up as a laundry agent was destroyed and entirely broken up, and she thereby sustained great loss and damage by reason of appellants so contriving, plotting, and conspiring by the means aforesaid to break up and destroy her said business. Issues were joined, and upon a trial in the circuit court of Cook county the defendants were found guilty, and the plaintiff's damages were assessed by a jury at

\$6,000. Motions for a new trial and in arrest of judgment were overruled, and judgment was entered on the verdict, to which defendants excepted. On appeal to the appellate court for the First district the judgment was affirmed, and this appeal is prosecuted.

The contention of appellants is that they cannot be held liable for merely inducing others to break their contracts; that the parties who broke their contracts were the only ones liable, they being free agents, and not coerced or influenced by force or fraud; that their acts in inducing parties to break their contracts with appellee were not mere malicious acts, done solely with the intent to injure her, but were in the line of legitimate trade competition, for which they cannot be held liable, nor can they be held liable, they claim, for acts which are charged to have been done in pursuance of a conspiracy, as it is insisted that a conspiracy does not create a liability in a civil action, as the damage illegally done, and not the conspiracy, must be the gist of the action.

The common law seeks to protect every person against the wrongful acts of others, whether committed alone or by combination, and an action may be had for injuries done which cause another loss in the enjoyment of any right or privilege or property. No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses willfully caused by another, from motives of malice, to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill, and credit, will sustain an action. It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers, or those who would be customers, or by preventing others from working for him, or causing them to leave his employ, by fraud or misrepresentation, or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss. A conspiracy may create a liability; for, by reason of the fact that one or more conspirators may do an unlawful act which causes damage to another, all those engaged in the conspiracy for the accomplishment of the purpose for which the injury was done, and which was done in pursuance of the conspiracy, would be alike liable, whether actively engaged in causing the loss or not. For acts illegally done in pursuance of such conspiracy, and consequent loss, a liability may exist against all of the conspirators. Appellants, and those persons who refused to do appellee's work, had each a separate and independent right to unite with the organization known as the "Chicago Laundrymen's Association," but they had no right,

separately or in the aggregate, with others, to insist that the appellee should do so, or to insist that appellee should make her scale of prices the same as that fixed by the association, and make her refusal to do this a pretext for destroying and breaking up her business. A combination by them to induce others not to deal with appellee, or enter into contracts with her, or do any further work for her, was an actionable wrong. Every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will, and any one who invades that right without lawful cause or justification commits a legal wrong; and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong. Damage inflicted by fraud or misrepresentation, or by the use of intimidation, obstruction, or molestation, with malicious motives, is without excuse and actionable. Loss resulting from competition in trade, business, or occupation will not be restricted or discouraged, whether concerning property or personal service. Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set, and actually accomplishing that result, be actionable, unless there was actual malice. "Malice," as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done, to the detriment of the right of another, it is malicious; and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition. In this case it is clear the evidence sustained the allegations of the plaintiff's declaration, and there is here no contention on the facts. The principles herein announced are sustained by the weight of authority in England and in this country. *Lumley v. Gye*, 2 El. & Bl. 216; *Blake v. Lanyon*, 6 Term R. 221; *Sykes v. Dixon*, 9 Adol. & E. 693; *Pilkington v. Scott*, 15 Mees. & W. 657; *Hartley v. Cummings*, 5 C. B. 247; *Bowen v. Hall*, 6 Q. B. Div. 333; *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 Mass. 555; *Chiple v. Atkinson* (Fla.) 1 South. 934; *Delz v. Winfree* (Tex. Civ. App.) 25 S. W. 50; *Curran v. Galen* (Sup.) 22 N. J. Supp. 826; *Van Horn v. Van Horn*, 52 N. J. Law, 284, 20 Atl. 485. In *Steamship Co. v. McGregor*, 15 Q. B. Div. 476, Lord Coleridge said: "It seems that a large number of important and rich ship owners joined together, and have issued two circulars or documents to the different traders and their agents, with whom they had been in the habit of dealing in the tea and other trades in China,

to the effect that, if the persons whom that circular reached and was meant to affect should deal with the plaintiffs or plaintiffs' ship, they (the defendants) would deny them all the benefits, or at least a very large and substantial benefit, which had accrued to them in their dealing with the defendants; that, if the persons to whom they addressed the circulars would deal exclusively with them, they should have certain advantages at their hands. * * * It is conceivable that, if such a conspiracy (because conspiracy undoubtedly it is) were proved in point of fact,—were made out to be, not the mere honest support of a defendant's trade, but the destruction of the plaintiffs' trade, and their consequent wrong as merchants,—it would be an offense for which an indictment for conspiracy, and, if an indictment, then an action for conspiracy, would lie; * * * that the conspiracy to do the thing which has been called by the name of 'boycotting' is unlawful, and an indictable offense, and, if so, then a thing for which an action will lie. An action may well lie for that which is complained of here."

It is urged by appellants that they cannot be held liable for inducing certain persons named in the declaration to terminate their contractual relations with appellee, because their acts could not produce the injuries complained of without an independent force, which was the act of the parties themselves; and these appellants, it is urged, cannot be held liable for an intervening cause of damage sufficient to cause the injury, and that the refusal of different persons to work for the appellee was sufficient, of itself, to occasion injury, for which the appellants cannot be held responsible. The first branch of this proposition has been disposed of by what we have heretofore said, and the authorities above cited. In *Lumley v. Gye*, supra, it was said: "He who maliciously procures a damage to another by a violation of his right ought to be made to indemnify." In *Bowen v. Hall*, supra, it was said: "Merely to persuade the person to break his contract may not be wrongful in law or in fact, but, if the persuasion be used for the direct purpose of injuring the plaintiff, * * * it is actionable, if injury ensues from it." The second branch of the proposition, in which it is urged that appellants could not produce the injuries complained of without the intervention of an independent force, presents the question whether the proximate cause of the injury is a question of fact. It has been settled by the adjudication of this court, so far as this question is here concerned, that in this state what was the cause of the injury, or the combination of causes producing it, is a question of fact. Whether the injury and damage sustained by plaintiff resulted from the acts of the defendant, or were the result of a new, independent factor, for which appellants were not responsible, cannot be determined by the court as a

question of law, unless the fact be conceded, or the proof be substantially all to that effect. *Car Co. v. Bluhm*, 109 Ill. 20; *City of Mt. Carmel v. Howell*, 137 Ill. 91, 27 N. E. 77; *Meyer v. Butterbrodt*, 146 Ill. 181, 34 N. E. 152. The finding of the trial and appellate courts on this question is not subject to review in this court.

It is next insisted that the damages are excessive. This has so repeatedly been held to be an error which cannot be assigned in this court that citation of authority will be unnecessary.

What has been said in the discussion of the questions heretofore presented effectually disposes of all questions raised on giving, refusing, and modifying instructions. The judgment of the appellate court for the First district, affirming the judgment of the circuit court of Cook county, is affirmed. Judgment affirmed.

(176 Ill. 127)

CHICAGO & E. I. R. CO. v. KNAPP.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

MASTER AND SERVANT—INJURIES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—INSTRUCTIONS.

1. Where plaintiff, who was injured on account of the unsafe condition of a drawbar and coupling, knew of the condition, but it was not shown that he knew that such condition made them unsafe, he cannot be charged with contributory negligence.

2. An instruction that plaintiff must show that he was "exercising reasonable and ordinary care," or was injured "while in the exercise of due care," is a sufficient submission of the question whether plaintiff knew that the appliances by which he was injured were dangerous.

Appeal from appellate court, Second district.

Action by Robert A. Knapp against the Chicago & Eastern Illinois Railroad Company. From a judgment of the appellate court (74 Ill. App. 148) affirming a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Lyford (W. J. Calhoun, of counsel), for appellant. D. & T. J. and J. M. Sheehan, for appellee.

WILKIN, J. Appellee began this action in the circuit court of Kankakee county to recover damages for personal injuries sustained by him on the 10th day of April, 1895, at Brazil, Ind. The declaration contained two counts, to which appellant filed a plea of the general issue. Trial by jury resulted in a verdict for plaintiff for \$5,000, on which judgment was entered, and the defendant appealed to the appellate court for the Second district. This is an appeal from a judgment of affirmance in that court.

Appellee was a freight conductor in the employ of appellant, and, at the time of the injury complained of, was in charge of a coal train about to leave Brazil, Ind. (a terminal of appellant's road), for Mokenca, Ill. It was

his duty to inspect his train before starting. While making this inspection, preparatory to leaving, he noticed that a coupling pin on the end of the car nearest the engine attached to the train was not exactly in place, but projected out, slanting backward towards the car. The cause of this condition appellee could not tell without an examination. He stepped between the cars for that purpose, and "took hold of the pin, to see if he could push it down or pull it out." At that moment the train moved back, and the drawbar pushed back under the car so as to cause the pin head to strike the deadwoods on the end of the car, and crush appellee's hand. The negligence charged in the declaration is that the drawbar on the car was not reasonably safe, in that it was not equipped with a shoulder, collar plate, or other device to prevent the drawbar from sliding under the car.

The first error assigned in this court by appellant is the refusal of the trial court to instruct the jury to render a verdict for the defendant. The ground upon which appellant claims that instruction should have been given is that there is no evidence tending to prove the allegation of the declaration that plaintiff was himself exercising due care at the time of the accident, and had no knowledge and no means of knowing of the faulty construction of the drawbar and coupling. It is conceded the judgment of the appellate court settles the controverted questions of fact that the drawbar and coupling device were unsafe, and that the company was chargeable with negligence in allowing them to be in that condition at the time of the accident; but it is insisted that, the danger being known and obvious, the plaintiff, having voluntarily incurred it, cannot recover from the defendant for injuries suffered in consequence, and to allow him to do so would amount to compensating him for his own negligence,—citing *Pennsylvania Co. v. Lynch*, 90 Ill. 333, and *Stafford v. Railroad Co.*, 114 Ill. 244, 2 N. E. 185. We do not think the rule is properly applicable to the facts of this case. While it is true the plaintiff admitted that, before going between the cars, he saw the drawbar hanging down, and that the pin was not exactly in place, it does not appear that he knew these defects necessarily rendered the coupling dangerous. The evidence shows that notwithstanding the obvious conditions referred to, had the car been equipped with other usual appliances, and had the drawbar been in proper condition, the act of appellee in taking hold of the pin would not necessarily have been dangerous. "Unless it shall appear from the evidence that a servant injured in his master's service had knowledge of the dangers of the service from the master's neglect of duty, it will not be presumed, as no one is presumed to knowingly incur physical pain and death when he can avoid it, at his discretion." *Railroad Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021. To charge an employé with negligence in using a machine or appliance known by him to be defective, it

¹ Rehearing denied December 14, 1898.

must also be shown that he knew the defect rendered its use dangerous. We do not think it can be fairly said from the evidence in this record that appellee was guilty of negligence contributing to his injury, or that the evidence, with all its reasonable intendments, fails to show that he was not, at the time of the accident, in the exercise of reasonable care for his own safety. There was no error in the refusal of the trial court to take the case from the jury.

The giving of the second and third instructions on behalf of the plaintiff is assigned for error. The criticism made upon each of them is that they do not submit to the jury the question whether the plaintiff, at the time of the accident, knew that the drawbar was not reasonably safe. We do not think the objection well taken. Both instructions require the plaintiff to show that he was "exercising reasonable and ordinary care for his personal safety," or was injured "while in the exercise of due care for his personal safety in such case." The jury seem to have been fairly instructed as to the law of the case.

Objection is made that certain questions were allowed by the court to be answered by the plaintiff and one of his witnesses, named Taylor, over the objection of appellant. While we think the ruling of the court upon these questions was not entirely accurate, yet we cannot see wherein the defendant was so prejudiced thereby as that a reversal of the judgment below should result. We find no reversible error in the record, and the judgment of the appellate court will be affirmed. Judgment affirmed.

(176 Ill. 376)

McCLUN v. BULKLEY et al.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

DEEDS—DELIVERY—POWER OF ATTORNEY—CANCELLATION—PARTIES—LUNATICS.

1. Where a bill was filed in the name of a lunatic, by his conservator, and, to conform with Rev. St. 1881, c. 110, § 24, which authorizes such bills to be filed in the name of the conservator, was amended by making the conservator a co-complainant, it was a mere irregularity to let stand the name of the lunatic as a complainant.

2. Grantor executed two deeds, and a will referring to them; his declared object being that the grantees, who were beneficiaries under the will, should take possession of the lands conveyed, on the grantor's decease, without expense of probate. The deeds and the will were placed in an envelope, and delivered to the attorney who had drawn them, who subsequently returned them to the grantor, at the latter's own request. A short time later he conveyed lands included in one of the deeds. His health failing, he went to a health resort, where, becoming insane, he executed a power of attorney to his partner, who went to grantor's former residence, and took the deeds, and delivered them to one of the grantees, who shortly recorded them. *Held*, that it was the grantor's intention that the deeds should take effect only at his death.

3. In such case, the power of attorney being void because of the grantor's mental incapacity,

the delivery of the deeds by his attorney was also void.

4. A power of attorney to care for and conserve the principal's property interests, though broad and general in terms, does not authorize the agent to deliver deeds executed by his principal, intending that they should take effect only as a testamentary disposition of his property.

5. Where, pending a bill to cancel of record a deed to two co-defendants, one of them quit-claimed all interest to the other co-defendant, the bill making no reference to, or specific prayer regarding, the latter conveyance, a decree that it also should be canceled is proper, under a prayer for such general relief as the "case may require."

Error to circuit court, Grundy county; H. M. Trimble, Judge.

Bill by C. G. Bulkley, conservator of Isaac McClun and another against John G. McClun and others. There was a decree for complainants, and defendant John G. McClun appeals. Affirmed.

E. Sanford and T. M. Noble, for plaintiff in error. S. C. Stough and W. T. Dillon, for defendants in error.

BOGGS, J. This is an appeal from a decree in chancery entered in the circuit court of Grundy county, vacating and canceling a warranty deed purporting to have been executed by one Isaac McClun to the plaintiff in error and his mother, Lydia J. McClun, and to convey to said grantees the N. W. $\frac{1}{4}$ of section 16, township 31 N., range 8 E. of the third P. M. in the said Grundy county. The decree was granted upon a bill which alleged it was not the intention of the grantor, at the time of the execution of the said deed, that the same should be delivered or should become effective; that it was never delivered by the grantor, but was retained by him until he became insane and utterly incapacitated to comprehend or transact affairs of business; and that, after he was so stricken with insanity and so incapacitated, the deed was fraudulently placed in the possession of the defendants to the bill. The insane person was a resident of the state of Kansas, and the defendant in error Bulkley was his conservator, by virtue of an appointment made by the probate court of Republic county, Kan. The bill styled the complainant therein, "Isaac McClun, by C. G. Bulkley, conservator and guardian." Section 41 of chapter 86 of the Revised Statutes of 1881, entitled "Lunatics," etc., authorizes a suit in behalf of a non-resident insane person to be prosecuted in the name of the conservator of such insane person; and, for the reason that the complainant in this bill was not so styled, the defendants thereto moved the court to dismiss the suit for want of jurisdiction. The court granted a cross motion to amend the bill so as to make "C. G. Bulkley, conservator and guardian of said Isaac McClun, an insane person," a co-complainant in the bill, and, such amendment being made, denied the motion to dismiss. Section 24 of chapter 110, entitled "Practice," authorized the amend-

¹ Rehearing denied December 15, 1898.

ment introducing the conservator as a party complainant in his own name. Retaining the insane person by the said conservator as a party was but an irregularity, not an error of reversible character.

In the view we take of the case, it is not necessary that we should discuss alleged erroneous rulings of the chancellor with reference to the admissibility of certain testimony, for the reason that, excluding such testimony from consideration, we find the decree amply supported by other proof in the record. The facts established by the testimony not objected to are that the said Isaac McClun on the 23d day of March, 1883, executed a will and two deeds. One of the deeds (the one here in controversy) purported to convey the tract of land here involved to Lydia J. McClun during the minority of the plaintiff in error, and to the plaintiff in error in fee when he should arrive at the age of 21 years, and, should he not survive to reach that age, to the said Lydia J. McClun in fee. The other deed purported to convey to the same parties, and upon the same terms and conditions, certain lots in the town of Scandia, Kan. The will recited the execution of the said two deeds, and provided for the like disposition of the property at the death of the testator. The attorney who drew the will and the deeds, and as notary took the acknowledgment to the deeds, testified the said Isaac McClun talked with him freely before the instruments were prepared, and that his object in making the deeds and the will, and specifying the deeds in the will, was to enable the grantees in the deeds and legatees in the will to take possession of the lands without the delay and expense of probating the will. The will and the deeds were placed in an envelope and left by the said Isaac McClun in the possession of one J. C. Price, an attorney, for safe-keeping. Price retained them for some four months, and then, at the request of the said Isaac McClun, delivered them to him. He placed them, inclosed in the same envelope, in his trunk, which he kept in an hotel in Scandia. On the 22d day of August, 1883, the said Isaac McClun sold and conveyed to one Andrew Berggen the lots in the town of Scandia which were described in said will and one of the said deeds, but left undisturbed in the envelope the deeds and the will. Soon after, and in the fall of the same year in which the deeds and the will were signed, said Isaac went to Manitou, Colo., leaving the trunk containing the deeds and the will remaining in the hotel in Scandia. We find testimony in the record indicating that his mind was not always in a healthy condition at periods prior to the date the deeds and the will were made, nor was his general health good; but he engaged actively and successfully in the management of his business affairs, and accumulated considerable property. He was under the care of a physician, and was concerned about his health, when he made the deeds and the will. It

was because of his physical afflictions he went to Manitou, hoping to receive benefit from the water of the springs at that place. Soon after he arrived there he engaged in business as a co-partner of one Albert T. Aldrich in a small retail drug store. While there he indulged in the excessive use of intoxicating liquor, and peculiarities of speech and conduct, which became more marked; were attributed to the effects of liquor. On the 1st day of September, 1884, he started from Manitou on a trip to Scandia, Kan. He stopped in Denver for a few days, and was there overcome by his mental infirmity and became helplessly insane. His partner, Aldrich, was notified of his condition about the 10th of September, and came for him and took him back to Manitou some five or six days thereafter. He was oppressed with insane delusions with reference to the condition of an imaginary bank which he supposed he owned in Kansas, and imagined his business interests in Kansas were threatened with serious and dangerous complications. A few days thereafter, and while under the influence of such insane fears, a power of attorney was signed by him, bearing date September 18, 1884, authorizing said Aldrich to take general control of his affairs and business in the states of Kansas and Colorado. Aldrich had been in Manitou but a few months when McClun came there, was the owner of no property, and contributed no money to the capital of the firm. McClun was the owner of property of considerable value in Kansas; having at one time been a banker, and engaged also in other important business occupations. Aldrich at once proceeded to Kansas, taking with him the power of attorney. He arrived in Scandia, secured the trunk which McClun had left at the hotel, opened it, and took therefrom the envelope containing the will made by McClun, and also the two deeds before mentioned. On the 27th day of September, 1884, Aldrich gave to Mrs. Lydia McClun the deed for the land in controversy, which he found in the envelope in the trunk, at the same time giving her information as to the condition of said Isaac. It appears in the testimony of Mrs. Lydia J. McClun that Aldrich told her when he gave her the deed that Isaac was "ailing." The defendant in error contends that she testified that he told her that Isaac was insane, and that the word "insane" appeared in the transcript made by the shorthand reporter of her testimony, but had been erased, and the word "ailing" inserted in its stead. The testimony of the shorthand reporter, which is preserved in the record, tends strongly to support the defendant in error in this contention. On the next day after she received the deed, Mrs. McClun proceeded by rail to Manitou, where she remained three or four days, during which time Isaac signed an instrument revoking the power of attorney to Aldrich. On the 3d day of October, 1884, Mrs. McClun and Aldrich started back to Scandia with Isaac. On the

10th day of October she filed in the probate court of Republic county, Kan., a complaint in writing, verified by her oath, informing the court that said Isaac was a lunatic and of unsound mind, and praying that he might be so adjudged. A jury was impaneled in said court, and the said Isaac, upon the testimony of the said Lydia J. McClun and others, was adjudged insane, and Mrs. McClun was appointed his conservator. Said Isaac continues to be insane. Mrs. McClun continued to act in the capacity of conservator until October, 1885, when the court ordered that she be removed, and the defendant in error appointed in her place and stead. It appeared that Mrs. McClun retained the deed which she received from Aldrich until after she returned from Manitou with Isaac. She caused it to be sent to the recorder, of Grundy county, Ill., by mail, where it arrived and was filed for record on the 14th day of October. The exact time when she caused it to be mailed does not appear, but it seems most probable that it was still in her possession when she filed the petition for an inquisition as to the lunacy of Isaac. At this time the plaintiff in error was of the age of 15 years. The premises in controversy have been in the possession of the said Mrs. McClun and the plaintiff in error since the date of the recording of the deed, and they have enjoyed the rents and profits during all that time.

We do not think a careful consideration of the facts established by the evidence as preserved in the record leaves the intention and purpose of the said Isaac McClun at the time of the execution of the deeds at all in doubt. His design was to make a disposition of his property, to take effect only in the event of his death. The deeds and the will were executed together, and the purpose which influenced the execution of the deeds was but to render more certain and effective the testamentary provisions of his will. The deeds did not pass from the control of the grantor, and there is nothing to indicate that it was his intention or desire that he should lose dominion and power over them, or that his right, interest, or title in any of the property mentioned in either of the deeds and the will should be in any respect abridged or affected by reason of the execution of the instruments. He regarded his rights in and his power over the premises the same after as before the execution of the deeds, which is unmistakably manifested by the subsequent sale of the town property in the town of Scandia. It was clearly proven that he was in a condition of irresponsible insanity when he executed the power of attorney to Aldrich. Though broad and general in its terms as to the powers vested by it in Aldrich, the power of attorney cannot be construed, even had the maker thereof been sane when it was executed, to authorize Aldrich to take the envelope which contained the will and

the two deeds, and to deliver the deed for the Grundy county land to Mrs. McClun. The authority granted by the power of attorney, if any was granted, had reference to the care, management and preservation of the estate of the maker, and not to a testamentary disposition thereof. But we think, aside from this, the power of attorney was wholly void because of the mental incapacity of the maker. The better view of the testimony is that Mrs. McClun was informed of this mental incapacity when the deed was placed in her hands, but, whether she was so advised or not, she parted with nothing as consideration for the delivery of the deed, and gained nothing by it, if the delivery was not the rational act of the maker of the deed. We have repeatedly held—indeed, it is fundamental law—that delivery is as essential to the validity of a deed as the act of signing or acknowledging it, and that without delivery a deed is void. The proof here is not only that the deed was not delivered by the grantor, but it clearly manifests that it was never, during his rational moments, his intention that the deed should at once become operative, or that it should pass from his control during his lifetime. The delivery of the deed by Aldrich to Mrs. McClun, if not fraudulent, was wholly unauthorized and void. Not having been delivered, the deed did not operate to transfer the title from the insane man, and the chancellor correctly decreed that it be canceled of record.

After the bill had been filed, but before it had been amended by changing the style of the plaintiff, as hereinbefore stated, the said Lydia J. McClun, who was a defendant to the bill, executed and delivered to the plaintiff in error a quitclaim deed conveying to him all interest she had in the land. The decree orders that the quitclaim deed shall also be canceled. The bill makes no allegation with reference to that deed, and does not pray the relief granted with reference to it. The cancellation thereof in the condition of the pleadings is assigned as for error. The plaintiff in error and Mrs. McClun were named as the grantees in the deed which the bill prayed should be canceled. They were both made parties defendant to the bill. The amendment simply effected a change in the style of the complainant, and had no effect to deprive the court of jurisdiction it possessed over the defendants to the bill. The evidence disclosed that pending the litigation the defendant Lydia J. McClun had conveyed to her co-defendant all possible interest in the land which was the subject-matter of the litigation. The bill contained a general prayer "for such other and further relief in the premises as the nature of the case may require." It was not error to decree that the deed made pending the litigation should be canceled. The decree of the circuit court is affirmed. Decree affirmed.

(177 Ill. 558)

WABASH R. CO. v. KINGSLEY.

(Supreme Court of Illinois. Feb. 17, 1899.)

RAILROADS—TRESPASSERS—EJECTION—INJURY—LIABILITY—NEGLIGENCE—INSTRUCTIONS.

1. A railroad is liable to a trespasser for injuries sustained by his ejection only when such injuries result from the wanton or willful act of its servants; and a charge authorizing recovery if defendant's servants failed to exercise due care in such ejection was erroneous.

2. In an action for the ejection of a trespasser from a railroad train, where the declaration did not charge negligence, but alleged that plaintiff was injured by the willful and wanton acts of defendant's servants, instructions authorizing a verdict for plaintiff "if the jury believed * * * defendant was guilty of the negligence charged in the declaration" were error.

Appeal from appellate court, Third district.

Action by Alexander Kingsley against the Wabash Railroad Company. From a judgment for plaintiff, which was affirmed by the appellate court (78 Ill. App. 236), defendant appeals. Reversed.

This was an action brought by Alexander Kingsley against the Wabash Railroad Company to recover for an injury received from being put off a freight train running on the defendant's road. The declaration contained two counts. In the first count it is averred that, plaintiff being on a certain car of a freight train on defendant's road, the conductor of said train came to the plaintiff, and ordered him to alight therefrom; that plaintiff told said conductor that he could not obey said command on account of the speed of the train, and that the plaintiff then and there offered to pay his fare to said conductor; that the said conductor, in a willful and wanton manner, used threatening language towards and against the plaintiff, and then and there made an attack on the person of the plaintiff, and with force and violence then and there attempted to throw and force plaintiff from said car and train, whereupon, in fear of his life if he were so thrown, and to escape being thrown, he stated to said conductor that, if he (said conductor) would not throw and force said plaintiff from said train, he (the plaintiff) would get off of said train; and plaintiff avers that he did so get off said train while it was running in the rapid manner aforesaid, by reason of the threats and intimidations of said conductor, and to avoid being thrown off as aforesaid, and for no other reason or cause whatever; that, in so getting off, plaintiff used ordinary care for his own safety, but was thrown with great force and violence upon the ground, and received great, serious, and permanent injuries, etc. The second count is substantially like the first. To the declaration the defendant pleaded the general issue, and on a trial before a jury the plaintiff obtained a verdict and judgment for \$700, which, on appeal, was affirmed in the appellate court. The appellate court granted a certificate of importance, and allowed an appeal to this court.

Geo. B. Burnett, for appellant. John Stapleton, for appellee.

CRAIG, J. (after stating the facts). It appears from the record that while a freight train of appellant, running from Springfield to Decatur, was stopped at the Illinois Central Railroad crossing, about three miles east of Springfield, appellee and two other persons who were with him boarded a flat car, and took seats behind an oil tank on the car. This train made no regular stops between Springfield and Decatur, and carried no passengers. The conductor of the train, who was standing on the top of a box car, saw appellee and his companions get on the train, and walked down where they were, and ordered them to get off. The testimony of appellee and his two companions' was, in substance, that "they were put off the train, by force and intimidation," while it was running at a high rate of speed, while the evidence of the conductor and other trainmen was that the train was a heavy train, had just started, and was running slow, and that no force or intimidation whatever was used. The declaration charged "that the injury to appellee was willfully inflicted," and his evidence tended to support that averment; while the testimony on behalf of appellant as to what occurred at the time, and as to the speed of the train, tended to prove "that what was done by appellant's servants, at most, could not be deemed to be anything more than negligence."

Under the facts as disclosed by the evidence, in order to enable the jury to arrive at a correct result, it was necessary that the instructions should be accurate. At the request of the plaintiff, the court gave to the jury four instructions, three of which—the first, second, and fourth—are claimed to be erroneous. They are as follows: (1) "The court instructs you that even if you do believe, from the evidence, that the plaintiff had no right on that train, and the conductor, in discharge of his duty as manager of the train, undertook to put him off, the law requires the conductor to act in a prudent manner,—to exercise due care for the safety of the plaintiff; and if he failed to do so, and in consequence the plaintiff was injured, the defendant is liable." (2) "The court instructs the jury that if you believe, from the evidence, that the defendant is guilty of the negligence charged in the declaration, and that the plaintiff, while in the exercise of ordinary care for his personal safety, was injured as alleged in the declaration, then you should find the defendant guilty, and assess plaintiff's damages at whatever you may believe, from the evidence, the plaintiff has sustained." (4) "The court instructs the jury that if you believe, from the evidence, that the defendant is guilty of the negligence charged in the declaration, and that the plaintiff was injured as in the declaration alleged, and that the plaintiff, at the time of the in-

jury, was in the exercise of ordinary care for his own personal safety, then you should find for the plaintiff."

In regard to the first instruction, upon an examination of the declaration and the evidence, it will be found that there is no claim in either that appellee was a passenger upon the train. The rights of the parties are therefore to be determined upon the fact conceded that appellee was wrongfully on appellant's train when expelled,—that he was a trespasser. As a general rule, a railroad company owes no duty to people who trespass upon its cars, except, of course, its servants have no right to wantonly or willfully injure them. 3 Elliott, R. R. § 1255; Railroad Co. v. Brooks, 81 Ill. 245; Railroad Co. v. Mehl-sack, 131 Ill. 61, 22 N. E. 812. In the case last cited, the duties of a railroad company to its passengers, and to persons who are trespassers on its trains, are considered. It is there said (page 64, 131 Ill., and page 812, 22 N. E.): "A common carrier of passengers is not under the same obligation as to care and diligence in guarding against injuries to strangers, and especially to trespassers, that it is in guarding against injuries to passengers. His duty to the latter involves the use of the utmost care and diligence which can be bestowed by human skill and foresight, and is enforced by the highest considerations of public policy; but, as to the former, his duty rests merely upon grounds of general humanity and respect for the rights of others, and requires him to so perform the transportation service as not wantonly and carelessly to be an aggressor towards third persons, whether such persons are on or off the vehicle. Schouler, Bailm. & Carr. § 620. In Railroad Co. v. Beggs, 85 Ill. 80, we held that a person fraudulently riding on a free pass issued to another, and not transferable, was not a passenger, and that the railroad company would only be held liable for gross negligence which would amount to willful injury." In the case cited, an instruction was given in behalf of the plaintiff, as follows: "If the jury believe from the evidence that the plaintiff, while in the exercise of ordinary care, and without negligence on his part, was injured by negligence of the defendant, as alleged in the declaration, then the jury should find the defendant guilty, and assess the plaintiff's damages." This instruction the court held to be erroneous, upon the ground that it required a verdict of guilty upon mere proof that the injury complained of was caused by the negligence alleged in the declaration, irrespective of whether the plaintiff was a passenger or a mere trespasser, although the negligence alleged was such as would render a carrier liable only in case of injury to a passenger. Under the rule announced, it is manifest that the first instruction was erroneous. Here the declaration is predicated upon the ground that plaintiff was a trespasser, and that his injury resulted from the wanton and willful act of the servants of the railroad company; and

yet, under the instruction, if the servants of appellant failed to exercise due care, the jury were informed that the plaintiff could recover. The plaintiff being a trespasser on the appellant's train, he could not recover unless the act resulting in his expulsion from the train by the servants of appellant was wanton or willful; but the instruction tells the jury that a recovery may be had if the servants of appellant failed to exercise due care for the safety of the plaintiff. The obligation imposed by the instruction was one which the appellant owed alone to a passenger, and the court erred in informing the jury that the railroad company owed the same duty to one who was a trespasser on the train.

In regard to the second and fourth instructions, it will be seen upon examination that they authorize a verdict for the plaintiff if the jury believe, from the evidence, that defendant is guilty of the negligence charged in the declaration. The declaration did not contain a charge of negligence. The act charged upon which a recovery was asked was willful and wanton, and under the rule laid down in Railroad Co. v. Dickson, 86 Ill. 431, no recovery could be had, under the declaration, for mere negligence. In that case the wrong charged in the second count of the declaration was that the servants of the defendant caused the whistle to be sounded in sharp, shrill, loud sounds, "needlessly and recklessly, willfully, wantonly, and maliciously." In considering the right of recovery under that count, the court said (page 435): "Under the second count the plaintiff could not recover upon proof of mere negligence on the part of defendant. No recovery could be had under that count without proof that the sounding of the whistle in the manner charged was done needlessly, and either wantonly, recklessly, willfully, or maliciously." We think these instructions were calculated to mislead the jury. For the error, therefore, in giving the three instructions mentioned, the judgments of the appellate and circuit courts will be reversed, and the cause will be remanded. Reversed and remanded.

(176 Ill. 220)

PEASE v. L. FISH FURNITURE CO.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

CHATTEL MORTGAGES—HUSBAND AND WIFE—ACKNOWLEDGMENT BEFORE JUSTICE—EFFECT OF INCORRECT ENTRY.

1. 2 Starr & C. Ann. St. (2d Ed.) p. 2773, § 2, requiring both husband and wife to join in a chattel mortgage on the household goods of either, does not prevent a wife from purchasing household goods, and giving a valid mortgage on them in her own name to secure the price.

2. Under the statute requiring a justice before whom a chattel mortgage is acknowledged to enter on his docket the names of mortgagor and mortgagee, and a description of the property, the entry of "L. Fish" as mortgagee, instead of the "L. Fish Furniture Company," and

¹ Rehearing denied December 13, 1898.

of a substantially correct description of the property, cannot prejudice the rights of mortgagee.

Error to appellate court, First district.

Replevin by the L. Fish Furniture Company against James Pease. From a judgment of the appellate court (70 Ill. App. 138), affirming a judgment for plaintiff, defendant brings error. The appellate court granted a certificate of importance. Affirmed.

This was an action of replevin brought by the L. Fish Furniture Company against James Pease, sheriff of Cook county, to recover certain furniture, fully described in the affidavit upon which the action was brought. The declaration was in the usual form, to which the defendant pleaded non cepit, non detinet, and one other plea, in which he alleged that on the 6th day of February, 1895, one Hayes recovered a judgment in the circuit court of Cook county against Abby Pinkston for \$558.75, upon which execution was issued and placed in his hands as sheriff, commanding him to make said sum of money, costs, and interest out of the property of said Abby Pinkston; that, under and by virtue of said execution, he took the goods and chattels described in plaintiff's declaration as the property of Abby Pinkston; that the property taken was the property of Abby Pinkston, and not the property of the plaintiff. To the defendant's pleas the plaintiff filed replications, and, on a trial before a jury, the court instructed the jury to return a verdict in favor of the plaintiff, which they did, and the court entered judgment on the verdict. The defendant appealed to the appellate court, which affirmed the judgment, but granted a certificate of importance.

S. W. McCaslin and Clifford & More, for plaintiff in error. Hofheimer & Pfau, for defendant in error.

CRAIG, J. (after stating the facts). There is no controversy in regard to the facts in this case. The plaintiff in error claims the right to hold the property under an execution against Abby Pinkston, while, on the other hand, the defendant in error, the L. Fish Furniture Company, claims the property under two chattel mortgages executed by Abby Pinkston, which were acknowledged and recorded prior to the time the execution was issued and delivered to the sheriff. It appeared from the evidence that the L. Fish Furniture Company was a dealer in furniture on what is called the "installment plan," and on the 12th day of September, 1894, sold the furniture in controversy to Abby Pinkston. While the goods were still in the possession and place of business of the defendant in error, and to secure the purchase price, Abby Pinkston made, executed, acknowledged, and delivered to defendant in error two sets of promissory notes and two chattel mortgages, which were duly recorded. It is, however, contended by the appellant—First, that the property sought to be covered by the mortgages, and by each of them, is "household goods," and the

husband of the mortgagor did not join in the mortgages; and, second, that there was no entry of these mortgages, or either of them, upon the docket of Justice Lyon; that for these reasons the mortgages constituted no lien upon the property, and the superior court therefore erred in directing a verdict for the plaintiff.

In regard to the first question, it was expressly decided in *Mantonya v. Outfitting Co.*, 172 Ill. 92, 49 N. E. 721, that a husband or wife may lawfully purchase furniture or goods for household purposes, and individually execute a valid mortgage upon the property to secure the purchase price, as was done in the present case. As that case is conclusive of the question raised, and as our views are there fully expressed, it will not be necessary to enter into any further discussion of the question.

In regard to the second point relied upon by plaintiff in error, upon examination of the evidence it will be found that the justice before whom the mortgages were acknowledged did make an entry of the mortgages upon his docket, but it is claimed in the argument that the entry made was insufficient. The chattel mortgage record of Justice Lyon showed the following entry, viz:

"Mrs. Abby Pinkston Chattel Mortgage.
to Dated Sept. 12, 1894.
L. Fish. Consideration, \$800.
Ack'd and ent'd Sept. 14,
1894."

Then follows a description of the property embraced in the mortgage.

"Mrs. Abby Pinkston Chattel Mortgage.
to Dated September 12, 1894.
L. Fish. Consideration, \$699.50.
Ack'd and ent'd September 14, 1894."

Then follows what purports to be a list of the mortgaged property. It will be observed that the name of the mortgagee, as entered on the docket, was L. Fish, when in fact the mortgages were given to the L. Fish Furniture Company; and some of the mortgaged property was not correctly described by the justice in the entry on his docket. The mortgages were acknowledged and the certificates of the justice entered thereon as required by the statute, and the mortgagee had no notice whatever that the justice had failed to make an accurate entry upon his docket. It was the duty of the justice to enter upon his docket substantially the names of the mortgagor and mortgagee, and also a description of the property contained in the mortgage, but we do not understand that there was here such a failure to comply with the statute as would invalidate the mortgages. The object of the statute requiring the justice before whom a chattel mortgage may be acknowledged to enter upon his docket the names of the mortgagor and mortgagee, and a description of the property, was to afford notice to such persons as might prefer to examine the record of the justice of the peace within their township in preference to going to the county records. Here the entry made by the justice showed clearly the name of the mortgagor,

amount of the two mortgages, and a substantial list of the property mortgaged. The entry was ample to notify any person who might desire to give the mortgagor credit or buy any of her property that she had mortgaged the property. The fact that the justice had made a mistake in the name of the mortgagee was of little consequence. The main inquiry was whether Abby Pinkston had mortgaged her property, and, if so, the amount. These facts were fully disclosed by the entry on the docket of the justice. Moreover, the mortgagee in this case did all that could properly be required to make the mortgages valid instruments. The mortgages were drawn in proper form, duly acknowledged as required by statute, and placed on record, and the mere fact that the justice failed to make a proper entry on his docket could not invalidate the mortgages. The mortgagee had no control over the justice in regard to the entry to be made on his docket, and should not be made to suffer on account of his incompetency or mistakes. This court has held in at least three cases (*Cook v. Hall*, 1 Gilman, 575; *Merrick v. Wallace*, 19 Ill. 483; and *Nottinger v. Ware*, 41 Ill. 245) that the failure of the recorder of deeds properly to record a deed will not invalidate the title of the grantee, who has done all that is required of him by law in leaving the deed for record. The principle decided in these cases applies here. The mortgagee did all that could be required on its part, and it should not be prejudiced by the mere failure of the justice of the peace to make a proper entry on his docket. The judgment of the appellate court will be affirmed. Judgment affirmed.

(176 Ill. 368)

KNIGHT et al. v. POTTGIESER.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

WILLS—CONSTRUCTION—LIFE ESTATES—VESTED REMAINDERS.

1. A testator devised his property to his wife for her natural life, at her death "to go to, and be divided amongst, my children and their descendants," in equal shares. One of such children died prior to the death of the widow, leaving surviving a widow. *Held*, that the remainder created vested, immediately on testator's death, in his surviving children, subject to the life estate of testator's widow, so as to give an interest to the son's widow.

2. A will provided that, at the death of testator's wife, the estate should "go to, and be divided amongst, my children and their descendants." *Held*, that the interest which vested at the death of the testator was not divested, as to a devisee dying without descendants during the continuance of the life estate, since there was nothing in the will on which such a supposition could be reasonably based.

Appeal from circuit court, Cook county; M. F. Tuley, Judge.

Bill by Martha Pottgleser against Mary Knight and others for partition. From a decree in favor of complainant; defendants appeal. Affirmed.

¹ Rehearing denied December 14, 1898.

William H. Barnum and Barnum, Mott & Barnum, for appellants. D. C. Kelleher, for appellee.

BOGGS, J. Glesbert Pottgleser, Sr., departed this life testate, seised of certain real estate in the city of Chicago. The portion of his will necessary here to be consulted is as follows: "I give, devise, and bequeath unto my well-beloved wife, Barbara Pottgleser, the buildings known as numbers 369 and 371 State street, in Chicago, in which I am now carrying on business and where I live, together with the business and good will thereof, and all furniture, apparatus, fixtures, household furniture, and all goods and chattels, in, about, and upon said premises, and used in carrying on said business, and in and about housekeeping, at the time of my death, together with the lots on which the same are erected, and described as subplot 1 of lot 3, in block 14, in fractional section 15, addition to Chicago, between Harrison street and Hubbard court, in said city; to have and to hold the same for the term of her natural life, and to have and enjoy the rents, profits, and income derived therefrom, to and for her own exclusive use and benefit as long as she lives, and upon and at her death the same to go to, and be divided amongst, my children and their descendants, in equal shares, the descendant or descendants of a deceased child to take the parent's share in equal proportions. All the rest and remainder of my estate and property I give, devise, and bequeath unto my said children and their descendants in the same proportions as above mentioned in regard to the distribution of my homestead property: providing, however, that if my daughter Mary shall marry without the consent, or against the wishes, of myself or my wife, then the estate and property coming to her under this will shall go to her only for the term of her natural life, and after her death to her issue in fee, and in default of issue to my other children and their descendants, as above provided for in regard to my other estate."

Said testator left surviving him a son, Glesbert, Jr., his widow, Barbara, and three daughters. Glesbert, Jr., intermarried, and subsequently departed this life intestate, leaving him surviving, Martha, his widow, Barbara, his mother (widow of Glesbert, Sr.), and three sisters, but neither child, children, nor descendants of a child. Martha, the widow of Glesbert, Jr., on the theory that her husband was seised of a vested remainder in the premises and that she inherited an undivided one-half thereof, filed a bill in chancery praying for a partition of the premises mentioned in the will of Glesbert, Sr., subject to the life estate of said Barbara. Pending the hearing of the cause said Barbara died, and the court construed the remainder created by the will to be vested, not contingent, and entered a decree of partition according to the prayer of the bill, except that, as the life estate had been terminated, the interests of the parties

were declared accordingly. This is an appeal prosecuted by the sisters of said Giesbert, Jr., deceased, to reverse the decree.

Appellants contend: (1) The remainders created by the will were contingent, and did not vest until after the death of the widow Barbara, and as said Giesbert, Jr., did not survive his mother, he was never seised of title or interest in the premises, and hence the petitioner inherited no interest from him; (2) if the remainder should be deemed vested, the interest so vested was a determinable fee, liable to be divested by the death of the remainder-man prior to the termination of the life estate, and another fee substituted.

The argument in support of the first contention is that there is no devise of the remainders except to a class of persons not named, but described; that the devise is only to be found in directions given to divide the premises at and after the death of the life tenant; and that, consequently, only such persons are entitled to take as are, at the time fixed for the division, of the class described in the will,—that is, such a devise vests in the survivors of the class. It is not the policy of our law to favor the abeyance of estates, and for this reason it long ago became a fixed rule, to be observed in the construction of wills in the courts of America and England, that estates should be deemed to vest upon the death of the testator unless very clear words were found in the will evincing that it was the manifest intention of the testator that the estate should not vest except upon the happening of a certain contingency. *Carper v. Crowl*, 149 Ill. 465, 36 N. E. 1040; *Allen v. McFarland*, 150 Ill. 455, 37 N. E. 1006; *Grimmer v. Friederich*, 164 Ill. 245, 45 N. E. 498, and authorities cited. A devise of a life estate, with remainder over to a class of persons not named, but described, is not to be regarded as manifesting that it was the intention of the testator that such persons only should take in remainder as could answer the description at the termination of the life estate. On the contrary, in the absence of other indications of testamentary intent, the settled rule is that it will be deemed to have been the will of the testator that the remainders created by such a devise should vest in interest and title, at once upon his death, in the persons then comprising the class described, and that the right of possession only should be postponed until the life estate had become extinguished. Under such a devise, all persons who, at the time of the death of the testator, would take if prior estate was removed, are seised of a vested interest to take at once upon the determination of such prior estate. 6 Am. & Eng. Enc. Law, 898, 899; 29 Am. & Eng. Enc. Law, 447; 1 Redf. Wills, 386; 1 Jarm. Wills, 306, 307.

The facts of this case do not involve a limitation ingrafted on this rule, that where the remainder is limited to children as a class, to take effect in enjoyment in the future, the estate vests in such children as are

in esse, subject to open and let in others as they may be afterwards born.

It is a general rule, in regard to vesting of personal legacies, that if there is no independent bequest, but only a direction to pay at a future time or upon the happening of a certain event, the vesting will be postponed until the event has occurred or the time arrived. But the general rule is subject to an exception so well established and universally recognized as to practically constitute another general rule, which is: Though a gift arises wholly out of directions to pay or distribute in futuro, yet if such payment or distribution is not deferred for reasons personal to the legatee, but merely because the testator desired to appropriate the subject-matter of the legacy to the use and benefit of another for and during the life of such other, the vesting of the gift in remainder will not be postponed, but will vest at once, the right of enjoyment only being deferred. *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351; *Carper v. Crowl*, supra. The principles which apply to and control vesting of bequests of personal property are in general equally applicable to devises of real estate.

We find nothing in the will under consideration indicating that any cause or reason personal to the remainder-men induced the testator to postpone the right of such remainder-men to possess and enjoy the estate. He desired the income and benefit of the property should be enjoyed by his widow as long as she should live, and for that reason invested her with the exclusive right of possession during her lifetime, and deferred the right of the remainder-men to enter into possession accordingly. Futurity was not annexed to the right of the remainder-men to possession, but only to the time when such right may be exercised. The postponement had reference to the situation or convenience of the estate, possession of the premises at once upon the death of the testator being denied the remainder-men solely because the testator desired his widow should enjoy the use and benefit thereof so long as she should live. An immediate right of present enjoyment is not essential to a vested remainder. It is sufficient if there is present a fixed right of future enjoyment. 1 Kent, Comm. 202, 206.

The will provides that upon the termination of the life estate the premises shall "go to and be divided among" the children of the testator and their descendants. It is urged the word "descendants" means only those persons who have proceeded in some degree from the body of a child of the testator, and that the selection and use of that word unmistakably indicate that it was the intention and purpose of the testator to exclude from the devise those who, though heirs at law of any deceased child, were not the direct or remote issue of such child. If this be conceded, we do not perceive it discloses that it was the purpose of the testator that those whom he intended to receive his bounty should not

be determined during the lifetime of the widow. It is but his declaration as to the class of persons who should take, not as to the time when the investiture should occur. His desire thereby indicated is well fulfilled by our construction of the will, i. e. that his children, at and upon his death, became seised of the estate in remainder in fee.

A further argument is that, even if the remainder should be deemed to have vested at the death of the testator, yet, in view of the provision of the will that at the death of the widow of the testator the estate in remainder should "go to and be divided among the children of the testator and their descendants," the interest which vested at the death of the testator should be held to be a base or determinable fee, subject to be divested as to any devisee by the death of such devisee during the continuance of the life estate without leaving "descendants" to take after the death of the widow of the testator. "A base or determinable fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end." *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 94 Ill. 83. There is nothing in the will upon which the supposition may be reasonably based that the testator intended to qualify or limit the character of the interest to be taken by those entitled to be vested with the remainder. The testator gave the right of exclusive possession of the premises here involved, together with the rents, issues, and profits thereof, to his widow for and during her life. A fee in the remainder, subject to be divested by the death of the person seised prior to the death of the life tenant, is not, for any practical purposes, to be distinguished from a remainder contingent upon the remainder-man surviving the life tenant. That a testator designed to create such an interest or title should, in view of the policy of our law in favor of vested interest only, be declared from words found in the will unmistakably manifesting such an intent. We find nothing in the will under consideration from which such an intent can be ascribed to the testator. The decree is right, and is affirmed. Decree affirmed.

(176 Ill. 442)

ARNOLD et al. v. HART.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

BANKS and BANKING—DEPOSITS—DEMAND—INSOLVENCY—PARTNERSHIP—DISSOLUTION—NOTICE—PLEADING—VARIANCE—EVIDENCE.

1. Where a person commenced business relations with a banking firm, it is presumed that he relied on the financial ability and integrity of each ostensible partner, and as to such partners the original partnership continues until he has knowledge or notice of a change in the same.

2. A banking firm, by the terms of its dissolution, was to be continued by several of the co-partners. The succeeding firm became in-

solvent. A depositor, who had commenced business dealings with the original firm, continued them with its successor, not knowing of the change. After the insolvency of the succeeding firm, he brought suit against the individuals who constituted the original firm, to recover the amount of his deposit in the insolvent firm. *Held*, that he was not bound to anticipate a possible defense that the original firm had been dissolved.

3. Where a bank discontinues banking operations, it waives any demand on the part of its depositors which, under the terms of the deposit, was necessary for a withdrawal of the funds deposited.

4. In a suit to recover a deposit in an insolvent banking firm, brought against individuals who were held out as members of the firm, but who had retired therefrom, it is immaterial whether the retiring members were actually solvent, where the bank had closed its doors against the depositors.

5. A variance between allegations and proof must be distinctly pointed out on the trial.

6. In a suit to recover a deposit in a bank, where the terms of the deposit required a demand on the part of the depositor, a motion for a verdict "on the ground that the promise shown by the evidence has a condition precedent, and the condition is not shown to have been complied with," does not point out any variance, but simply challenges plaintiff's right to recover for want of proof of a demand.

7. A condition attached to a deposit in a bank requiring a demand on the part of the depositor "if the same may be deemed advisable" is not an absolute requirement that such demand shall be made.

8. In an action for a deposit against an insolvent banking firm, plaintiff's pass book was properly admitted, where the co-partnership of the bank, the depositor's dealings with it, and the entries in the pass book by the bank, were previously shown.

Appeal from appellate court, First district.

Assumpsit by Charles Hart against Adolph Arnold and others. A judgment in favor of plaintiff was affirmed in the appellate court (75 Ill. App. 165), and defendants appeal. Affirmed.

Eschenburg & Whitfield and Samson & Wilcox, for appellants. Collins & Fletcher, for appellee.

WILKIN, J. This is an action in assumpsit, by appellee, against Adolph, Herman, and Theodore Arnold and Benjamin F. Baker. Arthur J. Howe and Gustavus A. Bodenschatz were originally joined as parties defendant, but were not served with process. The declaration is the common counts only, alleging promises by all the defendants as co-partners, doing business as "Arnold Bros. Baker & Co." Adolph, Herman, and Theodore Arnold filed pleas admitting their liability, except as to \$551.24, to which they pleaded non assumpsit and non joint liability. Benjamin F. Baker filed pleas of non assumpsit and non joint liability as to the whole amount. The jury found the issues for the plaintiff, and assessed his damages at \$1,164.48. Motion for new trial was overruled, and judgment entered on the verdict for the full amount against the four defendants served. An appeal was taken to the appellate court for the First district, where

¹ Rehearing denied December 14, 1898.

the judgment of the trial court was affirmed. Appellants appeal to this court.

On December 23, 1892, Herman, Theodore, and Adolph Arnold, Benjamin F. Baker, Arthur J. Howe, and Gustavus A. Bodenschatz entered into partnership to do a general banking, exchange, insurance, and mortgage business at No. 143 West Randolph street, Chicago, under the firm name of "Haymarket Produce Bank, Arnold Bros., Baker & Co., Proprietors," commencing May 1, 1893, and expiring April 30, 1903. They continued such business until October 25, 1895, when an agreement to dissolve was entered into, which was reduced to the form of articles of dissolution November 14, 1895, and signed by all the partners. By the terms of the dissolution, Howe and Bodenschatz were to continue the business alone. They were to give notice immediately to the creditors of the partnership of the dissolution, and to pay all its liabilities, and were not to use the name "Arnold Bros., Baker & Co." in continuing the business. The new firm of Howe & Bodenschatz carried on the business at the same place until August, 1896, when it passed into the hands of an assignee. On January 6, 1895, appellee, Hart, opened a savings account with the original firm of Arnold Bros., Baker & Co., bankers, and received at the time a pass book, on the cover of which was printed, "Haymarket Produce Bank, Arnold Bros., Baker & Co., Bankers." At the top of the page on which the entries of deposits and payments were made were the words "Dr. Arnold Bros., Baker & Co., in Acc't with Charles Hart." In this pass book were entered by the bank the different items of deposit and of withdrawal, each with the date of its occurrence. Deposits and withdrawals were made both before and after the dissolution, and the verdict in this suit is for the total deposits less the total withdrawals, with interest for the entire period. All the deposits were made with Bodenschatz, one of the partners, or with one Peter Boyeson, a clerk in the bank both before and after the dissolution. Immediately after the dissolution, the succeeding firm caused a glass sign to be hung inside the bank window, and just above the old firm name of Arnold Bros., Baker & Co., as follows: "Howe & Bodenschatz, Successors to," and also caused a large number of calendars bearing the name of "Howe & Bodenschatz" to be printed and left in the windows of the bank for its patrons. After the dissolution, appellee signed a number of receipts to the bank for withdrawals, which were on a printed form, and were in the name of Howe & Bodenschatz. Appellee testified that knowledge of the dissolution of the original partnership never came to him until after the bank's failure; that he did not see the calendars mentioned, nor notice the change in the sign, nor read the receipts given to him, further than to ascertain that the amount stated was correct. It was not shown by

appellants that the bank notified appellee personally of the change, and it is not disputed but that the pass book remained the same throughout his entire dealings with the bank. The pass book issued to him by appellants contained a number of conditions to which he, by accepting the same, must be held to have agreed. Among others was the right of the bank to demand and have 60 days' notice in writing as a condition of payment on all sums exceeding \$100, and 30 days' notice on smaller sums, when, in their opinion, they deemed the same advisable.

Appellee bases his right to recover in this action on the liability of the defendants under the original partnership agreement. Having begun business relations with the original firm, the law presumes that he relied upon the financial ability and integrity of each ostensible partner, and as to him the original partnership continued until he had knowledge or notice of a change in the same. *Ellis' Adm'r v. Bronson*, 40 Ill. 455; *Southern v. Grim*, 67 Ill. 106; *Page v. Brant*, 18 Ill. 37, and cases cited. The sufficiency of the evidence, it tending to support the allegations of appellee's declaration, is not subject to review here.

It is insisted by counsel for appellants that the facts relied upon by appellee to establish the partnership liability of appellants amount to an estoppel in pais, and should therefore have been specially pleaded to admit proof of the same on trial. Story on Partnership (7th Ed., § 334) says: "It is well settled at common law that an estoppel in pais need not be pleaded, but this rule has been changed by statute in some of the states." See, also, *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846, and *Caldwell v. Auger*, 4 Minn. 217 (Gill. 156). It is also a rule that "facts are available as estoppel where there was no opportunity to plead them." *Foye v. Patch*, 132 Mass. 105; *Clink v. Thurston*, 47 Cal. 21; *Gans v. Insurance Co.*, 43 Wis. 108. In this case appellee was not bound to anticipate the possible defense that the partnership had been dissolved, even if he knew it.

It is further contended that the suit was prematurely brought, because no demand was made on the bank, as provided by the printed conditions in the pass book, and in any event, after the dissolution, the retiring members being solvent, the bank should have had the benefit of the 60-days notice provided for in the printed conditions. We are unable to find any merit in these contentions. As we said in *Meadowcroft v. People*, 163 Ill. 56, on page 82, 45 N. E. 303, 310: "When a bank or banker suspends payment, and closes the doors against depositors and creditors, and discontinues banking operations, it or he waives the necessity for a demand on the part of its or his depositors." See *Watson v. Bank*, 8 Metc. (Mass.) 217; *Planters' Bank v. Farmers' & Mechanics' Bank*, 8 Gill & J. 449. Counsel seem to overlook the fact that appellee's recovery for the deposit subsequently to the dissolution is upon the liability of

the original partnership. As to him, under the facts found, there was no dissolution. It is immaterial whether the retiring members were actually solvent, and able to pay his claim or not. By closing the doors of the bank, and proclaiming its financial inability to continue operations, they thereby waived the right to insist on a demand.

Counsel insist that plaintiff's evidence on the trial proves, at most, but an express conditional promise to pay on demand, the condition or demand being waived, and hence, to have been properly provable on the trial, must have been specially declared on. This is, in effect, a claim that there was a variance between the allegation and proof. It is a general rule of pleading that when a demand is required, and that demand is a part of the contract, it must be specially alleged and proved, or an excuse given for not making such demand. *People v. Glann*, 70 Ill. 232; also, see 2 Enc. Pl. & Prac. 1001; 4 Enc. Pl. & Prac. 648. It is equally well settled that in order to entitle defendants to take advantage of that rule, assuming that it is applicable to this case, they should have raised the point on the trial of the case, and have distinctly pointed out the variance, so as to have enabled the court to have passed upon it understandingly, and, if necessary, have amended the pleading so as to correspond with the proof. *Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801; *Railroad Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680. They claim to have complied with this rule by moving the court, at the close of plaintiff's testimony, to direct a verdict "on the ground that the promise shown by the evidence has a condition precedent, and the condition is not shown to have been complied with." This motion did not pretend to point out any variance, but simply challenged the plaintiff's right to recover for want of proof of a demand. It is to be remarked that the condition in the pass book as to a demand is not an absolute requirement that a demand shall be made to entitle the depositor to his money, but only "if the same may be deemed advisable." There is nothing in this case, so far as we have been able to discover, showing that the bank had deemed such notice advisable in all cases, or in any way advised the plaintiff that it had done so.

The admission of the pass book in evidence was not error. The foundation—by proving the partnership, the plaintiff's dealings with the bank, the entry in the pass book by the bank of the different items of deposit and withdrawal—was duly laid.

The contention that appellee had actual notice of the dissolution, as shown by all the circumstances of the case, and that the uncontradicted evidence was such that it amounted to a conclusive presumption of law that he had such actual notice, cannot be sustained. There is evidence to the contrary, and the judgment of the appellate court is final on that as well as all other controverted questions of fact.

We are unable to discover any substantial error in the instructions to the jury. The principal error complained of in that regard, as said by the appellate court, worked no prejudice to the defendants, conceding the instructions were not entirely accurate.

After examining the many points raised by counsel for appellants, we are satisfied there is no reversible error in the record, and the judgment of the appellate court is affirmed. Judgment affirmed.

(176 Ill. 156)

NATIONAL SURETY CO. v. T. B. TOWNSEND BRICK & CONTRACTING CO.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

DAMAGES—COMPLETION OF SUBCONTRACT—EVIDENCE—APPEAL AND ERROR—REVIEW—PARTNERSHIP—SHARING OF PROFITS AND LOSSES.

1. Plaintiffs, who had contracted to construct a sewer, entered into a subcontract for the construction of a definite portion, and, upon the subcontractor's default, completed such portion in connection with the remainder of the work, keeping an account of the cost of labor and material incurred in all the work, but not a separate account of the items entering into the work covered by the subcontract. *Held*, in an action against the subcontractor and his surety to recover for the nonperformance of the contract, that evidence of the cost of each item of the work covered by the subcontract, consisting of estimates based on the proportion it bore to the whole expense of that item, was not objectionable, as being speculative and immaterial.

2. Where a contractor completes the work on default of his subcontractor, the sufficiency of the proof in respect to the former's accounting as to the cost of completing the work, in an action against the subcontractor's surety, is for the trial court and appellate court to determine, and is not open to review in the supreme court.

3. Where no partnership was intended, the mere agreement of a third person to assist a contractor in the execution of the contract, and to share in his profits and losses, does not create a partnership relation.

4. Though a contractor and a third person were jointly interested in the contract by reason of the fact that the latter was to share in the profits and losses of the former, as the basis of his compensation in assisting in the execution of the contract, such fact does not affect the contractor's right to recover damages for nonperformance of a subcontract in an action against the subcontractor's surety.

Appeal from appellate court, Second district.

Action by the T. B. Townsend Brick & Contracting Company against Sinclair & Co. and the National Surety Company. Judgment of the circuit court for plaintiff was affirmed by the appellate court (74 Ill. App. 312), and defendant National Surety Company appeals. Affirmed.

Defendant's first and third propositions of law are as follows: "First. The bond sued on in this case was given solely for the benefit, advantage, and indemnity of the T. B. Townsend Brick & Contracting Company. If Adams Bros. were jointly interested with said

¹ Rehearing denied December 14, 1898.

Townsend Brick & Contracting Company in the performance of the work undertaken by said T. F. Sinclair & Co., and were entitled to receive one-half the profits and to share one-half the losses arising therefrom, then plaintiff cannot recover to exceed one-half the damages occasioned by the default of said T. F. Sinclair & Co. (Refused.)" "Third. If, subsequent to the date of the contract between the T. B. Townsend Brick & Contracting Company and the city of Peoria for the construction of the West Bluff sewer system of the city of Peoria, the said Townsend Brick & Contracting Company entered into an agreement with Adams Bros. for the construction of said system, by which Adams Bros. were to receive one-half the profits and bear one-half the losses thereof, and the contract with T. F. Sinclair & Co. was thereafter made to construct a portion of said work, and Sinclair & Co. defaulted in whole or in part, then, under the bond in this case executed by the National Surety Company, the plaintiff cannot recover as damages from said surety company more than one-half of the loss which accrued by reason of such default. (Refused.)"

Defendant's sixth proposition of law was modified and held, as follows: "When the Townsend Brick & Contracting Company took charge of the work after the default of T. F. Sinclair & Co., it became and was its duty to keep a true and accurate account of the materials by it furnished and supplied for the completion of the work, as fully as practicable, for which the defaulting contractor was liable. It is not sufficient, in an action brought against the surety of the defaulting subcontractor, to estimate the materials and supplies as furnished, where the same can be practically and definitely fixed."

Jack & Tichenor (Geo. A. Vandever, of counsel), for appellant. Page, Wead & Ross, for appellee.

WILKIN, J. (after stating the facts). The city of Peoria let a contract for the construction of the sewer system in that city, known as the "West Bluff Sewer System," to the T. B. Townsend Brick & Contracting Company. This company afterwards contracted with T. F. Sinclair & Co. for the performance of certain work connected with the construction of the said system. Sinclair & Co., to secure the Townsend Company in the faithful performance of their contract with it, entered into an indemnity bond in the penal sum of \$10,000, and the National Surety Company became surety on this bond. Sinclair & Co. failed to perform their contract, whereupon the Townsend Company was compelled to, and did, undertake the work contracted for by Sinclair & Co., and completed it. This is an action of debt by the Townsend Company against Sinclair & Co. and the National Surety Company, to recover on their bond, and for damages sustained by reason of fail-

ure of Sinclair & Co. to perform their contract. No service was had upon Sinclair & Co. The declaration contains two special counts, besides the common counts. The special counts are the same in substance, the second being only more specific than the first. These counts allege a contract by Sinclair & Co. with the Townsend Company, by which Sinclair & Co. agreed to construct a portion of the main sewer of the West Bluff sewer system strictly according to the contract of the Townsend Company with the city, and providing that the rate of progress by Sinclair & Co. should be such as, in the opinion of the Townsend Company or of the department of public works of the city of Peoria, should be necessary to insure its completion by May 1, 1896; and, if it failed to make such progress, the Townsend Company reserved the right to terminate the contract and assume charge of the work; also, if Sinclair & Co. should not promptly pay all employees engaged in the work, plaintiff was authorized to pay them, and deduct the amount from the amount due Sinclair & Co. from it. These counts each allege the beginning of the work by Sinclair & Co. on November 1, 1895, and its abandonment by them on December 4, 1895, after having performed but a small and immaterial part of the contract; also the completion of the same by the Townsend Company at an expense of \$10,000 more than the cost to it would have been had Sinclair & Co. carried out their contract. Annexed to the declaration was a copy of account sued on, containing 44 items, aggregating over \$12,000. The defendant pleaded "non damnificatus," and stipulated with plaintiff that it might make and rely upon any defense whatever which it might or could have made under any pleas if well and properly pleaded in the cause. The case was tried before the court, a jury being waived by agreement. The finding was for the plaintiff in the sum of \$10,000 debt, and the damages assessed at \$9,719. Motion for a new trial was overruled, and judgment rendered according to the findings. On appeal to the appellate court for the Second district, this judgment was affirmed, and from the latter judgment appellant appeals to this court.

Numerous alleged errors in the trial of this case are pointed out and relied upon by counsel for appellant as ground for reversal. Aside from those which have been settled by the decision of the appellate court, there remain for our consideration only those assigned on the admission or rejection of evidence by the trial court over the objection of appellant, and on its ruling on propositions of law submitted to it, and to which objections by appellant were made and saved.

On the trial the court held that plaintiff had succeeded in establishing 34 items of expense incurred by it in completing the contract undertaken by Sinclair & Co., which items aggregate \$57,140.41, whereas, under the contract, Sinclair & Co. would have been entitled

to \$47,420.85, leaving a total loss to the Townsend Company of \$9,719.56, or practically the amount of the judgment. Upon the abandonment of their contract by Sinclair & Co., the Townsend Company notified the National Surety Company that, unless Sinclair & Co. would resume and fulfill the subcontract, it would be held liable, under the terms of its suretyship, for such damage as might result from the failure, and later, in writing, gave further notice that it would proceed to do the work and keep a strict account of the cost, and require appellant to pay such damages as appellee might sustain on account of the failure of Sinclair & Co. to perform their contract. Plaintiff completed the work of construction covered by the Sinclair contract, in connection with the remainder of the work necessary to complete the system, and kept an accurate account of the cost of labor and material necessarily incurred in all the work, but did not keep an accurate account of all the items entering into the part covered by the Sinclair contract. As to each of these items of expense so kept, plaintiff offered evidence tending to prove the amount by estimates based on the proportion it bore to the whole expense of that item. To the admission of some of this evidence, defendant objected, on the ground that plaintiff had agreed to keep an accurate account of it, and, to other parts of it, that it was speculative and immaterial. None of the objections were well taken. There was nothing in the agreements, either in the contract with Sinclair & Co. or in the bond, which bound plaintiff to separate in an account each item of labor and material used in the completion of the contract abandoned by Sinclair & Co. Certainly, the notice did not require it to do so. It was not the contract, nor can we see that any principle of estoppel can be invoked to that effect.

To the argument that plaintiff, in the completion of this work, held a trust responsibility to defendant, and therefore should be held to a strict accounting, it is sufficient to say that whether the court considered the proof sufficient was for it and the appellate court to determine, and not open to review here. Defendant's sixth proposition, as modified, gave it the full benefit of the law on that point.

It is next contended by counsel for appellant that the Townsend Company, after it contracted with the city, but before it entered into the agreement with Sinclair & Co., made a contract with the firm of Adams Bros., by which, in so far as Sinclair & Co. and defendant are concerned, they, the Townsend Company and Adams Bros., became partners, the effect of which contract was to render it not liable on the bond, or, in any event, only to the extent the Townsend Company was interested in the contract with the city at the time of the Sinclair contract. Assuming that appellee and Adams Bros. were, as to appellant and Sinclair & Co., partners, appellant argues that there was no privity of contract between

Sinclair & Co. and Adams Bros., and that there was a concealment of parties, and hence their contract was not binding, and, in any event, if they were equal partners with Adams Bros., that appellee could not have been damaged to a greater extent than one-half the loss by reason of the failure of Sinclair & Co. Many cases are cited in support of the position, announcing principles of law which may be conceded to be correct, but none of them are, to our minds, decisive of the above point made. We do not, however, regard the question raised as of controlling importance in the decision of the cases.

On the question of the partnership relations of the Townsend Company and Adams Bros., it was conceded that after making the contract with the city, but before contracting with Sinclair & Co., the Townsend Company contracted with Adams Bros. for certain assistance by the latter, in return for which they were to receive one-half the profits and share one-half the losses. The appellate court, in dealing with this question, said: "From a careful consideration of the evidence upon this point, we have reached the conclusion the agreement with Adams Bros. did not create a partnership. No partnership was intended. They were merely the employees of the defendant in error, and their share in the profits and losses was a mere measure of compensation for the work to be done. The facts and circumstances in evidence repel every other inference." In other words, while the agreement with Adams Bros. to share one-half the profits and losses might raise a presumption of partnership, yet if the parties actually meant that there was to be no partnership created, and so contracted, the presumption would be rebutted. But counsel insist that there is no evidence that would justify a court in holding this presumption to be overcome. That question is not presented by the record to this court.

The first and third propositions of law were properly refused, in our opinion, because, conceding that the Townsend Company and Adams Bros. were jointly interested in the work contracted for by Sinclair & Co., and were to receive one-half the profits and share one-half the losses, still, if that interest arose from a contract made merely to arrive at a method of compensation, and which clearly precluded a partnership relation, then it did not necessarily affect the contract between the Townsend Company and Sinclair & Co. There is no claim that Adams Bros. were at any time held out as partners of the Townsend Company, and we can find no evidence of any acts in this regard which would estop it from denying the existence of such partnership. The law is well settled that, as between the parties, the question of a partnership relation is one of intention, and hence to be gathered from the facts. *Niehoff v. Dudley*, 40 Ill. 406; *Snell v. De Land*, 43 Ill. 323. The judgment of the appellate court will be affirmed. Judgment affirmed.

(178 Ill. 169)

GRAY et al. v. JONES et al.

(Supreme Court of Illinois. Feb. 17, 1899.)

HIGHWAYS — ESTABLISHMENT — APPEAL — INJUNCTION — JUDICIAL FUNCTIONS — INTEREST.

1. Injunction will not lie against an appeal from a decision of commissioners to lay out a highway because the supervisors to whom it is taken are without jurisdiction, since the acts of the supervisors would be void.

2. Where a petition for a public road is granted, petitioner is not entitled to appeal.

3. A justice of the peace who is a petitioner for a public road is disqualified to approve the bond, on appeal from the decision of the commissioners, and to select the supervisors to hear the appeal.

Appeal from appellate court, Third district.

Bill by M. S. Gray and others against T. T. Jones and others. From a judgment of the appellate court, reversing a decree entered on overruling a demurrer to the bill (78 Ill. App. 309), complainants appeal. Affirmed.

Andrews & Vause, for appellants. J. W. & E. C. Craig, for appellees.

CARTWRIGHT, J. The circuit court of Coles county overruled the demurrer of appellees to the bill filed by appellants in this case for an injunction to restrain the appellee T. T. Jones from prosecuting his appeal from an order of the commissioners of the town of Lafayette laying out a road, and to enjoin the appellees M. P. Neal, W. Taylor Conley, and David Gannaway, supervisors of said county, from hearing said appeal, and to set the same aside as fraudulent and void. Appellees elected to stand by their demurrer, and there was a decree as prayed for in the bill. On appeal to the appellate court, that court reversed the decree, and remanded the cause to the circuit court, with directions to sustain the demurrer, and this appeal was thereupon taken.

The facts, as alleged in the bill and admitted by the demurrer, are briefly as follows: Complainants are owners of land over which T. T. Jones, James W. Ellis, and others petitioned the commissioners of highways to lay out a new road. The commissioners granted the prayer of the petition, and filed their certificate for the assessment of damages with the said James W. Ellis, one of the petitioners, who was also a justice of the peace. Complainants took a change of venue from said justice to a police magistrate, before whom their damages were assessed, and a final order was then made by the commissioners, September 8, 1897, laying out the road. An appeal was immediately taken on the same day by said T. T. Jones, under a collusive arrangement between him and the commissioners and said James W. Ellis, for the purpose of having the order laying out the road confirmed. The petition for appeal was filed with said petitioner, James W. Ellis, as a justice of the peace, on the same day, and he assumed jurisdiction, and selected the three supervisors to hear the appeal, who were made defendants. One of these supervisors is related by

consanguinity to Leageon Williams, a petitioner for the road, who caused the petition to be prepared, and who circulated it, and employed the attorneys in the case to procure the opening of the road, and another is related by affinity to said T. T. Jones. The purpose of that appeal was merely to forestall parties having an actual and bona fide interest in reversing the order, and to secure, by the means adopted, an affirmance of it. Complainants, who were interested in the decision of the commissioners and desired to reverse it, took an appeal September 11, 1897, by filing their petition with James L. Scott, a justice of the peace, and he selected supervisors, who met September 23, 1897, after proper notice, and reversed and set aside the order laying out the road and the damages assessed. The time appointed for the hearing before the defendants Neal, Conley, and Gannaway was September 24, 1897, and the bill was filed upon that day to enjoin the proceeding, and a temporary injunction was ordered and issued.

It is claimed by appellants that the judgment of the appellate court was wrong, and that they are entitled to relief in equity, on the grounds that Jones, a petitioner for the road, who had obtained by the order all that he asked for, was not entitled to take an appeal; that Ellis, the justice of the peace, was disqualified to act as such on account of his interest; and that the court was unlawfully constituted because of the relationship of its members to the petitioners. Whether these grounds exist or not, we think that the conclusion of the appellate court was right. If the appeal of Jones was lawfully taken, and the supervisors were invested with jurisdiction, complainants could have no relief, because it would have been their duty to have joined in the appeal. Appeals may be taken at different times and by different persons, but they must all be heard together before the body which acquires jurisdiction. *Corley v. Kennedy*, 28 Ill. 143. When a valid and lawful appeal is taken, the supervisors acquire jurisdiction, and, the proceeding being pending before them, no subsequent appeal could confer jurisdiction on another body, but must be taken to the same supervisors. On the other hand, if the grounds alleged are valid, any proceeding by the defendant supervisors would be void, as without jurisdiction, and any order they might make could be successfully resisted elsewhere, and a court of equity would not assume jurisdiction.

Any party who has an appealable interest may prosecute an appeal, and, if one who instituted a suit or proceedings does not obtain what he asks for in full, he can undoubtedly prosecute an appeal. A party in whose favor a judgment is rendered may sue out a writ of error and obtain a reversal for an error prejudicial to him. *Fuller v. Robb*, 26 Ill. 246. If he is able to assign any error, or has not obtained all that he deems himself entitled to, he may appeal, under the statute, and, where a trial is *de novo*, he may appeal to secure a

larger judgment or more complete relief. *Kasting v. Kasting*, 47 Ill. 438. If, however, he has obtained everything that he claims, he has no adverse or appealable interest, since he cannot then call for a re-examination to rectify an erroneous decision, which is the meaning and purpose of an appeal. The rule is stated as follows in 2 Enc. Pl. & Prac. 157: "Where the plaintiff obtains the precise relief sought by him in the trial court, he is estopped from prosecuting an appeal from the decision awarding it. But where the judgment, although in his favor, does not afford him the relief claimed, or where he may sustain injury thereby, he may seek its reversal." Jones was a petitioner for the road, and obtained before the commissioners the precise thing which he asked for. He had no adverse interest in any question of damages, but the grounds of his appeal stated in his petition to the justice were wholly public in their nature, and were merely statements, in different form, that the commissioners ought not to have granted the prayer of his petition, and erred in not refusing to grant what he had asked. He was therefore not a person entitled to take an appeal, and his attempt to do so did not confer jurisdiction.

James W. Ellis, the justice of the peace who approved the bond and selected supervisors to hear the appeal, was also a petitioner for the road. Presumably he thought that his personal interests would be advanced and he would be benefited by having it opened. It is a fundamental maxim that it is not within the province of judicial authority for one who is interested in a decision to act in the same matter. Wherever judicial functions are to be exercised, a judicial officer who is interested, however remotely, is prohibited from taking part in their exercise. The rule is not confined to cases where he is a party, or his relations are such that he is entitled to appeal, but if he has a substantial interest in the result he is disqualified, and his action is a mere nullity. *Cooley, Const. Lim.* 411. And so, also, if he is complainant or moving party in a prosecution or proceeding, he cannot act in deciding it. *Cooley, Torts*, 421. In such a proceeding as an assessment for widening a street, where one of the commissioners owned property near the starting point of the improvement, the assessment was held void. *Hunt v. City of Chicago*, 60 Ill. 183.

It is claimed by appellees that the action of Ellis was merely formal, for the purpose of bringing the question before the appellate tribunal. But we do not think that is so. That tribunal was not one established by the law, but one whose members were to be chosen and organized as a tribunal by him. The approval of the appeal bond and the selection of proper officers for hearing the appeal involved the exercise of official discretion, which seems to have been exercised in the line of what may be regarded as his personal interest. He selected one supervisor related by consanguinity to a petitioner who was active

in procuring the road and employed counsel to accomplish the object, and another related by affinity to another petitioner. Ellis was one of those who instituted the proceeding, and had such an interest in securing the affirmance of the order as, in our opinion, disqualified him from acting in a position where absolute impartiality was called for. The incapacity of Jones to appeal and Ellis to act appear on the face of the record, and the objection of the want of jurisdiction can be raised in any forum. It follows that the judgment of the appellate court was right, and should be affirmed. Judgment affirmed.

(178 Ill. 39)

DEWEES v. OSBORNE.

(Supreme Court of Illinois. Feb. 17, 1899.)

APPEAL — WITNESSES — COMPETENCY — PLEDGE OF LIFE INSURANCE POLICIES — RELEASE — BURDEN OF PROOF — PLEADING — ESTOPPEL.

1. An objection that a witness is incompetent cannot be raised for the first time on appeal.

2. Where a wife admits that she assigned life insurance policies as collateral security, and alleges a release of the policies, she is bound to establish the release to entitle her to payment.

3. In support of its claim to insurance policies in favor of a wife, a bank averred that they had been assigned to it by her as security for her husband's debt to it, and that it thereafter paid all premiums thereon. *Held*, that it was sufficient to support a claim thereto as security for renewals of the debt.

4. A debtor of a bank secured from his wife an absolute assignment to it of insurance policies on his life in her favor, which he delivered to it to secure existing and future debts; and she left the policies with the bank for several years, without objection, and it kept them alive until the husband died. *Held*, that she was estopped to deny his authority to pledge the policies.

Appeal from appellate court, Third district.

A bill of Interpleader by the Equitable Life Assurance Society of the United States against Jacob H. Osborne and Harriet B. Dewees and others, and a like bill by the Provident Savings Life Assurance Society of New York against the same parties, were consolidated, and the parties were ordered to interplead. From a judgment of the appellate court reversing a judgment in favor of defendant Harriet B. Dewees (78 Ill. App. 314), she appeals. Affirmed.

M. T. Layman and Patton, Hamilton & Patton, for appellant. John A. Bellatti, Charles A. Barnes, and Richard Yates, for appellee.

CARTWRIGHT, J. The Equitable Life Assurance Society of the United States filed its bill in the circuit court of Morgan county against the appellee, Jacob H. Osborne, receiver of the Central Illinois Banking & Savings Association of Jacksonville, a co-partnership for conducting a bank, and the appellant, Harriet B. Dewees, together with John I. Chambers and William E. Veitch,

former receivers of said bank, alleging that complainant was justly indebted in the amount of two policies of insurance upon the life of Samuel S. Dewees, deceased, for \$5,000 each, and aggregating \$10,000, originally payable by the terms of the policies to the appellant, Harriet B. Dewees, then wife of Samuel S. Dewees, and assigned by her to said William E. Veitch, cashier of said bank, and by subsequent assignments transferred to appellee as such receiver, and that appellant and appellee each claimed the money so due, and complainant asked that said parties be required to interplead and state their respective claims to the money, and that the court would adjudge to whom the same belonged. A like bill was filed by the Provident Savings Life Assurance Society of New York against the same parties, and stating the same facts, except that there was a single policy in that case, for \$10,000. The court ordered the parties to interplead, and the money was deposited in the court by complainants, subject to final decree. Chambers and Veitch disclaimed any interest, and appellant and appellee answered. The bill first mentioned was consolidated with the latter one. Appellant, by her answer as finally amended, admitted the assignment of the policies by her, but claimed that they were assigned as security for certain notes of Samuel S. Dewees then held by the bank, and alleged that the bank repeatedly extended the time of payment of such indebtedness by taking renewal notes therefor without her knowledge or consent, whereby the policies were released as security. Appellee answered, claiming the insurance policies as security for the indebtedness of Samuel S. Dewees to the bank, and alleging that after the assignment the bank had paid all premiums on the policies, and that the receivers had kept up the payment of such premiums, and there had been paid in all \$3,527.05. The cause having been referred to a master, he reported that the policies were assigned to the bank as collateral security for any indebtedness of Samuel S. Dewees to the bank existing at the time of the assignment, or that might thereafter exist; that appellant was not notified of the renewals, and did not consent thereto; but that the policies were not released by the taking of renewal notes in accordance with the contract; and that the moneys due on the policies were to be paid to the appellee to apply on the indebtedness of Samuel S. Dewees. Objections were overruled by the master, and his report was excepted to before the court, which sustained the exceptions of appellant to said findings, and entered a decree that the money should be paid to appellant, except the sum of \$2,749.84 paid by appellee, as receiver, for premiums on the policies and interest thereon, which was to be refunded to him. An appeal was taken by appellee to the appellate court, and that court reversed the decree of the circuit court, and remanded the cause,

with directions to enter a decree ordering the money paid to appellee, as receiver. From that judgment of the appellate court the cause is brought here by this appeal.

The single question in the case is whether the policies assigned to the cashier for the bank were released by the bank taking new notes in renewal and extending the indebtedness from time to time after the assignment. The appellant, widow of Samuel S. Dewees, testified concerning the authority given by her to her husband to pledge the policies, and an argument is made here upon the proposition that she was not a competent witness. That objection was not made before the master or in the circuit court, and it will not be considered here, for the reason that it cannot be made for the first time on appeal. *Doty v. Doty*, 159 Ill. 46, 42 N. E. 174.

On the other side, it is urged that the answer of appellee did not claim the policies as security for the indebtedness as extended and renewed, and therefore the decree of the circuit court was right, and its reversal by the appellate court was wrong. In the original answer of appellant her claim was that the assignment was without any good and valuable consideration, and that it was not binding on her. The first amendment to her answer alleged that the indebtedness of her husband should be credited with the proceeds of a lot of cattle, and that the indebtedness was paid. After the evidence had been taken before the master, and an order entered that the cause had been heard by the court and taken under advisement, she was permitted to make a further amendment. For the purpose of permitting this amendment, the order of the previous term rectifying that the cause was heard and taken under advisement was set aside, and by that amendment she set up the claim of a release by extension of time of payment. As the pleadings then stood, she admitted the assignment, and claimed a release of the policies, and this was affirmative matter, which she was bound to establish to entitle her to the money. If she failed in that, a decree in her favor would be wrong and properly reversed. Besides, we regard the claim to the money stated by appellee in his answer as sufficient.

Taking all the evidence in the record into consideration, it proved the following facts: The Central Illinois Banking & Savings Association was a partnership of a considerable number of persons, who issued what they called "stock," showing the interest of the partners, and carried on a general banking business. Samuel S. Dewees had some interest as one of these "stockholders," as they were called, and was a customer of the bank. On August 19, 1890, he was indebted to the bank, individually and as a member of the firm of Smith & Dewees, to the amount of \$41,142.87. He had been a customer and borrower from the bank, and, under its rules and in accordance with the ordinary custom

of banks, his notes were renewed from time to time, about every three months. The bank was then demanding payment, or security in case it should continue to carry the indebtedness. There were five policies of insurance upon his life, amounting to the face value of \$35,000. Two of these were payable to his estate, and the three in question in this case were payable to his wife, the appellant. He said that he would give the insurance policies as security if the bank would grant the extension and continue the credit, and he would get his wife to assign these policies. The two which were payable to his estate were assigned by him, and have been collected, amounting to \$15,371.60. He went to his wife, the appellant, and told her that he was indebted to the bank, and that if she would assign the policies, "they would not crowd him; would not push him; would extend his time on the note." She then executed legal and formal assignments of the policies to William E. Veitch, and acknowledged them before a notary public. The officials of the bank and appellant did not see each other, or have any negotiation or agreement about the matter, but the business was carried on, on her part, entirely through her husband. He delivered the policies and assignments to the bank as collateral security to secure the indebtedness then existing or to be contracted thereafter in the course of his business with the bank. His agreement was that the collateral was to apply on the indebtedness as a whole, as it might exist at any time, covering the notes, which were to be renewed from time to time, or divided in any way that might best suit the bank, and without regard to the manner in which it was represented, whether by notes then existing, future notes, overdrafts, or otherwise. The insurance companies were notified of the assignments, and assented thereto. The notes were renewed about every four months. Appellant had no notice of extensions, and never gave any consent to them, or to renewal of notes, but left the policies where they were with the bank, and never paid any premiums, or attempted to reclaim them. The policies remained in the possession of the bank, and the indebtedness was continued in different forms until August 25, 1893, when the bank suspended, and the indebtedness had then been reduced to \$26,826.54. During this time the bank paid the premiums, and kept the policies in force; and at the time of the suspension the notes and policies went into the hands of the receivers, who continued to pay the premiums. Dewees died December 19, 1896; and, on proofs of his death being made, the policies matured.

The transaction with the bank was conducted by appellant through her husband, and, so far as the original contract is concerned, the rights of the parties are to be determined from the law of agency. Accord-

ing to her testimony, the express authority given to him was to pledge the policies to secure the then-existing indebtedness; but she executed absolute assignments of the policies to Veitch, the cashier, and acknowledged them before a notary, transferring the entire title and interest therein, without any condition or limitation. The assignments were not limited to any particular purpose, and were free from any condition. These assignments she delivered to her husband, who took them to the bank, and pledged them generally for his indebtedness then existing, or which might thereafter exist, in the usual course of the business as it had been conducted and was to be conducted in the future. By the law of agency, although she did not give her husband express authority to pledge the policies in the way he did to secure the indebtedness in its continued form, she would be liable if the act was within the apparent authority conferred upon him by her act of delivering the policies to him, and making and delivering to him the assignments. To permit her to dispute such authority as she appeared, from her own act, to have given him, would be to enable him to commit a fraud upon innocent persons, and could not be allowed. There was nothing on the face of the assignments which could give the bank notice that the power was less than what it appeared to be, which was to transfer the entire interest or any lesser interest; and it seems to us that she justified the bank, which took the assignments in good faith, in believing that she had given her husband power to pledge them according to his proposal to and agreement with the bank. Under such circumstances she is bound by his act. 1 Am. & Eng. Enc. Law (2d Ed.) 989; *Norwood v. Guerdon*, 60 Ill. 253.

We think that other facts should also have weight in determining the rights of the parties. These policies were of no value, except as they were kept in force by the payment of premiums; and for more than six years appellant permitted the bank, or its receivers, to pay the premiums, and keep the policies in force, and retain possession, under the assignment which she had made. She did nothing to reclaim the policies, and either gave no attention whatever to keeping them alive, or, if she did, knew that the bank was doing it, and making payments, on the faith of her assignment. She allowed the bank and the receivers to pay a large sum of money in premiums, covering a period of many years after the first extension of the indebtedness, and we think her conduct would justify an inference that she knew the policies were being used to secure the indebtedness during that time, and tacitly assented to such use, and, in equity, should be estopped from now making a claim that they had been released. The judgment of the appellate court is affirmed. Judgment affirmed.

(178 Ill. 122)

LAWRENCE v. OGLESBY.

(Supreme Court of Illinois. Feb. 17, 1899.)

APPEAL—RECORD—FINDING—EVIDENCE—PROMISE—CONSIDERATION.

1. The opinion of the appellate court is not a record on which errors can be assigned on writ of error or appeal to the supreme court.

2. No proposition of law having been presented at the trial, the findings of the trial and appellate courts are conclusive on the supreme court on the facts.

3. The will and the inventory of testator's estate are admissible in an action by testator's daughter based on defendant's promise to testator to pay plaintiff certain money; the request of testator that the payment be made, and defendant's promise to make it, being made because testator had made a will under which defendant was a beneficiary.

4. Where testator, who had promised to expend \$1,500 for his daughter, G., on being seriously injured requested others than his son and another to retire, and then said to his son that he had made a will, and that he wanted him to pay G. \$1,500, and asked him if he would do it, there is a consideration for the son's promise to do so.

Appeal from appellate court, Third district.

Action by Georgia Oglesby against Arthur Lawrence. From a judgment of the appellate court affirming a judgment for plaintiff (75 Ill. App. 669), defendant appeals. Affirmed.

Oscar Allen, for appellant. A. L. Anderson and Beach & Hodnett, for appellee.

PHILLIPS, J. Appellant, a brother of appellee, was, with the latter, a legatee under the will of Alexander Lawrence, who had by his will devised to appellant property of the value of about \$25,000, subject to a charge in favor of another brother amounting to about \$3,500. By the will a life estate in land of about the value of \$7,000 was devised to appellee, with remainder to her children who attained the age of 21. In his lifetime, Alexander Lawrence promised his daughter, the appellee, to build on the land so devised to her a house of the value of \$1,500. On or about June 29, 1896, Alexander Lawrence received a serious injury, which caused his death about five weeks thereafter. Within two hours after receiving the injury, he asked to be left alone with Mrs. Turner, his sister-in-law, and the appellant. Mrs. Turner testifies: "He asked all to go away, except Arthur and myself. He said to me, 'I want you to hear what I am going to say;' then, 'I have made my will;' then to Arthur, 'I want you to pay Georgia \$1,500 not mentioned in my will.' He asked Arthur if he heard that. He bowed his head, and said he did. He says, 'You hear that, Frank?' I said, 'Yes, sir.' He said to Arthur again, 'You will do that Arthur?' and Arthur said that he would. This was an hour or two after the injury. My given name is Frances. I am called Frank in the family." A part of this conversation was overheard by the appellee. The appellant admits the conversation was had as testified to by Mrs. Turner,

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but claims that subsequent to that time—about two or three weeks afterwards—he had another conversation with his father, which he details, and which, as shown by the abstract, was as follows: "Now, you may state, Mr. Lawrence, what was said in that conversation." To this question plaintiff objected. The court overruled the objection, and plaintiff excepted, and the witness answered: "My best recollection is that father broached the subject in regard to this \$1,500, and I asked him, I says: 'As I haven't the money,' I says, 'do I have to mortgage the land, or do I have to borrow the money, to pay this?' He says, 'No, sir,' he says; 'as you get the money off of the farm, you pay it to them.' I says, 'I will.' My sister came in there when I told my father that I would, and I told her in just a little bit afterwards what it was that I had agreed to do. I agreed to pay the \$1,500. I don't know that my father said anything more,—only just what I have told. I have not at any time since coming into possession of those lands under my father's will been able to raise the \$1,500 for my sister without incumbering the property." The appellee brought an action at law to recover the \$1,500, and filed a declaration containing the common counts and a special count. The plaintiff recovered in the trial court, and on appeal to the appellate court for the Third district that judgment was affirmed. No propositions were asked or held on the trial. By the assignment of errors on the record of the court, it is claimed error was committed in admitting improper evidence, and in excluding proper evidence, and in the finding and judgment for the plaintiff. No other questions were presented by the assignments of error on that record.

On this appeal from the appellate court the appellant assigns as error that the appellate court erred (1) in affirming the judgment of the circuit court; (2) in not holding that the count of the declaration relied upon shows no cause of action cognizable at common law; (3) in holding that a consideration was shown for the alleged promise; (4) in adopting in its opinion rules to govern its decision which, however applicable in equity, are not applicable at common law; (5) in holding the statement of facts in the opinion on which it bases its decision shows a legal cause of action; (6) in holding that any consideration is shown by the evidence for the alleged promise; (7) in holding as unworthy of belief witnesses against whom there is no impeaching evidence; (8) that the court erred in assuming as the ground of its opinion that certain things were evident to the circuit court which the record shows were not before the circuit court at all, thus assuming original instead of appellate jurisdiction; (9) that the court erred in declining to pass upon legal questions submitted to it for its decision; (10) that the court erred in assuming questions of fact as a reason for not passing upon legal questions submitted for decision; (11) that

the court erred in not holding that improper evidence was admitted for plaintiff in the circuit court.

The opinion of the appellate court is not a record on which errors can be assigned on writ of error or appeal to this court, as has been frequently held; and this disposes of the fourth, fifth, seventh, eighth, and tenth assignments of error.

No propositions of law having been presented, the finding of the trial and appellate courts is conclusive on this court on the facts; and for this cause the third and sixth assignments cannot be considered.

The only objection to the admission of evidence urged in the brief of appellant was in admitting the will and inventory of the estate of Alexander Lawrence. The basis of the appellee's claim was by reason of a promise made by the appellant because of the fact that a will had been made under which appellant was a beneficiary; and no conclusion can be had, other than that the request made by Alexander Lawrence and the promise of appellant were because of that fact alone. It would be fatuous to attempt to assign any other reason for either the request or promise. By the affirmance of the judgment the appellate court necessarily held that improper evidence was not admitted. In that view we concur. The will and inventory were clearly competent evidence. This disposes of the ninth and eleventh assignments of error.

The first and second assignments of error can be considered together. Appellant insists that no consideration existed for the promise, and that the same is a nullity, as attempting to enforce a parol trust in opposition to the terms of a will; that no spoken words can revoke or annul a will, or a verbal agreement change any testamentary terms; that there is no remedy by an action at law, even conceding the facts, but that resort must be had to a court of equity. The evidence is clear that the father stated he had made a will, and desired his son, the appellant, to pay appellee \$1,500. Prior to the time of his injury he had promised appellee that he would expend that amount for her benefit. He recognized that compliance with this promise was a duty and an obligation on his part. In the shadow of death he remembered it, and desired his promise should be carried out. His will was merely ambulatory, and could be changed by him. He knew he had a right to do this, and the son knew it. With this knowledge he retained his sister-in-law and the son near him, and said: "I have made a will. I want you, Arthur, to pay Georgia \$1,500. Will you do it?" He recognized a moral obligation as existing in consequence of his promise to his daughter. "When a man is under a moral obligation which no court of equity can enforce, and promises, the honesty and rectitude of the thing is a consideration." *Hawkes v. Saunders*, Cowp. 290. Recognizing that obligation, and exact-

ing a promise from his son to carry out that promise, the promise of the son has for its consideration the honesty and rectitude of the duty of compliance. Promises of this character have frequently been recognized as enforceable, and as founded on a sufficient consideration. *Drakeford v. Wilks*, 3 Ark. 539; *Barrow v. Greenough*, 3 Ves. 152; *Byrn v. Godfrey*, 4 Ves. 6; *Stickland v. Aldridge*, 9 Ves. 516; *Russell v. Jackson*, 10 Hare, 204; *Dutton v. Pool*, 1 Vent. 318; *Knowles v. Erwin*, 43 Hun, 150; *Hind v. Holdship*, 2 Watts, 104; *Williamson v. Yager*, 91 Ky. 282, 15 S. W. 660; *Hawkes v. Saunders*, supra. To hold that the son could not be required to comply with such promise, as not being based on a sufficient consideration, would be to disregard the fact that the will was merely ambulatory, and could be changed by the testator so long as he was of sound and disposing mind, and that he must have known that fact, and would be, in effect, to aid the appellant in the perpetration of a fraud on appellee. *Gilpatrick v. Glidden*, 81 Me. 137, 16 Atl. 464; *Drakeford v. Wilks*, supra; *Russell v. Jackson*, supra. It is not a change of testamentary terms by a verbal agreement, nor a revocation of a will by spoken words; neither is it an attempt to ingraft a parol trust in opposition to the terms of a will. The will remained as it was written. It was not changed because of the promise. Neither can it be doubted that, had the promise not been made, it would not have remained as written. There was here a full and sufficient consideration for the promise. That promise was for the benefit of appellee. Where a contract is entered into by one with another for the benefit of a third person, such third person may maintain an action in his own name for a breach thereof. Such is the well-recognized rule, and one not an open question in this state. *Bristow v. Lane*, 21 Ill. 194; *Insurance Co. v. Olcott*, 97 Ill. 439; *Eddy v. Roberts*, 17 Ill. 505; *Snell v. Ives*, 85 Ill. 279; *Beasley v. Webster*, 64 Ill. 458. In the enforcement of such right on such a promise resort may be had to a court of law. It is not necessary to resort to chancery. The common count for money had and received for the use of another is an equitable form of common-law pleading, and of itself is sufficient on which to authorize the admission of this evidence and sustain a recovery. *Eggleston v. Buck*, 24 Ill. 262. The judgment of the appellate court for the Third district is affirmed. Judgment affirmed.

(178 Ill. 103)

KEISTER v. KEISTER et al.

(Supreme Court of Illinois. Feb. 17, 1899.)
WILLS—RECORD OF PROBATE—CONTEST IN CHANCERY—LIMITATIONS—EFFECT OF PRAYER FOR PARTITION.

1. A bill for partition, filed by one who claims to be a tenant in common with defendant on the ground that a will giving the land to defendant was obtained by fraud and undue in-

fluence, is within the statute of wills (Rev. St. c. 148, § 7), providing that a bill to contest a will in chancery must be filed within three years after the probate of such will.

2. An indorsement on the back of a will: "Probate of Will, Macon County Court. In the Matter of the Last Will," etc.; "Filed in the county court this 10th day of November;" "Recorded in Will Records, page 202,"—followed by the oath of the executors, subscribed and sworn to in open court before the clerk, is sufficient to show that the will was properly admitted to probate, although no formal order to that effect was entered.

3. Where jurisdiction of an estate was taken by a probate court under a will, it will be presumed that it had been settled in pursuance of that will.

4. That the record of the probate of a will, which is indorsed as having been filed and recorded in the county court, contains no formal order to the effect that the will has been admitted to probate, will not prevent the running of Rev. St. c. 148, § 7, providing that a bill in chancery to contest a will must be filed within three years after probate of such will.

Error to circuit court, Macon county; Edward P. Vall, Judge.

Bill for partition by Julius Keister against John F. Keister and others. From an order sustaining a demurrer to the bill, plaintiff brings error. Affirmed.

Le Forgee & Lee, for plaintiff in error.
Johns & Housum, for defendants in error.

WILKIN, J. At the January term, 1897, of the circuit court of Macon county, Julius Keister, plaintiff in error, filed his bill for the partition of certain lands in that county; alleging that by reason of the death of his father, Peter Keister, on November 5, 1891, he became the owner of the lands in question as tenant in common with his brother, John F. Keister, subject to the dower and homestead rights of Susan Keister, the surviving widow. The bill charges that, by means of fraud and undue influence on the part of John F. Keister and Susan Keister over the mind of the deceased, they induced him to make a will which practically disinherited plaintiff in error, and that in pursuance of their fraudulent designs the purported will was on the 10th day of November, 1891, presented for probate in the county court of Macon county, and was improperly admitted to record, and that letters testamentary were granted thereunder. It is alleged that the will thus obtained and improperly probated constitutes a cloud upon complainant's title, which he asks to have removed, and that partition of the premises be decreed. To this bill the defendants filed a general demurrer, which was sustained. From that ruling complainant brings the cause to this court on writ of error.

While this is called a "bill for partition," it clearly shows on its face that the complainant can only have that relief upon an order setting aside the will of his father, Peter Keister. Therefore, unless sufficient facts are properly alleged to entitle him to the latter relief, the demurrer was properly sustained, and the decree below must be affirmed. On

this branch of the case the bill is plainly one to contest said will by bill in chancery. The right to that relief is purely a statutory right, and can only be availed of under the provisions of section 7 of the statute of wills (Rev. St. c. 148). *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166; *Wheeler v. Wheeler*, 134 Ill. 522, 25 N. E. 588; *Jele v. Lemberger*, 163 Ill. 338, 45 N. E. 279.

It is alleged in the bill that the will was presented for probate to the county court of Macon county November 10, 1891, and letters testamentary in the estate were issued to the executors named in the will. The bill, however, was not filed until the 22d day of May, 1897. One of the requirements of section 7, supra, is that a bill to contest a will in chancery must be filed within three years after the probate of any such will. Here more than six years have intervened, and, as held in *Luther v. Luther* and *Wheeler v. Wheeler*, supra, the court was without jurisdiction to entertain the bill. It is not shown by allegations, nor is it even claimed in the argument, that the complainant was at any time under either of the disabilities named in section 7 of the statute.

An attempt is made to escape the foregoing conclusion by insisting that it is shown by the bill that the will was not properly admitted to probate. The allegations in that regard are as follows: "That upon the 11th day of November, 1891, John F. Keister and Jacob S. Keller filed their certain petition in the county court of Macon county for letters testamentary in the estate of Peter Keister, deceased; that, the said cause coming on to be heard, letters testamentary were improperly granted to the said John F. Keister and Jacob S. Keller as executors of the last will and testament of the said Peter Keister, deceased; that upon the 10th day of November, 1891, the said will, purporting to be the last will and testament of the said Peter Keister, deceased, was presented for probate in the county court of Macon county, Illinois; that at the time said alleged will was so presented for probate no real proof or testimony was offered or tendered as to the execution of said will; and that the only proof so presented was a certain paper purporting to be proof, a copy of which is hereto attached, marked 'Exhibit B,' and made a part of this bill of complaint." The allegations that the will was not properly probated, and that letters testamentary were improperly granted, are the mere conclusions of the pleader, and are not supported by the facts. Exhibit B, referred to, shows that the witnesses to the will appeared at the November term, 1891, of the Macon county court, and made oath to the execution of the instrument; and, while the oath is not literally in the language of the statute, we think it is in substantial compliance therewith. On the back of the will and attestation by the witnesses was indorsed: "Probate of Will, Macon County Court, November Term, 1891. In the Matter of the

Last Will and Testament of Peter Keister, Deceased. Filed in the county court this 10th day of November, 1891. George P. Hardy, Clerk." "Recorded in Will Records, page 202." Then follows the oath of the executors, dated November 11, 1891, subscribed and sworn to in open court before the clerk, which was duly filed. It does thus appear with reasonable certainty that the will was in fact admitted to probate, although no formal order to that effect was entered, as should have been done. Certainly, enough is here shown to establish the fact, in the absence of an allegation to the contrary, that the estate of Peter Keister was taken jurisdiction of by the probate court under the will, and it must be presumed that in due course of law it has been settled in pursuance of that will. See *Counts v. Wilson* (S. C.) 23 S. E. 942; In re *Warfield's Will*, 22 Cal. 51.

But, even if it could be said that the record of probate as here shown would be insufficient in a direct attack upon the same, nothing, we think, is clearer than that in this collateral proceeding it must be held sufficient. The wisdom of the statute fixing a time within which bills in chancery may be filed to contest and set aside wills, testaments, and codicils, and of that well-settled rule of law which permits attacks upon the proceedings of courts of general jurisdiction for mere irregularities only by a direct proceeding for that purpose, is forcibly illustrated by this bill. To permit the complainant now to come into a court of equity and attack this will, or its probate, on the facts alleged, would be inequitable, and wholly unauthorized by the law. There are many allegations in the bill which seem to have no relevancy to the legal or equitable rights of the complainant, even though he had the right to file the bill when he did. In our view of the case, section 7, *supra*, is a complete bar to the bill; and, as this appears upon the face of it, the defect was properly taken advantage of by demurrer. The circuit court committed no error in sustaining that demurrer and dismissing the bill. Judgment affirmed.

(178 Ill. 72)

BAILEY v. SMITH.

(Supreme Court of Illinois. Feb. 17, 1899.)

TAXATION—NOTICE OF PURCHASE—CONSTRUCTION—TAX TITLE—VALIDITY—STATUTORY REQUIREMENTS—COMPLIANCE.

1. A notice by a purchaser at a tax sale that he had purchased certain property described, "for the taxes, special assessments, interest, and costs," does not show whether the land was sold for general taxes or special assessments, as required by Revenue Act, § 216, and a title based on such notice is void.

2. Strict compliance with all statutory requirements is necessary to the creation of a valid tax title.

Appeal from circuit court, Adams county; J. C. Broady, Judge.

Ejectment by Oliver J. Bailey against Thomas B. Smith. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action of ejectment brought by appellant against appellee, in the circuit court of Adams county, to obtain possession of certain lands in that county and in the Indian Grave drainage district, to which lands appellant claims title under a tax deed issued in pursuance of a tax sale on June 2, 1894. A jury was waived by agreement, and the case was tried by the court at the March term, 1897, resulting in a judgment for appellee. Appellant paid the costs, and took a new trial, under the statute; and at the June term, 1898, at a trial by the court, judgment was again rendered in favor of the appellee and against appellant for costs. From that judgment this appeal is now prosecuted.

G. Edmunds, for appellant. James N. Sprigg, for appellee.

WILKIN, J. It appears from a stipulation on file that the tax deed offered in evidence by appellant in support of his claim to possession of the lands in question was given under a sale for delinquent special assessments in the Indian Grave drainage district, that all state and county taxes had been paid in full, and that only the special assessments for the years 1892 and 1893, and the costs accrued thereon, were delinquent. The chief defense interposed to appellant's action is that the notice given by him in attempted compliance with section 216 of the revenue act is defective, in that it fails to show whether the lands in question were sold for delinquent general taxes or for delinquent special assessments. The notice with reference to this land is as follows: "That at said sale on June 2, 1894, I purchased eighty acres, N. $\frac{1}{2}$ N. W. qr. sec. 28, township 1 north, of range 9 west, in Adams county, Illinois, for the taxes, special assessments, interest, and costs due thereon for the years 1892 and 1893, respectively, which tract was taxed for each of said years in the name of T. B. Smith, and was specially assessed in the name of James Mulligan by order of the county court of Adams county, Illinois, confirming the first assessment of the Indian Grave drainage district, entered April 20, 1880, and that said tract was also specially assessed in the name of James Mulligan by order of the county court of Adams county, Illinois, confirming the second assessment of the Indian Grave drainage district of Adams county, Illinois, entered October 3, 1881, upon which two assessments installments of interest were due, assessed by the commissioners of said drainage district in the name of Tom B. Smith, for the years 1892 and 1893, respectively, one for the year 1892, due September 1, 1892, and one for the year 1893, due September 1, 1893, and also assessment of said drainage district for annual amount of benefits thereon for repairs, called 'repair tax,' assessed by said commissioners in the name of Tom B. Smith for the year 1893, due September 1, 1893, for the year ending with the July term, 1894, of said county court, and that the time of redemption from said sale will expire

with June 2, 1896." It will be seen that the notice is for "taxes, special assessments, interest, and costs," while the land was sold for special assessments only. It has been repeatedly held by this court, in considering this statute, that the notice required by section 216 above referred to must show for what the lands were sold,—whether for general taxes or for special assessments. *Gage v. Waterman*, 121 Ill. 115, 13 N. E. 543; *Stillwell v. Brammell*, 124 Ill. 338, 16 N. E. 226; *Gage v. Du Puy*, 137 Ill. 652, 24 N. E. 541, and 26 N. E. 386. See, also, *Gage v. Banl*, 141 U. S. 344, 12 Sup. Ct. 22. It is unnecessary to enter into an extended discussion of the notice in this case, but we are satisfied that a careful examination of it does not relieve one from doubt as to whether appellee's lands were sold for general taxes or for special assessments. The title to be made under a tax deed is *stricti juris*. All the requirements of the statute must be clearly and strictly complied with. We think the notice in this case defective. The disposition of this point makes it unnecessary to consider other questions urged on this appeal. The judgment of the circuit court will be affirmed. Judgment affirmed.

(178 Ill. 235)

CITY OF JACKSONVILLE et al. v. HAMILL et al.

(Supreme Court of Illinois. Feb. 17, 1899.)

STREET PAVING—ASSESSMENT FOR BENEFITS—REDUCTION—AUTHORITY TO DISTRIBUTE DEFICIENCY—CONCLUSIVENESS OF APPORTIONMENT TO CITY.

1. Under Act June 14, 1897, §§ 38, 39 (providing for the appointment of a suitable person to assess the cost of certain paving, and that he shall apportion the cost between the city and the property benefited), the act of the commissioner in fixing the amount which the city is to pay is conclusive, and cannot be increased by the court, in subsequent proceedings to reduce the amount assessed for benefits against certain property.

2. Under Act June 14, 1897, § 50 (providing that whenever the amount of any assessment for benefits shall be reduced, so that there shall be a deficiency in the total amount remaining assessed, the court may distribute such deficiency upon the other property in the district assessed), before the court can distribute upon the other property the amount which a jury deducted from certain assessments, it must ascertain by evidence that the total assessment, after such deduction, will not be sufficient to complete the improvement.

Appeal from circuit court, Morgan county; Charles A. Barnes, Judge.

Appeal by the city of Jacksonville and Isaac L. Morrison from an order overruling objections to the distribution of a reduction in a paving assessment, made on objections of H. M. Hamill and others. Reversed.

This was a proceeding in the county court of Morgan county, under the provisions of the act of the legislature entitled "An act concerning local improvements," approved June 14, 1897, in force July 1, 1897, for the construction of a brick street pavement on South Diamond street, in the city of Jack-

sonville, by special taxation of contiguous property, except as to intersections of cross streets and alleys, the expense of the paving as to cross streets and alleys to be paid for by general taxation. On March 17, 1898, a petition was presented to the board of local improvements of said city, signed by the owners of a majority of the real estate or property abutting upon said street proposed to be improved. The board of local improvements, after giving notice of the time and place for hearing, caused to be prepared and presented to the city council, at its regular meeting on August 4, 1898, its recommendation of the construction of said improvement, together with the estimate of cost of the improvement as prepared by the engineer of the city, and also an ordinance providing for the construction of the improvement. The estimate of cost was approved, and the recommendation concurred in, and the ordinance was duly passed by the council. On August 15, 1898, the city attorney, as directed by the ordinance, filed a petition in the county court of said county asking for the confirmation of a special tax for the construction of the improvement, as provided by law. A commissioner was appointed for the purpose of preparing a special tax roll, as provided by law; and, the necessary steps having been taken, the assessment roll was returned into court on the 17th day of August, and notices of time and place of application for confirmation of the assessment roll were given, as provided by law. Objections were filed to the confirmation of the assessment roll as returned by the commissioner, by H. M. Hamill, Martha Tapp, Mary Fitzgerald, Thomas White, Jeanette Watkinson (widow and heir at law of Isaac Watkinson, deceased), Libby Hatfield, Mrs. L. B. Mack, Richard T. Mathews, John W. Muse, George Washington, Margaret Kennedy, Pat Duffy, Thomas White, Ruby White, Albert White, Frances Rightmeier (heirs at law of John C. White, deceased), Thomas Harrison, and William S. Wyatt. These objectors filed seven objections. The fifth was that the property of the respective objectors is not benefited to the amount of their respective assessments as returned by the commissioner. The sixth was because the property of each of the objectors is assessed more than its proportionate share of the cost of said improvement. Objections 1, 2, 3, 4, and 7 were overruled, and a jury was called to try the issue raised by the fifth and sixth objections. By the verdict of the jury, there was a reduction of \$2,991.78, in the aggregate, from the amount of the assessment as returned by the commissioner, and the objectors moved the court to distribute said amount of reduction upon the other property. The petitioner the city of Jacksonville filed an objection in writing, supported by affidavit of C. W. Brown, to the distribution of said reduction, on the ground there was not a deficiency remaining in the amount assessed with which

to construct the proposed improvement, and objected to placing any of such amount upon the city as public benefits, because the distribution made by the commissioner between the public and private property was final. Isaac L. Morrison, one of the defendants below, and one of the appellants here, objected to the placing of any of said reduction upon his property, because there was no evidence that his property would be specially benefited to the additional amount, and because the notices required by law in such cases had not been given. The court overruled the objections of the city of Jacksonville, and also the objections of Isaac L. Morrison, and placed one-half of the amount of the reduction caused by the jury trial upon the city of Jacksonville as public benefits, and the other one-half upon the property between Grove and Edgmon streets, except the property objected for, in proportion to the assessment made by the commissioner. From this ruling of the court the city of Jacksonville and the said Isaac L. Morrison appeal.

J. J. Reeve and Isaac L. Morrison, for appellants. Edward P. Kirby and H. G. Whitlock, for appellees.

CRAIG, J. (after stating the facts). The first question presented for consideration by the record is whether the court was authorized to require the city of Jacksonville to pay any part of the deficiency resulting from the verdict of the jury. Section 38 of the act under which the proceeding was had provides for the appointment of a suitable person by the court to make an assessment of the cost of the improvement upon the petitioner and the property benefited. Section 39 provides that such officer shall estimate what proportion of the total cost of such improvement will be of benefit to the public, and what proportion will be of benefit to the property to be benefited, and to apportion the same between the city, village, or town and such property, so that each will bear its relative equitable proportion. This section of the statute is a substantial copy of paragraph 139 of chapter 24 of the Revised Statutes; and, under that paragraph of the statute, we held in a number of cases that the action of the commissioner was conclusive in so far as it fixed the relative amount of the cost of the improvement that is to be respectively borne by the municipality and the owners of the property benefited. *Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471; *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731. Here the person appointed by the court to make the apportionment apportioned to the city of Jacksonville, as the amount to be borne by it, the sum of \$2,956.83, and the amount to be assessed upon the property benefited the sum of \$29,904.64. The amount that the city of Jacksonville should pay having been fixed and determined in the mode provided by law, the action of the commis-

sioner in fixing the amount was final and conclusive, and the court had no power, at any subsequent stage of the proceedings, to increase the amount it was required to pay. As has been seen, by the verdict of the jury there was a reduction of \$2,991.78 from the amount of the assessment as returned by the commissioner, and thereupon the objectors moved the court to distribute the amount upon the other property. This motion was resisted, but the court, without hearing any evidence on the motion, allowed it, and placed one half of the amount of the reduction on the city as public benefits, and the other half upon the property between Grove and Edgmon streets, except the property objected for. Section 50 of the act provides: "Wherever, on a hearing, * * * the amount of any assessment shall be reduced or canceled, so that there shall be a deficiency in the total amount remaining assessed in the proceeding, the court shall have the power, in the same proceeding, to distribute such deficiency upon the other property in the district assessed, in such manner as the court shall find to be just and equitable, not exceeding, however, the amount it will be benefited by said improvement. In case any portion of such deficiency be charged against such property not represented in court, a new notice, of the same nature as the original notice, shall be given in like manner as the original notice, to show the cause why the said assessment, as thus increased, should not be confirmed, and the owners of or parties interested in such property shall have the right to object in the same form and with the same effect as in case of the original assessment."

Where a verdict has been returned, as was the case here, in which the amount of the assessment has been reduced, the first question to be determined by the court is whether there is a deficiency in the amount required to construct the improvement; and upon this question the court may hear competent evidence, and, if it appears from the evidence there will be enough left to complete the improvement after deducting the amount of the reduction made by the jury, there is no deficiency, within the meaning of the statute, and no distribution should be made of any supposed deficiency, either upon the municipality or any property owner. We think a fair construction of the language of the statute is that there must be a deficiency in the amount of the assessment with which the improvement is to be constructed, after deducting therefrom the amount of the reduction made by the jury. The mere fact that the jury has reduced the assessment on certain property is not enough to establish a deficiency. Before the court should proceed to make a distribution of a supposed deficiency, it should appear from the evidence that there was not a sufficient amount of the assessment left to complete the improvement. Here no such proof was made by the

objectors who entered the motion, but, on the other hand, the city, in opposition to the motion of the objectors, filed the affidavit of the civil engineer of the city of Jacksonville tending to prove that there was no deficiency,—that there was more money still remaining assessed than was necessary to construct the improvement. If such was the case, as the evidence tended to prove, the court had no authority to enter the order requiring the city to pay one half of the reduction caused by the jury trial, and the property between Grove and Edgmon streets, except the property objected for, to pay the other half. Indeed, the court had no authority to enter the order unless the evidence before the court established the fact that there was a deficiency.

It is also claimed in the argument that the court erred in placing a deficiency against the property not objected for without giving notice to these property owners, and also in failing to place the deficiency upon all property along the line of the improvement. It will not be necessary to pass upon these questions in this case. There was here no deficiency, and the determination of that question necessarily settles the entire controversy. The assessment roll as returned by the commissioner should have been confirmed, except where it was reduced by the verdict of the jury on property of certain objectors, and in these cases the assessment roll should have been modified to conform to the verdict of the jury, and the entire assessment roll, as thus modified, should have been confirmed. The judgment will be reversed, and the cause remanded, with directions to enter a judgment of confirmation as herein indicated. Reversed and remanded.

(178 Ill. 132)

CHICAGO & E. I. R. CO. v. ROUSE.

(Supreme Court of Illinois. Feb. 17, 1899.)

CONFLICT OF LAWS—NEGLIGENCE OF FELLOW SERVANT—LIABILITY.

Right of action for injury to employé occasioned by a fellow servant, occurring in a state the statute of which makes the master liable, will be enforced in a state the laws of which do not make the master liable in such case; the doctrine of respondeat superior, as so enlarged, not being so repugnant to good morals or natural justice, or so prejudicial to the best interests of the people, that maintenance of the action should not be allowed.

Appeal from appellate court, Third district.

Action by R. A. Rouse, administrator of George W. Brewer, deceased, against the Chicago & Eastern Illinois Railroad Company. From a judgment of the appellate court affirming a judgment for plaintiff (78 Ill. App. 286), defendant appeals. Affirmed.

Will H. Lyford, H. M. Steely, and Albert M. Cross, for appellant. Tilton & Cundiff, for appellee.

BOGGS, J. George W. Brewer, deceased, appellee's intestate, during his lifetime and at the time of his death, was a resident of Vermillion county, in this state. The appellant, a corporation organized under the laws of this state, was engaged in operating its trains over its own lines and leased lines of railway in the states of Illinois and Indiana. Said intestate was employed as a fireman on one of appellant's locomotive engines, and, while engaged in the discharge of his duty in that capacity on an engine drawing a passenger train along the line of appellant's road in the state of Indiana, was killed by a collision between the said engine and train upon which he was employed, and another engine, drawing a freight train, controlled and operated by other servants of the appellant company upon its said line of road in the state of Indiana. This was an action on the case, commenced in the circuit court of Vermillion county, Ill., by the appellee, administrator of the said Brewer, to recover damages for the benefit of those entitled to receive distribution of the personal effects of the said deceased.

The declaration, in some of the counts, charged that the collision was occasioned by the negligence of the conductor of the freight train, and, in other counts, that the trains collided because of the negligence of the engineer of the freight train, and counted and predicated the right of recovery upon an alleged liability created by the statute of the state of Indiana in such cases, and set forth the statute of such state, and such statute was produced in evidence. Section 7083 of the Indiana statute (Burns' Rev. St. 1894, § 7083) provides that where the death of an employé of any railroad company or other corporation is caused by the negligence of any person in the employ or service of such corporation who has charge of any locomotive engine or train of cars upon any railroad, or by the negligence of any fellow servant engaged in the same common service in any of the several departments of such corporation, while the employé so killed is obeying or conforming to the orders of some superior having authority to direct at the time of such death, the railway company or other corporation operating such locomotive engine or train shall be liable to respond to the personal representatives of such deceased in damages in a sum not exceeding \$10,000, to be distributed to the widow and children, if any, or next of kin, of the deceased, in the same manner as personal property of the deceased. A plea of not guilty was filed, and the cause submitted to and heard by a jury, who returned a verdict in favor of the appellee administrator in the sum of \$5,000. The judgment was affirmed by the judgment of the appellate court for the Third district on appeal, and the appellant company has prosecuted a further appeal to this court.

The effect of the statute of Indiana is to abrogate the doctrine which, it seems to be

conceded, would otherwise be applicable to the facts of this case,—that the appellant company, as employer, is not to be held liable for an injury, fatal or otherwise, to an employé which was occasioned by the negligence of a fellow servant of such employé. The principal question arising is whether this statute will be applied and the doctrine thereof enforced in an action instituted and maintained in the courts of this state, or whether the law as it exists in this state will govern and control. Actions not penal, but for pecuniary damages for torts or civil injuries to the person or property, are transitory, and, if actionable where committed, in general may be maintained in any jurisdiction in which the defendant can be legally served with process. We think it well settled that, without regard to the rule which may obtain as to a cause of action which accrued under the laws of a separate and distinct nation, a right of action which has accrued under the statute of a sister state of the Union will be enforced by the courts of another state of the Union, unless against good morals, natural justice, or the general interest of the citizens of the state in which the action is brought. *Dacey, Conf. Laws*, pp. 667–669, par. 1; *Herrick v. Railway Co.*, 31 Minn. 11, 16 N. W. 413; *Dennick v. Railroad Co.*, 103 U. S. 11; *The Scotland*, 105 U. S. 29; *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978; *Higgins v. Railroad Co.*, 155 Mass. 176, 29 N. E. 534; *Walsh v. Railroad Co.*, 160 Mass. 571, 36 N. E. 584; *Burns v. Railroad Co.*, 113 Ind. 169, 15 N. E. 230; *Morris v. Railway Co.*, 65 Iowa, 727, 23 N. W. 143; *Leonard v. Navigation Co.*, 84 N. Y. 48; *Railway Co. v. Lewis*, 89 Tenn. 235, 14 S. W. 603; *McLeod v. Railroad Co.*, 58 Vt. 726, 6 Atl. 648.

It is argued by counsel for appellant that an action cannot be maintained in this cause in our courts, for the reason, as alleged, that the laws of the two states are materially variant, it being, as counsel insist, against natural justice and the established public policy of this state to hold an employer liable for injuries inflicted upon an employé by a fellow servant. This position finds support in the opinion rendered by the supreme court of Wisconsin in *Anderson v. Railway Co.*, 37 Wis. 321, and also in expressions employed in opinions rendered in cases in the courts of England. But such is not the prevailing doctrine in the courts of this country. The supreme court of the state of Minnesota, having before it the precise point in the case of *Herrick v. Railway Co.*, 31 Minn. 11, 16 N. W. 413, gave forcible and clear expression of that which we conceive to be the correct doctrine. In that case the injury was inflicted in the state of Iowa, and was actionable under a statute of that state making railroad corporations liable for damages sustained by an employé in consequence of the negligence of a fellow servant. The rule of nonliability for injuries caused by a fellow servant obtained in Minnesota, where the action was

brought. The court said: "The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same whether the right of action be *ex contractu* or *ex delicto*. The defendant admits the general rule to be as thus stated, but contends that, as to statutory actions like the present, it is subject to the qualification that, to sustain the action, the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. We admit that some text writers, notably Rorer on *Interstate Law*, seem to lay down this rule, but the authorities cited generally fail to sustain it. * * * But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the law of the state where made. To justify a court in refusing to enforce a right of action which accrued under the laws of another state because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens." The same question engaged the attention of the supreme court of the state of Massachusetts, in *Walsh v. Railroad Co.*, 160 Mass. 571, 36 N. E. 584, and it was said: "If, however, we assume, as was ruled and as we do assume, that, if the accident had happened in this state, the plaintiff could not have recovered, it is argued he cannot recover now. As between the states of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties." In *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup.

Ct. 978, the observations of the supreme court of the state of Minnesota in *Herrick v. Railway Co.*, supra, were quoted with approval, and the principles of that case applied. And in *Railroad Co. v. McDuffey*, 25 C. C. A. 247, 79 Fed. 934, it was ruled the responsibility of the master for the act of a fellow servant is governed by the law of the place where the cause of action arose. In *Railway Co. v. Lewis*, supra, the suit was brought in Tennessee to recover damages for injuries received by an employé in the state of Georgia. The trial court charged the jury the plaintiff could recover, though guilty of contributory negligence. Such was the law of Tennessee, the place of the forum. The rule in the state of Georgia, the place where the injury was received, precluded recovery if the neglect of the person injured contributed to his injury. The court held the law of the state of Georgia controlled, and that the rule in the state of Tennessee, where the case was being tried, was not applicable to the case. The supreme court of the state of Indiana has declared the statute in question to be constitutional and valid. *Railway Co. v. Montgomery*, 49 N. E. 582. The right of action accrued and became complete in that state. In this state the doctrine of respondeat superior does not apply to a case where an employé is injured or killed by the neglect of a fellow servant, but the doctrine of respondeat superior is, in general, recognized in the jurisprudence of this state, and we perceive no ground warranting us to declare the enforcement of the doctrine as enlarged or extended by the Indiana statute must be regarded as so repugnant to good morals or natural justice, or so prejudicial to the best interests of our people, that we should shut the doors of our courts against a suitor who seeks to enforce a right of action which arose under the statute of the sister state.

What has been said disposes of all objections to the action of the court in giving, refusing, and modifying instructions to the jury, except the complaint as to one instruction given for the appellee, relative to the liability of the company in the event they should find the trains collided because of the negligence of the conductor of the freight train. The criticism made upon this instruction is that there was no evidence to support it. We think the objection is not well grounded. The testimony of the engineer of the freight train, which was proceeding northward, tended to show he was induced to refrain from putting the train upon the side track at the stations of Atherton and Lyford by a remark, in the nature of directions, made to him by the conductor at Otter Creek Junction. It further appeared that the conductor was riding in the cab of the engine of the freight train when that train ran past the side tracks at Atherton and Lyford. The trains collided 500 feet north of Lyford. The freight train should have been placed on

the side track at Atherton or at Lyford, and this the conductor knew, or would have known had he kept his orders in mind, and noted the fact that his train was moving on the time of the passenger train, which was coming south. No other errors are assigned, and the judgment of the appellate court is affirmed. Judgment affirmed.

(178 Ill. 222)

**BOARD OF SUP'RS OF VERMILION
COUNTY v. PEOPLE ex rel. WITH-
ERSPOON.**

(Supreme Court of Illinois. Feb. 17, 1890.)

**TOWNS—CREATION—NAME—PETITION—NOTICE OF
HEARING—MANDAMUS—PETITION
—ALLEGATIONS.**

A petition for mandamus to compel a board of supervisors to give notice of the presentation and hearing of a petition for the creation of a new town, as required by Hurd's Rev. St. c. 139, § 26, need not show that the name of the proposed town had been filed in the state auditor's office, and that his certificate had been obtained, since Hurd's Rev. St. c. 34, § 59, requiring the supervisors to refrain from naming a new town until the proposed name had been so filed and a certificate obtained, only becomes operative after such petition has been favorably acted on by the board.

Appeal from appellate court, Third district.

Mandamus by the people, on relation of Elmer E. Witherspoon, against the board of supervisors of Vermilion county, to compel them to give notice of the presentation of a petition to create a new town, and of the date of final hearing thereof. From a judgment of the circuit court overruling a demurrer to the petition, which was affirmed by the appellate court (78 Ill. App. 321), defendants appeal. Affirmed.

The opinion announced in this case by Mr. Justice Burroughs, speaking for the appellate court for the Third district, states fully the points of law and fact involved, and is as follows:

"The appellee commenced, in the circuit court of Vermilion county, mandamus proceedings against the appellant. The original petition for the writ was demurred to, and the demurrer sustained. Thereupon the appellee, by leave of court, filed an amended petition, setting up that on July 12, 1897, there was filed with the county clerk of the county of Vermilion, and state of Illinois, a petition, a copy of which was attached, made a part hereof, and marked 'Exhibit A,' which was signed by the relator and 187 others, all voters of and residents in the following described territory, to wit: (Then describing by metes and bounds 30½ square miles of territory, constituting parts of the towns of Vance, Catlin, Sidell, and Carroll, in said county;) that the persons signing said petition constituted more than three-fourths of the voters residing in the territory above described on July 12, 1897; and the number of voters then residing in said territory who

did not sign the said petition were 18, and no more, and that the total number of voters in said territory then was 206, and no more,—all of which was shown in said petition to said board by the affidavits of good and reliable citizens. It was also stated that in and by said petition the said board of supervisors was asked to create a new town out of said described territory, for the convenience of the inhabitants residing therein; that, after such new town shall be created out of said described territory, the said towns of Vance, Catlin, Sidell, and Carroll will each still contain more than ten square miles of land; that, after the said petition had been so filed and presented to said board, the said petitioners asked that the said board give notices of the presenting of said petition, and of the date of its final hearing, as is required by the provisions of section 26, c. 139, Hurd's Rev. St. Ill., but that said board refused so to do, contrary to the wishes of said petitioners, and over their express objections; that, until the said board of supervisors shall give said notices aforesaid, no further steps can be taken in order to create the said new town according to the prayer of the said petitioners. The amended petition contains the other usual averments in a petition for a writ of mandamus, and prays such writ may issue, directed to appellant, commanding it forthwith to give notice of the presenting of said petition, and when it shall be considered, as required by said section of said chapter of our statutes, and for such further order as may be required. The 'Exhibit A' attached to this amended petition contains a full, formal petition, as described in the amended petition for the writ, and in every particular conforming to the requirements of such a petition, as provided by said section 26, c. 139, Hurd's Rev. St. Ill. To this amended petition the appellant interposed a demurrer, which the circuit court overruled. The appellant elected to stand by the demurrer, and the court awarded the peremptory writ of mandamus, as prayed for in the amended petition. The appellant brings the case to this court, and insists the judgment of the circuit court should be reversed, because (1) the amended petition fails to show a demand upon the appellant to give the desired notice; (2) the amended petition fails to show the name for the proposed new town had been filed in the office of the state auditor, and his certificate obtained, as is provided by section 60, c. 34, Starr & C. Ann. St. Ill.; (3) the amended petition does not state that the several towns from which the proposed new town is to be taken will each have left at least ten square miles of territory. An inspection of the amended petition shows that it does contain averments setting up the very demand which the appellant claims it does not; also, it contains an express averment that the several towns out of which territory is sought to be taken for the new town will each have remaining more

than ten square miles; and, as to the other contention about the name of the proposed new town, we are satisfied that our statute only requires the board of supervisors to refrain from naming a new town created by it until the proposed name has been filed with the auditor of public accounts, and his certificate obtained, as provided by section 59, c. 34, Hurd's Rev. St. Ill. In this proceeding the appellee only sought, and the circuit court only adjudged, that the appellant give notice that the petition for the new town was filed, and when it would be acted upon, as required by section 26, c. 139, Hurd's Rev. St. Ill. This notice was necessary to be given, in order that the appellant might act upon the merits of the petition for the creation of the new town; and, after it has so acted, and concluded to create a new town, as petitioned for, and concluded to give it a name, before giving it such name will it be necessary for it to act under section 59, c. 34, Hurd's Rev. St. Ill.? Finding the judgment of the circuit court appealed from in this case is in accordance with the law arising out of the facts well pleaded in the amended petition, which were admitted by the demurrer thereto, we affirm its judgment."

S. G. Wilson, State's Atty., G. T. Buckingham, and Edwin Winter, for appellants. Isaac A. Love and William R. Jewell, Jr., for appellee.

BOGGS, J. (after stating the facts). Thorough investigation of the points presented by the briefs of counsel has led to the conclusion the record herein is free from error. The legal principles involved are fully and satisfactorily treated in the opinion of the appellate court, and that opinion is adopted as the opinion of this court. The judgment of the appellate court is affirmed. Judgment affirmed.

(178 Ill. 192)

CHICAGO & A. R. CO. v. ESTEN.

(Supreme Court of Illinois. Feb. 17, 1899.)

RAILROADS—FIRES—EVIDENCE—INSTRUCTION—APPEAL—REVIEW—HARMLESS ERROR.

1. To prove that an elevator adjoining a railroad caught fire from a passing locomotive, it was shown that two freights passed a few minutes before the fire, one of the locomotives emitting sparks, and that there was a high wind, which would carry sparks from the track to the elevator. The elevator was locked, and had no fire in it, and there was no way for fire to originate within it. The fire caught in the "dog house" on top of the elevator,—apparently from the outside. The only other source from which the fire might have started was a house across the track, but this was not shown to have a fire in it. *Held*, that a peremptory instruction was properly refused.

2. The decision of the trial and appellate courts as to whether evidence sufficed to overcome the prima facie case required by statute will not be reviewed by the supreme court.

3. Where there was no evidence to show that a fire might have originated from some other cause than a passing engine, error in permit-

ting a witness to give her opinion that it could have originated in no other way was harmless.

4. A charge using the term "prima facie," without explaining its meaning, is not erroneous for that reason.

Appeal from appellate court, Third district. Action by Emma Esten against the Chicago & Alton Railroad Company. From a judgment of the appellate court affirming a judgment for plaintiff (78 Ill. App. 326), defendant appeals. Affirmed.

Blinn & Harris, for appellant. Beach & Hodnett, for appellee.

CARTWRIGHT, J. Appellant's railroad runs north and south through Lawndale, in Logan county, where it has a main track, and two side tracks west of it. Between 9 and 10 o'clock on the night of November 4, 1895, an unused elevator adjoining the west side track took fire and was burned, and from it fire was communicated to two buildings and out-buildings of appellee across the street, and about 300 feet northwest from the elevator. There was a two-story building, with merchandise stored in the upper story, a cob house, and a tenant house, which were destroyed, with the fences, walks, and trees. She lived in a house 14 feet east from the main track, opposite the elevator, and about 40 feet from it, and that property was damaged by the fire. She brought this suit against appellant to recover for her loss, and there was a verdict for \$1,500, followed by a judgment. The appellate court has affirmed the judgment.

At the conclusion of the evidence the defendant asked the court to give an instruction directing a verdict of not guilty, but the court refused to give it. It is argued that the court was in error in such refusal, because there was a total absence of evidence of the origin of the fire. No one saw what caused the fire, and no witness knew from personal knowledge that it was communicated from the defendant's engines to the elevator. The only means of determining the agency which caused it consisted in the surrounding circumstances, and the evidence tending to charge defendant with causing it was that two of its freight trains passed through Lawndale within a few minutes of each other, just before the fire was discovered; that the elevator was closed and locked, and there had been no fire in it, and no way by which the fire could have originated in the building; that there was a high wind blowing from the southeast, which would carry fire or sparks from the track to the elevator; that the engine on one of the trains was emitting some sparks as it passed through Lawndale; that, just after the second train had passed, the elevator was seen to be on fire, in what is called the "dog house,"—a sort of cupola on top of the building; and that the appearances indicated that it took fire from the outside. There was no evidence of any other agency

which could have caused the fire, and no other source is pointed out by counsel, except that it might have been communicated from the plaintiff's house on the opposite side of the tracks. It is true that the evidence shows that the house was there, but there was no evidence that there was any fire in it. The plaintiff, who lived there, had gone to bed, and had been in bed for an hour; and the only thing from which counsel think an inference that there was a fire in the house might be drawn is the time of year, November 4th, when we might presume the weather was cold. We think it clear that such fact, under the circumstances, had no tendency to prove that there was a fire burning in the house which might have been communicated to the elevator. The evidence tended to prove that the fire was communicated by one of these locomotives, and the statute has made such fact, when established, prima facie evidence of negligence. The defense made at the trial was that the engines were equipped with the best and most-approved appliances for preventing the escape of fire; that they were in good condition and repair, and were carefully and skillfully managed; and that no device could be provided that would prevent all sparks from escaping, as in such case there would be no draft, and the utility of the engine would be destroyed. There was no evidence which pointed to any other agency than the engines which could have caused the fire, and the defense does not seem to have been based upon such a proposition. Whether the evidence on the part of the defendant was sufficient to overcome the prima facie case made under the statute was for the trial court and appellate court, and cannot be reviewed here. The request for the peremptory instruction was properly denied.

Plaintiff, while testifying, was asked if there was any way for the roof to take fire other than from fire from the train, and the court overruled an objection to the question. She answered: "No, sir; none I can conceive of." She did not see the fire originate, but was in bed and asleep, and knew nothing about any cause that might have existed, and did not pretend to. Anything she could say about it would be a mere conclusion from the facts and circumstances, and the jury had been impaneled to decide what conclusion should be drawn from them. Witnesses must ordinarily testify to facts, and not to conclusions or inferences from facts, and by permitting her to answer this question the court allowed her to take the place and usurp the functions of the jury. The ruling of the court was undoubtedly erroneous. 7 Am. & Eng. Enc. Law, 492; 2 Best, Ev. § 512; 1 Phil. Ev. 778. If there had been any evidence tending to show that the fire might have originated through some other cause, we should say that such an error could not be overlooked, but would require a reversal. The admission of her opinion or conclusion to influence determination between different theories or claims

as to the cause of the fire would necessarily have been prejudicial; but, in the condition of the evidence, we do not see how it could have made any difference, because there was only one conclusion which could have been drawn.

The court gave an instruction asked by the plaintiff, which followed the statute, and informed the jury that, if they believed from the evidence that the fire was communicated from the locomotive engines used by defendant upon its railroad, that fact should be taken by them as full prima facie evidence to charge the defendant with negligence. The instruction was substantially the one given in *Railroad Co. v. Spencer*, 149 Ill. 97, 36 N. E. 91; and the objection made is that the term "prima facie" should have been so modified and explained that the average juror would comprehend and understand what was meant by it. In the case cited the instruction was held to be proper, and it was said that if, in the opinion of counsel for defendant, there was danger that its meaning might be misapprehended, they should have offered an instruction for that purpose, which would undoubtedly have been given. In the first instruction given for the plaintiff in this case the subject is referred to, and it was conceded by that instruction that the defendant might overcome the prima facie case made by the proof of setting the fire. Webster's dictionary contains the term as English, and it is probably as well understood as a large share of the words and terms used, so that it cannot be said to be the introduction of a foreign language into an instruction. The judgment of the appellate court is affirmed. Judgment affirmed.

(178 Ill. 57)

**SUPREME SITTING, ORDER IRON HALL,
v. GRIGSBY.**

(Supreme Court of Illinois. Feb. 17, 1899.)

**INSURANCE COMPANIES—DEFINITION—RIGHT TO DO
BUSINESS—PENALTIES—GARNISHMENT.**

1. A corporation organized to create a benefit fund, from which its members should receive a benefit, to be paid according to by-laws, is an insurance company.

2. A fund raised by a local branch of a foreign benefit insurance company belongs to the members of the branch, and not to the company, where it failed to comply with the statutes authorizing it to do business in the state.

3. Where a foreign benefit insurance company cannot recover funds collected by a local branch in the state by reason of the company's failure to comply with the statutes authorizing it to do business in the state, its creditor cannot reach such funds by garnishment, though he is a resident of the state.

Appeal from appellate court, Third district.

Action by Henry C. Sumpter against the Supreme Sitting, Order of the Iron Hall. James H. Grigsby was summoned as garnishee. Judgment for defendant, and plaintiff appealed to the appellate court, which affirmed the judgment (78 Ill. App. 300), and plaintiff again appeals. Affirmed.

Henry C. Sumpter brought an action of attachment in the county court of McDonough county against the Supreme Sitting, Order of the Iron Hall, a corporation organized in Indiana under the laws of that state. James H. Grigsby, the appellee, was summoned as garnishee. The object of the corporation, as disclosed by the record, was to create a benefit fund, from which its members should receive a benefit in sums not exceeding \$1,000, to be paid as provided in the by-laws or in the certificate of membership. The plaintiff and the appellee, the garnishee, were residents of McDonough county, Ill. They and a number of other persons formed themselves into what was called "Local Branch No. 208," located in McDonough county. This local branch never became incorporated. Appellee was its cashier. Sumpter held a certificate of membership, which provides that in case a member shall continue to pay all assessments and demands made for the full term of seven years from its date, and maintain himself in good standing in the order, he shall then be entitled to a sum not exceeding \$1,000, less the amount which he has already received as benefits on account of sickness or other disability. The corporation became insolvent, and a receiver was appointed therefor August 18, 1892, by a court in Indiana, and the corporation has remained insolvent ever since. At the time of the appointment of the receiver, appellee had \$681.94, which was in his hands as cashier of said local branch. Sumpter obtained judgment against the corporation in attachment for \$700 upon his certificate of membership in the county court of McDonough county. Appellee, who had been summoned as garnishee, answered, under oath, the interrogatories filed, denying that he had any money, property, or effects of any kind in his possession belonging to the defendant corporation. He admitted he had in his hands the above-named sum of money, but claimed that the same was not subject to garnishment, because the defendant corporation was engaged in the business of insurance in taking risks and insuring the lives of its members, and was not authorized to transact business in the state of Illinois, and has never been so authorized, and could not maintain a suit herein on account of its failure to comply with the laws of this state with reference to foreign insurance companies. He further averred, among other things, that certain members of the local branch, on the 1st day of September, 1892, filed their bill in chancery in the circuit court of McDonough county against said corporation and said garnishee; that summons was issued and served upon the garnishee; that the bill alleged that the complainants were co-partners, and that the money in the hands of the garnishee belonged to them as such; that the bill prayed that the partnership be dissolved, the money divided between the members, a receiver appointed, etc.; that said bill is still pending

and undetermined. Issue was joined upon the answer, and the cause was tried by the court, a jury having been waived. The court found the issues for the defendant, and, on appeal to the appellate court, the judgment was affirmed.

H. C. Agnew, for appellant. Sherman & Tunncliffe, for appellee.

CRAIG, J. (after stating the facts). From the facts appearing in the record, it is clear that the Supreme Sitting, Order of the Iron Hall, falls within what was determined an "insurance company" in *Rockhold v. Society*, 129 Ill. 440, 21 N. E. 794. The company was organized in the state of Indiana, under the laws of that state, and, never having complied with the laws of this state authorizing it to do business here, it could not lawfully transact business in this state. Indeed, it is not claimed that the company had authority to do business in this state, as is shown by a provision in the stipulation of facts upon which the case was tried, as follows: "That the said corporation is not authorized, under the provisions of the laws of the state of Illinois, to transact the business for which the same was organized, in the state of Illinois, and has never been so authorized; that, at the time said sum of money came to the hands of the garnishee, he did not know that said corporation had not complied with the statute of this state, and was not authorized to transact business herein, but, on the contrary, presumed that all proper steps had been taken by said corporation to permit it to legally transact business in this state." As has been seen, the appellee, the plaintiff, Henry C. Sumpter, and several other persons, residents of McDonough county, formed themselves into what was called "Local Branch No. 208," and appellee was selected as its cashier. In his capacity as cashier, there came into his hands, from his associates in the local branch, \$681.94, the money involved in this proceeding; and the first question to be determined is whether this fund belonged to the Indiana corporation, and had that company the right to collect it from appellee, who had received it from his associates.

The right of the Indiana corporation to collect the money rests upon its right to transact business in this state, and, as it had no such power, it could not collect the money. The Indiana corporation had no control or supervision over the "Local Branch," so called, or any of its members, and was not entitled to any fund which was raised or paid over as dues or assessments by the persons who were members of the local branch. Whatever money was raised by the local branch and paid into the hands of appellee belonged to the members of the branch as individuals. If, then, the fund in question did not belong to the Indiana corporation, upon what ground can it be claimed or recovered by Sumpter, a garnishing creditor of that corporation? The law is well settled in this state that in gar-

nishment proceedings the creditor can only recover such indebtedness as can be recovered in an appropriate action in the name of the attachment or judgment debtor against the garnishee. *Webster v. Steele*, 75 Ill. 544; *Richardson v. Lester*, 83 Ill. 55; *Capes v. Burgess*, 135 Ill. 61, 25 N. E. 1000; *Drake, Attachm.* §§ 485, 541, 547. Here, as we have seen, no right of recovery existed in favor of the Indiana corporation, the judgment debtor; and, under the rule laid down in the authorities cited, no recovery could be had by Sumpter, the creditor of the corporation.

It is, however, suggested in the argument that there is no rule of law which will prevent appellant from recovering in this case, unless it is the policy of our courts to punish foreign corporations that have not complied with our laws, and that it would be contrary to the spirit of our laws to inflict upon a citizen of this state the penalty belonging to a foreign corporation. It will be remembered that appellee and all the other members of the local branch who contributed to the fund appellant is attempting to recover are residents of this state, and they are entitled to the same protection which should be extended to appellant. But, aside from this consideration, the question of inflicting punishment upon a foreign corporation for transacting business here without complying with our laws does not enter into the decision of this case. In a garnishment proceeding like the one in question, the garnishing creditor can only recover of the person garnished when the debtor in whose name the suit is instituted can recover. This rule of law is general in its application, applying to all cases; and it makes no difference whether the party in whose name the suit is brought is a corporation or a natural person, a resident or a non-resident. After a careful consideration of the record, and the questions raised and discussed in the argument, we are satisfied the judgment of the appellate court is correct, and it will be affirmed. Judgment affirmed.

(178 Ill. 182)

BLAKE et al. v. STATE BANK OF FREEPORT.

(Supreme Court of Illinois. Feb. 17, 1899.)

JUDGMENT BY CONFESSION—CONCLUSIVENESS—VACATION—IRREGULARITIES—EXECUTION OF POWER—COGNOVIT.

1. A judgment by confession will be set aside, on motion, for fraud or want of authority, but will not be vacated for mere irregularities, such as the insufficiency of the affidavit of the genuineness of the signature to the power, except when a defense on the merits is shown.

2. It is no objection to a judgment by confession that the affidavit of genuineness of the signature of the debtor to the power was made before a cause of action had accrued.

3. It is immaterial that the cognovit was prepared before the cause of action accrued, where the judgment was not entered until after accrual.

4. A judgment by confession cannot be attacked by showing that the cognovit was prepared before the cause of action accrued.

Appeal from appellate court, Second district.

The State Bank of Freeport obtained judgment by confession against Seymour A. Blake and others. Order setting aside the judgment was reversed by the appellate court (78 Ill. App. 166), and defendants appeal. Affirmed.

A. D. Early, for appellants. William Marshall, for appellee.

CARTWRIGHT, J. A judgment by confession in favor of appellee against appellant Seymour A. Blake was entered September 4, 1897, in the circuit court of Winnebago county, for \$3,515.68, which was the amount of a promissory note executed by said Blake to appellee, September 3, 1897, with interest, and \$15 for attorney's fees. On September 13, 1897, Blake executed a voluntary assignment for the benefit of his creditors to appellant Joel B. Whitehead, and on October 12, 1897, appellants entered their motion to vacate said judgment. The motion was heard upon affidavits, and was allowed, and an order was entered setting aside the judgment and quashing an execution which had been issued thereon. On appeal to the appellate court, that order was reversed and this appeal was prosecuted.

Such an application as this is addressed to the sound discretion of the court, and calls for the exercise of the equitable power of the court over its own judgments. A court of law, being invested with such power, will not send a defendant against whom a judgment has been entered by confession to a court of equity for redress, but the power, whether exercised by a court of law or of equity, is an equitable one, to be governed by the same principles. If a judgment so entered was not confessed by authority of the defendant, it will be void for want of power to confess it, and a defendant who is injured by it may have it set aside upon motion. *Stein v. Good*, 115 Ill. 93, 3 N. E. 735; *Whitney v. Bohlen*, 157 Ill. 571, 42 N. E. 162. So, also, if a power to confess a judgment has been obtained by fraud, so that it is vitiated and rendered a nullity by such fraud, it will be set aside. *Kingman & Co. v. Reinemer*, 186 Ill. 208, 46 N. E. 786. In such cases the judgment is to be considered as absolutely void. For mere irregularities or defects in the proceedings the court will not set aside a judgment, except where a good defense on the merits is shown, but if the judgment is unjust and against conscience, it will be opened, and permitted to stand as security, until the case can be heard on its merits. *Rising v. Brainard*, 36 Ill. 79; *Farwell v. Meyer*, Id. 510; *Holmes v. Parker*, 125 Ill. 478, 17 N. E. 759; *Hansen v. Schlesinger*, 125 Ill. 230, 17 N. E. 718.

In this case no defense on the merits was shown. The debt for which the note was given was due and was just, and so is the judgment. The grounds upon which the judgment is attacked are alleged irregularities

in the execution of the power and fraud in procuring the execution of the warrant. One of these grounds is that the affidavit that the signature of Blake was genuine was made September 3, 1897, before a cause of action had accrued on the note. This is not a good objection. The office of such an affidavit is not to prove a cause of action, but to establish the fact that the signature is genuine. There is no reason why the fact may not as well be proved at any time after the making of the signature as after a cause of action has arisen. Where the attempt is to furnish evidence of a cause of action, such cause of action must have accrued when the proof is made; but, where it is necessary to prove a signature, all that is necessary is that the signature shall be in existence and can be identified. There can be no possible difference whether the affidavit was made at one time or another, after the fact to be proved exists. If the time when the affidavit was made constituted any objection at all, it would not be available without showing a good defense, and that is not attempted.

All the necessary papers were filed at the time of the entry of judgment and the judgment and proceedings are regular on their face. There is an attempt, however, to show by affidavits that the plea confessing the cause of action was written and signed the night before it was filed in the clerk's office, and that, therefore, the judgment was confessed prematurely, before the note was due. The warrant of attorney authorized the confession of the judgment at any time after the date of the note, and there was therefore no power to confess a judgment on the day of the date of the note, at which time the affidavits state the plea was drawn and signed. *Waterman v. Jones*, 28 Ill. 54. It is conceded that a judgment could properly be confessed on September 4, 1897, when the judgment was entered, and it is immaterial when the plea and confession were written and signed. The execution of the power was by the entry of appearance and confession, and what was done in the way of preparation for such execution was immaterial. Furthermore, the judgment could not be attacked in that way. A judgment by confession has all the qualities, incidents, and attributes of other judgments. The legislature has fixed and provided for the judgment, and authorized the clerk to enter it upon the filing of the proper papers. The clerk, in making such entry, records the conclusion and finding of the law, and the judgment is of the same character as any other. *Ling v. King*, 91 Ill. 571. While it may be shown that there was no power to enter the appearance of the defendant, or that an execution was issued before the judgment was entered, the record imports verity and cannot be contradicted. *Knights v. Martin*, 155 Ill. 486, 40 N. E. 358. To enter upon an investigation of such questions as when and where the plea was drawn and signed, or by whom it was brought to the clerk's office, and wheth-

er plaintiff's attorney was such a person as could be authorized to deliver it to the clerk, would be wholly improper. The record recites the entry of the appearance by the attorney for Blake, and the confession of the judgment in due and proper form.

The remaining ground for setting aside the judgment is that the execution of the note with the power of attorney was obtained by fraud. Seymour A. Blake, Oscar Norton, and Charles A. Norton were partners doing business under the name of the Bank of Durand. Charles A. Norton was the son of Oscar Norton and son-in-law of Blake, and was the managing partner. When the Bank of Durand was opened, in September, 1881, the appellee loaned said parties, under said name, \$4,100 to do banking business, and from that time on they were debtors of appellee for money loaned, evidenced by promissory notes, and secured by collateral notes supposed to have been made by customers of the Bank of Durand. On September 8, 1897, when the note was made, the Bank of Durand owed appellee \$9,000, in two notes of \$5,500 and \$3,500, respectively, and secured by such collaterals of the face value of about \$14,000. Appellee then learned that most of the collateral notes were forged by Charles A. Norton, and its cashier went to Durand to see what could be done towards securing its claim. The note in question in this case was then made by Blake to take up said note of \$3,500, which was then surrendered to him. He was fully on his guard, and refused to sign the first note drawn because it was due one day after date, but agreed to sign this note, and understood it, with the exception, as he claims, of the warrant of attorney. The alleged ground of fraud in respect to that is that he had no glasses, and his eyesight was poor, so that he could not read the warrant, which was in fine print, and that when the cashier read the note at his request he did not read it distinctly, so that he was able to comprehend that the note was a judgment note. Without going into details, we are well satisfied with the conclusion of the appellate court that there was no fraud in the respect claimed. The judgment of the appellate court is affirmed. Judgment affirmed.

(177 Ill. 634)

VILLAGE OF WESTERN SPRINGS v.
HILL et al.¹

(Supreme Court of Illinois. Feb. 17, 1899.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS
—SPECIAL TAXATION—ORDINANCES—VAL-
LIDITY—AMENDMENTS.

1. City and Village Act, art. 9, § 19, providing that, where local improvements are made by special assessments, the city council shall pass an ordinance describing the improvements, provided that, when such improvement is the building of sidewalks, the owner of the adjacent lot shall have 15 days after the ordinance takes effect in which to build it, and relieve

his property from the assessment, applies as well to improvements made by a special tax as by special assessment.

2. An ordinance passed pursuant to City and Village Act, art. 9, § 19, for the building of a sidewalk, must itself contain the provision allowing the adjoining owner 15 days to build it.

3. An ordinance providing for the collection of interest on a special tax for a longer period than is authorized by the law in pursuance of which it is passed is invalid.

4. Where a petition is filed for the confirmation of a special tax levied under an invalid ordinance, and objections are made thereto, an amendatory ordinance, passed after the cause is heard to conform such ordinance to the law, is inadmissible.

Appeal from Cook county court; Robert H. Lovett, Judge.

Petition by the village of Western Springs for the confirmation of a special tax to defray the cost of sidewalks. Adaline B. Hill and others filed objections. From an order sustaining the objections and dismissing the petition, complainant appeals. Affirmed.

Frederick A. Willoughby, for appellant.
A. J. Elvig, for appellees.

MAGRUDER, J. The village of Western Springs filed its petition in the county court of Cook county for the confirmation of a special tax to defray the cost of a cement sidewalk on certain streets of the village. The appellees objected to the confirmation of the tax; and the court sustained their objections, and dismissed the petition. The present appeal is prosecuted from the order of the court sustaining the objections, and ordering the petition to be dismissed. The objections filed by the appellees were more than twenty in number; but we do not deem it necessary to notice more than two of these objections, which we think were sufficient to justify the action of the court below.

The main objection to the confirmation of the assessment discussed by counsel in their briefs is that the ordinance providing for the sidewalk does not give to the property owners 15 days to complete or build the sidewalk in front of their property, as required by section 19 of article 9 of the city and village act. Counsel for appellant claims that the first proviso to said section 19 does not apply where the proceeding for a local improvement is by special taxation, instead of special assessment. Section 17 of said article 9 provides that "when said ordinance, under which said local improvement shall be ordered, shall provide that such improvement shall be made by special taxation of contiguous property, the same shall be levied, assessed and collected in the way provided in the sections of this act, providing for the mode of making, levying, assessing and collecting special assessments." Section 18 of article 9 provides that "when the ordinance, under which said local improvement is ordered to be made, shall provide that such improvement shall be wholly or in part made by special assessment, the proceedings for the making such special assessment shall be

¹ Rehearing denied.

in accordance with the sections of this article from 18 to 51 inclusive." Section 19 of article 9 provides that, "whenever such local improvements are to be made wholly or in part by special assessment, the said council in cities, or board of trustees in villages, shall pass an ordinance to that effect, specifying therein the nature, character, locality and description of such improvement, either by setting forth the same in the ordinance itself, or by reference to maps: * * * provided, that, whenever any such ordinance shall provide, only, for the building or renewing of any sidewalk, the owner of any lot or piece of land fronting on such sidewalk shall be allowed fifteen days after the time, at which such ordinance shall take effect, in which to build or renew such sidewalk opposite his land, and, thereby, relieve the same from assessment: provided, that the work so to be done shall, in all respects, conform to the requirements of such ordinance." As special taxation is to be levied, assessed, and collected in the mode provided for the making, levying, assessing, and collecting of special assessments, and as section 19 is embraced within the sections which provide the mode of making improvements by special assessments, it would seem to follow that section 19 and the provisos thereto apply as well to improvements made by special taxation as to improvements made by special assessment. Where the improvement is by special assessment, the owner is to be allowed 15 days after the taking effect of the ordinance in which to build the sidewalk opposite his land, and thereby relieve the same from the assessment. So, also, where the improvement is by special taxation, there is no reason why the property owner should not be allowed the privilege of building or renewing the sidewalk opposite his land within the 15 days named in the proviso.

But it is contended on the part of the appellant that, under the decisions of this court, the proceedings for the making of improvements by special assessment are inapplicable to the making of such improvements by special taxation. This contention is based upon the facts that in special taxation the municipal authorities fix the basis on which the property is to be assessed, while in special assessment the commissioners appointed by the court determine the benefits, and assess the property in proportion to the benefits received by it from the improvement; that in special taxation the tax is confined to contiguous property, while in special assessments it extends to property benefited, though not contiguous; and that, before the amendment made in 1895 to section 17 allowing the question of benefits to be tried by a jury in special taxation cases, the benefits were determined in such cases by the municipal authorities, while in special assessments a jury might be called to determine the question whether the premises were as-

essed more or less than they were benefited, or more or less than their proportionate share of the cost of the improvement. The holding of this court has always been that the object of the legislature was to provide two modes for the making of local improvements,—one by special assessment, and the other by special taxation of contiguous property; and that, in view of the two distinct systems provided for, section 17 was only to be understood as requiring such portions of the statute in regard to special assessments to be followed as might be consistent with a proper exercise of the power of special taxation. *Enos v. City of Springfield*, 113 Ill. 65. As, in special taxation, the benefits were determined by the municipal authority, it was held that those portions of the statute providing for the making of the local improvement by special assessment which required the trial of the question of benefits by a jury were inapplicable to the proceeding by special taxation. The provision that the common council should determine the benefits was inconsistent with the provision that the jury should be required to determine them. *Chicago & A. R. Co. v. City of Joliet*, 153 Ill. 649, 89 N. E. 1077. But it was never intended to be decided, nor was it ever decided, by this court, that the provisions of the statute in regard to special assessments should not be followed in proceedings by special taxation, where such provisions were not inconsistent with a proper exercise of the power of special taxation. It is consistent with the proper exercise of the power of special taxation that the property owners should be allowed to build or renew their own sidewalks, as provided for in section 19. We are of the opinion that section 19 applies as well to a proceeding by special taxation as to a proceeding by special assessment.

It is claimed, however, that, even if section 19 is applicable to special taxation, yet there is nothing in that section which requires the ordinance itself to contain a provision allowing the property owners to build their sidewalks. We are unable to agree with this contention made by counsel. The part of section 19 which provides for the allowance of 15 days after the taking effect of the ordinance for the building or renewal of the sidewalk opposite his land by the property owner is contained in a proviso. The office of a proviso, as a general thing, is to except something from the enacting clause, or to qualify or restrain the generality of such enacting clause. *Sutton v. People*, 145 Ill. 279, 34 N. E. 420; *De Graff v. Went*, 164 Ill. 485, 45 N. E. 1075. The main or precedent clause in section 19 has reference to the contents of the ordinance required to be passed, inasmuch as it sets forth that such ordinance must specify the nature, character, locality, and description of the improvement. The proviso is therefore intended to restrict or qualify a provision in reference to the contents of an ordinance. When, therefore, it

provides that "the owner of any lot or piece of land fronting on such sidewalk shall be allowed fifteen days from the time at which such ordinance shall take effect in which to build or renew such sidewalk opposite his land." the plain intention of the legislature is that the ordinance itself should contain a provision allowing the building or renewing of the sidewalk in the manner stated. It is true that the law gives the owner the privilege of building his sidewalk for himself within a certain time; but the municipality is to indicate, in the ordinance passed by it, that the exercise of such privilege is to be allowed to him. The statute makes no provision for giving notice to the property owner that he will be allowed to exercise such privilege, otherwise than by the contents of the ordinance itself. In addition to this, the provision allowing the building of the sidewalk by the property owner should be inserted in the ordinance as a guide to the persons to be appointed to make an estimate of the cost of the improvement contemplated by the ordinance. The improvement whose cost is to be estimated is so much of the sidewalk as is to be built by the municipality, excluding the part to be built by the property owners themselves. The estimate should recite that the commissioners are appointed to make an estimate of the cost of so much of the improvement as has not been made by the owners within the 15 days specified by the proviso. *McChesney v. City of Chicago*, 173 Ill. 75, 50 N. E. 191. In the case at bar the ordinance was passed and approved June 24, 1897; the commissioners to estimate the cost of the improvement were appointed the same day; their estimate was returned and approved the same day; and on June 25, 1897, the petition was filed in the county court. It follows, in view of the haste thus indicated, that the commissioners must have made an estimate of the cost of making the whole improvement without giving the property owners the 15 days to which they were entitled for the making of the improvement so far as it was in front of their property. It is said, however, that this court decided in *People v. Yancey*, 167 Ill. 255, 47 N. E. 521, that section 17 did not give the owners of property contiguous to the improvement the right to build their own sidewalks. The decision in that case bears no such construction as is thus put upon it. That decision was merely to the effect that the amendment to section 17 passed by the legislature and approved June 21, 1895, did not apply to the sidewalk act of 1875. It was there held that the amendment of 1895, which provides that a jury may pass upon the question of the benefits in special taxation cases, does not affect the act of April 15, 1875, entitled "An act to provide additional means for the construction of sidewalks in cities, towns and villages." 1 Starr & C. Ann. St. (2d Ed.) p. 857.

Another objection made to the confirmation
52 N.E.—61

of the assessment, and which was sustained by the court below, was that the ordinance provided for the collection of interest upon the special tax for a longer period than was authorized by law. Section 4 of the ordinance in the present case provides that the special tax should be divided into four installments, and that "said deferred installments shall bear interest at the rate of six per cent. per annum from and after the confirmation of said special taxation, until paid." The section also provides for the issuing of bonds in accordance with the provisions of section 2 of "An act to authorize the division of special assessments in cities, towns and villages into installments, and authorizing the issue of bonds to anticipate the collection of deferred installments," approved June 17, 1893 (Sess. Laws 1893, p. 78). This act of 1893, under which the present assessment was made, provides that the installments "shall bear interest from and after thirty days succeeding the confirmation." It is thus apparent that that portion of the present ordinance which provides for interest upon the installments is in direct conflict with the act of 1893, in pursuance of which the ordinance was passed. Section 4 of the ordinance says that the installments shall bear interest from and after the confirmation of the special taxation, whereas the law says that the installments shall bear interest from and after 30 days succeeding the day of confirmation. It is not seriously contended that section 4 of the ordinance was not invalid in thus requiring the property owners to pay more interest than was authorized by law.

It is claimed, however, that the difficulty was cured by the passage of an amendatory ordinance, making section 4 of the original ordinance conform to the law. The objections filed in this case, and the argument of counsel thereupon, were heard by the court on December 4, 1897; and the matter was taken under advisement by the court until December 13, 1897. On December 11, 1897, the president and board of trustees of the village passed the amendatory ordinance above referred to; and on December 13, 1897, such amendatory ordinance was admitted in evidence by the court, over the objections of the appellees. This evidence was clearly incompetent, and should not have been admitted. The issues were tried upon objections made to the original ordinance. Section 22 of article 9 of the city and village act requires that the petition to be filed in the county court shall recite the ordinance for the proposed improvement. The petition thus reciting the ordinance is necessary to be filed in order to give the court jurisdiction. It is plain that the amendatory ordinance passed on December 11, 1897, was not, and could not have been, recited in the petition, because it was passed long after the petition was filed.

We are of the opinion that the objections herein considered were well taken, and that the court below committed no error in sus-

taining the same, and in dismissing the petition. Accordingly, the judgment of the county court is affirmed. Judgment affirmed.

(178 Ill. 96)

JEWETT et al., Commissioners, v. SWEET.

(Supreme Court of Illinois. Feb. 17, 1899.)

HIGHWAYS—SURFACE WATERS—INJUNCTION—PLEADING.

1. The highway commissioners, in a suit to enjoin them from diverting the flow of surface waters, cannot plead the rights of adjacent owners who are not parties nor asking relief.

2. The highway commissioners cannot, by cutting a ditch across the highway, change the natural flow of surface water so as to cast it on adjacent land.

3. A defendant must apprise complainant, by his answer, of the nature of the case he intends to set up, and cannot avail himself of a defense not pleaded, though it be proved.

Appeal from appellate court, Second district.

Bill by Truman Sweet against Robert B. Jewett and others, as commissioners of highways for the town of Harrison. A decree for complainant was affirmed by the appellate court (77 Ill. App. 641), and defendants appeal. Affirmed.

Arthur H. Frost and Robert G. McEvoy, for appellants. Works & Hyer, for appellee.

BOGGS, J. This was a bill in chancery by appellee for an injunction restraining the appellants, in their official capacity as commissioners of highways, from cutting a certain ditch and waterway through a highway and turnpike road upon which the farm of appellee abuts. Decree as prayed was awarded by the chancellor, and on appeal the decree was affirmed by the appellate court for the Second district. This is a further appeal by the said commissioners.

The opinion of the appellate court, rendered by Mr. Justice DIBELL, is as follows:

"Appellee owns the southeast quarter of the northeast quarter of section 7, in the town of Harrison, in Winnebago county, and a tract of twenty-four acres next south thereof. John Dolan owns land north of appellee. The heirs of Catherine Grattan, deceased, own lands west of Dolan, and own the southwest quarter of the northeast quarter of said section 7. William Bodine owns a twenty-acre tract south of the Grattan lands. The Grattan and Bodine tracts are therefore next west of the two tracts owned by appellee. Between the lands of appellee and Dolan, on the one side, and of Grattan and Bodine, on the other, is a north and south highway. About three-eighths of a mile north of appellee's land, Otter creek flows in a general easterly direction, and crosses the highway, and there is a bridge in the highway at that place. About half a mile directly west from the southern part of appellee's land is a lake or pond, the natural and ordinary outlet of which is due north into Otter creek. In times

of high water the pond also overflows in a northerly and easterly direction. Several natural draws or depressions cross the highway south of the creek, and carry off these waters. There is one bridge across such a draw opposite the south part of Dolan's land, and three bridges cross three such draws opposite the north part of appellee's land. Some forty years before this suit was begun, the then owner of the Grattan and Bodine lands dug a ditch east and west on the north line of Bodine's present land, extending back from said highway eighty rods. Said ditch was dug to carry a part of said overflow off the lands here called the Grattan and Bodine lands, and to carry it to the highway. The highway authorities at that time built a sluiceway across the highway at that point to let said waters across the road. At or about that time a ditch was dug in the highway on the east side thereof, which received said waters to a greater or less extent, and conveyed them north to the draws before mentioned. At some time, variously estimated by the witnesses at from seventeen to thirty years before this suit was brought, the highway authorities closed said ditch on the east side of the highway, took out said sluiceway at the east end of said Grattan and Bodine ditch, turnpiked said road, and dug a deep ditch on the west side of said turnpike, which received the waters from said Grattan and Bodine ditch, and conducted them north to said draws and bridges. In the spring of 1897 the highway commissioners of said town decided to cut through the turnpike at a point 135 feet north of the place where said old sluiceway had formerly been, and 315 feet south of the most southern of the existing bridges, and to put in a bridge across the turnpike at that point, and thus to provide a way across the highway for the water coming from the west, and from the Grattan and Bodine ditch, and to discharge said water upon appellee's land at that point. Thereupon appellee began this suit, by filing a bill to enjoin the commissioners from cutting through said turnpike and putting in said bridge at that point. He set out the facts as to the location and ownership of the land, the waters and their natural outlets, the bridges already in existence, the Grattan and Bodine ditch, and the highway ditches; and he charged that to open said turnpike and put in said bridge would take said waters out of their natural course, and cast them upon his lands to the east of said proposed bridge, and irreparably injure them. A preliminary injunction was granted, and the commissioners answered. Proofs were heard, and there was a decree making said injunction perpetual. From that decree the commissioners now appeal.

"The commissioners, in their answer, do not claim that the proper care of the highway requires the new bridge to be put in and the proposed cut to be made through the turnpike. They do not set up in their an-

swer that the highway, in its present condition and with its present bridges, is in any respect defective or out of repair. They do not seek to justify their proposed action on the ground that it will in any respect improve the highway. They do not suggest in their answer that they are acting for the public good. Neither in their answer nor their proofs do they deny that complainant's lands will be injured by their proposed course, and they do not offer to restore the ditch on the east side of the highway, which was some protection to the land on that side of the road when said former sluiceway was in existence at the end of the Grattan and Bodine ditch. The answer does assert the right of the commissioners to open the turnpike and build the new bridge, regardless of its effect upon appellee's land, and it places that claim of right upon two grounds.

"The answer is, first and chiefly, devoted to the claim that the Grattan and Bodine ditch was lawfully dug by the man who then owned the lands west of the road, and that it and the sluiceway across the highway at the end thereof were constructed with the approval of the man who then owned the land east of the road, appellee's grantor; that the highway commissioners ought not to have taken out said sluiceway, and that to do so was a wrong against the owners of the Grattan and Bodine lands; and the highway commissioners here set up and pleaded the rights which they claim exist in the owners of said lands west of the highway by reason of what occurred forty years before between the adjacent landowners. The Grattan heirs and Bodine are not before the court. They have not asked any relief against appellee. We are of opinion the highway commissioners have no right to injure appellee merely for the purpose of benefiting Bodine and the Grattans. If the Grattans and Bodine have any contract rights or any equities against appellee because of what occurred between their respective grantors when the Grattan and Bodine ditch was dug, that is a matter for the interested parties to litigate, if they desire; but we think the highway commissioners should not take it upon themselves to determine those questions, nor to initiate this change in the course of the water, and carry on litigation for the benefit of Bodine and the Grattans.

"The answer secondly claims that the natural flow of the water from the west is across the highway at about the point of the proposed bridge, and therefore the commissioners may build a bridge there if they choose. We think the preponderance of the evidence is that the water from the lake or pond in question would never reach the place where the commissioners planned to put in the new bridge but for the Grattan and Bodine ditch, which ditch, we think the evidence shows, was cut through a rise of ground which would have prevented the waters from the pond coming into a state of

nature to the point where it was proposed to locate the new bridge. The result of building such bridge will be to cast upon appellee's land water which would not have come upon that part of his farm in a state of nature, but which would have passed northeasterly over the lands of Bodine and the Grattans, and reached the highway at one of the bridges already in the road. The commissioners have no right to do this, and injunction is a proper remedy to prevent the wrong. *Graham v. Keene*, 143 Ill. 425, 32 N. E. 180.

"It is argued that to carry this water to the old bridges through the ditch on the west side of the highway is to discharge it where they have no right to carry it. We think the proof shows that is the place the overflow would have reached the highway if the Grattan and Bodine ditch had not been dug, and it is the point to which the highway commissioners have carried it for not less than seventeen, and perhaps thirty, years; and, when it crosses the highway at that point, it discharges upon the lands of appellee, and not upon the lands of some stranger, but at the point where said overflowing waters crossed his land in a state of nature, and where, therefore, he is bound to receive them.

"Some attempt was made by defendants to prove that the condition of the highway was such that this bridge was needed, or that to put in the new bridge would benefit the highway. The rule that a party cannot make one case by his pleadings, and a different case by his proofs, is applicable to a defendant as well as to a complainant. The defendant is bound to apprise the complainant, by his answer, of the nature of the case he intends to set up, and cannot avail himself of any matter of defense not stated in his answer, even though it appears in evidence. *Johnson v. Johnson*, 114 Ill. 611, 3 N. E. 232. By filing an answer, the defendant submits to the court the case made by the pleadings. *Kaufman v. Wiener*, 169 Ill. 596, 48 N. E. 479; *Holmes v. Dole, Clarke*, Ch. 71. As the answer in this case does not assert any public necessity for the proposed bridge, nor that the highway will be improved thereby, complainant was not required to meet that defense, and defendants cannot ask a decree in their favor because of any evidence which they introduced on that subject. But the proof shows the commissioners have permitted the ditch on the west side of the road to become filled and clogged up to some considerable extent, and have let willows grow in it, and corn stalks, straw, hay, and stubble to accumulate against the willows, to the serious obstruction of the flow of the water, and have let long grass grow under the present bridges. We conclude from the evidence that, if the highway commissioners will remove the obstructions in that ditch, and under the existing bridges, the proposed new bridge will not be required for the benefit of the highway. We think the answer shows

this was not the reason why they planned to cut the turnpike and put in the bridge. For the reasons stated, the decree of the court below will be affirmed."

We find the conclusions arrived at by the appellate court as to the matters of fact involved in the case abundantly supported by the proof. The principles of law announced in the opinion are in accord with our views. There seems no reason why we should indulge in further observations as to the case. The opinion of the appellate court is adopted as the opinion of this court, and its judgment is affirmed. Judgment affirmed.

(178 Ill. 285)

TOWN OF MANCHESTER v. PEOPLE ex rel. GRADY.

(Supreme Court of Illinois. Feb. 17, 1899.)

MUNICIPAL CORPORATIONS—TAXATION—ASSESSMENT AND COLLECTION—STATUTES—AMENDMENT—CONSTITUTIONALITY—CONSTRUCTION.

1. Act July 1, 1897, amending Act May 23, 1877, providing for the mode only of assessing and collecting municipal taxes, does not, by also prescribing the rate which might lawfully be levied, contravene the provision of Const. 1870, art. 4, § 13, that "no act hereafter passed shall embrace more than one subject," since both the mode and the limitation related to but one subject,—the production of municipal taxes.

2. Const. 1870, art. 4, § 13, provides that "no law shall be revived or amended by reference to its title only, but the law revived or the section amended shall be inserted at length in the new act." *Held*, that an amendment referring to the title of the amended act, and setting it forth in full as amended, without reciting it as it stood prior thereto, did not violate said provision.

3. The act of July 1, 1877, provides that all cities, villages, and incorporated towns, whether organized under general law or special charters, shall assess and collect their taxes in the manner provided for in article 8 of the act entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872. *Held*, that the act of June 11, 1897, amendatory of said act of 1877, by referring to article 8 of the act of 1872, adopted it as it existed in 1897, it having been subsequently amended.

Appeal from circuit court, Scott county; Robert B. Shirley, Judge.

Application for mandamus on the relation of Mary E. Grady against the town of Manchester. From a judgment in favor of relator, defendant appeals. Affirmed.

On the 6th day of May, 1895, in the circuit court of Scott county, a judgment was entered in an action at law, in favor of the relator, Mary E. Grady, against the appellant town, in the sum of \$750. The town of Manchester is a municipal corporation, incorporated by a special charter adopted by the general assembly in 1861. The special charter vested in the "town council" of the said town power to assess and collect a tax upon all taxable property within its limits of not exceeding 1 per centum per annum upon the value of such property as is assessed for taxation for state and county purposes. The amount pro-

duced by such levy of 1 per centum was sufficient only to pay the appropriations made by the town council for the necessary current expenses of the municipality. The town council contended it did not possess power to levy more than the said 1 per centum, and refused to make a greater levy or to make an appropriation for the payment of the said judgment. The appellee relator insisted the act of the general assembly entitled "An act to amend an act in regard to the assessment and collection of municipal taxes," approved June 11, 1897, authorized the town council of the said town to levy, assess, and collect taxes for corporate purposes at the rate of not exceeding 2 per centum upon the aggregate valuation of all property in the said town, and exhibited in the said circuit court of Scott county her petition for a peremptory writ of mandamus, commanding the said appellant town to levy taxes at such rate, not exceeding 2 per centum upon all taxable property in the said town, as might be necessary to defray the current expenses of conducting the municipality, and, in addition thereto, to produce a fund to be applied to the payment and discharge of the judgment in her favor against the town. The court overruled a demurrer to the petition, and the appellant town abided its demurrer. Judgment was entered awarding the writ as prayed in the petition, and appellant has prosecuted this appeal to obtain a reversal of such judgment.

Mark Meyerstein, for appellant. J. M. Riggs and James Callans, for appellee.

BOGGS, J. (after stating the facts). Section 1, art. 8, c. 24, Hurd's Rev. St. 1891, as amended by an act adopted for that purpose June 18, 1891, in force July 1, 1891, entitled "Cities," etc. (Laws 1891, p. 83), vests the city councils of cities and boards of trustees of villages with power to levy and collect taxes in an amount not exceeding the rate of 2 per centum upon the aggregate valuation of all taxable property within the municipality, as the same was equalized for state and county taxes for the preceding year, and also directs the mode or manner in which such corporate authorities shall proceed in order to execute the power so granted to them. Said section 1 of article 8 of said chapter 24 (said chapter being usually denominated the "General Act for the Incorporation of Cities and Villages"), when the act was adopted, did not contain the provisions now found in it limiting the rate of taxation, and requiring the council or board of trustees should adopt an ordinance specifying in detail the purposes for which appropriations were made and the amount appropriated for each purpose, and did not mark out a course of procedure to be observed when the corporate limits of the city, town, or village were situated partly in two or more counties; but it was amended by an act of the general assembly May 28, 1879, in force July 1, 1879, which limited the rate per centum to be levied, and required the adoption of

a general appropriation ordinance; and was again amended by the act of the general assembly approved June 18, 1891, which incorporated in the section the provision with reference to cities and towns which were situate partly in two or more counties. The section as originally enacted and as re-enacted by the amendatory acts referred to had and has reference only to cities and villages incorporated under the provisions of the general act of which it is a part, and within itself did not operate to increase or diminish the power to levy and collect taxes possessed by any municipality organized under and existing by virtue of a special charter, or to regulate the manner in which such municipalities having special charters should levy and collect municipal taxes. The condition then was that cities and villages organized under the general incorporation act were alike restricted in point of power to levy and collect taxes, and were required to observe the same course of procedure with reference thereto, while cities and villages organized under special charters had such limitations and restrictions as were to be found in their respective charters. In order to secure uniformity in the mode of levying and collecting such taxes in all cities and towns in the state, whether acting under special charters or under the general incorporation act, the general assembly, at the session thereof in the year 1877, on the 23d day of May of that year, adopted the following enactment, which became effective July 1, 1877, to wit: "Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that all cities, villages and incorporated towns in this state, whether organized under the general law or special charters, shall assess and collect their taxes in the manner provided for in article eight (8) of the act entitled 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872, and in the manner provided for in the general revenue laws of this state; and all acts or parts of acts inconsistent with the provisions of this act are hereby repealed." This enactment had no effect to authorize cities and villages acting under special charters to levy a greater rate of taxation than the respective charters thereof permitted, but only operated to secure uniformity in the mode or manner of levying and collecting taxes in all the cities and villages in the state, whether acting under the general incorporation act or under special charters. After this last-mentioned enactment, cities and villages organized under the general incorporation act had authority to levy taxes at the rate of 2 per centum upon the aggregate value of all taxable property within their limits, while the cities and towns acting under special charters had power to levy at such rate only as should be specified in their respective charters. It was deemed better the limitation as to the rate per centum of taxation should be uniform in all cities and villages in the state, and, to accomplish this, the

general assembly adopted the following act, which was approved June 11, 1897, and in force July 1, 1897, viz.: "Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that 'An act in regard to the assessment and collection of municipal taxes,' passed May 23, 1877, be and the same is hereby amended so that hereafter it shall read as follows: All cities, villages and incorporated towns in this state, whether organized under the general law or special charters, shall assess and collect their taxes in the manner and shall have power to assess and collect them at the rate provided for in article eight (8) of the act entitled 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872, and in the manner provided for in the general revenue law of this state; and all acts or parts of acts inconsistent with the provisions of this act are hereby repealed." It was the view of the circuit court that this act conferred upon the town council of the appellant town power and authority to levy taxes at a rate not exceeding 2 per centum of the aggregate value of the taxable property within the limits of the town. The correctness of this view is challenged by the appellant.

The power of the general assembly to enact a law, general in its application, changing or amending existing special charters of cities or villages without consulting the wishes of the inhabitants to be affected, does not seem to be questioned. We have held the authority of the general assembly to so legislate in relation to these municipalities is in no wise restricted by any provision of the constitution. *People v. Cooper*, 83 Ill. 585; *McCormick v. People*, 139 Ill. 499, 28 N. E. 1106. The appellant, however, contends that the act in question conflicts with certain of the provisions of section 13 of article 4 of the constitution of 1870 of this state, the grounds of such contention being stated by the appellant as follows: "First, because it embraces more than one subject; second, because the act embraces a subject not expressed in the title; third, because the act amended is not inserted at length in the act." The title of the act of 1897, under consideration, is as follows: "An act to amend an act in regard to the assessment and collection of municipal taxes, approved May 23, 1877." As we have seen, the act of 1877, which was to be amended by the act of 1897, related to the mode, only, of assessing and collecting municipal taxes; while the act of 1897 provides, not only for the mode of assessing and collecting such taxes, but purports to empower the municipal authorities to levy and collect a greater rate per centum of taxes than such authorities possessed prior to its adoption. The argument of appellant in support of the first and second of its objections as to the constitutionality of the act is that the mode of levying and assessing taxation and the rate per centum permitted to be levied and assessed should be regarded as distinct subjects of

legislation, and, as the act purports to legislate upon both subjects under one title, it contravenes that provision of section 13 of article 4 of the constitution which provides, "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The constitutional provision in question is not to be given a strict construction, but is to be liberally interpreted, in aid of the action of the general assembly; and it has accordingly been held the subject of the act may be expressed in general terms (*Johnson v. People*, 83 Ill. 431); that there may be included in an act any means which are reasonably adapted to secure the objects indicated by the title (*Larned v. Tiernan*, 110 Ill. 173); that many things, though of a diverse nature, may be included in an act if the doing of them may fairly be regarded as in furtherance of the general subject of the enactment (*Blake v. People*, 109 Ill. 504; *Mix v. Railroad Co.*, 116 Ill. 502, 6 N. E. 42; *People v. Hazelwood*, 116 Ill. 319, 6 N. E. 480); that any title may be adopted which is sufficient to apprise the legislators fairly of the general subject of the act, all of the provisions being fairly related to that general subject (*Town of Abington v. Cabeen*, 106 Ill. 200); and that the general terms employed in the title of an act shall be deemed sufficient if comprehensive enough to reasonably include, as falling within that general subject and as subordinate branches thereof, the several objects which the statute assumes to effect (*People v. Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923, and cases there cited). Under our system of raising revenue by levying taxes upon property according to the value thereof, a rate per centum upon such value is essential "to the assessment and collection of municipal taxes." The act in question related to but one subject, i. e. the production of municipal taxes. The provisions of the act relative to the mode or manner of assessing, levying, and collecting such taxes, and as to the rate per centum which might lawfully be levied, were in furtherance of the general object and purpose of the act as expressed in the title, and are clearly germane thereto, and therefore the act is not obnoxious to the constitutional provision under consideration.

Nor is there any force in the other constitutional objection,—that the act of 1897 contravenes the provision of section 13 of article 4 of the constitution, which provides that "no law shall be revived or amended by reference to its title only, but the law revived or the section amended shall be inserted at length in the new act." The act in question sets forth in full the section as amended. It is not necessary that the section intended to be amended shall be incorporated or recited in the new enactment as it stood prior to the amendment proposed to be accomplished by the amendatory act. *People v. Wright*, 70 Ill. 338; *Timm v. Harrison*, 109 Ill. 593; *Chambers v. People*, 113 Ill. 509.

The act entitled "An act in regard to the assessment and collection of municipal taxes," in force July 1, 1877, did not purport to amend article 8 of the general act providing for the incorporation of cities and villages. Said article 8 had and has application only to cities and villages having corporate existence under the general incorporation act, and the said act of 1877 had and has application only to cities and villages created by special charters. The act of 1877 was not designed to enlarge or restrict in any respect the operation or effect of the said article 8; and said article 8 remained in full force and effect after the enactment of the act of 1877 as before that enactment. The act of 1877 but adopted, by reference, such parts of said article 8 as related to the assessment and collection of taxes in municipalities organized under the general incorporation act, and ordained that cities and villages existing under special charters should, in assessing and collecting municipal revenues, pursue the same course as cities and villages organized under the general incorporation act were required to pursue by the said article 8. When the act of 1877 was passed, said article 8 contained no proviso of limitation as to the rate per centum which might be levied, but such limitation was incorporated in said article 8 by an act amendatory thereof, approved May 28, 1879, in force July 1, 1879. This amendatory act destroyed the uniformity in the matter of assessing and collecting taxes by cities and towns having their existence by virtue of the general incorporation act and those existing by force of special charters, inasmuch as the restrictions and limitations as to the rate per centum of taxation to be levied and collected was not the same in the two classes of such municipalities. The act of 1897, amending that of 1877, was designed to remedy this undesirable condition, and to vest all cities and villages in the state with uniform and equal powers of taxation. The act of 1897, by the reference therein made to said article 8 of the general incorporation act, adopted the provisions of said article 8 as it existed at the time of the enactment of the law of 1897. *Culver v. People*, 161 Ill. 89, 43 N. E. 812; *City of Charleston v. Johnston*, 170 Ill. 336, 48 N. E. 985. There is therefore no force in the further contention of the appellant that the act of 1897, amending that of 1877, referred to and adopted article 8 as it stood in 1877, and which had been repealed by the acts amendatory thereof, hereinbefore referred to.

The act of 1897 vested the town council of the appellant town with ample power to assess, levy, and collect taxes at not exceeding the rate of 2 per centum upon the aggregate valuation of all property within the limits of the town subject to taxation for state and county purposes, as alleged in the petition. It became the duty of the council of the appellant town to exercise the power in order that the petitioner might obtain payment of

her judgment against it. The judgment awarding writ of mandamus as prayed is correct, and is affirmed. Judgment affirmed.

(178 Ill. 19)

GILMAN et al. v. PEOPLE.

(Supreme Court of Illinois. Feb. 17, 1899.)

CRIMINAL LAW—EVIDENCE—DECLARATIONS—MANSLAUGHTER—APPEAL—OBJECTIONS.

1. In a prosecution against several defendants for murder, the declarations of one of them concerning the homicide, made in the presence of another after the homicide, are admissible against the other.

2. As deceased was seen to emerge from a saloon in which three defendants were present, a flying bottle struck him on the neck. Fifteen minutes later he was found dead in a stable, near a vicious horse, with marks of deadly blows, such as would not be made by the kicking of a horse. Defendants' declarations showed that there was a fight in the saloon on the day of the homicide, and no other difficulty was shown than the one wherein deceased was the victim. Defendants testified that there was a dispute about a game of dice, and deceased left the saloon peaceably, when ordered to do so. *Held* sufficient to sustain a conviction of manslaughter.

3. An objection in a criminal case that an erroneous ruling was made on the admission of evidence, as shown by a certain page of the record, will not be considered, where the evidence is not abstracted and the ruling is not otherwise pointed out.

Error to circuit court, Vermillion county; F. Bookwalter, Judge.

Frank Gilman and others were convicted of manslaughter, and they bring error. Affirmed.

C. M. Swallow, Mabin & Clark, J. W. Keeslar, and H. M. Steely, for plaintiffs in error. Edward C. Akin, Atty. Gen., S. G. Wilson, State's Atty., Geo. T. Buckingham, C. A. Hill, and D. B. Monroe, for the People.

PHILLIPS, J. On the 13th day of September, 1898, and a few minutes after 4 o'clock in the afternoon, one William Swank arrived in Westville, in Vermillion county, Ill., from his home near Indianola, and at about half past 5 o'clock of the same afternoon his dead body was found in a livery stable a short distance from the depot, and near a saloon kept by plaintiff in error Frank Gilman. The plaintiffs in error, Frank Gilman, Albert Underwood, and Walter Halbert, with Peter Carp and Joseph Bitius, were indicted for the crime. On trial the plaintiffs in error were found guilty of manslaughter, and sentenced to the penitentiary for one year. The other two defendants were acquitted.

From the time Swank arrived in Westville, at 4:08 p. m., until he was found dead, did not exceed 1 hour and 31 minutes. As far as this record shows, he was sound in body and in good health at the time he arrived in Westville. At the time he was found dead there was the mark of a blow extending from the nose, in a straight line, across the left side of the head, just bruising the tip of the left ear. The wound was six inches in length and about one inch in breadth. It

had the appearance of having been made by a smooth, round, hard, and perfectly straight instrument. The larynx of his throat was crushed and utterly destroyed, and the nose was broken. There were no outside visible marks of the condition the larynx was in. There were a number of small cuts, scratches, and pricks upon the right side of the neck, just under the ear and jawbone. There were also one or two small marks or cuts on the head, and there seems to have been a bruise or mark upon the outside of the left limb, below the knee. When he arrived in Westville he went immediately to a saloon kept by one Myers, and in a very short time went from there to a saloon kept by the plaintiff in error Frank Gilman. Here he shook a game of dice with Gilman, and played a game of pool with a man by the name of Peter Johnson, and also shook two or three games of dice with the said Johnson, drinking beer or whisky in the meantime in the said saloon. He left the saloon of Gilman about 4:45 or 4:50 p. m., according to the evidence of Gilman, and at about 5 o'clock he returned, and remained there until, according to the evidence of all of the defendants, he was ordered out by Gilman, and from which place he was seen by the witness Wesley Anderson coming out of the saloon door. As he was passing out a bottle was thrown at him. He then ran in a northeasterly direction towards the door of the livery stable in which he was found dead. This could not have been to exceed 15 minutes previous to the time that his dead body was found. It seems from the evidence that not more than 10 minutes intervened. From where the witness Anderson stood he could not see into the door of the livery stable, but did see deceased disappear behind the office at the southwest corner of the stable, and in a direct line with the west door, and he is certain that he did not pass on and beyond the northwest corner of said barn. He must have entered the barn then and there. When found, the body was lying upon its back, with the legs, from the knees down, behind a pony, with the rest of the body lying in a vacant stall just north of said pony. The pony stood with its head to the east, and just behind the pony was a door opening out of the barn. This door was fastened with a latch on the inside, and at the time the body was found was so fastened. There was no way to fasten or unfasten said door from the outside. At the time Swank was in the saloon of Gilman, and just previous to his fleeing therefrom, there were also in the said saloon the plaintiffs in error Underwood and Halbert and Peter Carp and Joseph Bitius. Within 15 minutes from the time the man was seen fleeing from Gilman's saloon the dead body was found, bearing evidence that death resulted from violence. There were two injuries, either of which would cause death. The evidence shows the blow on the side of the head was given by

a smooth, round, straight, hard substance. The thyroid cartilage, or Adam's apple, is shown by the evidence to have been crushed. The physicians who examined the body agree that the condition of the larynx could have been, and probably was, produced by choking, although a rapidly thrown missile, hard and smooth, delivered upon the larynx, would be sufficient to produce a wound of that kind. A blow with any hard substance, or the fist, might also cause the injury. They state the larynx was utterly destroyed, and, in their opinion, the condition of his lungs showed conclusively that this happened before he quit trying to breathe. From this evidence it is clear the death of Swank resulted from violence received at the hands of some person or persons.

The next question which presents itself is, does this evidence prove the defendants guilty of that crime beyond a reasonable doubt? The evidence is that Swank arrived in Westville with a considerable amount of paper money, and at the time he was playing pool with Peter Johnson, in Gilman's saloon, the witness McKinstry saw him changing a pocketbook from one pocket to another, and also saw money sticking out between the clasps of the pocketbook. This must have been very close to 5 o'clock, according to the evidence of Johnson, with whom he played pool and shook dice for the drinks. When Johnson left the saloon, he left Swank in there. There is nothing in the evidence to show that Swank left the saloon from that time until the time he fled from it, at the time the bottle was thrown, except the evidence of Gilman that he went out, and the evidence of Gilman and Halbert that he returned while they were shaking dice. Some 15 minutes after Peter Johnson left the saloon,—at about 5:05 or 5:10 p. m.,—Walter Halbert came in, according to his testimony, and commenced shaking dice with Gilman for beer. He and Gilman testified that about this time Underwood and Swank came, and that in a short time thereafter Peter Carp and Joseph Bitus came in. There is conflict in the evidence of the defendants as to where Halbert and Underwood were at the time the bottle was thrown. They maintain that they were on the east side of the saloon. Carp and Bitus testified that, at the time they came into the saloon, Swank, Gilman, Halbert, and Underwood were all four shaking dice at the bar. Bitus went out back of the saloon after drinking a glass of beer, leaving Carp and the other four in the saloon, and when he returned everybody had gone out of the saloon except Gilman and Peter Carp. According to the testimony of Peter Carp, Gilman, Swank, Halbert, and Underwood were shaking dice at the bar just before the time the bottle was thrown. According to the testimony of the three defendants, only Swank and Gilman were shaking dice at that time. According to the evidence of Gilman, although they shook three games of dice, there was a continual dispute, and

at no time did Swank call for the drinks at the end of either of the three games. According to the evidence of Gilman, Halbert, and Underwood, during the progress of these three games the dicebox was changed. How Halbert and Underwood could have known this if they were not at the bar is not shown. It appears that Swank did not call for the drinks on the games of dice shaken by them, although invariably the loser. The dice game broke up, and Swank was ordered out of the saloon. According to the evidence of all three of the defendants, without any resistance or trouble he peaceably turned and walked across the saloon and back, and then passed out through the door. Without any provocation whatever, we find Gilman hurling a pepper-sauce bottle at him just as he was leaving the door. Halbert and Underwood testified that just previous to his leaving the saloon they were on the east side of the saloon, and that Swank walked over near them when first ordered from the saloon. The physicians testified that a man injured as Swank was might have life enough left in him to make a final plunge or run for a considerable distance before falling. Dr. Fallis testified: "I don't think he would travel far, but men with terrible injuries have been known to go some little distance." Witness Anderson testifies that he saw Swank come from the saloon, running in a stooped position, and that as he reached the door he was struck about the neck with a bottle. This bottle must have gone to pieces, and the flying glass made the cuts on the neck and jaw. Some of the pieces also struck the door, as there were some scars made on the door by flying glass striking it. They were small scars, only removing the paint from the wood. According to the evidence of Anderson, when Swank got onto the porch he straightened up, and ran rapidly, and disappeared in the barn. The defendant Underwood also testifies that he saw him, after he went out of the saloon, running past the window.

Taking the evidence bearing upon the conduct of these defendants, we have Gilman, as shown by the evidence of Stark, an officer, denying that there had been a fight or trouble in his saloon. Afterwards, when confronted by the officer with the statement that there had been trouble in the saloon, he admitted it. The evidence of Critchfield is that Gilman said to Underwood to keep still about what happened in the saloon that day. The evidence of Critchfield is that Gilman had him (Critchfield) take him (Gilman) down to the room of Walters, with whom Underwood roomed; that the latter was called from bed, and struck a light, but was told from the outside to put the light out; that he went out, and talked quite awhile, and then returned to bed. The next morning Underwood told Walters, in answer to an inquiry, that he did not know who it was that was there and called him out the night before, and further told him to say nothing about any one being there.

There is evidence of a statement of Underwood to Anderson at the depot, just after he and Halbert came from the saloon and immediately after Swank had fled from the saloon. They wanted to know what became of that man that ran out of the saloon, and, in answer to an inquiry of Anderson as to what the trouble was over there, Underwood stated that it was none of his business. According to the evidence of Anderson, at the time Halbert and Underwood came from the saloon over to the depot "Halbert spoke up, and said he would not let any strange man shake dice with him." According to the evidence of Oliver Kidd, he arrived at Westville on the 5:35 train, and went immediately to Gilman's saloon, where he saw Underwood, Halbert, Critchfield, Gilman, and one foreigner. The first four were in a conference by themselves, and were talking of a fight, and also drinking beer. Kidd heard the remark made "that he got what he needed; that it would teach farmers to keep out of other people's games"; and heard Gilman say that he did not hit the man. Kidd is very positive that Critchfield, Halbert, and Underwood were standing at the bar, with a glass of beer each, at the time he heard this conversation in the saloon, though this evidence is disputed by the defendants. It was argued by the defense that this evidence was not proper as to Halbert, and yet the witness Kidd says that Halbert, Critchfield, and Underwood were all three standing at the bar talking with Gilman, and that the conversation was had in the presence of all four. The evidence was competent as against Halbert.

From this evidence it is clear, not only that the death of Swank resulted from a crime, but it also shows that that crime must have been committed in Gilman's saloon, and that all these defendants were present there at the time. Declarations made by them, and by others in their presence, clearly implicate them as being engaged in a difficulty in that saloon, and no other difficulty is shown therein other than the one wherein Swank was the victim. This evidence was for the jury. The plaintiffs in error contend that this evidence is not sufficient to sustain a conviction. Applicable to the facts thus shown, what was said in *McCoy v. People*, 175 Ill. 224, 51 N. E. 777, not only states the rule of law, but is exceedingly appropriate. On page 229, 175 Ill., and page 779, 51 N. E., it is said: "The law has placed the determination of that question with the jury, and it is only when this court is satisfied, from a careful consideration of the whole testimony, that there is a reasonable doubt of the guilt of the accused, that it will interfere with the verdict of the jury on the ground that the evidence does not support the verdict. *Gainey v. People*, 97 Ill. 270. We are satisfied the evidence sustains the verdict of the jury, and that the jury would have been justified in inflicting, under the evidence in the record, a much heavier punishment."

The only evidence attempted to be introduced by the defendants was that the deceased was found dead behind a vicious mare that was in the habit of kicking, and that in another saloon, near Gilman's saloon, two fights occurred that afternoon. There was no evidence to show that deceased was present at either of those fights, nor is there any evidence to show the bruises inflicted were of a character that could be caused by the kick of a horse, but the evidence shows, on the contrary, that the bruises could not have been so caused.

Counsel for plaintiffs in error complain of the rulings of the court in reference to objections to testimony for the state. Counsel have not, however, done more than refer to a record which comprises over 500 pages, and their reference to that record is by the page thereof, without allusion to the particular ruling. No effort has been made to abstract this branch of the evidence. Over 60 pages are referred to as containing questions objected to, and not a single question is abstracted or pointed out. We cannot consider the assignments of error on this branch of this record.

It is objected that the bailiff in charge of the jury was in the jury room and made a map showing the location of the different points referred to in the evidence. A careful reading of the affidavits in support of a motion for a new trial on this branch of the case shows that the map was made by one of the jurors, and that the bailiff took no part in the deliberations of the jury or in making or explaining the map. This error is not well assigned.

Error is assigned in giving instructions for the state and in modifying and refusing instructions asked by the defendants. Thirty-six instructions were given in behalf of the people, many of them being a definition of murder and manslaughter, etc. The defense asked thirty instructions, some of which were given as asked and others modified and given. Fourteen were refused. The instructions given for the defense covered every phase of the case, and, from a careful examination of them, we find no error in the giving, modifying, or refusing of instructions. The evidence supports the verdict, and we find no error in the record. The judgment of the circuit court of Vermillion county is therefore affirmed. Judgment affirmed.

(173 Ill. 241)

WEISS v. BINNIAN.

(Supreme Court of Illinois. Feb. 17, 1899.)

VENDOR AND PURCHASER—ACTION FOR PRICE—FAILURE OF PART OF TITLE—WARRANTY AGAINST INCUMBRANCES — KNOWLEDGE OF VENDEE — PLEADING.

1. Where, in an action on a note, the maker alleges that it was given for an agreement to convey certain premises free from incumbrances, with full covenants of warranty, and that the payee of the note could not convey a good title, plaintiff must aver in his replication, be-

fore he can force the defendant to carry out his part of the contract, that he was in a situation to perform his part.

2. Where the plea is a complete defense to the cause of action, and plaintiff elects to stand on replications held insufficient on demurrer, a judgment in bar of plaintiff's cause of action is proper.

3. A warranty against incumbrances includes an easement to cut ice.

4. The consideration of a note given for an agreement to convey certain premises free from incumbrances wholly fails if there is a failure of title to a portion of such premises, though such portion be not worth the amount of the note.

5. An agreement to convey free from incumbrances includes those known to the vendee when the contract was made.

Appeal from appellate court, Third district.

Assumpsit by William Weiss against William H. Binnian. From a judgment of the appellate court affirming a judgment for defendant (78 Ill. App. 292), plaintiff appeals. Affirmed.

Ben Hoff, Jr., and W. R. Curran, for appellant. Arthur Keithly, for appellee.

CRAIG, J. This was an action of assumpsit, brought by William Weiss to the May term, 1897, of the Tazewell county circuit court, against William H. Binnian, upon a promissory note, as follows: "\$5,000. Peoria, Ill., Jan. 16, 1893. On or before July 10, 1896, after date, I promise to pay to the order of William Weiss \$5,000, at the First National Bank, Peoria, Ill., value received, with interest at the rate of six per cent. per annum from July 10, 1893. William H. Binnian. William E. Stone. The declaration contained one special count, with the common counts, and alleged damages at \$7,000. To the declaration appellee filed a number of pleas, in which it was averred that the note in suit is the sole cause of action, and that it is the last to mature in a series of notes, aggregating \$18,200, made by William E. Stone, as principal, and the defendant, William H. Binnian, as surety, for the purchase price of certain real estate that day bought by said Stone of plaintiff, and which plaintiff agreed to convey to Stone upon the fulfillment of certain conditions, expressed in a written contract entered into between the plaintiff and Stone contemporaneously therewith, and as part thereof. The fourth plea set out the contract in full, and it was referred to in the other pleas. The material part of the condition of said contract, necessary to be considered in this decision, is, in substance, as follows: "Upon the payment of said sums being made at the time and in the manner aforesaid, the said William and Eva Weiss covenant and agree to and with the said William E. Stone, his heirs, executors, administrators, and assigns, to execute a good and sufficient deed of conveyance, in fee simple, free and clear from incumbrance, with full covenants of warranty for the above-described premises." Subsequently, by leave of court, the above pleas were all withdrawn, and ap-

pellee filed substituted pleas 1, 2, 3, 4, 5, 6, 7, and 8. To each of these pleas appellant filed replications. Appellee then filed a general and special demurrer to appellant's replications to the third, fourth, fifth, sixth, seventh, and eighth substituted pleas. Appellant joined in demurrer. On hearing, the court sustained appellee's demurrer to appellant's replications to the third, fourth, fifth, sixth, seventh, and eighth substituted pleas, and carried the demurrer back to appellee's fourth and seventh pleas. Appellant was then granted leave to amend his replications to appellee's third, fifth, sixth, and eighth substituted pleas. Appellee abided by his seventh plea, and was granted leave to amend his fourth plea and to file additional pleas. Thereupon appellee filed an amendment to his fourth plea, and filed additional pleas Nos. 9, 10, and 11. The appellant then demurred to appellee's amended and substituted pleas 3, 4, 5, 6, 8, 9, 10, and 11. There was joinder on demurrer, and a hearing. The court overruled appellant's demurrer to the appellee's third, fifth, sixth, eighth, and tenth amended and supplemental pleas, and sustained the demurrer as to the appellee's fourth amended and ninth and eleventh additional pleas. Appellee abided by his ninth and eleventh additional pleas, and was granted leave to make a second amendment to his amended fourth plea, which second amendment was made. On motion, leave was granted the appellant to reply to the third, fourth amended, fifth, sixth, eighth, and tenth additional pleas, which replications were filed. Appellee filed a general demurrer to each of said replications. On the hearing of this general demurrer, the court overruled it as to appellant's replication to appellee's third, eighth, and tenth pleas, and sustained it as to appellant's replications to the fourth, fifth, and sixth pleas, to which ruling of the court in sustaining said general demurrer to said replications appellant excepted, and abided by his said replications to said fourth, fifth, and sixth pleas, and the court entered final judgment against appellant.

From the foregoing statement of the pleadings, it is apparent that, in order to dispose of the questions presented by the record, it will only be necessary to consider the fourth amended plea and the fifth and sixth additional pleas, and the replications filed to these pleas. The facts disclosed by these pleas constituted a complete defense to the promissory note set up in the declaration. The payment of the note sued on in the case at bar, and the conveyance of the land described in the contract by "a good and sufficient deed of conveyance in fee simple, free and clear from incumbrance," are dependent, concurrent conditions, and the plaintiff is required to be in a situation to perform his part of the contract, and to so aver in his replications, before he can force the defendant to carry out his part of the contract. *Tyler v. Young*, 2 Scam. 444. In *Mason v.*

Wait, 4 Scam, 127, the case was debt on a promissory note. The declaration contained the usual money counts and an account stated. The pleas set up in different ways that the consideration of the note was the sale of certain lots and lands, and the delivery of a bond for a deed, and that the payee in the note could not convey title. This court said: "A want of title in the vendor may be set up under our statute as a want or failure of consideration of the note sued on. We do not regard the title bond in this case, or the covenant for title, as the consideration. The true consideration is the estate,"—citing *Mason v. Walte*, 1 Pick. 455; *Dickinson v. Hall*, 14 Pick. 217; *Stone v. Fowle*, 22 Pick. 166; *Owings v. Thompson*, 3 Scam. 502. A purchaser of property to be paid for in installments, where there is no time fixed for the delivery of the deed, is not entitled to receive his deed until the last payment is made; nor is a purchaser obliged to part with his money before he receives the deed. *Doyle v. Teas*, 4 Scam. 202; *Thompson v. Shoemaker*, 68 Ill. 256; *Duncan v. Charles*, 4 Scam. 561. As has been seen, the appellee demurred to the replications to the fourth, fifth, and sixth pleas, which the court sustained, and, the plaintiff electing to stand by his replications, the court entered judgment in bar against the plaintiff for costs of suit, because the facts set up in the pleas were a complete defense to the cause of action set up in the declaration, and remained unanswered. Appellant assigns error in entering judgment in bar against the plaintiff, and in favor of the defendant, on the pleas. In this there was no error. In *Ward v. Stout*, 32 Ill. 399, this court said (page 411): "Where the defendant's plea constitutes a bar to the action, if the plaintiff demurs to it, and the demurrer is determined in favor of the plea, judgment of *nisi* capiat shall be entered, notwithstanding there may be also one or more issues of fact, for the reason that upon the whole it appears the plaintiff had no cause of action. *Lawe v. King*, 1 Saund. 80a, note 1. It is true a demurrer was not interposed to the second plea, but a defective replication was, which amounts to the same thing, and the demurrer to it tested the validity and sufficiency of the plea. The effect is the same as if an issue of fact had been made upon the plea and that issue had been found for defendant, which, if so found, necessarily put an end to the plaintiff's action. It is impossible, on this state of the pleadings, that the plaintiff could have judgment. Standing by his defective replication, the court was bound to give judgment in chief. One party cannot have a judgment upon the law and the other party upon the facts of the case."

It is, however, said that the facts set up in the replications constituted a complete answer to the pleas, and the court erred in sustaining a demurrer thereto. The premises described in the bond for deed or written contract, which the pleas aver the plain-

tiff, Weiss, could not convey free from incumbrance, are lots 3, 4, and 5, a part of lot 6, and fractional northwest quarter of section 27, township 25, range 5, Tazewell county, Ill. The replications to the amended fourth plea and fifth and sixth substituted pleas aver that, at and before the time of concluding and executing the said written contract, the defendant had notice and knowledge that the ice-cutting privilege on lot 3 was intended to be conveyed by plaintiff to said William E. Stone by said contract. The replications confess the incumbrance, but attempt to avoid its effect, alleging that the title was subject to said ice-cutting privilege, and that William E. Stone had knowledge of the conveyance of the said easement before the execution of the contract, and offered to convey subject to said incumbrance, on the payment of the note and interest. The appellant, in support of his position, cites several cases from the courts of other states. In *Walles v. Cooper*, 24 Miss. 208, cited by appellant, it was held that parties, in the absence of anything to the contrary, are presumed to have contracted with reference to the then condition of the property, and if any easement to which it is subject be open and visible, and of a continuous character, the purchaser is supposed to have been willing to take the property as it was, subject to the burden. In *Patterson v. Arthurs*, 9 Watts, 152, also referred to in appellant's brief, it was held that, while a public highway is an easement, yet, if the purchaser knew of its existence, he took the covenant with notice that the easement was there, and it was not regarded as an incumbrance that came within the meaning of the parties when they used the term "incumbrance" in the contract. While it may be the rule in some of the states that a grantor's covenant of warranty in a deed does not include an easement, this court has adopted a different rule in *Beach v. Miller*, 51 Ill. 206. In that case an action of covenant was brought to recover damages claimed to have been sustained by reason of an alleged breach of covenants contained in a warranty deed. The defendant, on the 27th day of September, 1855, conveyed the right of way across the land described in the deed sued upon to the Peoria & Oquawka Railroad Company. The evidence showed that the railroad was constructed across the land and was in use by the company at the time plaintiff purchased, and he was aware of the fact, but nothing was said in reference to it at the time of, or previous to, the sale. The plaintiff claimed this was such an incumbrance as created a breach of the covenant against incumbrances, while the defendant claimed it was not. There was no reservation of this right of way from the operation of defendant's deed. The deed to the railroad company only purported to convey the right of way, and not the fee to the land. In the decision of the case it was said (page 209): "Was this right of way, then, an in-

cumbrance upon the land? We think it was. It is true, the authorities on this question are not harmonious; but we think the current holds such an easement to be an incumbrance, and that they are supported by the better reason. In the case of *Prescott v. Trueman*, 4 Mass. 627, Chief Justice Parsons, in delivering the opinion of the court, says: 'Thus, the right to an easement of any kind in the land is an incumbrance. So is a mortgage. So, also, is a claim of dower, which may partly defeat the plaintiff's title by taking a freehold in one-third of it.' And to the same effect are the cases of *Mitchell v. Warner*, 5 Conn. 497, and *Harlow v. Thomas*, 15 Pick. 68, where it is held that a private way over the land is an incumbrance. A right to go upon the land to clear an artificial water course has been so held (*Prescott v. Williams*, 5 Metc. [Mass.] 433), and a right to cut timber on land was held to be an incumbrance (*Oatchart v. Bowman*, 5 Pa. St. 319.) In the case of *Kellogg v. Ingersoll*, 2 Mass. 97, Chief Justice Parsons said, in delivering the opinion of the court, that 'the court are well satisfied that the road, as there described, is an incumbrance on the land sold. It is a legal obstruction to the purchaser to exercise that dominion over the land to which the lawful owner is entitled. An incumbrance of this nature may be a great damage to the purchaser, or the damage may be very inconsiderable, or merely nominal. The amount of damages is a proper subject of consideration for the jury who may assess them, but it cannot affect the question whether a public town road is an incumbrance of the land over which it is laid.' Where a purchaser acquires the fee to land free and unincumbered, he obtains the absolute dominion over it, and may use and enjoy it by appropriating it to any legitimate use he may choose, but where it is subject to easements it is not free, nor can he enjoy it to its full extent. When incumbered by a private or public way passing over it, he does not have absolute dominion over it, as he would were it not under such servitude. With the easement of a private way, the person holding it can use and enjoy it in his own right for the purposes of the way, and the owner of the fee cannot control its use. So, of a public highway. The public enjoy the right to its unobstructed use, in defiance of the owner of the fee. * * * The vendor is under no compulsion to make covenants when he sells land, but, having done so, he must keep them or respond in damages for injury sustained by their breach. Nor is it a release or discharge of the covenant to say that both parties knew it was not true, or that it would not be performed when it was made. A person may warrant an article to be sound, when both buyer and seller know it is unsound. So, the seller may warrant the quantity or quality of an article he sells, when both parties know that it is not of the quality or does

not contain the quantity warranted. * * * If, then, a private or public way is an incumbrance (and we have seen that it is), it follows that, in principle, a turnpike or railway, legally located and running over a piece of land, upon the same ground, and for the same reasons, must be held to be an incumbrance, as it in an equal or greater degree obstructs or incumbers the free use of the land; and a person selling land thus incumbered, and covenanting that it is not, must be held to perform his covenant by its removal, or respond in damages. * * * In Maine, New Hampshire, Connecticut, Vermont, and Iowa the courts of those states seem to have followed the case of *Kellogg v. Ingersoll*, and are opposed to the doctrine of the Pennsylvania courts. Although the fee may not have passed by the deed in this case, still the right of user was granted, and, that being vested in the railroad company, and they having its exclusive use, it must be held to be an incumbrance, within the covenants of this deed, and, being an incumbrance, it operated as a breach of the covenant, and gives the right of recovery." In line with the foregoing authority is the case of *Wadhams v. Swan*, 109 Ill. 46, where the doctrine announced in *Beach v. Miller* is reaffirmed. Upon an examination of appellee's pleas, it will be found that the contract under which the lands described therein were to be conveyed provided that \$18,200 should be paid for all of the lands named in the contract, all of which has been paid except the note in suit, which is the last payment. The pleas aver that appellant, Weiss, and wife should convey to said Stone, by good and sufficient deed of conveyance, in fee simple, free from all incumbrances, with full covenants of warranty, all of said premises, and then aver that at no time before the commencement of the suit could Weiss or his wife convey to said Stone lots 3, 4, and 5 and the fractional northwest quarter of section 27, in fee simple, free and clear from all incumbrances, as in said contract provided. As the lands which the vendors could not convey were only a part of those contracted to be conveyed, it is claimed that the pleas are bad, because they fail to aver that the lands which could not be conveyed were worth at least the amount of the note sued upon, and interest. No authority has been cited to sustain this position, and we are aware of no well-considered case where the rule contended for is sustained. As has been said before, the conveyance of the premises described in the contract of sale in fee simple, free and clear of all incumbrance, and the payment of the note in suit, are dependent and concurrent acts, and, before the plaintiff can recover on the note, it must appear that he is ready and able to convey, not only a part of the premises agreed to be conveyed, but all. The purchaser, Stone, contracted for all the lands described in the contract, and he could not be required to pay

for all and accept a deed for less. The easement set up in the replications being an incumbrance, and the vendor, Weiss, having covenanted "to execute a good and sufficient deed of conveyance in fee simple, free from incumbrance, with full covenants of warranty," for the premises described in the bond for a deed, he cannot collect this, the last of a series of notes given for the purchase money, unless he can convey the title free of incumbrance, and he cannot release or discharge the covenant by saying the vendee knew of the incumbrance when the contract was entered into. The judgment of the appellate court is affirmed. Judgment affirmed.

(178 Ill. 29)

CARPENTER et al. v. CAPITAL ELECTRIC CO.

(Supreme Court of Illinois. Feb. 17, 1899.)

DEEDS — RESERVATION — PRIVATE ALLEYS — OBSTRUCTION — EQUITY JURISDICTION — ELECTRICITY.

1. Where adjoining lot owners acquired their lots from the same grantor by deeds, each of which reserved a strip 10 feet wide off the rear end for use as an alley, the entire strip thus reserved inures to the use of the abutting lot owners alone, as a private alley for their ordinary purposes of passage and repassage.

2. Poles and wires cannot be run along a private alley, the fee of which is in the abutting lot owners, to supply one owner with electric lights, against the objection of the others, since it constitutes an additional easement to its ordinary uses, regardless of the height to which the wires may be elevated.

3. Equity will prevent the obstruction of a private alley by poles and wires for electric lights, since the injury is continuing, and there is no adequate remedy at law.

Appeal from circuit court, Sangamon county; James A. Creighton, Judge.

Bill by John Carpenter and others against the Capital Electric Company. There was a decree dismissing the bill, and complainants appeal. Reversed.

This is a bill filed by the appellants against the appellee, praying that the appellee may be decreed to take down two electric wires and a cross arm stretched and extending over a private alley in the rear of the property of the appellants, in the city of Springfield, and to remove said wires and cross arm from said alley, so as to render the use thereof with the appurtenances by the appellants as the same was used previous to the erection of the said wires and cross arm. The bill was answered by the appellee, and, upon hearing had, a decree was entered by the circuit court dismissing the bill at the cost of the appellants. The present appeal is prosecuted from such decree of dismissal.

The facts, as shown by the pleadings and proofs, are substantially as follows: The appellants herein are the children of one William Carpenter, now deceased. William Carpenter in his lifetime purchased at a judicial sale, held under a decree of the circuit court of Sangamon county entered in a certain suit

pending therein, certain lots fronting 36 feet on Washington street, in the city of Springfield, and running north 97 feet, and received for said property from the master in chancery of said court two deeds,—one dated October 25, 1852, and the other dated December 26, 1855. One of said deeds conveyed a strip 10 feet wide and 97 feet deep, and the other of said deeds conveyed a strip 26 feet wide and 97 feet deep. The deeds contained these words: "Ten feet in width by twenty-six feet (or ten feet) on the north end to be used as an alley." In 1852 said master in chancery, in pursuance of the decree in the same cause, sold to one S. B. Fisher a parcel of land immediately west of the parcel so sold to William Carpenter, and having a frontage of 22 feet on Washington street, and a depth of 97 feet. In the same year the master in chancery, in pursuance of the same decree, sold to Fagan & Fitzpatrick a parcel of land immediately west of the land sold to Fisher, and having a frontage of 22 feet on Washington street, and a depth of 97 feet. All said deeds to Carpenter and Fisher and Fagan & Fitzpatrick were made at the same time, and by virtue of the same decree, in the same cause. Each of the deeds to Fisher and to Fagan & Fitzpatrick contained the words, "Ten feet in width by twenty-two feet on the north end, to be used as an alley." The grantees in said deeds took immediate possession of the premises so sold to them, and they, or their grantees and descendants, by themselves or tenants, have remained in possession thereof for more than 20 years last past, and are now in possession of the same. There are no other words in said deeds restricting the rights of the grantees therein, except the words above quoted. The said alley was closed at the west end thereof, and extended westward from its eastern opening only 80 feet, and did not run through the block in which it is located. Said alley has been open for the benefit of the parties for whom it was created, since said deeds were executed, and has been in continual use. The property in question is situated on the northeast corner of the public square in Springfield, and was when said deeds were made, and is now, business property, and business buildings were erected thereon soon after said deeds were executed. The appellee is a corporation organized under the laws of Illinois, and has a grant from the city of Springfield to erect poles and wires for the purpose of conducting electric currents for the purpose of furnishing electric lights on all the streets and alleys of said city. The tenant occupying the building on the lot 22 feet wide sold to Fisher, and lying next west of the lot on which the building of the appellants, thirty-six feet wide, stands, requested the appellee to introduce electric light into the building on said lot next west of the lot of appellants, through said alley, which was accordingly done. The wires were strung for this purpose along said alley, entering the alley at

the east end thereof. The eastern ends of said wires are attached to a pole erected in Sixth street, which runs north and south on the east side of the building of appellants, and the wires extend west over said alley to the premises immediately west of the lot of appellants. The west ends of said wires, which are two in number, are attached to a cross arm fastened to a pole at the top thereof, which cross arm extends into the alley. Said wires are about 14 feet above the surface of the ground, and about 3 feet in the rear of the store building on the premises of the appellants. The pole to which the western ends of the wires are attached does not stand in said alley, but said cross arm and pole are wholly upon the premises to the west of the lot of the appellants. Said wires are now used by appellee to furnish electricity for lighting purposes to the tenants of the building adjoining the building of the appellants on the west. The wires were erected without the knowledge or consent of appellants, or of either of them, before the commencement of this suit, and appellants requested appellee to remove said wires and cross arm from said alley, but appellee refused, and still refuses, to take down the two electric wires and cross arm from the alley. The present tenants of the Fisher lot are in the rightful possession of, and entitled to the enjoyment of, all easements and appurtenances created in favor of the Fisher lot.

C. A. Keys, for appellants. Brown, Wheeler, Brown & Hay, for appellee.

MAGRUDER, J. (after stating the facts). The alley in the rear of the building of appellants is a private alley, created for the use of the appellants and of the owners of the two lots lying west of the lot of the appellants. It is alleged in the bill that the easement consisting of the use of said alley, as created by the original deeds conveying the property, was so created for the benefit of the property of the appellants, and of the two pieces of property adjoining the property of the appellants on the west. It is admitted in the answer that the alley was reserved, as alleged in the bill, for the benefit of the properties aforesaid, and for a right of way to and from the rear of said premises. The words contained in the deeds, to wit, "Ten feet in width * * * on the north end, to be used as an alley," taken in connection with the allegations of the bill and the admissions of the answer as above set forth, clearly indicate that the alley is a private alley. The purpose of the reservation in the deeds was not for the use of the public, but for the use of the parties to the deeds; and hence the public acquired no right to the use of the alley, and no public easement was created therein. The fee of that portion of the alley, 10 feet wide and 36 feet long, in the rear of the building of the appellants, was in the appellants, as owners of the abutting property,

subject, however, to the right of the property owners on the west to use the strip of land reserved for the purposes of an alley. In other words, the title is in the appellants, but the property owners on the west have the right of passage over the alley, and the title of appellants is burdened only with said right of passage or easement. The question then presented is whether the appellee had the right to extend electric wires over the portion of the alley in the rear of the building of appellants, for the purpose of furnishing light to the occupants of the building lying west of the property of appellants, without the consent of the appellants.

It is conceded that the appellee company had a grant from the city to erect its poles and string its wires for the purpose of furnishing electric light along the streets and alleys of the city. But the alley here was not a public alley, over which the city had control, but was a private right of way, the use of which was confined to the appellants and the owners of the two properties adjoining them on the west. *Garrison v. Rudd*, 19 Ill. 558. It served as a means of accommodation to a limited neighborhood for local convenience. 2 Am. & Eng. Enc. Law (2d Ed.) p. 149. It is also to be observed that here the electric wires passing over and above the alley were so placed for the purpose of furnishing light to private persons, and not for the purpose of furnishing light to the public. It seems to be clear that the use of this alley for the purpose thus indicated imposed a new and additional burden upon the fee owned by the appellants, subject to the easement consisting in the use of the alley. The erection and use of telegraph poles in a public highway, where the abutting landowner is the owner of the fee in the highway, constitutes a new servitude, which entitles such owner to recover damages for the additional use thus created. *Board v. Barnett*, 107 Ill. 507. The principle which is applied to the erection of telegraph poles on a public highway, where the fee of the highway to the center thereof is in the abutting owner, and to the stringing of wires upon said poles over the highway, applies to a private alley, like that here under consideration, where the fee of the ground is in the owner of the property abutting upon the alley. It is immaterial to inquire whether the damages are great or small. It is sufficient that the property rights of the appellants are interfered with in a manner detrimental to their interests, as the owners of the fee. The taking possession of their land forcibly and against their will comes within the constitutional inhibition that private property shall not be taken or damaged without just compensation. *Board v. Barnett*, supra. Nor is it material that the telegraph wires are some 14 feet above the surface of the ground. The owner of land, unless restricted by covenant or custom, has the complete control of the soil, together with the space above and below, so far as he may choose to use it.

Tanner v. Volentine, 75 Ill. 824. The uncontradicted evidence tends to show that the presence of the wires in the alley would operate as a hindrance to the fire department in case it should become necessary to extinguish a fire in the building of the appellants, and also that the presence of the wires in the alley would have a tendency to obstruct the conveyance of freight or other material to and from the second story or upper window in the rear part of the building of appellants.

It is laid down in some of the authorities that the erection of electric light poles by city authorities for the purpose of lighting the public ways and places is not a taking of private property for public use, upon the ground that the use of the streets for this purpose is in the nature of an exercise of the police power by the city. But when an electric light company erects poles or strings wires, not for the purpose of lighting public ways and places, but for the purpose of supplying light to private individuals and firms in the transaction of its own corporate and commercial business, such erection of poles and stringing of wires constitute an additional easement in the highway or private alley, for which the owner of the fee may demand compensation. *Light Co. v. Hart*, 13 Pa. Co. Ct. 369; *Tiffany v. Illuminating Co.*, 51 N. Y. Super. Ct. 280; *Crow. Electricity*, § 126. It has been held that the laying down of gas pipes or other pipes for the purpose of supplying the city and its inhabitants with light is a legitimate use of the streets, for which the abutting owner is not entitled to compensation. 2 Dill. Mun. Corp. (4th Ed.) § 691, note; *Elliot, Roads & S.* p. 305; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 40 N. E. 1008. And it has been said that the legal relations of electric light wires through the streets of a city must be analogous to those of gas pipes, upon the ground that both the electric light wires and the gas pipes are means of furnishing light from a central source of supply, and that, if the laying of gas pipes in a city street is not an additional servitude on the land of the abutting owner, the same should be true of laying tubes for electric light wires, or placing posts in the ground for carrying the wires overhead. *Keasbey, Electric Wires*, p. 86. This doctrine, however, applies only to such public streets and alleys as are under the control of the municipality, and where the light to be transmitted by the wires or pipes is for the benefit of the public, as well as of property owners along the line of the street. The doctrine, however, can have no application to such a private alley as is that in the case at bar, where the fee of the ground in the alley is in the abutting owners, and where the easement, consisting of the use of the alley, is confined to a limited number of property owners, whose lands abut upon the alley. When the strip of land in question was reserved in the original deeds for the purpose of an alley, it was intended for the or-

dinary purposes of passage and repassage, and not for the erection of any such permanent obstruction as the stringing of wires in the manner shown in the present record.

It is said by the appellee that equity has no jurisdiction to entertain the present bill. We regard this contention as without force. Where a party has a right of way over, or an easement in, certain real estate, and the same is obstructed, equity has jurisdiction, as the injured party has no adequate remedy at law. *McCann v. Day*, 57 Ill. 101. Moreover, the injury complained of is one of a continuing or permanent nature, for which an action at law would not afford a complete and adequate remedy. *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. 105. The decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(178 Ill. 140)

WEBSTER v. FLEMING.

(Supreme Court of Illinois. Feb. 17, 1899.)

CONVEYANCE OF MORTGAGED PROPERTY—ASSUMPTION OF DEBT—ACTIONS—PARTIES—JUDGMENTS—ENTRY—ESTOPPEL—RELEASE—EVIDENCE—INSTRUCTION.

1. Where mortgagor conveys the mortgaged property to a grantee, who assumes the incumbrance and accepts the deed with such assumption clause therein, mortgagee can, in his own name, sue the grantee thereon, since the distinction between contracts under seal and those not under seal (except penal bonds) is abolished by Rev. St. 1874, p. 777, c. 110, § 19, in so far as bringing suits is concerned.

2. Where a party agrees to the submission of a cause under a certain title, and the judgment is entered under that title, he is estopped from claiming error in its entry.

3. Where incumbrances, which grantee assumed, rest on a number of lots, oral testimony that the trust deed securing a note sued on is the particular incumbrance resting on a particular lot is admissible.

4. The court's refusal to hold as law a proposition submitted is proper, where it is inapplicable to the facts.

5. Where mortgagor conveys the mortgaged property to a grantee, who assumes the payment of the incumbrances, the fact that grantee conveys to a third person, who assumes the payment, will not release him from liability to the mortgagee.

Appeal from appellate court, First district.

Action by William Fleming against William E. Webster. There was a judgment for plaintiff, and defendant appealed to the appellate court, and from an order of affirmance (73 Ill. App. 234) defendant appeals. Affirmed.

This is an action of assumpsit, originally brought by the appellee, William Fleming, against the appellant, William E. Webster. A demurrer was filed to the original declaration, and sustained. A demurrer was also filed to the declaration, after it had been amended, and sustained. The declaration, as finally amended, alleges that "William Fleming, plaintiff, * * * complains of Wil-

liam E. Webster, defendant." Several pleas were filed to the declaration, some of which were demurred to, and the demurrers were sustained. Pleas, however, were finally framed to which all demurrers were overruled, and replications were filed thereto, and the cause was put at issue. By agreement, a jury was waived, and the cause was submitted for trial to the court without a jury. Upon the trial appellant submitted to the court nine propositions to be held as law in the decision of the case, all of which were marked "Held" by the court, to which action of the court the appellant excepted. The defendant submitted to the court five propositions to be held as law in the decision of the case, of which the first, second, and fifth were refused, and the third and fourth were held by the court after having been modified, to which refusal and modification the defendant excepted. The finding of the court was in favor of the plaintiff below, the present appellee. Motions for new trial and in arrest of judgment were overruled, and exceptions were taken to the orders so overruling them. Judgment was thereupon entered in behalf of the plaintiff for \$1,268.89 and costs. An appeal was taken to the appellate court. In the appellate court the appellee remitted the sum of \$120.55 from the judgment of the lower court, and thereupon the appellate court affirmed the judgment of the lower court for \$1,148.34 and costs. The present appeal is prosecuted from such judgment of affirmance.

The declaration alleges, substantially, that on December 17, 1890, John J. Shutterly, being the owner of lot 7, and four other lots, in block 19, in Mallette & Brownell's subdivision of Auburn Park, in Cook county, sold and conveyed the same, by warranty deed, to the appellant, William E. Webster; that in this warranty deed the grantee, Webster, assumed and agreed to pay, as a part of the consideration for the five lots, incumbrances on said lots amounting to \$19,860, with interest after September 1, 1890, besides an alley assessment of \$100 and taxes of 1890; that this incumbrance secured promissory notes, executed by Shutterly, amounting to the sum aforesaid, with interest as aforesaid; that among these notes was one for \$860, bearing date August 9, 1889, payable on or before four years after date to the order of Mallette & Brownell, with interest at the rate of 6 per cent. per annum, payable semiannually, and after maturity to bear interest at the rate of 8 per cent. per annum; that thereafter said note was duly indorsed by the payees, Mallette & Brownell, and for a valuable consideration assigned to the appellee, William Fleming, who is now the holder and legal owner thereof; that said note was secured by a trust deed on said lot 7, described in the deed from Shutterly to Webster; that said deed conveying the said five lots, including lot 7, was executed and delivered by Shutterly to Webster, and accepted and re-

corded by him; that, in and by the said deed, Webster assumed and agreed to pay said note for \$860, together with interest thereon from September 1, 1890, as part of the consideration therefor, in the following words: "Subject, however, to incumbrances thereon to the amount of \$19,860, with the interest since September 1, 1890, which incumbrances the said party of the second part assumes and agrees to pay as a part of the above-named consideration;" that there were no other incumbrances on the said lot, except said notes and trust deeds, executed by said Shutterly, amounting to \$19,860; that thereby Webster became liable to pay said note for \$860 to the legal holder thereof, at maturity, but failed to pay the same; that this suit is brought by William Fleming, plaintiff, to recover the amount of said note, against William E. Webster, defendant. The second count of the amended declaration alleges the same facts, and avers, in effect, that, by the assumption clause in the deed, Webster undertook and promised to pay, and became liable to pay, to William Fleming, plaintiff, the \$860 note, and, not having so paid it, William Fleming brings this suit against Webster for the amount of that note; that said note sued on was part of the incumbrances assumed by Webster.

Of the three special pleas filed, the first set forth that under the deed the defendant was entitled to possession of the property, but was deprived of the same for a period of six months after the date of the deed, whereby he lost the use and occupation of the premises, and was thereby damaged \$2,000. The second special plea avers that, by the terms of the deed from Shutterly to defendant, defendant was only bound to pay \$19,860 of incumbrances, but was compelled to pay, and did pay, \$1,000 for a special assessment upon the property, and that, having already paid more than \$19,860 of incumbrances, he is not liable for said note of \$860. The third special plea averred that the note for \$860 was secured by trust deed on one of the lots described in the deed from Shutterly to Webster, and that subsequently thereto Webster sold and deeded this lot to George M. Reed, and that, in the deed to Reed, Reed, the grantee, assumed and agreed to pay this \$860, and had paid interest on the note to plaintiff, and was accepted as the debtor, and arrangements were made with him to pay the note, of which defendant had no notice.

James A. Fullenwider and John M. Hamilton, for appellant. Jones & Strong, for appellee.

MAGRUDER, J. (after stating the facts). The main contention between the parties to this litigation has reference to the manner of bringing the suit. It is claimed by the appellant that the suit should have been brought in the name of John J. Shutterly, for the use of William Fleming, and not in the name of

William Fleming alone. It appears that the original *præcipe* and summons were entitled, "William Fleming vs. William E. Webster," and that, in the declaration as finally amended, William Fleming, plaintiff, complained of William E. Webster, defendant. But the clerk, in entering up the judgment, entered it under the title of "John J. Shutterly, for the use of Fleming," instead of entering it in the name of Fleming alone. Counsel for appellant say in their brief: "From an examination of the pleadings and history of this case, * * * it seems perfectly apparent that the attorneys on both sides, and the trial court, pleaded and tried this case, from the time defendant's demurrer was sustained to plaintiff's original declaration down to the entry of the judgment, as a case wherein William Fleming was the sole plaintiff, suing in his own name and in his own right. This being so, the entry of the judgment by the clerk of the trial court in favor of 'John J. Shutterly, for the use,' etc., was unauthorized, and simply a mistake of the clerk."

Was the suit properly brought in the name of William Fleming? Shutterly had mortgaged the property to secure notes payable to the order of Mallette & Brownell, and subsequently sold the property to the appellant, Webster. In the warranty deed executed by Shutterly to Webster, Webster assumed and agreed to pay the incumbrances upon the five lots, among which was the note and trust deed for \$860 upon lot 7. When a mortgagor thus executes a deed, by the terms of which the grantee in the deed assumes and agrees to pay an outstanding incumbrance, and where such grantee accepts a deed with such assumption clause in it, can a mortgagee in his own name sue the grantee in an action at law, or must the suit, if at law, be brought in the name of the mortgagor for the use of the mortgagee against such grantee?

It is well settled that, where one person enters into a simple contract with another for the benefit of a third person, such third person may maintain an action for the breach, and such a contract is not within the statute of frauds. In line with this principle, we have held that, "where a person becomes the purchaser of real estate by deed, which, at the time, is incumbered by mortgage, and in the deed conveying the property it is stipulated and agreed that the purchaser assumes and agrees to pay the mortgage as a part of the consideration, the contract creates a personal liability on the purchaser in favor of the holder of the mortgage, which may be enforced in an appropriate action." *Thompson v. Dearborn*, 107 Ill. 87, and cases there cited. In *Dean v. Walker*, Id. 540, where the action was *assumpsit*, brought by one of the grantees from the original mortgagor for the use of the mortgagees against the subsequent grantee, whose deed contained such an assumption clause as is above set forth, the court said (page 544): "The law may be regarded as well settled, where A. has given a

mortgage on a tract of land to B., and subsequently conveys to C., the deed containing a contract that C. assumes the mortgage and agrees to pay the same, that B. may compel the grantee to pay the mortgage indebtedness, either by a suit at law or by a bill in equity foreclosing the mortgage, and obtain a personal decree against the mortgagor and the purchaser of the mortgaged premises for any deficiency. * * * No reason is perceived which will prevent the mortgagee, for whose benefit the clause in the deed is inserted, from maintaining an action upon such a contract against the grantee." In *Bay v. Williams*, 112 Ill. 91, this court indorsed and approved of the case of *Dean v. Walker*, 107 Ill. 540, and said (page 96): "It has ever been held by this court that such a promise inures to the benefit of the person for whose benefit it is made, and the right to sue is vested in him by force of the agreement itself. It has never been held by this court that the express assent of the beneficiary is essential to his right to avail of its benefits; nor has it been held, to have force as an agreement to the person in whose favor it was made, he must discharge his debtor, and accept the maker of the new promise as his debtor. On the contrary, it was held in *Dean v. Walker*, *supra*, that the mortgagee might sue either the mortgagor or his grantee assuming to pay the debt. Nor has it been held that the promise of the grantee to the mortgagor is a mere indemnity of the latter against the payment of the mortgage. On the contrary, this court has uniformly held that the beneficiary may sue at law, which repudiates the doctrine of indemnity, as the person for whose benefit the promise is made can never reach an indemnity or security given to his debtor but in chancery, and then only when his debtor is insolvent or on some other equitable grounds. The principle upon which this court has acted is that such a promise invests the person for whose use it is made with an immediate interest and right, as though the promise had been made to him." Again, in *Schmidt v. Glade*, 126 Ill. 485, 18 N. E. 762, we said (page 490, 126 Ill., and page 764, 18 N. E.): "This deed recites that it is subject to the incumbrances on the property and to the liabilities of the firm, and that the party of the second part thereto, who is the appellant in this case, assumes and agrees to pay such incumbrances and liabilities. The deed was delivered to appellant and accepted by him. The law is that, where such a deed poll is accepted by the grantee, he is liable in an action of *assumpsit* to pay the liabilities therein mentioned." In *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1061, it was again held that, where there is a conveyance of mortgaged property by the mortgagor to one who assumes and agrees to pay the mortgage debt by the terms of the deed executed to him, the mortgagor and the grantee are both liable to the holder of the note and mortgage as principals. *Crandall v. Payne*, 154 Ill. 627, 39 N. E. 601; *Insurance*

Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437; Daub v. Englebach, 109 Ill. 267; Jones v. Foster, 175 Ill. 459, 51 N. E. 862. In Daub v. Englebach, *supra*, where it was held that a person who purchases land, and agrees to pay off an incumbrance on the same as a part of the purchase price, is liable to the holder of the lien for the sum due him, we said (page 271): "Even if the mortgage was rendered void, he, in equity, is still liable to pay the debt. He agreed to do so, and, even if the mortgage was rendered void, that did not cancel the debt, nor did it release him from his legal liability to pay it."

But, while it is admitted that the parties for whose benefit a contract is made may sue thereon in their own names, although the agreement may not be to or with them, yet it is claimed that this rule only applies to simple contracts, and not to contracts under seal. The contention is that a person for whose benefit a covenant in a deed is made cannot sue upon such a covenant, unless he is a party to the deed, but the suit must be brought in the name of the person with whom the covenant is made. It was, however, expressly held in Dean v. Walker, *supra*, that the rule is equally applicable whether the contract is a contract under seal or a simple contract. In that case we said (page 546): "But it is said a third party cannot bring an action in his own name on a contract under seal between third parties; and, in support of this, Moore v. House, 64 Ill. 162, is cited and relied upon. In the case cited, it was held that a covenant cannot be sued upon by the person for whose benefit it is made, if he is not a party to the deed. In the same case it is also held that, where a contract not under seal is entered into by two for the benefit of a third person, it is a general principle that the latter may sue thereon in his own name, although the agreement may not be directly to or with him. What is said in relation to an action on a sealed instrument is merely a reiteration of the common-law rule on that subject when the case was decided, but, since that case was decided, the rule of the common law on that subject has been changed by section 19, c. 110, Rev. St. 1874, p. 777, so that now it is immaterial, for the purpose of bringing the suit, whether the contract is under seal or not. Chitty, in his work on Pleading (volume 1, p. 4), says: 'If the instrument be not under seal, it seems to be a general principle that the party for whose sole benefit it is evidently made may sue thereon in his own name, although the engagement be not directly to or with him.' As our statute has, therefore, abolished the distinction between contracts under seal and those not under seal (except penal bonds), so far as bringing an action on such contracts is concerned, the law, as declared by Chitty, applies as well to contracts under seal as to those not under seal."

It seems, however, to be assumed by counsel for appellant that the case of Dean v. Walk-

er, *supra*, in so far as it holds that there is no difference between simple contracts and contracts under seal, has been overruled by the case of Harms v. McCormick, 132 Ill. 104, 22 N. E. 511. In the latter case the following statement is made: "The language used in Dean v. Walker, 107 Ill. 540, to the effect that, since the passage of the act, it is immaterial, for the purpose of bringing a suit by a third person upon a provision for his benefit in a contract made between other persons, whether such contract is under seal or not, is mere obiter dictum, as that question was not there involved." The remark in Harms v. McCormick, *supra*, that the holding of the court upon this subject in Dean v. Walker, *supra*, was mere obiter dictum, was unnecessary to the decision of the case in hand. The facts in Harms v. McCormick, *supra*, were entirely different from the facts in the case at bar and in cases of like character with the case at bar. In the Harms Case the action was assumpsit on a lease between McCormick for himself and as agent for certain other parties, which lease was signed by McCormick alone in his own individual name and by the lessees; and which provided that the lessees covenanted and agreed with McCormick, his heirs, executors, administrators, and assigns, to pay him, as rent for said premises, a certain sum of money. There the covenants did not agree to pay any debt to the persons for whom McCormick was acting as agent, or to pay any debt due to third persons. The decision in the Harms Case states that the covenant to pay rent, as contained in the lease in that case, was not such as would authorize appellants to sue for and recover in their own names, even if the contract had not been under seal. Although the language used in Harms v. McCormick, *supra*, may have weakened, in the mind of the profession, the force of the decision upon this subject in Dean v. Walker, *supra*, yet, after a further consideration of the matter, we are inclined to hold that the views, as expressed in the latter case, are correct, and that the rule in question applies as well to contracts under seal as to simple contracts.

The ground upon which the Harms Case proceeds is that section 19 of the practice act—which provides that "any deed, bond, note, covenant or other instrument under seal (except penal bonds) may be sued and declared upon or set off as heretofore, or in any form of action in which such instrument might have been sued and declared upon or set off if it had not been under seal, and demands upon simple contracts may be set off against demands upon sealed instruments, judgments or decrees"—only abolished the distinction between sealed and unsealed instruments, so far as the form of action was concerned. In other words, the Harms Case takes the ground that section 19 did not purport to abolish the distinction between sealed and unsealed instruments, but merely provided additional forms of action for the enforce-

ment of rights predicated upon such sealed instruments. This may be admitted to be correct, but the rule that a third party cannot bring an action in his own name on a contract under seal between third parties, where he is not a party to such contract under seal, is a rule which grows merely out of the requirements of the common law in relation to forms of action. Where the reason of a rule fails, the rule itself ceases. At common law, only an action of covenant or debt could be brought upon a sealed instrument. The rule that, when one person covenants with another to pay money to, or perform some act for the benefit of, a third person named in the deed, the action must be brought in the name of the covenantee in the deed, and cannot be maintained by the third person in his own name, even though he is a party in interest, and even though it is expressly stated to be for his benefit, has its origin in the nature of the action of covenant, inasmuch as only a party to the instrument under seal can bring an action of covenant or debt. 5 Enc. Pl. & Prac. pp. 343, 345, 352, 357, 358, and cases referred to in notes; Hager v. Phillips, 14 Ill. 260; Gautzert v. Hoge, 73 Ill. 30; Moore v. House, 64 Ill. 162. In Hendrick v. Lindsay, 93 U. S. 143, Mr. Justice Davis, speaking for the supreme court of the United States, said: "It is also argued, as Mansfield's name does not appear in the letters of Hendrick, that he could not join in this action. This would be true, if the promise were under seal, requiring an action of debt or covenant; but the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country. 1 Pars. Cont. (6th Ed.) 467, and cases cited." That is to say, the person for whose use the money is to be paid, or the act to be done, cannot bring the suit in his own name where the instrument is under seal, because of the necessity of bringing an action of debt or covenant upon such instrument. The action of debt or covenant requires the suit to be brought in the name of the party to the sealed instrument with whom the covenant is therein made. Parsons, in his work on Contracts (volume 1 [6th Ed.] p. 468), says: "Where the promise is made under seal, and the action must be debt or covenant, then it must be brought in the name of the party to the instrument, and a third party, for whose benefit the promise is made, cannot sue upon it." As the rule, which forbids the party for whose benefit the money is to be paid or the act is to be performed from bringing an action in his own name, has its rise in the nature of the actions of debt or covenant, the rule can have no application where an action of assumpsit is substituted for an action of debt or covenant, so far as the remedy upon sealed instruments is concerned. "Where one promises another for the benefit of a third person, such person

may maintain an action of assumpsit in his own name. Where one covenants * * * with another to do any act for the benefit of a third, the rule differs from that in assumpsit, and the action cannot be maintained upon such covenant in the name of the third person for whose benefit it was made." Hinkley v. Fowler, 15 Me. 289; Packard v. Brewster, 59 Me. 404. As was said by this court in Eddy v. Roberts, 17 Ill. 505, where one enters into a simple contract with another for the benefit of a third, such third person may maintain an action for breach. At common law, all contracts not under seal were deemed to be in parol, and were called "simple contracts." Simple contracts, under the common law, included written as well as oral agreements, and are distinguished from special contracts simply by the fact that they are not under seal. 7 Am. & Eng. Enc. Law (2d Ed.) pp. 94, 96.

Section 19 of the practice act says that any instrument under seal (except penal bonds) may be sued and declared upon in any form of action in which such instrument might have been sued or declared upon if it had not been under seal, and demands upon simple contracts may be set off against demands upon sealed instruments. Undoubtedly, the action of assumpsit, under the statute, can be brought upon a sealed instrument where one covenants for another to do an act for the benefit of a third person. The requirement in an action of covenant, that the suit must be brought in the name of a party to the sealed instrument, does not obtain where the action of assumpsit takes the place of the action of covenant or debt. If such third person may bring an action of assumpsit in his own name upon a simple contract, it can make no difference in his right to do so that the contract is under seal, in view of the provision of our statute. "There has * * * long been a growing tendency, in the decisions of the courts, to permit the beneficiary to enforce his rights by direct action in his own name." 5 Enc. Pl. & Prac. p. 358, note 1. The weakening of the rule as to the distinction between simple contracts and contracts under seal, so far as the forms of action to be brought upon them are concerned, is seen in the provision of section 19, which permits demands upon simple contracts to be set off against demands under sealed instruments. We have also held that, where an action is brought by a person in his own name for a debt due to him for the use of another, the defendant can set off a demand against the *cestui que trust*. *Rothschild v. Bruscke*, 131 Ill. 265, 23 N. E. 419. In *Rogers v. Gosnell*, 51 Mo. 466, the court say: "It seems to be well established that a party for whose use a contract, or a stipulation in a contract, is made, may maintain suit in his own name on such stipulation. * * * Old authorities maintain that this can only be done on contracts not under seal. * * * By recent decisions in New York, it is laid down

that no such distinction exists. I see no good reason for keeping up this sort of distinction between contracts under seal and not under seal. If the covenant is made for the benefit of a third person, why is he not a party to it so as to maintain an action in his own name? * * * It does not follow that, because the trustee is allowed to sue in his own name on such contract, the beneficiary is precluded from doing so. A recovery by either would be a bar to another action, whether brought by the trustee or beneficiary." In *Coster v. Mayor of Albany*, 43 N. Y. 399, the court say: "It is settled in this state that an agreement made on a valid consideration, by one with another, to pay money to a third, can be enforced by the third in his own name. And, though a distinction has sometimes been made in favor of a simple contract, it is now held that, when the agreement is in writing and under seal, the same rule prevails. Nor need the third person be privy to the consideration. Nor need he be named especially as the person to whom the money is to be paid."

In *Coster v. Mayor of Albany*, supra, it was held, not only that a grantee of mortgaged premises, who takes them subject to the lien of the mortgage, and by words in the deed of conveyance to him assumes to pay, is personally liable to the holder of the mortgage for the amount of the mortgage debt, but also that the action may be maintained in the name of the holder of such debt, although he be not named in the deed. In *Emmitt v. Brophy*, 42 Ohio St. 82, the court said: "It is settled in this state that an agreement made on a valid consideration by one person with another, to pay money to a third, can be enforced by the latter in his own name. Nor need he be named especially as the party to whom the money is to be paid. * * * The proposition that the rule * * * is confined in its operation to simple and unsealed contracts is not well founded." In *Bassett v. Hughes*, 43 Wis. 319, the court say: "It is settled in this state that when one person, for a valuable consideration, engages with another to do some act for the benefit of a third person, the latter may maintain an action against the former for a breach of such engagement. This rule applies as well to covenants under seal as to simple contracts." *McDowell v. Laev*, 35 Wis. 171. In *Hughes v. Navigation Co.*, 1. Or. 437, 5 Pac. 206, it is said: "A party for whose benefit a contract is made, and who thereby becomes the real party in interest, may sue upon it. It makes no difference that the contract is under seal." 7 Am. & Eng. Enc. Law, p. 109, and cases cited in notes; *Hume v. Brower*, 25 Ill. App. 130. In the latter case Mr. Justice Pleasants says: "It has long been settled that a third party may sue on a simple contract entered into by others for his benefit, and, upon such an agreement to pay all the debts of one party, any creditor of such party may maintain an action. Lithograph-

ing Co. v. Kerting, 107 Ill. 344; *Snell v. Ives*, 85 Ill. 279. The old distinction, with reference to this right, between simple contracts and specialties, is abolished by section 19, c. 110, Rev. St."

In view of the considerations already presented, we are of the opinion that the present suit was properly brought in the name of Fleming, the holder of the incumbrance against Webster, the grantee of Shutterly, the original mortgagor. It is true that in *Dean v. Walker*, 107 Ill. 540, the suit was brought in the name of a remote grantee of the mortgagor, for the use of the holders of the incumbrance, against a grantee from such remote grantee. But the attention of the court does not seem to have been called to the particular form in which the suit was brought. The reasoning of the court is in line with the views hereinbefore presented, and the case cannot be regarded as conclusive authority in favor of bringing the suit in the name of the mortgagor for the use of the mortgagee, instead of bringing it in the name of the mortgagee or the holder of the incumbrance. Inasmuch as the judgment in this case was entered by mistake of the clerk in the name of "John J. Shutterly, for the use of William Fleming," against William E. Webster, it would, under other circumstances, be necessary to reverse the judgment of the appellate court, and remand the cause to the superior court of Cook county, with directions to that court to enter a judgment in favor of William Fleming in his own name against William E. Webster. But inasmuch as the case, by agreement of the parties made in open court, was submitted to the court for trial without a jury, under the title of "John J. Shutterly, for the use of William Fleming, vs. William E. Webster," the appellant is estopped from complaining of the error in the entry of the judgment. Indeed, the whole contention of the appellant in this case is that the entitling of the suit in the name of Fleming alone was erroneous, and that the suit should have been brought, and the declaration should have been filed, in the name of "Shutterly, for the use of William Fleming."

Propositions submitted by the appellee to the trial court, and held as law in the decision of the case, embodied the views hereinbefore expressed, and, in view of what has been said, these propositions cannot be regarded as erroneous. Propositions 1 and 2, submitted by the appellant to the trial court, and refused by that court, embodied opposite views from those taken herein, and, in view of what we have said, there was no error in refusing such propositions.

Counsel for appellant complain that the court below permitted the witness Shutterly to state, in answer to a question by plaintiff's counsel, that the incumbrance upon lot 7, securing the note for \$860 for which this suit is brought, was embraced in the incumbrances, amounting to \$19,860, which the appellant assumed and agreed to pay as a

part of the consideration for the transfer to him by Shutterly. Appellant objected to the question which called out this testimony, and took exception to the order of the court overruling the objection. The alleged ground for the objection is that it was incompetent to prove by oral testimony the fact thus drawn out. In propositions 3 and 4, asked by the appellant and held by the trial court after the same were slightly modified, the court held that the assumption clause in a deed, whereby the grantee agrees to assume and pay incumbrances upon real estate, must describe and identify the particular incumbrance sued for as included in that assumed by the grantee in the deed. Undoubtedly, the incumbrance must be specifically described in the assumption clause in the deed to clearly identify it as a part of the incumbrances assumed. But the incumbrances assumed in this case were specifically identified by the assumption clause already referred to. As the incumbrances rested upon the real estate transferred, it was an easy matter, by reference to the record, to identify them. There was no error in introducing oral testimony to show that the trust deed, securing the note for \$860, was the particular incumbrance which rested upon lot 7, lot 7 being one of a number of lots, upon which all the incumbrances, amounting to \$19,860, rested. Jones, in his work on Mortgages (volume 1 [5th Ed.] § 740a), says that "the identity of the mortgage assumed, when left in doubt by the terms of the deed, may be shown by parol evidence."

It was claimed by appellant upon the trial below that, when he purchased the premises of Shutterly, Mallette & Brownell, payees in the note for \$860, stated to him that Seventy-Fourth street would be opened alongside of the lots in question without expense to the property owners, but that such street has not been opened, and thereby the lots purchased by appellant were damaged, and of less value than they otherwise would have been. There is no evidence going to show that appellee, Fleming, to whom Mallette & Brownell transferred the note, had any notice or knowledge of any such promise by Mallette & Brownell. It also appears that the note was transferred to Fleming before its maturity. We do not, however, deem it necessary to discuss the question whether this defense, if it is a defense, could be set up as against the present appellee. Appellant complains that the court refused to hold as law the fifth proposition submitted by him, which announced, in general terms, that the suit by a holder of an incumbrance against the grantee from the mortgagor, who has assumed and agreed to pay the incumbrance, is subject to the same defenses by the grantee as he would have if the original grantor in the deed were suing for purchase money. Without determining whether this proposition stated a correct principle of law or not, it is sufficient to say that it was in-

applicable to the facts of the case, and therefore properly refused. In the first place, the proof shows that the promise in question was made, if made at all, by Mallette, of the firm of Mallette & Brownell, and was not made by Shutterly, appellant's grantor. In the second place, whatever agreement Mallette may have made in reference to opening the street was merely a conditional agreement. If Seventy-Fourth street was to be opened, it was to be done by a condemnation proceeding instituted by the city. The promise made by Mallette was conditioned upon the facts that he and his partner should obtain certain quitclaim deeds to one-half of the property through which the street was to be opened, and that they should themselves collect such damages as might be awarded to them when the city should take the property. The proof fails to show that such quitclaim deeds were obtained, or that such damages were allowed to Mallette & Brownell. Therefore, in regard to this defense, we agree with the appellate court when they say: "Waiving the question whether appellant could legally claim damages in the present suit on account of the alleged representations of Mallette & Brownell, the proof * * * fails to show a breach or falsity of the alleged representations."

Appellant also claims that, after his purchase of the property from Shutterly, he transferred the property to one Reed, and that, in the deed executed by him to Reed, Reed assumed and agreed to pay said incumbrances, including that which secured the note for \$860 as a part of the purchase money. The fact that Reed assumed the payment of the incumbrances in the manner thus stated did not relieve appellant from his obligation to pay them. The mortgagor, and the grantee from the mortgagor, who assumes the payment of the incumbrances upon the property, are both liable as principal debtors to the mortgagee, unless the latter has released the mortgagor from his liability, and has agreed to look solely to the purchaser from him for payment of the mortgage debt. 1 Jones, Mortg. §§ 741, 742a; Fish v. Glover, supra; Dean v. Walker, supra. There is no evidence here that the holders of the incumbrances which were assumed released appellant from his liability, or agreed to look to Reed alone, for the payment of the mortgage debt. There is nothing to show that there was a substitution of Reed's obligation for that of appellant's obligation.

So far as the delay in the delivery of the possession, as set up in the first plea, is concerned, no action of the court upon that subject is called to our attention by counsel for appellant in their briefs, and no complaint is made of any ruling of the court below upon the question of possession. We therefore dismiss it without comment. The judgment of the appellate court is affirmed. Judgment affirmed

(176 Ill. 404)

CITY OF CHICAGO et al. v. McDONALD.¹

(Supreme Court of Illinois. Oct. 24, 1898.)

**MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMIT
—CONSTITUTIONAL LAW—JUDGMENTS IN TORT
—REVENUE WARRANTS—WATER BONDS.**

1. Const. 1870, art. 9, § 12, prohibiting a city from becoming indebted, in any manner or for any purpose, to an amount exceeding 5 per cent. of the taxable value of its property, precludes it from contracting for the removal of garbage, and for the making of monthly payments as the work progresses, after the indebtedness has reached such limit.

2. In determining a city's indebtedness, within Const. 1870, art. 9, § 12, prohibiting an indebtedness, in any manner or for any purpose, in excess of 5 per cent. of the taxable value of its property, the cash in the city treasury and uncollected taxes should not be deducted.

3. Judgments in tort against the city should be included as a part of the indebtedness.

4. Revenue warrants which are issued on taxes in course of collection, and which are taken by the party receiving them in exchange for a debt, should not be included in the indebtedness.

5. Bonds issued by a city for the construction of a water-works system in an amount less than the value of the system, being similar to other bonds, except that they are designated as "Water-Loan Bonds," should be included in the indebtedness.

Cartwright and Phillips, JJ., dissenting.

Appeal from circuit court, Cook county; M. F. Tuley, Judge.

Bill by Michael C. McDonald against the city of Chicago and others to enjoin defendants from carrying into effect certain contracts for the removal of garbage in the city. From a decree for plaintiff, defendants appeal. Affirmed.

Charles S. Thornton and Granville W. Browning (Darrow, Thomas & Thompson, of counsel), for appellants. John Mayo Palmer and A. B. Jenks, for appellee.

WILKIN, J. On December 15, 1897, Michael McDonald, on behalf of himself and other taxpayers of Chicago who would come into the suit and contribute to the expense thereof, filed his bill in chancery against the city of Chicago, Lawrence E. McGann, its commissioner of public works, Patrick Mulcaire and Francis C. Burk, partners, John Dowdle and Marvin Chamberlain, partners, and R. T. Hanrahan and J. T. Downey, partners. The prayer of the bill was that the defendants be perpetually enjoined from carrying into effect certain contracts by the city, through said commissioner of public works, with the other defendants, for the removal of garbage in designated districts of the city. The bill was afterwards amended, and a motion made for a temporary writ of injunction, which was heard on the bill and answer of the defendants, and a temporary writ ordered. Subsequently leave was had to file a new answer, and upon it the defendants moved to dissolve the injunction. Upon that motion the cause was tried as on a final hearing, and

a decree entered overruling the motion, and decreeing that the injunction be made perpetual. To reverse that decree this appeal is prosecuted.

The principal question raised in this court is whether or not the contracts in question are illegal and void under that section of our constitution which prohibits cities from becoming indebted in excess of 5 per cent. on the valuation of their taxable property. This question presents for determination two propositions: First, do the contracts create an indebtedness, within the meaning of the constitution? and, second, was the city of Chicago indebted beyond the prescribed limit at the time of entering into the contract?

The language of section 12 of article 9 of the constitution of 1870 is: "No county, city, township, school district or other municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." While there would seem to be little difficulty in determining whether or not a city becomes indebted by entering into a particular contract for municipal purposes, it has not been found easy to do so in all cases within the meaning of constitutional and statutory provisions like this, the result being a conflict in the decisions of courts in different states. Some have held that a contract by a municipality to pay for the annual supply of necessities, such as light and water, upon rendering the services or furnishing the supplies, is not the incurring of a present indebtedness, in the constitutional sense; but this court is committed to a contrary construction. Being called upon to construe the foregoing section of our constitution in the case of *City of Springfield v. Edwards*, 84 Ill. 626, Justice Scholfeld, rendering the majority opinion of the court, said (page 632): "In considering what construction shall be given to a constitution or a statute, we are to resort to the natural signification of the words employed, in the order and grammatical arrangement in which they are placed; and if, when thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the instrument, then such meaning is the only one we are at liberty to say was intended to be conveyed." Justice Dickey, in his dissenting opinion, considered the rule of construction to be as stated in the majority opinion, also in the meaning of the words of the constitution as defined by Justice Scholfeld, but he dissented from the view that to give those words that meaning would involve no absurdity or contradiction with other clauses of the constitution. It thus clearly appears that the words "to become indebted" were, after full consideration, given by the court in that case

¹ Rehearing denied December 14, 1898.

their natural signification; and Justice Scholfeld proceeds to determine their meaning, as follows: "There is no difficulty in ascertaining the natural signification of the words employed in the clause of the constitution under consideration, and to give them that meaning involves no absurdity, or contradiction with other clauses of the constitution. The prohibition is against becoming indebted,—that is, voluntarily incurring a legal liability to pay,—'in any manner or for any purpose,' when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs the liability is absolute,—the debt exists,—and it differs from a present unqualified promise to pay only in the manner by which the indebtedness was incurred; and, since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else." It was again said in *Law v. People*, 87 Ill. 385, speaking of the same provision (page 392): "The language of this clause is clear, explicit, and emphatic, that no city shall be allowed to become indebted, in any manner or for any purpose, beyond the prescribed limit. The city of Chicago was indebted beyond the limit when these certificates were issued, and if they, in any manner or for any purpose, create an additional indebtedness beyond that limit, they are clearly prohibited. The language prescribing the limit is so plain as to admit of no doubt, and forbids all construction, and the provision must be enforced as it is written." And also in *Culbertson v. City of Fulton*, 127 Ill. 30, 18 N. E. 781, we said (page 36, 127 Ill., and page 782, 18 N. E.): "By entering into the contract on August 15, 1887, the city 'became indebted.' The obligations entered into by the terms of the contract constituted such an indebtedness as is contemplated by the language of the constitution. It cannot be said that the indebtedness did not come into being until the work was completed and accepted by the city. The city bound itself to pay for the work when it should be completed, and could be compelled to do so, if the work should be done according to the contract." The language in *City of Springfield v. Edwards*, supra, as to a debt payable in the future, or upon a contingency, was cited and quoted. It thus appears that this court has given effect to the language of the con-

stitution in its plain and commonly accepted signification.

The question has frequently arisen whether a municipal corporation can incur an indebtedness in excess of 5 per cent. of its taxable property for necessary supplies, such as light and water. In *Prince v. City of Quincy*, 105 Ill. 138, the city had contracted with Prince to construct, maintain, and keep in operation within the limits of the city a system of waterworks; the city agreeing to pay him a certain sum per annum, in monthly installments, for the use of water for fire and other purposes, the contract to run for a period of 30 years, and, if not renewed, the city to purchase the works for a cash value. The works were constructed according to the contract, and the agreement was observed by the parties for a number of years, when the city declined to further fulfill its terms, upon the ground that the agreement had been entered into without legal authority on the part of the city, and so notified Prince. Thereupon he brought his action to recover damages for a failure on the part of the city to perform its part of the agreement. The city filed a plea setting up that at the time of making the agreement in suit it was, and had continued to be, otherwise indebted in an amount exceeding the constitutional limit. To this plea the plaintiff replied that the money sought to be recovered pertained to "the ordinary expenses of the defendant in the administration of the affairs and government of the city, and that at the time of the making of said contract the said several sums of money so provided to be paid monthly by said defendant to said plaintiff, together with other ordinary expenses of the government of the said defendant, were within the limits of the current revenues of said defendant." In passing upon the sufficiency of the replication, we said (page 142): "While the provision of the constitution just cited declares, in emphatic terms, that a city or other municipality whose existing indebtedness already exceeds the constitutional limit, as was the case here, shall not become further indebted 'in any manner or for any purpose,' it is seriously contended by counsel for appellant that a municipality thus circumstanced may become indebted for supplies to meet its ordinary wants and necessities. To so construe the constitution would be to add a provision, in the nature of an exception, to the constitution, which the framers of that instrument did not see proper to insert." And this, it was held, could not be done; citing the *Edwards Case*, supra. In a case between the same parties to the same contract, reported in the same volume (page 215), it was held that a city having an indebtedness in the aggregate exceeding 5 per cent. on the value of taxable property therein, while it so remains is powerless to create any debt at all, even for its ordinary or current expenses, and no contract of any municipality so situated, for the payment of money, can be enforced. To the same effect

is *Prince v. City of Quincy*, 128 Ill. 443, 21 N. E. 768.

The contracts here involved were entered into in pursuance to an act of the legislature approved March 30, 1897, empowering cities of more than 100,000 inhabitants to make contracts for more than one year, and not exceeding five years, relating to the collection and final disposition of garbage and ashes. They are identical in their terms, except as to parties and amounts. The contractors agree to furnish all labor, materials, lands, buildings, etc., to collect, remove, and finally dispose of all ashes and garbage in the respective districts of the city for and during a period of five years from the date of the agreements. For the first district they were to receive \$350,000; for the second, \$790,000; for the third, \$349,312.50; for the fourth, \$384,500. The agreement on the part of the city to pay was as follows: "The said city of Chicago hereby covenants and agrees, in consideration of the covenants and agreements in this contract specified to be kept and performed by the party of the first part, to pay the party of the first part the sum of — dollars for removing all garbage, ashes, etc., from the — district, payable at the time and in the manner prescribed in the specifications hereto attached: provided, however, that, whenever any payment shall become due to the said party of the first part, fifteen per cent. of the amount so becoming due shall be deducted and retained by the city of Chicago until the termination of this contract." The time and manner of payment prescribed in the specifications were that, on the progress and performance of the work and the fulfillment of the conditions of the contract being satisfactory to the commissioner of public works, vouchers would be issued to the party of the first part, divided and payable in equal monthly installments for and during the term of such contract, reserving on each payment the sum of 15 per cent. until the contract terminates. Manifestly, unless the foregoing decisions are overruled, holding that a debt payable in the future upon a contingency, such as the rendering of services or the delivery of property, is a debt within the prohibition of the constitution, there is no escape from the conclusion that by these contracts the city incurred an indebtedness.

Counsel for appellants cite the cases of *City of East St. Louis v. East St. Louis Gaslight & Coke Co.*, 98 Ill. 415, and *City of Carlyle v. Carlyle Water, Light & Power Co.*, 140 Ill. 445, 29 N. E. 556, as modifying the cases referred to. Conceding that there is language used in the opinion in the *East St. Louis Case*, and in the opinion of the appellate court cited in the *Carlyle Case*, which warrants the contention, it was not intended to have that effect. Nor was the language so used necessary to the decision of either case. They were each actions at law against the cities for services already rendered, and accepted by the cities. The attempt on the

part of the cities was to defeat a recovery by setting up that the contracts were void because they incurred an indebtedness beyond the constitutional limit. In both cases, at the time the contracts were entered into, the constitutional limit had not been reached,—in the *East St. Louis Case* by \$20,000, and in the *Carlyle Case* by nearly \$12,000. The pleas in the former case do not appear in the opinion or statement of the case. It is, however, stated (page 429): "It is insisted, further, that the city had no power to make the contract in question, because thereby an indebtedness was incurred in excess of the limitation fixed by section 12 of article 9 of the constitution of this state. * * * It appears that the previous indebtedness of the city existing at the time this contract was made was \$20,000 short of this constitutional limit. Two hundred lamps,—the minimum number provided for by the contract,—at \$35.20 per lamp per year, would amount to \$7,040 in a year, and to an aggregate for thirty years of \$211,200. Now, Appellant's counsel contend that this aggregate sum of \$211,200 should be considered as a present indebtedness,—as a debt incurred at the making of this contract, on October 3, 1890. We do not assent to the correctness of this view." Then, after the language relied upon by counsel as holding that no present indebtedness was created by the contract, it is said: "It appears that on February 1, 1877, the city was indebted \$50,000 in excess of the constitutional limit. This might have been, and yet the city, in the subsequent months, at the times the gas sued for was furnished, may not have been indebted beyond the constitutional limit; and this, without further noticing the point, we deem a sufficient answer to the objection made that the city at the times when the gas was furnished was indebted beyond said limit. Such a defense, in a case such as this, if it be one, must be strictly made out." In the *Carlyle Case* the constitutional limit had not been reached when the contract was entered into. The declaration, containing a special count setting up the contract, and alleging performance on the part of the plaintiff, averred that the defendant, after the completion of the works, had used the same, but wholly refused to pay the plaintiff as provided and agreed upon on its part. It also contained the common counts. By the pleas, which were held bad on demurrer, the city sought to annul the entire contract, and escape payment for that which it had actually received and used, by simply averring that it was indebted at the time of entering into the contract in the sum of \$1,000, and that the value of its taxable property was \$256,740, and from these facts drew the conclusion that the debt existing against the city, together with the indebtedness created by said contract, exceeded the sum of 5 per cent. of the assessed value of its property. In other words, the defense sought to be interposed by these pleas was upon the theory that the fact that the aggre-

gate amount agreed to be paid, extending over 21 years, was larger than 5 per cent. upon the taxable property of the city, would relieve it from the payment for the services actually rendered, whether the constitutional limit had been exceeded at the time such services were rendered and accepted or not. It was insisted upon the argument that the pleas did not answer the cause of action set up in the declaration, and that contention we sustained; citing the opinion of the appellate court, and also the East St. Louis Case. But we do not understand that thereby we adopted all of the language used in the opinion of the appellate court. It is, perhaps, true that the statement of the case (for which the writer of the opinion is alone responsible) was not as full as it should have been upon that branch of the case, and that the sufficiency of the pleas was not as fully considered as it should have been. That was, however, as plainly appears, a secondary consideration in the case, and we still think the conclusion clearly right. But it cannot be fairly said that any intention is there shown to change the rule of construction as to the meaning of the words "to become indebted," as formerly decided. That the East St. Louis Case was not so understood by the court admits of no question. As expressly stated in *Prince v. City of Quincy*, 105 Ill. 138, that opinion, so far as shown, was concurred in by the full bench, of which Justice Sheldon, who wrote the East St. Louis Case, was then a member. That which broadly distinguishes the East St. Louis and Carlyle Cases from the Prince Case and the one at bar is that there the constitutional limit had not been reached when the contracts were entered into, nor did it appear that the sums sought to be recovered carried the indebtedness beyond that limit. In these cases the whole contract was not void, but only so much of it as was in excess of 5 per cent. upon the taxable property within the city limits. The contracts were not of that indivisible character which would make it necessary to hold the entire contract void to defeat that part of it which was illegal, and therefore they were binding upon the city, in the one case to the extent of \$20,000, and in the other to substantially \$12,000. In the case of *McPherson v. Foster*, 43 Iowa, 48, the constitutional provision being identical with section 12 of article 9 of our constitution, a school district had incurred an indebtedness of \$15,000, when 5 per cent. upon its taxable property amounted only to the sum of \$2,482, and a debt then existed against it to the amount of \$425; and it was held that the contract, to the amount of \$2,057.50, was good, the court saying: "The independent district could become indebted to the extent of five per cent. upon the amount of the last tax list. Deducting existing indebtedness from such sum, we find the amount of the debt which it could contract was \$2,057.50. But it has attempted to contract a debt of

\$15,000. We have seen that for the excess over the prescribed limit no right of action exists against the district. The question now arises, is the district liable for the amount of the indebtedness within the restricted limit? We think it is. As we have seen, the constitutional inhibition operates upon the indebtedness, not upon the form of the debt. The district may become indebted to the amount of \$2,057.50 by bond. If the debt exceeds that amount, it is void as to the excess, because of the inhibition upon the power of the district to exceed the limit, and the bonds, as to the sum in excess, are void, because of the nonexistence of a valid debt therefor. But this restriction does not extend to the sum of \$2,057.50, for which the district had power to issue its bonds. The sum is a valid debt. The bonds, to that extent, are valid." See *Davless Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897. In this view of the law,—which is, we think, the correct one, and certainly reasonable and just,—it is clear that the aggregate amount of indebtedness extending over a period of years could not be made the test of the validity of the whole contract, because to do so would be to add that which was illegal to that which was legal, in order to defeat the whole contract; and this was what was attempted to be done in the East St. Louis and Carlyle Cases. In this case, according to the allegations of the bill, the city of Chicago was at the time of making the contract largely in debt, beyond 5 per cent. upon its taxable property. In other words, it had reached the point where it was compelled "to carry on its corporate operations, while so indebted, upon the cash or pay as you go plan, and not upon credit, to any extent, or for any purpose." *Prince v. City of Quincy*, 123 Ill. 443, 21 N. E. 768. In a case like this it is wholly unimportant whether the aggregate indebtedness shall be considered or not. That the first monthly installment, at least, became a debt, within the prohibition, under the cases first above cited, cannot be denied, and to incur even that liability was a violation of the constitution.

This brings us to a consideration of the second question above stated, namely, was the city of Chicago, at the time of entering into these contracts, indebted beyond the constitutional limit? This question, as well as the foregoing one, seems to have received careful consideration by the chancellor (Judge Tuley), in his written opinion filed upon the final hearing, and he states and decides this point in the following language:

"Certain statements as to the city indebtedness were admitted in evidence by stipulation, from which it appears that the funded debt of the city was nominally, in round numbers, \$17,000,000; and what is called the unfunded or floating debt, \$8,000,000. Five per cent. upon the value of the taxable property, by the last assessment for state and county taxes within the city, would

permit a city indebtedness, in round numbers, of \$11,500,000. The bonded debt of the city, known as the 'World's Fair Debt,' of \$4,500,000, it is conceded, should be deducted from the \$17,000,000. This would leave \$12,500,000 funded debt. In the funded debt is included what are called 'Water-Loan Bonds,' amounting to a little over \$4,000,000. If these are deducted, it would leave the funded debt about \$8,300,000. Very ingenious and quite forcible arguments have been made on the contention that the water-loan debt of over \$4,000,000 should be deducted from the funded debt of the city. The bonds known as 'Water-Loan Bonds' are in all respects similar in form and tenor to the other bonds issued by the city, except that they are designated 'Water-Loan Bonds,' and to all appearance an unqualified promise to pay. The contention is, without stopping to recite the different acts in relation to the waterworks of the city of Chicago, that the water bonds are only payable out of a special fund, known as the 'Water Fund,' and could not be paid by general taxation; therefore, that they do not come within the spirit or reason of the constitutional prohibition, which, it is contended, is merely a prohibition against incurring indebtedness which is to be paid by general taxation. In the view which I take of this present city indebtedness, it is not necessary to decide this question.

"A statement is presented as to the so-called floating indebtedness, amounting to \$8,624,152. That statement is as follows:

| Statement of All Liabilities of the City (Bonded Debt Excluded), and Showing the Floating Debt, or Debt for Which No Provision has as Yet been Made, as of Date December 31, 1897 (Practically Same on December 1, 1897). | |
|---|-----------------|
| | Liabilities. |
| Coupons and interest outstanding..... | \$ 231,528 29 |
| Judgments appropriated for..... | 306,734 27 |
| Judgments not appropriated for..... | 1,397,312 62 |
| Pension funds..... | 181,809 60 |
| Sinking funds..... | 1,639,035 01 |
| Special funds..... | 890,433 27 |
| Taxes for street intersections..... | 999,000 00 |
| Accounts payable, miscellaneous..... | 687,855 78 |
| Time or revenue warrants..... | 2,361,090 08 |
| Total liabilities..... | \$ 8,624,152 92 |
| Less cash in treasury..... | 2,742,328 53 |
| Cash shortage..... | 5,881,824 39 |
| Less uncollected taxes in course of collection applicable to the payment of these accounts..... | 8,303,702 17 |
| Net or floating debt (not provided for)..... | \$ 2,578,122 22 |
| Uncollected taxes of 1897 due city of Chicago app's..... | |
| | \$2,742,328 53 |
| | 8,303,702 17 |
| | Cash Assets. |

"It will be seen from that statement that the admitted liabilities of over \$8,000,000 are reduced by crediting cash in the treasury \$2,742,328, and by crediting uncollected taxes in course of collection applicable to the payment of these liabilities, \$3,303,702, leaving what is termed a net or floating debt of \$2,578,122. Upon what principle it is contended that an outstanding debt is not a debt, by reason of some cash in the public treasury. It is difficult to perceive. As long as the cash is not applied to the payment of the debt, the debt must remain. Nor can it be perceived upon what principle uncollected taxes in course of collection can be held to reduce the floating debt until they are actually collected and applied to its reduction. Ingenious argument is made that the judgments in tort against the city, amounting to \$1,397,312, should not be included as a city debt. If a judgment is not a debt, it is difficult to conceive what constitutes a debt. In the list of liabilities or floating debts which it has been contended should not be counted as a part of the city debt, there is this item: 'Time or revenue warrants, \$2,361,090;' and this contention must prevail, because, under the decision of our supreme court, warrants issued upon taxes levied or in course of collection are taken by the party receiving the same in exchange for the debt. In my opinion, the only other items about which any question could be raised, as to whether they constituted indebtedness, within the constitutional provisions, are the two items of 'pension funds' and 'special funds,' amounting to about \$1,000,000. But, even excluding those, together with the time or revenue warrants, there is a city indebtedness, by reason of its admitted funded debt and its floating debt, beyond the constitutional limitation. The question is not one of insolvency, but solely one of indebtedness."

This clear and concise statement of the facts and law upon this branch of the case we regard as unanswerable. The conclusions are in harmony with the decisions of this court as announced in the Edwards Case and in Fuller v. City of Chicago, 89 Ill. 282.

We are also of the opinion that the water-loan bonds issued by the city, amounting to \$4,000,000, are an existing indebtedness against the city. Beginning in the year 1851, the city constructed a system of water works, which has always been operated at a profit to the city; but, instead of using that profit in liquidation of the indebtedness incurred in the construction of the system, it has continued the extension of the same to meet the demands of the city, and at the time of making the contracts in question had incurred an indebtedness, represented by these bonds, to the amount of \$4,000,000.—much less in amount than the value of the system. While the purpose of managing the system so that it should be self-sustaining, and not require general taxation to in any way support it, has thus far been success-

fully carried out, yet the obligation of the city to pay the water bonds which were issued by it is absolute and unqualified; and if the water system should for any reason become worthless, or from its profits unable to liquidate those bonds, the city could be required to pay them, and, if necessary, raise the money by general taxation for that purpose. It seems to us that to hold that these bonds should not be included in the estimation of the city's indebtedness would be equivalent to saying that the provision of the constitution limiting the power "to become indebted, in any manner or for any purpose, to an amount," etc., is meaningless. If the contention of counsel for appellants is correct as to these bonds being an indebtedness against the city notwithstanding this constitutional limitation, a city may embark in enterprises of this kind without limit, and bond the municipality to the full extent of its credit. This certainly was not the intention of the framers of the constitution, nor can we conceive that the provision is susceptible of any such construction.

Our conclusion is that, as shown by this record, the city of Chicago was indebted, at the time of entering into these contracts, many millions of dollars beyond the limitation prescribed by the constitution; that by these contracts it attempted to incur an additional indebtedness, which, for want of power under the constitution, it could not lawfully do. In this view of the case, other questions raised and discussed become unimportant. The decree below will be affirmed. Decree affirmed.

CARTWRIGHT and PHILLIPS, JJ., dissent.

(152 Ind. 232)

NATHAN et al. v. LEE.

(Supreme Court of Indiana. Feb. 24, 1899.)

COURTS—ASSIGNMENTS FOR BENEFIT OF CREDITORS
—PREFERENCES—INSOLVENT CORPORATIONS
—RIGHT TO PREFER CREDITORS.

1. A decision of a foreign state that an insolvent corporation of that state cannot execute a preferential mortgage to secure an antecedent debt is not binding on the courts of another state as to a mortgage of such a corporation, no statute being construed, since, as to the general principles of the common law, each state may construe the law for itself.

2. A preferential mortgage executed simultaneously with a general assignment is not a part of it; the assignment being declared invalid as to the mortgaged property, and the mortgagor remaining in possession over six months.

3. An insolvent foreign corporation may mortgage land in Indiana to secure a bona fide antecedent debt, and thereby prefer one creditor over another, such action not being prohibited by the statutes of the foreign state or of Indiana; and this though the preferred creditor is a resident of the foreign state.

Appeal from circuit court, Dearborn county; A. C. Downey, Judge.

Bill by Edward M. Lee, receiver of the G. Y. Roots Company, against Samuel Stras-

burger (Solomon Nathan, executor, substituted) and Rosa E. Levi. There was a decree for complainant, and defendants appeal. Reversed.

Gustavus H. Wald, Givan & Givan and Stephens, Lincoln & Smith, for appellants. Robert & Strapp, Thornton M. Hinkle, and F. W. Hinkle, for appellee.

JORDAN, J. Appellee is the receiver of the G. Y. Roots Company, a foreign corporation incorporated under the laws of the state of Ohio; and prior to the suspension of its business, as hereinafter stated, its principal office was located at the city of Cincinnati, Ohio. The purpose for which this corporation was created was to manufacture, purchase, and deal in flour, grain, salt, and other merchandise, for profit. To further the object of its incorporation, it became the owner of and operated a large flouring mill and cooper shops, situated on certain described real estate in the city of Lawrenceburg, Dearborn county, Ind. In 1893 Samuel Strasburger, a resident of Cincinnati, Ohio, loaned to this company at different times money amounting in the aggregate to \$14,000 and over. This money was used by the company in carrying on its business. These several loans were evidenced by certain promissory notes executed by said company to Strasburger in 1893, payable to him at the city of Cincinnati, Ohio. In 1894 the company also borrowed of Rosa E. Levi, a resident of Cincinnati, Ohio, and one of the appellants in this appeal, money to the amount of \$5,000, which was also used by the company in its business; and for the several sums so loaned by her the company executed its promissory notes, payable to her at Cincinnati, Ohio. On August 6, 1895, these notes of Strasburger and Levi were unpaid; and on that day the G. Y. Roots Company was insolvent, having contracted debts and liabilities amounting to \$400,000, while its assets at the same time amounted in value to \$140,000. On said day it had virtually ceased to be a going concern, but was still in the possession and control of all of its property, but contemplated making a voluntary assignment for the benefit of its creditors. On the said 6th day of August, at its office at Cincinnati, Ohio, in order to secure the payment of the notes held by Strasburger and Levi for the money loaned, the company, by order of its board of directors, executed to each of these two creditors a mortgage upon its real estate on which its mills and shops were situated, in Lawrenceburg, Dearborn county, Ind. These mortgages were in accordance with the form prescribed by the laws of Indiana, and were duly recorded, after their execution and acknowledgment, in the recorder's office of said Dearborn county, on said 6th day of August, 1895. On the same day, after the execution of these mortgages, this company, under the insolvent laws of the state of Ohio, made

what purported to be a voluntary assignment to Edwin M. Lee, as its assignee, of all of its property. It also on the same day executed a special deed of conveyance, wherein it was recited that the said company conveyed and warranted to Edwin M. Lee its real estate (describing it), situated in Lawrenceburg, Dearborn county, Ind., to be held by him in trust for the benefit of its creditors; the real estate described in this latter deed being the same which the company had previously mortgaged to Strasburger and Levi. On February 22, 1896, in an action instituted by certain creditors of this company in the circuit court of Dearborn county, Ind., appellee, Lee, was by said court appointed receiver of the said insolvent company, and duly qualified as such; and thereupon, by permission of that court, he instituted this action therein, making Strasburger (then in life) and Levi, together with the said G. Y. Roots Company and its said assignee under its general and special assignments, parties defendant to the action. The receiver by his action invoked the judgment of the court in his favor as follows: First, to set aside the mortgages executed by the said company on August 6, 1895, to Strasburger and Levi; second, to set aside and have declared null and void the two assignment deeds heretofore mentioned, made by the company on the said 6th day of August, so far as the same, or either of them, sought to assign or transfer the property of the company situated in Dearborn county, Ind.; third, that the court order the said Dearborn county real estate sold, freed from the said mortgage liens, and, in the event the said liens should be held valid, that the same attach to the proceeds arising out of the sale of the said mortgaged premises, etc. All the parties appeared to this action and filed their answers thereto, and the matters and things involved under the issues so joined were submitted to the court for its judgment. The only question, however, which the court adjudicated upon this complaint of the receiver, was that which related to the validity of the deeds of assignment, so far as the same affected the property situated in Dearborn county, Ind., and embraced in the mortgages of Strasburger and Levi. Upon this question the court found and adjudged that the said deeds of assignment were invalid, and did not convey any right, title, or interest to the assignee in or to the property of the company situated in Dearborn county, Ind., and further decreed that the said deeds of assignment be set aside and held for naught, and that the title to the said property be held to be as fully and effectually in said company at the time of the appointment of the receiver by the Dearborn circuit court as if such deeds of assignment had not been made. After the rendition of this judgment, Strasburger and Levi each filed a cross complaint in the said action against the receiver, wherein they set up the notes which each

held against the said Roots Company, and also the mortgage executed by it to each of the cross complainants on the 6th day of August, 1895, to secure the payment of said indebtedness. The relief which each sought by their respective cross complaints was to enforce the mortgage lien against the proceeds arising out of the sale by the receiver of the mortgaged premises, and each cross complainant prayed that the respective lien of each under his mortgage be protected by the court in the distribution of the proceeds arising out of the sale of the said mortgaged premises. After the filing of his cross complaint Samuel Strasburger died, and appellant Nathan, as his executor, was substituted as a party in his place and stead. The receiver then filed his answer to each of these cross complaints, whereby he sought to defeat the mortgages, and have them adjudged invalid by the court, upon the grounds that they were each executed by the said company as a preference to said complainants at a time when the company had become insolvent and had decided to make an assignment of its property for the benefit of its creditors, and that, therefore, by the laws of Ohio, under which the company had been incorporated, as construed by the supreme court of that state, it was forbidden, under the circumstances, to execute the mortgages in controversy; and the prayer was that each of these instruments be declared invalid, and that the cross complainants take nothing thereunder. The answer of the receiver to each of the cross complaints was held sufficient upon demurrer, and the said complainants replied by the general denial; and, the cause being at issue between the said parties, it was submitted to the court for trial, and upon the evidence the court found for the receiver upon the issues joined upon the cross complaints of Strasburger and Levi, to the effect that the mortgages in controversy were invalid, and did not constitute a lien upon the real estate therein described, nor a valid charge against the proceeds arising out of the sale of the mortgaged premises; and, over the separate motions of appellants for a new trial, wherein they each assigned, among others, as reasons therefor, that the finding of the court was contrary to law, and also contrary to the evidence, the court adjudged and decreed the mortgages to be invalid, and that they be set aside and held for naught.

From this judgment appellants have appealed to this court, and their separate assignments of error call in question the ruling of the court upon the demurrers to the answer of appellee to the cross complaints, and also the overruling of their respective motions for a new trial. The evidence is in the record, and it discloses, among others, the facts heretofore stated. What might be denominated the charter of the corporation in question, or, rather, the governing laws of the state of Ohio relative to the creation of

corporations, under which this company seems to have been incorporated and controlled, were introduced in evidence by the appellee. In addition to these statutes, the opinion of the supreme court of that state in the case of *Rouse v. Bank*, decided June 18, 1889, and reported in 46 Ohio St., at page 493, 22 N. E. 293, was given in evidence upon the trial by the appellee. The holding of the supreme court of Ohio in that appeal was to the effect that a corporation organized for profit under the laws of Ohio, after it had become insolvent and had ceased to prosecute the object for which it was created, could not, by giving some of its creditors mortgages upon its corporate property to secure the payment of antecedent debts, create a valid preference in their favor over other creditors of the insolvent corporation, or over a general assignment thereafter made by such corporation for the benefit of its creditors. The contention of counsel for appellee, in the main, is that, as the G. Y. Roots Company was an Ohio corporation, it was governed by the laws of that state; that the laws of Ohio prohibited it from executing the mortgages to appellants, under the circumstances, as it did; and that these laws must be given force and effect by the courts of Indiana. Hence it is insisted that the right of appellants to enforce the mortgages in dispute was properly denied by the lower court. The question, as counsel for appellee propounded it, is, can this foreign corporation prefer appellants, in the execution of these mortgages, over its other creditors, when its right to do so is denied by the laws of its domicile, and where, as in this case, the persons seeking to enforce their rights under the preference given are citizens of the same state under whose laws the corporation was created? Reduced to a single or simple proposition, the contention of counsel for appellee is that these mortgages were executed in violation of the charter of the company or governing laws of Ohio relative to corporations like the one in controversy, as such charter or laws have been construed or interpreted by the supreme court of that state in its decision in the case of *Rouse v. Bank*, supra, and that the decision of the court in that case is as operative and controlling, under the circumstances, in Indiana as it is in Ohio, and that the rules of comity required the Dearborn circuit court to accept the principle or rule therein asserted as controlling upon it, and by reason thereof adjudge, under the facts, the mortgages in controversy to be invalid, and deny appellants' right to enforce them.

Counsel for the respective parties in this appeal have favored us with able and elaborate briefs, in which they have cited numerous authorities which, as it is insisted, support the proposition which each advances. It would, however, unnecessarily extend this opinion, were we to review or comment upon all of the cases referred to. Hence we con-

tent ourselves with such authorities as support the principles which in our opinion are controlling upon the questions involved in this cause.

It is a well-affirmed general rule that the laws of a sister state, which either give or deny the power to contract, have no extra-territorial force or effect where the particular contract involved relates to the conveyance or incumbrance of lands situated in another state or jurisdiction. *Cochran v. Benton*, 126 Ind. 58, 25 N. E. 870, and authorities there cited. Such conveyances or incumbrances are considered as being governed by the law of the situs of the realty, and all questions relating to the validity thereof are to be determined according to that law, and not according to the law of the place of the contract, or of the domicile of the contracting parties. 6 *Thomp. Corp.* § 7721; *Jones, Mortg.* § 823; *Whart. Conf. Laws*, §§ 273, 274; *Boehme v. Rall*, 51 N. J. Eq. 541, 26 Atl. 832, and authorities there cited. Another rule is that it is the restrictions or prohibitions contained in the charter of a foreign corporation, or those of the governing laws of the state where it is organized, in relation thereto, which follow it into another state. It is such restrictions or prohibitions, as a general principle, and these alone, which, under the rules of comity, are recognized and enforced in other jurisdictions, and not the general legislation or judicial decisions of the state in which such corporation is organized. The general laws, regulations, or decisions of the courts of a sister state are controlling only within its own limits, and such state has no power to give them force or effect in other jurisdictions. 2 *Mor. Corp.* § 967; *Warren v. Bank*, 149 Ill. 9, 38 N. E. 122, and cases there cited; *Boehme v. Rall*, supra; *Borton v. Brines-Chase Co.*, 175 Pa. St. 209, 34 Atl. 507. We have examined the statutes of Ohio, introduced in evidence, which relate to corporations organized thereunder, and we discover nothing therein which can be said to forbid or prohibit an insolvent corporation of that state from mortgaging its corporate property or assets to secure a bona fide antecedent indebtedness of its own, and thereby prefer one or more of its creditors over others. If it appeared in this case that the mortgages in question were executed in violation of the express provisions of any of these statutes, or that the power or right of the company to execute the mortgages depended upon a construction placed upon a statute of that state by its highest court, quite a different question would be presented for our decision.

That an insolvent corporation, in like manner as an insolvent natural person, may, at common law, execute a mortgage upon its property to some of its creditors, and thereby create a preference, is a well-settled proposition. See 2 *Cook, Stock, Stockh. & Corp. Law*, § 779; *Ang. & A. Corp.* p. 168, § 187; 2 *Mor. Corp.* § 802; 1 *Beach, Corp.* § 358;

Levering v. Bimel, 146 Ind. 545, 45 N. E. 775. Blackstone, in his Commentaries, asserts that it is necessarily and inseparably incident to every corporation aggregate that it has the power to sue or be sued, implead or be impleaded, grant or receive by its corporate name, and do all other acts as may a natural person. 1 Bl. Comm. (Cooley's Ed.) *475. In 2 Cook, Stock, Stockh. & Corp. Law, § 691, it is said: "Corporations, unless restricted by their charters or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may. In making the assignment, the corporation may make preferences for one or more creditors over others, or of one class of creditors over other classes. A preference by the directors of themselves is generally held to be fraudulent." By section 5098, Burns' Rev. St. 1894 (section 3879, Rev. St. 1881), the legislature of this state has removed all doubt as to the right or power of a foreign corporation, organized for a like purpose as the one in this case, to acquire lands in this state and mortgage the same. This statute is an affirmative permission by the state to foreign corporations, organized for manufacturing and mining purposes, to purchase and hold real property in this state for the purpose of its business, and to convey or mortgage the same, as corporations of this state, organized for similar purposes, may do. It is true that this statute is not intended to confer any power or right upon a foreign corporation which is denied to it by its charter, or the governing laws of the place of its organization and domicile. As to the rights mentioned in the statute cited, it is simply permissive, and may be said to be but a recognition of the rules of comity existing between sister states. There is no question but what the indebtedness secured by these mortgages is a legitimate and bona fide one in all respects, and is such as the company was fully authorized, under the laws of Ohio, to contract or incur. Neither can it be said that a preference created thereby in favor of Strasburger and Levi was a part of the assignment made by the company on August 6, 1895. That assignment, as we have seen, was adjudged by the lower court to be invalid and of no effect so far as it attempted to assign or transfer property owned by the company situated in Dearborn county, Ind.; and the mortgaged premises apparently remained under the dominion of the company, after the execution of the mortgages, for a period of over six months, until the appointment of the receiver by the Dearborn circuit court on February 22, 1896.

The power of this corporation, under the circumstances, to make the mortgages, and thereby prefer these creditors over others, is not prohibited, as we have seen, by the statutes of its own state; neither is it denied by the rules of the common law or the laws of this state. The situs of the mortgaged premises being in Indiana, it is evident, under

the circumstances, that the parties to the mortgages at the time of their execution must have contemplated their enforcement, if necessary, in the courts of this state. If these mortgages are to be adjudged invalid, and the right of appellants to enforce them denied, by the courts of this state, these results must follow by virtue of the rule announced and adopted by the supreme court of Ohio in *Rouse v. Bank*, supra. In that decision the court did not construe or interpret any statute of that state in relation to the execution of a mortgage by an insolvent corporation. The court therein expressly recognizes the fact that decisions of the higher courts of other jurisdictions are conflicting in respect to the question in dispute in that appeal; and the court expressly admits that it is one of first impression, so far as that court is concerned, and therefore, it is said, that it is at liberty to adopt the rule which in its judgment best coincides with justice and right. The rule adopted by the court in the case in question, and the one which controlled the question therein involved, is but an application of the equitable principle which arises out of what is denominated the "trust-fund doctrine." The foundation upon which this rule or doctrine, as recognized in the *Rouse* Case, and which now prevails in Ohio and other states, is said to rest, is that the assets or property of a corporation, when it becomes insolvent and has ceased to be a going concern, eo instante become a trust fund for the benefit of its creditors, and, under the circumstances, its officers, being trustees for all of its creditors, cannot lawfully dispose of or incur the property otherwise than for the equal benefit of all of its creditors. This doctrine or rule does not prevail in this jurisdiction, and this court has declined to accept or enforce it. See *Henderson v. Trust Co.* 143 Ind. 561, 40 N. E. 516; *First Nat. Bank v. Dovetail Body & Gear Co.*, 143 Ind. 534, 42 N. E. 924; *Levering v. Bimel*, supra; *First Nat. Bank v. Dovetail Body & Gear Co.*, 143 Ind. 550, 40 N. E. 810. In the case last cited, on page 553 of the opinion, 143 Ind., and page 811, 40 N. E., this court said: "The expression that the 'property of a corporation constitutes a trust fund' for its creditors only means that when the corporation is insolvent, and a court of equity has taken possession of its assets for administration, such assets must be appropriated to the payment of its debts, before distribution to its stockholders; but, as between the corporation itself and its creditors, the corporation does not hold its property in trust, or subject to a lien in favor of the creditors, in any other sense than does an individual debtor." In the appeal of *Levering v. Bimel*, on page 553 of the opinion, 146 Ind., and page 778, 45 N. E., we said: "As between the corporation and its creditors, it cannot, in reason, be said that the relation is anything more than that of debtor and creditor. The relation of trustee and cestui que trust does

not exist, so as to create a lien upon its assets in favor of the creditor, in any other sense than applies to an individual debtor."

While the decision of the Ohio court in the case in controversy is controlling in that jurisdiction upon like questions, when presented, it, as we have seen, can have no extraterritorial effect. It has merely a local application, and the courts of this state are not required to follow it, and by reason thereof declare invalid the mortgages in dispute, and deny appellants' right to enforce them. In addition to the authorities heretofore cited on this point, see *Rhawn v. Pearce*, 110 Ill. 350. While we may and do yield great respect to the decisions of the supreme court of Ohio, still we are not bound to accept them as governing us in the administration and application of legal or equitable principles. It is true that the construction placed upon a statutory law by the courts of its own state will, by virtue of the rules of comity, be followed by the courts of a sister state in cases in which such statute may be involved; but, as heretofore stated, the construction of a statute was not involved in the *Rouse Case*, but the question presented to the court in that appeal depended for its solution upon the view which the court might take in regard to the equitable rule or trust-fund doctrine. It is certainly manifest and well supported by authority that neither the principles of equity nor the common law, as they may be expounded by the supreme court of Ohio, are binding upon this court; but, in the administration of justice, we must adhere to and follow our own decisions or precedents in which such principles are exposed or expounded,—so far, at least, as we consider such decisions sound and correct. This rule is well affirmed by the courts of other states. *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 27 N. E. 849, and cases there cited.

The fact that the creditors in this cause are nonresidents of this state, and citizens of the state of Ohio, can exert no influence over the question as here presented. By the rule approved by this court in *Catlin v. Silver-Plate Co.*, 123 Ind. 477, 24 N. E. 250, it is asserted that when a citizen of another state is once properly in court, and accepted as a suitor, neither the law, nor the court administering the law, will admit any distinction between such a suitor and one who is a resident or a citizen of its own state. "Before the law and its tribunals, there can be no preference of one over the other."

Tested by the rules prevailing in this state, as expounded and settled by our own decisions, relative to the validity of mortgages given in good faith by an insolvent corporation upon its corporate property to secure a bona fide antecedent indebtedness, we are constrained, under the facts, to uphold the validity of the mortgages in controversy. Under the evidence, the judgment of the lower court ought to have been in favor of appellants upon the issues tendered by the

cross complaints. The judgment rendered by the trial court in favor of appellee upon the issues joined upon appellants' cross complaints is therefore reversed, and the cause is remanded to the lower court, with instructions to grant appellants a new trial, and for further proceedings not inconsistent with this opinion.

BAKER, J., did not participate in this decision.

(152 Ind. 197)

INDIANA MUT. BUILDING & LOAN
ASS'N v. PLANK et al.

(Supreme Court of Indiana. Feb. 21, 1899.)

PLEADING—SUFFICIENCY—EXHIBITS—BUILDING
AND LOAN ASSOCIATIONS—LIEN ON
STOCK—FORECLOSURE.

1. An exhibit that is not the foundation of an action cannot be considered in determining the sufficiency of a pleading with which it is filed.

2. A suit by a building and loan association to foreclose a mortgage, and to enforce a lien on shares of stock of the mortgagor given as collateral security to the mortgage, is not an action on the certificate, within Burns' Rev. St. 1894, § 365 (Horner's Rev. St. 1897, § 362), requiring the filing of a copy of a written instrument with any pleading founded thereon, and hence such certificate, when filed with the complaint, will not be considered in determining the sufficiency of the complaint.

Appeal from circuit court, Fulton county;
A. C. Capron, Judge.

Action by the Indiana Mutual Building & Loan Association against Mary B. Plank and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

McBride & Denny, Essick & Mitzler, and Elliott & Elliott, for appellant. Holman & Stephenson, for appellees.

MONKS, C. J. This action was brought by appellant against appellees to recover judgment upon a note executed by them, to foreclose a mortgage executed by appellees to secure said note, and to enforce a lien on 11 shares of stock of appellant corporation, pledged as collateral security to secure said note. A demurrer for want of facts was sustained to the complaint, and, appellant refusing to plead further, judgment was rendered in favor of appellees. The ruling of the court upon said demurrer is the only error assigned. It is not claimed by appellees that the complaint, when considered in connection with the note and mortgage filed therewith as exhibits, is insufficient. They insist, however, that the provisions of said certificate of stock filed as an exhibit control the allegations in the complaint, and that, when said certificate is considered in connection with the other exhibits, as a part of the complaint, it is not sufficient, and the court did not err in sustaining the demurrer thereto. It is true, as insisted by appellees, that, when the allegations of a pleading vary from the provisions of the instrument which is the

foundation of the action, the provisions of said instrument control, and such allegations will be disregarded. *Deposit Co. v. Lackey*, 149 Ind. 10, 14, 48 N. E. 254, and cases cited. If, however, an exhibit is filed with a pleading which is not the foundation thereof, the same cannot be considered in determining the sufficiency of such pleading, but must be disregarded. *Dudley v. Pigg*, 149 Ind. 363, 364, 48 N. E. 642, and cases cited; *Fitch v. Byall*, 149 Ind. 554, 557, 49 N. E. 455; *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158-161, 39 N. E. 443, and cases cited; *Newman v. Association*, 97 Ind. 295-297, and cases cited. Copies of the note and mortgage sued upon were filed with the complaint as exhibits. It is provided in said notes that certificate No. 1,474, for 11 shares of the capital stock in appellant corporation, held and owned by appellee Mary B. Plank, are transferred and pledged to appellant as collateral security for said note and mortgage. A copy of said certificate of stock is also filed with the complaint as an exhibit. It is alleged in the complaint that certificate No. 1,474, for 11 shares of stock of said association, held and owned by appellee Mary B. Plank, were transferred and pledged to appellant as collateral security, to secure said note and mortgage. Said assignment was contained in the note. The complaint clearly identified the shares of stock against which it was sought to enforce the lien. It is evident that this is not an action on the certificate of stock, within the meaning of section 365, Burns' Rev. St. 1894 (section 362, Horner's Rev. St. 1897), but an action on the note and mortgage, and to enforce a lien against said shares of stock. The contract sought to be enforced as to the stock is the written assignment thereof as collateral security, which is contained in the note and mortgage. The shares of stock described in the written assignment are the security, just as the real estate described in the mortgage is the security provided by that instrument. It follows that the court erred in sustaining the demurrer to the complaint. Judgment reversed, with instructions to overrule the demurrer to the complaint.

(152 Ind. 199)

ZIMMERMAN et al. v. MAKEPEACE.

(Supreme Court of Indiana. Feb. 21, 1899.)

COURTS — INJUNCTION — EXECUTION — PARTIES — TRUSTS — ERROR — WAIVER.

1. The court of one county may enjoin the illegal exercise of power in that county under an execution from the court of another county.
2. Where the trustee has resigned, and the court has not appointed his successor, the cestui que trust may sue to protect the estate.
3. Where an execution sale might becloud the title to land, equity may enjoin it, though the sale would pass no title to the purchaser.
4. Trustees were to pay the net income of devised land to the beneficiary during his life, and convey the fee to his children at his death; or they might sell absolutely, and account for the price and interest in the same way, the in-

come being intended to provide for the support of the beneficiary and his family. *Held*, that the beneficiary had no interest in the land which could be sold on execution, under Rev. St. 1881, § 752 (Burns' Rev. St. 1894, § 764; Horner's Rev. St. 1897, § 752), making any interest in lands held in trust for or to the use of another liable for his debts.

5. Error in refusing to dissolve a term-time interlocutory order is waived by proceeding to trial on the merits, since, under Rev. St. 1881, §§ 646, 647 (Burns' Rev. St. 1894, §§ 658, 659; Horner's Rev. St. 1897, §§ 646, 647), no appeal could be taken from it after the term.

Appeal from circuit court, Delaware county; George W. Koons, Judge.

Bill by Allen Q. Makepeace against Christopher Zimmerman and others. There was a decree for complainant, and defendants appeal. Affirmed.

Howell D. Thompson, for appellants. Walker & Foster, for appellee.

BAKER, J. Suit for injunction to restrain Zimmerman, as judgment creditor, and Starr, as sheriff of Delaware county, from selling land on execution against Makepeace, issued from the Madison circuit court. The complaint exhibits these facts, in substance: Appellee's mother, Nancy Makepeace, devised the undivided half of her lands to Alvira J. Corwin and John E. Corwin in fee simple, in trust for the following uses: That the land be kept rented by the trustees, and the annual rents and profits collected, and, after paying taxes and other necessary expenses, paid to and for Allen Q. Makepeace, annually, and as soon as received by the trustees, during his life; and, immediately after his death, the trustees or their successor shall convey to his legitimate children, if any survive him, in equal proportions, in fee simple, the land held in trust, and, if no lawful issue survive him, to Alvira J. Corwin, in fee simple; or, if the trustees shall find, in their judgment, it would be better to convert the land into personality, they are empowered to do so at any kind of sale, at their discretion, and to convey it in fee simple, free of incumbrance, and to put the proceeds at interest, and account for the interest and purchase money in the same manner the land and its rents are specified to go. The annual payments directed to be made to and for Allen Q. Makepeace are intended to provide for his necessary support and that of his family, and, should he be of dissolute and intemperate habits, or from other causes fail to provide for his family, the trustees shall apply to the support of his family a sufficient amount out of the same, to be paid him, to provide for the necessary support of his family, and pay him only the overplus. The Corwins acted as trustees till June 11, 1891, when the Madison circuit court appointed Dusang as their successor. Dusang resigned his trusteeship on June 25, 1895, and a successor has not been appointed. While Dusang was trustee, the trust estate was set off in severalty. Zimmerman recovered a

money judgment against Makepeace in the Madison circuit court, and caused execution to issue to the sheriff of Delaware county. Under direction of Zimmerman, the sheriff levied on land set off to the trustee in the partition proceedings, has advertised it for sale, and will proceed unless restrained. The joint demurrer of appellants, and the separate demurrer of Zimmerman, for want of facts, were overruled. Appellants joined in a general denial. Zimmerman answered separately, in two paragraphs, the first purporting to be an affirmative answer, the second a general denial. Demurrer to first paragraph of Zimmerman's separate answer was sustained. Temporary injunction pending trial was made permanent, on final decree. Appellants' joint, and Zimmerman's separate, motions for new trial were overruled.

The first assignment challenges the jurisdiction of the Delaware circuit court. The argument is that the Delaware circuit court was asked to nullify the final process, and thereby impugn the judgment of the Madison circuit court. If this be true, the decree is erroneous. *Plunkett v. Black*, 117 Ind. 14, 19 N. E. 537. But the judgment of the Madison court was not attacked; nor was its final process sought to be canceled. The only relief invoked was the granting of an injunction to restrain an illegal exercise of power under an unquestioned execution. In affording this remedy, a court of equity necessarily has power to proceed against the holders of a writ of another court. Injunctions operate in personam. The Delaware circuit court, as a court of equity, had jurisdiction of the subject-matter, and was the proper court to restrain persons in Delaware county from beclouding titles in Delaware county.

The second assignment involves the sufficiency of the complaint. The first point concerns appellee's right to sue. If there was a trustee, he should have been plaintiff. If a trustee neglects or refuses to act, the cestui que trust may protect the estate. *Beach, Trusts*, § 686. In this case, the trustee had resigned, and the court had not appointed a successor. Appellee, as a cestui que trust, was entitled to bring this suit. The second point questions the right to enjoin an execution sale under which no title nor right would pass to the purchaser. The contention is that the landowner has a complete remedy at law. The jurisdiction of equity to enjoin a sale that would be fruitless to the judgment creditor, and might cloud and complicate the title, is thoroughly established. *Freem. Ex'ns*, § 438; *Herm. Ex'ns*, § 614; *Beach, Inj.* § 710; *High, Inj.* § 372; *Davis v. Clark*, 26 Ind. 424; *Bank v. Deltch*, 83 Ind. 133; *Bishop v. Moorman*, 98 Ind. 1; *Scobey v. Walker*, 114 Ind. 254, 15 N. E. 674. The third point goes to the interest of appellee in the land. Appellee sued as representative of the trust. The case stands as if the trustee were plaintiff. *Rev. St. 1881*, § 52 N.E.—63

752 (*Burns' Rev. St. 1894*, § 764; *Horner's Rev. St. 1897*, § 752), provides: "The following real estate shall be liable to all judgments and attachments and to be sold on execution against the debtor owning the same or for whose use the same is holden, viz.: * * * Fourth. Lands, or any estate or interest therein, holden by any one in trust for or to the use of another." If Makepeace, in his individual right, has no estate or interest in the land held in trust, it becomes unnecessary to determine what equitable estates or interests in land may be sold on execution, or to attempt to reconcile the decisions in *Terrell v. Prestel*, 68 Ind. 86, and *Maxwell v. Vaught*, 96 Ind. 136. Under the will of Nancy Makepeace, the trustees are empowered, at any time during the life of appellee, at their discretion, to sell the land and give the purchaser the full title the testatrix had. If they should do so, the proceeds of sale must be held by them to the same uses for which they held the land; if they should not, they must convey the full title to the children of appellee at his death. It is manifest that a deed by appellee of any estate or interest in the land could not prevent the trustees from conveying the full title. If the trustees conveyed, appellee's deed could give the grantee, at most, only an equitable claim upon the trustees to account to him for the use of the purchase money, agreeably to the terms of the trust; if the trustees should not sell, appellee's deed would not give the grantee the right to dispossess the trustees, or to interfere with their control of the land in any way. The grantee, at most, could only call on the trustees, after they had received the annual rents and profits, to pay him the uncertain amount, if any, that might be left after they had paid the taxes and necessary expenses, and devoted what was necessary, in their judgment, for the support of appellee's family; that is, the deed could amount to nothing beyond an equitable assignment of an equitable chose in action. Appellee has no estate or interest in the trust lands. *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295, and note, pages 304-307; *Freem. Ex'ns*, §§ 187, 188. Whether appellee has an estate or interest in the body of the trust that is alienable, in anticipation of the yearly payments, does not arise properly in this record. *Thompson v. Murphy*, 10 Ind. App. 464, 37 N. E. 1094; *Beach, Trusts*, § 567.

The third assignment is based on the refusal to dissolve the restraining order. This was a term-time interlocutory order. No appeal from it could be taken after the term. *Rev. St. 1881*, §§ 646, 647 (*Burns' Rev. St. 1894*, §§ 658, 659; *Horner's Rev. St. 1897*, §§ 646, 647). The alleged error was waived by appellants in putting the cause at issue and proceeding to trial on the merits. *Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414.

The fourth assignment presents the motion for a new trial. Three reasons are given: The first, that the Delaware circuit

court had no jurisdiction, has been considered. The second is that the finding is not supported by sufficient evidence. Appellee's evidence amply covered every material point; appellants introduced none. The last ground is that the finding is contrary to law. Under the evidence, the law could permit no other finding. Zimmerman assigns separately that it was erroneous to sustain a demurrer to the first paragraph of his separate answer. This paragraph stated, substantially, the same facts set forth in the complaint, and thereupon affirmed that Makepeace owned the land in fee simple, and that the sale ought to proceed. Clearly bad. Decree affirmed.

(21 Ind. App. 641)

SLAUGHTER v. SLAUGHTER.

(Appellate Court of Indiana. Feb. 24, 1899.)
DESCENT AND DISTRIBUTION — ADVANCEMENTS — INTEREST.

1. A writing acknowledged the receipt of \$500 by a son from his father, to be in full of all claims as heir against the latter's estate. The sum was to bear 6 per cent. interest from date. *Held*, that this was not an advancement as to the interest, and the father's estate could recover it.

2. Under Rev. St. 1876, p. 601, providing that when no period is mentioned for which interest is to be calculated it shall be deemed to be by the year, annual interest was meant in a general agreement to pay interest.

Appeal from circuit court, Elkhart county; Henry D. Wilson, Judge.

Action by Solomon E. Slaughter, executor of the will of Solomon Slaughter, against John B. Slaughter. There was a judgment for defendant, and plaintiff appeals. Reversed.

W. J. Davis, for appellant. Baker & Miller, for appellee.

BLACK, O. J. The court below held each of the two paragraphs of the appellant's complaint insufficient on demurrer. In the first paragraph it was shown that on the 13th of March, 1863, at the city of Goshen, Elkhart county, Ind., the appellee, John B. Slaughter, executed to one Solomon Slaughter an agreement in writing, a copy of which was set out, as follows: "I, John Slaughter, son of Solomon Slaughter, of Ravenna, Ohio, hereby acknowledge the receipt of five hundred dollars this day from my father, Solomon Slaughter; and I hereby acknowledge the same to be in full of all claims that I may have upon my father's estate after his death, as one of his heirs; and I hereby stipulate and agree not to set up any claim as heir to my father's estate after the decease of my father; and I hereby stipulate and agree that said sum of five hundred dollars shall bear interest at six per cent. from this date." The instrument was witnessed by the signature and seal of John B. Slaughter, and bore the date alleged. It was further alleged that in April, 1896, said Solomon Slaughter died, at Portage county, Ohio, testate, and that the appellant was the

duly appointed and qualified executor of the last will and of the estate of said decedent; that the appellee did not pay any part of the annual interest on said sum of \$500, "as by him agreed to be paid, to said Solomon Slaughter, in his lifetime, nor has he paid said annual interest, or any part thereof, to this plaintiff, as executor of the estate of said Solomon Slaughter, deceased, though often requested so to do; that there is now due plaintiff from defendant the sum of twelve hundred dollars, accrued interest, as aforesaid. Wherefore," etc. In the second paragraph it was alleged that on the 13th of March, 1863, the appellee was the son of one Solomon Slaughter, and resided in Goshen, Ind.; that on said day the appellee proposed to his father that, if the latter would then advance and pay the former the sum of \$500, he, as one of the children and heirs of said Solomon Slaughter, would thereafter make no claim for any further sum or amount from the estate of his father at his death; that the appellee proposed, further, to his said father, as an inducement to him to raise for and pay to the appellee said sum of \$500, that the appellee would pay said Solomon Slaughter interest on said sum at the rate of 6 per cent. per annum until the death of said Solomon Slaughter; that the latter then and there accepted said proposition of the appellee, and did raise for and pay the appellee said sum, in accordance with said proposition; that then and there the appellee, to evidence the terms and condition of his said proposition and agreement, at Elkhart county, Ind., executed to said Solomon Slaughter his indenture in writing. The instrument is set out, being the same as is in the first paragraph, and the remainder of the second paragraph is like the closing portion of the first.

It is sought to enforce this instrument as a written promise to pay money; not to repay the sum received by the appellee, as shown by the instrument, but to pay the interest which, by the terms of the writing, that sum was to bear. It is sought to recover this interest as a part of the assets of the decedent's estate. The suit is brought in a court of this state, to recover upon the instrument executed in this state, as a promise to pay money generally, and the question for decision is whether or not the writing should have such a meaning attributed to it. If it ought to be treated as evidencing an advancement merely, both as to the amount received by the son from the father and as to the interest mentioned, it cannot be regarded as evidencing a debt.

An "advancement" has been defined as a giving by anticipation of the whole or a part of what it is supposed a child will be entitled to on the death of the parent making the advancement. *Dillman v. Cox*, 23 Ind. 440; *Ruch v. Biery*, 110 Ind. 444, 11 N. E. 312; *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. 779. In *Herkimer v. McGregor*, 126 Ind. 247, 253, 25 N. E. 146, a definition in a text-book

is quoted, as follows: "An 'advancement' is an irrevocable gift by a parent, who afterwards dies intestate, of the whole or a part of what it is supposed the child will be entitled to on the death of the party making the advancement." See, also, *Osgood v. Breed's Heirs*, 17 Mass. 356; *Miller's Appeal*, 31 Pa. St. 337. In *Quarles v. Quarles*, 4 Mass. 680, 684, it was said: "What could be more absurd than that a charge or memorandum by the intestate should be evidence of an advancement of a child, while a solemn acknowledgment by his [the child's] deed, as in this case, should not be at all admissible for the same purpose?"

In the case at bar the father died testate, and the appellant sues as executor. The will is not before us. What effect, if any, the instrument in suit should have in connection with any of the provisions of the will, is not to be decided in passing upon the question as to the sufficiency of the complaint. It has been held that, where a father giving money to his son takes the latter's note for its payment, it is a debt, but the father has power by his will to turn the debt into an advancement. *Porter's Appeal*, 94 Pa. St. 332. The will could not make an advancement, which is irrevocable, a part of the estate. An advancement made in the lifetime of a testator forms no part of the estate, to be administered by his executor. It cannot be resorted to for the payment of debts, and the child advanced cannot be compelled to refund for any purpose connected with the settlement of the estate. It cannot be recovered back from the person advanced, even for the purpose of equalizing legacies. *Black v. Whitall*, 9 N. J. Eq. 573. Interest is not chargeable ordinarily upon advancements. *Moale v. Cutting*, 59 Md. 510; *Black v. Whitall*, supra. An advancement is not treated as borrowed capital, drawing interest. *Osgood v. Breed's Heirs*, supra. One of the incidents of an advancement is that it shall be valued as of the date at which the child received the money. *Porter's Appeal*, supra. The time when an advancement is to be considered and settled is after the death of the ancestor, regardless of the time when made. *Miller's Appeal*, supra. Interest is not chargeable on an advancement, unless there be clear expression that it shall carry interest. An advancement is not chargeable with interest, "unless, perhaps, when expressly given and received upon such terms." *Miller's Appeal*, supra. See, also, *Roberson v. Nail*, 85 Tenn. 124, 2 S. W. 19; *Fickes v. Wireman*, 2 Watts, 314.

In determining whether the writing before us should be construed as a promise to pay the interest, or as an agreement that the interest should be added to the sum received and the amount should constitute an advancement, it is not necessary to decide whether or not the acknowledgment of the money received to be in full of all the son's claims as an heir, and the stipulation and agreement of

the son not to set up any claim as heir, could, under any circumstances, impose upon the son any binding obligation. Upon that subject the authorities are conflicting. See *Needles v. Needles*, 7 Ohio St. 432; *Quarles v. Quarles*, supra; *Stokesberry v. Reynolds*, 57 Ind. 425; *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523; *Binns v. Dazey*, 147 Ind. 536, 44 N. E. 644. Those stipulations in relation to the son's claims as heir, not to rights he might afterwards have as devisee or legatee, are to be viewed with regard to the situation of the parties at the time of the execution of the instrument. The object of our present inquiry being to construe the instrument, we must have regard to the purpose of the parties at the time of its execution; we must seek to ascertain what it meant to them; and therefore we must suppose that they regarded these engagements upon the part of the son in the writing as binding upon him according to the usual sense of the words, and that all parts of the instrument were inserted with such understanding of the father and the son, and that the stipulation in relation to interest was made with a meaning consistent with the meaning in the minds of the parties of what went before it in the writing. Unquestionably, the sum received by the son was an advancement, whether, because of the acknowledgment thereof as in full of all claims the son might have in the estate of his father after his death as one of his heirs, and his promise not to set up any claim as heir, the son could have been excluded from a share as heir or not. If the instrument had ended here, without the stipulation concerning interest, there would have been merely an advancement given with the understanding and agreement of the parties that it was to be in full of the son's claims as heir, and that he should not set up any such claims; and, if it had so ended, the father, or his personal representative after his death, could have had no claim, based upon this instrument, against the son. If it was the understanding that the son was cut off from any claim whatever as heir by this gift of \$500 and these stipulations, what reason could there be for the further stipulation and agreement about interest, if the interest was understood to be a part of the advancement? It was a stipulation in addition to the acknowledgment and engagement relating to claims as heir. There could be no plausible reason for adding the interest to the advancement, which without it was to cut the son off from any share as heir. To treat the interest as part of the advancement would be attributing inconsistency to the written instrument, whereas, if it will bear a construction which makes its parts consistent with each other, it ought to receive it. Having reference to the understanding as manifested by the writing, there could be no good reason for the stipulation and agreement that the sum of \$500 received should bear interest at 6 per cent. from the date of its receipt, unless it be regarded as a

promise of the son that, besides claiming nothing as heir, he would be bound for the interest on the \$500 at 6 per cent. per annum, from the date of his receipt of that sum.

In *Doty v. Willson*, 47 N. Y. 580, it was said: "The court below also erred, we think, in holding that the gift was necessarily invalid because the right to call for 6 per cent. interest was reserved. It is undoubtedly a general rule that the donor must part with all interest and control over the property, but I can find no authority, nor can I see any reason, for the doctrine that a promise made by the donee to pay a sum of money or do an act, not amounting to a condition of delivery or title, can invalidate the gift. If this was a gift of the \$3,000, the title and control of the money immediately vested in the donee, and his promise to pay the donor 6 per cent. in no degree affected such title or control. It might be a circumstance to determine whether it was a gift or not, but would not invalidate it as a gift. The donor could never recover back the principal, nor in any manner control it, and it is not material to inquire whether he could recover the interest. If he could, it would be upon a principle not affecting this question. * * * If it was an advancement, and the deceased had died intestate, it would have been brought into hotchpot, and deducted from the share of the defendant; but advancements only apply in cases of intestacy, and, when a will is subsequently made without noticing the advancement, the children take according to the will, without abatement."

In *Re Hicks*, 14 N. Y. St. 320, a father gave his son a certain sum as an advancement, upon the agreement of the son to pay the father interest upon it during his life, in monthly payments of a specified sum. After the father's death, the son was charged with the interest so far as it remained unpaid at the death of the father, but not for the sum advanced. It was held that the fact that the son agreed to pay his father interest upon the gift at the rate specified in their agreement did not invalidate it as a gift; citing *Doty v. Willson*, supra. It was said: "It was plainly competent for him to part with his money upon such terms as both parties agreed to, and it was immaterial by what name the transaction is called. Say that he purchased an income in the nature of an annuity, payable in monthly installments, and it is equally valid as a defense."

In *Ruch v. Biery*, 110 Ind. 444, 11 N. E. 312, a father made advancements of land to his sons, who each agreed to pay an annuity amounting to 6 per cent. of the consideration named in the deeds by which the lands were conveyed to them. The sons having failed to pay the annuities, the amount thereof was treated as assets of the deceased father's estate.

If the intention of the parties to the instrument in suit can be ascertained by reasonable construction, and performance be not im-

possible or illegal, the purpose should be effectuated. We must assume that no stipulation was inserted as a vain and useless form of words. The stipulation concerning the interest must be taken in the meaning of the words as we must suppose them to have been understood by the parties, but most strongly against the promisor, the son, and most favorably towards the promisee, the father. The agreement was that the sum given should "bear"—that is, produce or yield—interest at 6 per cent. It was intended that this interest should be paid by the son to the father. It was a provision for the benefit of the father, to be enjoyed by him. The sum which was to bear interest was itself never to become due to the person who was to receive the interest. If it were a stipulation for interest on a sum which was itself to constitute a principal indebtedness, the interest, no time of payment thereof being expressly stated, would become due and payable when the principal should be due and payable. At the time of the execution of the instrument there was in force a statutory provision that "when in any law or in any instrument of writing, specifying a rate of interest, when no period of time is mentioned for which such rate is to be calculated, it shall be deemed to be by the year." Rev. St. 1876, p. 601. Such meaning, we think, belongs to the stipulation under examination; such must be regarded as the intention of the parties.

A promise to pay a certain sum of money, upon a sufficient consideration, is not rendered void by the fact that no time of payment is expressed. Here was, in effect, a promise of the son to pay the father "interest" at the rate of \$30 by the year or per annum. The period for which the sum given was to bear interest was until the decease of the father, before mentioned in the instrument. It is reasonable to say that the stipulation had relation to what went before. The whole instrument must be considered in construing any portion of it. In *Brimblecom v. Haven*, 12 Cush. 511, where a testator by his will gave his widow "the interest of \$600" for and during her natural life, this was held to be an annuity equal to the interest of such sum. Where there is nothing but a simple gift of so much a year to A., he takes it only for life. *Hill v. Potts*, 8 Jur. (N. S.) 555. It seems to be the reasonable meaning of the stipulation of the appellee that he would pay his father annually a sum equal to the interest upon \$500, at 6 per cent. per annum, during the life of the father. Unless this stipulation be given such effect, it would seem to be necessary to hold it void for uncertainty; for no other construction appears reasonable which would raise an indebtedness of the son to the father in his lifetime, on which his personal representative could maintain an action. The inartistic form and incompleteness of the writing render its construction difficult. We have sought a construction which will avoid inconsistency in the terms of the in-

strument, and which will carry into effect the apparent intention of the parties. The complaint in each paragraph stated facts sufficient to put the appellee to his answer. The judgment is reversed.

(21 Ind. App. 650)

RAUH et al. v. STEVENS et al.

(Appellate Court of Indiana. Feb. 24, 1899.)

CONVERSION—PLEADING—CONTRACT AS EXHIBIT.

A complaint alleging that defendants acted as agents of plaintiffs in the sale of certain goods, under a written contract, providing that the title to the goods should remain in plaintiffs until sold by defendants, and that all proceeds of sales should belong to plaintiffs, and that defendants received a certain sum from such sales, but refused to pay it to plaintiffs, and unlawfully converted it to their own use, states a cause of action based on the wrongful conversion, and not on the written contract, so as to make it necessary to make such contract a part of the complaint, by copying it therein, or by exhibit, as required by Horner's Rev. St. 1897, § 363.

Appeal from circuit court, Bartholomew county; F. T. Hord, Judge.

Action by Leopold Rauh and another against Francis M. Stevens and another. From a judgment sustaining a demurrer to the amended complaint, plaintiffs appeal. Reversed.

Cooper & Cooper, for appellants. John W. Morgan, M. I. Emlg, and W. F. Norton, for appellees.

WILEY, J. The only question presented by the record in this case is the action of the court in sustaining a demurrer to the amended complaint. The complaint is in one paragraph, and avers that appellants were partners, engaged in the business of manufacturing and selling fertilizers at wholesale, and that appellees were partners engaged in selling fertilizers at retail; that on the 6th of July, 1896, appellants and appellees entered into a written contract, by the terms of which appellees were to act as agents of appellants for the sale of fertilizers at Columbus, Ind.; that by said contract it was expressly understood and agreed that the title and ownership of all the fertilizers received by appellees under said contract should remain vested in appellants until sold by appellees; and that, until so sold, the same should at all times be subject to the order of appellants, and, when sold, all proceeds, money, notes, etc., received in payment, should belong to, and be property of, appellants; and that appellees were forthwith to forward to them all proceeds of such sales; that in September, 1896, appellants shipped to appellees, at Columbus, about 50 tons of fertilizers; that appellees received the same, and commenced the sale thereof at retail, and between that time and January, 1897, sold of said fertilizers 25 tons; that said sales were made for appellants; and that appellees received from said sales the sum of \$500; but that they did not forward

or pay to appellants the same, or any of the proceeds of said sales, but unlawfully converted the same to their own use, to appellants' damage, etc.

The only objection that appellees make to the amended complaint is that the action is based upon a written contract, and that neither the contract nor a copy thereof is filed with the complaint. If the basis of the action is the written contract between the parties, and which is referred to in the complaint, then there can be no question but what it must be made a part of the complaint by being copied bodily into it, or made a part of it by exhibit. The statute so provides, and all the authorities so hold. Horner's Rev. St. 1897, § 363; Brown v. State, 44 Ind. 222. Additional authorities, numerous as they are, would be useless. It is insisted by appellants, however, that the action is not founded upon the contract, but upon the facts which charge a conversion. It has long been recognized in this state that a right of action *ex contractu* may be waived, and the party so waiving it seek his remedy *ex delicto*. Lane v. Bolcourt, 128 Ind. 420, 27 N. E. 1111; Boor v. Lowrey, 103 Ind. 468, 3 N. E. 151; Hess v. Lowrey, 122 Ind. 225, 23 N. E. 156. If that is the remedy which appellants here seek, and they are not seeking a recovery on the contract, then the failure to file the original or a copy of the contract with the complaint was immaterial. It seems to us that the theory of the complaint is readily understood and plainly discernible from its averments, and that appellants ask a recovery for the wrongful conversion of money which came into the possession of appellees, and which they have failed to turn or pay over to appellants. The demurrer admits the facts pleaded to be true, and the facts stated show a conversion of \$500 in money belonging to appellants. So, we think it is plain that the action is one sounding in tort, and not upon a contract. The facts do not charge a conversion of the fertilizer, for it appears from the complaint that appellees did with it what they had a right to do; i. e. they sold it in the usual course of trade. But here it is not averred that they converted the property itself to their own use, but the proceeds thereof. The money derived from the sale of the goods was as much the property of appellants, under the allegations of the complaint, as the fertilizers which appellants placed in the hands of appellees to sell; and a misapplication of such money, where it was their duty to turn it over to appellants, was a conversion of it.

In Bixel v. Bixel, 107 Ind. 534, 8 N. E. 614, it was held that where one takes possession of and sells personal property at the direction of the owner, but fails to properly apply or misapplies the proceeds, there is no conversion of the property, and that the liability of the seller is for the conversion or misapplication of the proceeds. In that case the court said: "If a person, having authority from the owner to sell the property and apply the pro-

ceeds, sells the property and misapplies or converts, the proceeds, he is liable for such misapplication or conversion, but does not become a wrongdoer *ab initio*." This language applies with great force to the facts set up in the complaint we are now considering. Here appellees were not wrongdoers *ab initio*, for they had a right to the possession of the property, and had a right to sell it, and they only became wrongdoers, and made themselves liable therefor, when they had misapplied or converted the money received from such sale to their own use. In *Bunger v. Roddy*, 70 Ind. 23, it was held that, where one is intrusted by another with money to be applied to a certain purpose, he is liable therefor for a conversion thereof, even without a demand. The court said: "The facts alleged in the complaint, if true, showed with sufficient clearness and certainty that appellant had in his possession a certain sum of money belonging to the appellee, the possession of which he obtained upon his promise that he would apply the same to the payment of William Roddy's note. * * * It was the appellant's duty either to apply the money, as he had undertaken to do, to the payment of the note, or to return the same forthwith to the appellee. In no event, under the facts stated in the complaint, could the appellant have acquired any such personal title to or interest in the money received by him from the appellee as would have authorized him, if for any cause he failed to apply the same to the specific purpose for which it was received, to withhold such money from the appellee." In that case the complaint alleged that appellant had converted the money due to his own use; and it was held that the complaint was good, and that a demand was not necessary, and upon that question the court said: "Conceding, without deciding, that such an averment would ordinarily be necessary in the plaintiff's complaint in such a case as the one now before us, we are of the opinion that the appellee's complaint in this case was not defective for the want of such averment. It was expressly alleged by the appellee that the appellant had converted the money sued for to his own use; and the rule is that, where an actual conversion is alleged, it is unnecessary to aver a demand." Of many cases so holding, we cite the following: *Robinson v. Shipworth*, 23 Ind. 311; *Ferguson v. Dunn's Adm'r*, 28 Ind. 58; *Railroad Co. v. Gent*, 35 Ind. 39; *Nelson v. Corwin*, 59 Ind. 489; *Proctor v. Cole*, 66 Ind. 576. In the case before us, under the facts stated, appellees certainly had no greater right to appellants' money than appellant did in *Bunger v. Roddy*, supra. There *Bunger* got the money for a specific purpose, and here appellees got the money under an agreement with appellants that such money should be theirs, and with the specific promise that they would pay it over to them forthwith. In the case before us, appellees were the agents of appellants to sell the fertilizer placed in their possession; and it is

well settled that, where an agent misappropriates or misapplies the money or property of his principal, he is guilty of conversion. *Clegg v. Baumberger*, 110 Ind. 536, 9 N. E. 700; *Worley v. Moore*, 97 Ind. 15.

Appellants had two remedies, to wit: (1) To declare upon the contract, and (2) to sue for conversion. They elected to pursue the latter, and have stated facts showing a conversion. Hence, as the written contract was not the basis of the action, it was wholly unnecessary to file the original or a copy of it with the complaint, and the objection urged against it for that reason is not well grounded. The judgment is reversed, with instructions to the trial court to overrule the demurrer to the amended complaint.

HENLEY, J., did not take part in the decision of this case.

(21 Ind. App. 629)

STATE ex rel. GARBER et al. v. MOCK et al.
(Appellate Court of Indiana. Feb. 23, 1899.)
TOWNSHIP TRUSTEE—LIABILITY—ACTION ON BOND
—PLEADING—DEFICIT OF PREDECESSOR.

1. Where a township trustee charges himself, in his annual report, with a certain sum on hand, and the board of commissioners approves the report, it is conclusive on the trustee, in the absence of fraud or mistake, and he cannot show that part of the sum was due from his predecessor, and that, in charging such sum, the trustee acted on the advice of the board that it was proper, the board having no authority to thus estop the township.

2. Where a complaint against a township trustee on his bond alleged as a breach his failure to collect the amount of a shortage which had existed during the term of defendant's predecessor, an answer alleging merely that during defendant's term his predecessor was insolvent is insufficient to excuse the breach, as it does not show that the money could not have been collected of the predecessor's bondsmen.

3. Sureties on the prospective bond of a township trustee are not liable for a deficit caused by a defalcation of the trustee's predecessor, and, in a suit for such deficit, may show that it did not occur during their principal's term.

4. Where a township trustee's bond is conditioned that he shall collect all moneys belonging to the township, his sureties are liable for the trustee's failure to collect the amount of a shortage occurring during a predecessor's term, where the trustee was not excused from failure to collect such amount.

Henley, J., dissenting.

Appeal from circuit court, Kosciusko county; Hiram S. Biggs, Judge.

Action by the state, on the relation of Dan M. Garber, township trustee, and others, against John A. Mock and others. From a judgment for defendants, relator appeals. Reversed.

M. E. Cox, for appellant. Bretz & McFall, for appellees.

ROBINSON, J. This cause was transferred from the supreme court. Appellant brought suit against appellee Mock, as principal, and the other appellees, as sureties, on two several bonds of Mock as township trustee. The

first paragraph of complaint avers that, in 1893, Mock was appointed trustee, and executed his bond, with James C. Jarret, John F. Bockman, Isaiah Kuhn, Albert B. C. Warner, Orlando F. Gerard, and Philip Beghtel as sureties; that he received funds amounting to several thousand dollars; that, in 1894, Mock was elected his own successor, and gave bond, with Orlando F. Gerard, Joseph Mock, and Philip Beghtel as sureties, and received additional sums of money; that relator Garber was elected trustee, and entered upon the duties of his office in 1895; that, at the expiration of Mock's term, he had in his hands a large sum of township money, which he failed to pay over. The two bonds are made exhibits. The second paragraph avers the appointment of Mock to fill the unexpired term of one Jasper Angel; that at that time there was due Mock from Angel, as trustee, a certain sum; that \$410 thereof Angel failed to pay over to Mock; that, during Mock's term, Angel paid him \$50 of such sum, but failed to pay the balance, \$360; the execution of the two bonds by Mock is shown, the breach thereof, and a breach of duty thereunder in failing to collect the money from Angel. The third paragraph is substantially as the second, but avers that the shortage occurred during the term of one Philip Arnold, who was trustee immediately preceding Angel; that, when Angel took the office, there was a large amount of money of the township in Arnold's hands, \$410 of which he failed to pay to Angel. The paragraph avers the execution of the two bonds by Mock, the breach thereof, and breach of duty on the part of Mock in failing to collect the money from Arnold.

Appellee Mock answered the first paragraph of complaint in four paragraphs, to the first, second, and fourth of which a demurrer was sustained, and overruled as to the third. The sufficiency of this third paragraph is the first question presented. This answer alleges Mock's appointment to succeed Angel; that, at that time, Angel had \$1,713.01 township money, which he paid over to Mock, except \$410; that, in his annual report to the board of commissioners, Mock showed there was \$410 due from Angel to the township, which Angel had failed to pay over; that, upon the examination of such annual report, the board refused to accept and approve the same, unless Mock would first charge himself with the \$410, which he then and there refused to do until he was assured by the board and county auditor that it was just and proper that he should do so; that upon being thus assured that it was his official duty to so charge himself with the \$410, and relying upon the advice and counsel of the board and auditor, he then and there permitted the county auditor to so change his report, which was done with the full knowledge of the board, so as to charge him with all of the \$410 shortage, and which he had never received; that the facts of such shortage were

fully known to the board and auditor; that after such change the board approved the report; that appellee was elected to succeed himself, and qualified as such trustee; that Angel paid \$50 on such shortage; that at the time of making his second annual report, relying upon the former statements of the board and auditor, he charged himself with the shortage of \$360, which report the board approved, with full knowledge that such sum had not been received from Angel; that, at the expiration of his term of office, he turned over to the relator all moneys he had received from all sources belonging to the township, less expenditures. The demurrer to this paragraph of answer should have been sustained. The statement of the trustee in his annual report of the amount of money in his hands is conclusive against the trustee in a suit on his official bond. There is no charge of any fraud or mistake. It was the duty of the board of commissioners to accept a report only when it showed the proper debits and credits. The acts of the board and auditor in reference to the report still leave it the voluntary act of the trustee. He was not bound to accept anything from his predecessor but money. If he should choose to accept a note or verbal promise of his predecessor, and voluntarily charge himself with cash, he cannot be heard to complain afterwards. He was not deceived. No fraud was practiced upon him. No mistake was committed; and, in the absence of fraud or mistake, the action of the board approving the report, while it remains in force, is conclusive against him. He was liable under his bond, not only for all moneys he actually received, but for moneys due the township, and which might have been collected. With full knowledge of all the facts, he made his second annual report, and again charged himself with the amount, and without any pretense of fraud or mistake. In passing upon a trustee's report, the board is acting in a purely administrative or ministerial capacity. It is the agent of the particular township for the particular business, and is not authorized to estop the township in the manner claimed from the collection of funds properly belonging to it. It is not the intention of the law that a shortage may be handed down from one trustee to another by reports correct upon their face until the township right is cut off by limitation. These reports give the public its only information as to the condition of the public funds, and to permit the officer to impeach them, and to show that he did not in fact have the money the report said he had, would not be conducive to the safety of the public funds. *State v. Grammer*, 29 Ind. 530; *State v. Prather*, 44 Ind. 287. In so far as the above cases hold that the annual report of the trustee is conclusive against the sureties on the trustee's bond, they have been overruled by the decision in *Ohning v. City of Evansville*, 66 Ind. 59. But, as to the effect of such report as against

the trustee, the doctrine of the above cases is still the law in this state.

The second paragraph of answer of appellee Mock to the second and third paragraphs of complaint alleges that the deficit existed at the time Angel and Arnold and each of them filed their bonds and entered upon their duties as trustee, and that they had never received such deficit from any source; that at the time appellee Mock filed his bond, and during his term, Angel and Arnold were insolvent, and at no time had either of them any property subject to execution. The fact that Angel and Arnold were insolvent did not necessarily preclude the collection of the money. No facts are pleaded showing it was impossible to have collected the money from their bondsmen. The paragraphs of complaint to which this paragraph of answer is directed declare upon a breach of the bonds in failing to collect the money from such predecessors respectively. These paragraphs of complaint show that Angel and Arnold were trustees for certain periods. As such officers, they gave official bonds. The answer purports to go to the whole of each paragraph, and should show that the money could not have been collected by a suit on these bonds. It was the duty of the trustee under his bond to collect all money belonging to the township, and, before he can be excused from collecting it, he must show that its collection was not possible. The demurrer to this paragraph of answer should have been sustained.

Quære: Whether the trustee would be excused by simply showing that the parties owing the money were insolvent, or whether he should not reduce such a claim to a judgment, and thus preserve to the township a claim which would otherwise become barred by the statute of limitations.

Overruling the demurrers to the second paragraph of answer of Jarret, Bockman, Kuhn, Warner, and Beghtel, and the second paragraph of answer of Gerard, Mock, and Beghtel, to the first paragraph of complaint, is assigned as error. These answers are filed by each set of sureties, separately, on the two bonds of appellee Mock. The question presented is whether sureties on a trustee's bond are liable for a deficit in township funds caused by the defalcation of their principal's predecessor, and whether, in a suit against them and their principal for such deficit, they may show that the same did not occur during their principal's term. These questions have been decided by the supreme court adversely to appellant in *Ohning v. City of Evansville*, 66 Ind. 59. In that case it is held that, upon prospective bonds, the sureties therein cannot be held liable for the defalcation of their principal which occurred during a prior term and the existence of a prior bond, and "that new sureties are not responsible for prior defalcations, unless the condition of the new obligation shall embrace them." See, also, *Goodwine v. State*,

81 Ind. 109. In the case at bar the first paragraph of complaint seeks to hold the sureties as for moneys coming into the hands of the principal which he has failed to pay over to his successor. There was no error in overruling the demurrer to these answers. Overruling the demurrers to the second paragraph of answer of the two sets of sureties to the second and third paragraphs of complaint is assigned as error. These demurrers should have been sustained. The bonds were conditioned that the trustee "shall faithfully collect and receive all moneys belonging to said township, expend the same as required by law, * * * correctly account to the board, * * * deliver up to his successor in office all books, * * * and pay over to him all moneys on hand belonging to said township." No excuse is shown for not collecting the money from the bondsmen of the two former trustees; and, as we have seen above, the fact that they were insolvent during Mock's term did not excuse him from attempting to collect the money. Their bonds may have been good for the amount. It is not shown that they were not. It cannot be said that the bonds in the case at bar are wholly prospective, as in the case of *Ohning v. City of Evansville*, supra. The condition in the bonds in the two cases is materially different. In the case at bar the sureties obligated themselves that the principal would faithfully collect all moneys belonging to the township. These paragraphs of answer fail to show he has done this, and are insufficient answers to the paragraphs of complaint to which they are addressed. Judgment reversed, with instructions to sustain the demurrers to appellee Mock's third paragraph of answer to the first paragraph of complaint, and to his second paragraph of answer to the second and third paragraphs of complaint, and the demurrer to the second paragraph of answer of the two sets of sureties to the second and third paragraphs of complaint.

HENLEY, J., dissents.

(21 Ind. App. 617)

MCCORMICK HARVESTING MACH. CO. v. SMITH.

(Appellate Court of Indiana. Feb. 21, 1899.)
APPEAL—ASSIGNMENT OF ERROR—BILL OF EXCEPTIONS.

1. An assignment of error which is not discussed is waived.
2. Where assignments of error are joint as to more than one ruling, they must fail unless valid as to all of such rulings.
3. Where the evidence is not in the record, instructions cannot be regarded as erroneous, if they can be considered correct on any facts admissible under the issues.
4. A bill of exceptions, though signed by the trial judge, cannot be considered on appeal, unless it affirmatively appear that it was filed after it was so signed.
5. The order-book entry or the certificate of

the clerk, showing that it was so filed, is necessary to prove such filing.

6. Where a bill of exceptions is not incorporated into the transcript, but is attached to it after the clerk's certificate and the assignment of errors, and it is not certified to nor identified as a bill of exceptions by the clerk, it cannot be considered as part of the record.

Appeal from circuit court, Newton county; S. P. Thompson, Judge.

Action by the McCormick Harvesting Machine Company against Phillip S. Smith. There was a judgment for defendant, and plaintiff appeals. **Affirmed.**

Cumming & Darroch, for appellant. Sanderson & Cunningham, for appellee.

HENLEY, J. This is an action commenced by the appellant against the appellee to recover damage for an alleged breach of contract of purchase by appellee of appellant of one McCormick Harvester Binder. The contract of purchase was in writing. The complaint is in two paragraphs. Appellee filed five paragraphs of answer, the first being a general denial. Appellant demurred to the second, third, fourth, and fifth paragraphs of answer, which demurrer the court overruled, and appellant replied in general denial. The cause, being at issue, was submitted to a jury for trial, which resulted in a verdict in favor of appellee. Appellant moved for a new trial, which was refused. The appellant has assigned errors to this court as follows: (1) That the court erred in overruling appellant's demurrer to the second, third, fourth, and fifth paragraphs of answer; (2) the court erred in giving to the jury, on its own motion, instructions numbered 4, 5, 6, and 7, over the objections of appellant; (3) the court erred in overruling appellant's motion for a new trial.

The first specification of the assignment of errors is not discussed by appellant's counsel, and any question raised thereon, under the often-stated rule of this court, is waived. No question is presented by the second specification of the assignment of errors. Questions involving the giving and refusal to give instructions to a jury are raised by the motion for a new trial, and whatever question appellant attempts to raise by its second specification of the assignment of errors is raised by the third specification.

The motion for a new trial assigns as one of its reasons that "the court erred in giving instructions numbered 3, 4, 5, 6, and 7, on its own motion, and excepted to at the time by the plaintiff." When the objection or exception taken by the appellant in the lower court, or its assignment of errors in this court, is joint as to more than one ruling or act of the lower court, it will fail, unless valid as to all of such acts or rulings. *Saunders v. Montgomery*, 143 Ind. 185, 41 N. E. 453; *Pennsylvania Co. v. Sears*, 136 Ind. 460, 34 N. E. 15, and 36 N. E. 353; *Black v. Thompson*, 136 Ind. 611, 36 N. E. 643; *Noe v. Roll*, 134 Ind. 15, 33 N. E. 905; *Lawrence v. Van Buskirk*,

140 Ind. 481, 40 N. E. 54; *Cargar v. Fee*, 140 Ind. 572, 39 N. E. 93; *Eddingfield v. State*, 12 Ind. App. 312, 39 N. E. 1057; *McCullough v. Martin*, 12 Ind. App. 165, 39 N. E. 905; *Bank v. Cooper*, 19 Ind. App. 13, 48 N. E. 236; *Oil Co. v. Whiteman*, 19 Ind. App. 149, 49 N. E. 171; *Elliott*, App. Proc. § 793.

There can be no doubt but that the court stated the law correctly in its instruction to the jury numbered 7, of which appellant has complained. The instruction is not only correct as an abstract statement of law, but the error, if any, would not be available for another reason: The evidence not being in the record, instructions given by the court cannot be regarded as erroneous, if they can be considered correct on any state of facts admissible under the issues. *Hilker v. Kelly*, 130 Ind. 356, 30 N. E. 304; *Joseph v. Mather*, 110 Ind. 114, 10 N. E. 78.

From an examination of the record in this case, we find that the bill of exceptions is not properly a part of the record. A bill of exceptions, although signed by the trial judge, as it is in this instance, cannot be considered on appeal, unless it affirmatively appears from the record that it was filed after being so signed. An order-book entry showing that it was filed after being so signed, or the certificate of the clerk of the trial court showing such filing, is necessary. *Mills v. Bryam*, 16 Ind. App. 698, 45 N. E. 525; *De Hart v. Board*, 143 Ind. 363, 41 N. E. 825; *Stone Co. v. Wray*, 143 Ind. 574, 42 N. E. 927; *Shewalter v. Bergman*, 132 Ind. 558, 27 N. E. 159; *Board v. Huffman*, 134 Ind. 1, 31 N. E. 570; *Stone Co. v. Hobbs*, 144 Ind. 146, 42 N. E. 1022; *Lowry v. Downey*, 150 Ind. 364, 50 N. E. 79; *Gifford v. Hess*, 15 Ind. App. 450, 43 N. E. 906; *Kelso v. Kelso*, 16 Ind. App. 615, 44 N. E. 1013, and 45 N. E. 1065; *Acts 1897*, p. 244.

But the bill of exceptions containing the evidence is not in the record for other reasons. What purports to be a bill of exceptions in this case is not incorporated into the transcript, but is attached to the transcript after the clerk's certificate and after the assignment of errors, and it is not certified to be, nor identified as, the bill of exceptions by the clerk of the trial court. Either of these reasons has been held sufficient by our supreme court to prevent it being considered a part of the record. *De Hart v. Board*, supra. No question is therefore presented by that specification of the assignment of errors that the court erred in overruling the motion for a new trial. The following language, used by *Jordan, J.*, in pronouncing the opinion of the court in the case of *Watson v. Finch*, 150 Ind. 183, 48 N. E. 245, seems particularly appropriate here: The court in that case said: "All appeals in this court are tried by record. It is the only legitimate evidence to establish the rulings of the trial court upon which alleged errors are based. In the absence of the transcript being authenticated as required by the statute, it cannot be con-

altered or treated as a copy of the original record, and therefore cannot be received or used as evidence to sustain appellant's complaint, and the appeal must fail. In *Miller v. Railroad Co.*, 143 Ind. 570, 41 N. E. 801, and 42 N. E. 806, on page 573, 143 Ind., and page 806, 42 N. E., it is said: "The duty rests upon parties or their counsel, in appeals to this court, to carefully examine the transcript, and ascertain if the clerk has properly and correctly prepared the same, and, when necessary, to take timely steps, and correct errors therein, and to obtain amendments thereto, and, if they suffer judgment to be rendered upon a defective record, the fault must rest upon them." On account of the condition of the record in this case, and on account of the assignment of errors, questions which appellant seeks to present cannot be passed upon. The judgment is therefore affirmed.

(22 Ind. App. 656)

F. W. COOK BREWING CO. v. BALL.¹
(Appellate Court of Indiana. Feb. 22, 1899.)

APPEAL AND ERROR—BILL OF EXCEPTIONS—TRANSCRIPT—CLERK'S CERTIFICATE—RECORD—IMPEACHMENT—DEPOSITIONS—EVIDENCE—BICYCLES—INTERROGATORIES—INSTRUCTIONS—COLLISIONS—LAW OF THE ROAD—HIGHWAYS—CROSSINGS.

1. The fact that the evidence or bill of exceptions is not properly in the record is not ground for dismissal of appeal.

2. If the clerk's certificate to the transcript that it contains copies of all papers or entries in the cause is not correct, an additional transcript of the omitted papers or entries can be brought into the appellate court.

3. The record on appeal cannot be impeached by certifying up the original bill of exceptions, since the appeal must be determined on a transcript of the record remaining in the court below.

4. The record on appeal need not show appellant's request to the clerk to certify up the original report of the evidence, and hence it will not be presumed that the clerk did not have authority to so certify the report.

5. Where the record shows only that a document, not set out therein, was "offered" in evidence, it will not be presumed, as against the completeness of the record, that it was "introduced" in evidence.

6. Under *Horner's Rev. St. 1897, § 510 et seq.* (*Burns' Rev. St. 1894, § 518 et seq.*), authorizing an examination of a party by his opponent "before any officer authorized to take depositions," which shall be "taken and filed as a deposition, and may be read by the party taking it, at his option," where such examination was not filed as a deposition, nor authenticated by such officer, the party taking it cannot object that he was not permitted to read parts only of it.

7. Where, in an action for personal injuries, defendant proved that plaintiff refused to submit to an examination by defendant's physicians, it was competent for plaintiff to explain, as a reason for such refusal, that he consulted with his physician, and determined, on his advice, that it would be apt to result injuriously, and retard his recovery.

8. It was not error to exclude testimony as to whether a high-g geared bicycle was a fast or slow running bicycle, the witness not being shown to be a bicycle expert.

9. The capacity for speed of a bicycle is not proved by showing that it was high-g geared.

¹ Rehearing denied.

10. The court's action in excluding special interrogatories, some of which are admittedly incompetent, will not be reviewed, where the alleged competent ones are not discussed by counsel, nor the court referred to any evidence to which they could be regarded as applicable.

11. In an action involving a collision between a bicyclist and a team on a highway, a charge that the law requires persons meeting on the highway to keep to the right is not erroneous, since the jury would understand that it applied to the meeting of vehicles, and that each should keep to the right of the other.

12. The law of the road, requiring travelers meeting each other on a highway to turn to the right, applies to crossings.

Appeal from circuit court, Warrick county; C. W. Armstrong, Special Judge.

Action by Harry N. Ball against the F. W. Cook Brewing Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Chas. L. Wedding, for appellant. Hornbrook & Wheeler and J. E. Williamson, for appellee.

BLACK, C. J. The appellee recovered judgment against the appellant in the sum of \$1,000 for personal injury. It is assigned that the court erred in overruling the appellant's motion for a new trial.

The appellee has moved to dismiss the appeal. The first and second grounds of the motion are, in effect, because the evidence is not properly in the record, and because "the bill of exceptions" is not properly in the record. These are not good grounds for a motion to dismiss an appeal. It is proper to call the attention of this court to any such supposed insufficiency in the record, and this court, the matter coming to its notice by its own examination of the record or through the suggestion of counsel, will not reverse the judgment for an alleged error insufficiently shown by the record.

The third ground in the motion to dismiss is that the first brief filed by the appellant is not a sufficient brief, under the rules of this court. While the brief in question does not contain a full and satisfactory discussion of the assigned errors relied upon, it cannot be said to be entirely inadequate.

The fourth and last ground in the motion is that the transcript contains no præcipe giving directions to the clerk what to certify up; that in this case his duty was to certify a complete record, while the record itself shows that it is incomplete, in that it shows that the action originated in the Vanderburgh circuit court, while the record gives no history of the case in said court. The record shows that the complaint, which is set out, was filed in the court below on change of venue from the Vanderburgh circuit court. At the end of the transcript, the clerk certifies that "the above and foregoing transcript contains true and complete copies of all papers and entries in said cause, as set out." The appellee submitted his cause to the court below and recovered his judgment under the complaint so set out in the

record. He is not in position to deny the jurisdiction of the trial court, and he does not pretend to do so. If the certificate of the clerk, as above stated, was not correct, and there were other papers or entries constituting parts of the record of this cause remaining in the court below, a transcript thereof, upon proper application, might have been brought into this court. We do not find any sufficient reason for the dismissal of the appeal.

The question whether or not the evidence is in the record is one which is always before us when any matter requiring its presence is to be considered. If we find, upon examination of the transcript, that the evidence is properly in the record, we need not so state, unless we are called upon to do so by some proper objection or suggestion of counsel. As already remarked, a motion to dismiss the appeal will not lie for such a cause, and, having concluded that the evidence is properly before us, we perhaps might pass the matter without further remark, yet we will notice the objections of counsel briefly.

The transcript is without any fault in this regard, but it is claimed on behalf of the appellee that the longhand manuscript of the evidence was not incorporated in the bill of exceptions when it was presented to the judge and signed by him, but that it was attempted to incorporate it by a direction to the clerk by the words, "Here insert." In seeking to impeach the record in this court in this respect, the appellee procured a certiorari, and the clerk of the court below has certified to this court the original bill of exceptions, except, of course, the original longhand report of the evidence already here. Affidavits relating to this matter, also, have been filed in this court. If we were to try the question upon the showing thus made, our conclusion would not uphold the appellee's position. But the record in this court cannot thus be made up or changed. The appeal must be determined upon a transcript of the record remaining in the court below, except so far as the statute otherwise permits, as in the case of the certification of the original longhand report of the evidence instead of a transcript thereof.

As one of the reasons for claiming that the evidence is not properly before us, it is suggested that it does not appear that the appellant directed the clerk to certify up the original longhand report of the evidence, and that it was the clerk's duty to copy the entire record. The transcript of the record, with the appellant's assignment of errors attached, having been filed in this court, we will not presume, against the record, that the clerk did not have the authority of the appellant to certify up the original report of the evidence instead of his copy thereof. It is not necessary that the record show the appellant's request for the certification of the original report of the evidence.

It is further objected that the record shows the introduction of evidence which is not set out in the record. This objection relates to an almanac, but the record shows, not that it was introduced, but only that it was offered in evidence.

One of the grounds for the motion for a new trial was the refusal of the court to permit the appellant to read "certain parts of the deposition of the plaintiff, Harry N. Ball, taken November 20, 1896, and in ruling that the defendant should not put in evidence any part of the deposition unless he put in all, and thereby obliging the defendant to put in evidence the entire deposition to get the benefit of any." A writing purporting to be a deposition of Harry N. Ball, the plaintiff, and having his name attached thereto, was produced on the trial. The plaintiff was a witness on the trial, and then testified that this paper was the deposition he had given in the case, and that after giving it he had read and signed it; and, while so testifying upon the trial, he was interrogated concerning some of the questions and answers in that paper. At a subsequent stage of the trial, to which the statement of cause in the motion for a new trial relates, the appellant, as shown by the record, offered in evidence parts of the deposition, not specified in the offer except as parts testified and sworn to at the former stage of the trial. The appellant, it is shown by the record, asked to introduce these parts, "because the plaintiff himself testified that he made the distinct statements which are indicated and offered to be read in evidence, and that he testified to the statements separate from other parts of the deposition." The court sustained appellee's objection to the introduction of the parts, but permitted the whole deposition to be introduced. It appears from the statement of counsel, in making the offer to read the parts, that they were not offered for the purpose of impeachment; for, when read to the witness on the trial, he testified that he had so stated in his deposition. The deposition in question appears to have been intended as an examination of the appellee taken at the instance of the appellant, under the statute. Horner's Rev. St. 1897, § 510 et seq. (Burns' Rev. St. 1894, § 518 et seq.). It is there provided that the examination may be had "before any officer authorized to take depositions," and that it "shall be taken and filed as a deposition in the cause, and may be read by the party taking it, at his option." In *Scott v. Wagon Works*, 48 Ind. 75, it was held to be error to permit a part of such an examination to be read in evidence by the party taking it. It was said by the court: "The whole deposition or examination should have been read in evidence." We observe that it is not shown by the record that the examination was filed as a deposition in the cause, and, further, that it does not appear to be authenticated by any officer authorized to take depositions. The person whose name

Is signed to the certificate, and who therein states that the deposition was taken by him, does not anywhere appear or purport to have been, or to have professed to be, an official of any kind. The appellant must be regarded as having read the examination in evidence voluntarily and of its own motion. There does not appear to have been any available error in the action of the court.

On the trial, which was on the 30th of September, 1897, the appellant introduced in evidence a letter signed by an attorney for the appellant to the attorneys for the appellee, with the written acknowledgment by the attorneys for the appellee of the receipt thereof on the 5th of June, 1897, in which said attorney for the appellant requested the attorneys for the appellee to consent, or to procure the appellee's consent, to an examination of the appellee by two physicians, to determine the nature and extent of the injuries for which appellee sued herein, at such time and place as might be satisfactory to appellee or his said attorneys, and the names of two physicians were suggested. The appellant then called as a witness one of the said attorneys for the appellee, who had so acknowledged the service of said notice or request, who testified, on his examination in chief, that he did not give said attorney for the appellant any notice of consent or permission to make an examination. On cross-examination, the witness was asked to state what he did with regard to the notice that was served. He answered that the case was finally postponed and the matter dropped; that before that the witness consulted with his associate counsel, and that they consulted with Dr. McCoy. It had appeared in evidence that Dr. McCoy attended the appellee as his surgeon after his injury. The witness was proceeding to state what was the advice of the physician, when the appellant objected to "the testimony of the witness as to the reasons for not consenting to the examination, and especially to his testifying to the conversation with Dr. McCoy, and reasons assigned by Dr. McCoy for not submitting to the examination, as hearsay, not original testimony, and not admissible or competent in this case." The objection having been overruled, the witness proceeded: "I think I have stated I consulted with you in the matter, and we consulted with Dr. McCoy, and determined, on his advice in the matter, that such an examination would be very apt to result injuriously to the plaintiff, Mr. Ball, and might seriously retard his recovery, and we thought we owed it to him to refuse the examination. Inasmuch as we were not required to submit to it." In *Railroad Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, which was an action for personal injury, it was said, concerning the exclusion of an affidavit of Dr. O'Farrell, offered in evidence: "It is said that this affidavit was competent for the purpose of showing that the appellee objected to a medical examination of her person. We per-

ceive no merit in this position. The appellee unquestionably had a right to make the objection she did, and the jury could have nothing to do with her conduct in opposing an examination. It is a debatable question whether a party can be compelled to submit to a medical examination at the instance of the opposite party, and it cannot affect the merits of the case that an objection is made to such an examination." In *Kern v. Bridwell*, 119 Ind. 226, 21 N. E. 664, an action for slander, it was held that there was no error in a ruling of the court refusing to grant an application for an order requiring the plaintiff to submit her person to an examination of medical experts. In *Hess v. Lowery*, 122 Ind. 225, 23 N. E. 156, an action for a personal injury through malpractice, the action of the trial court in refusing to make an order requiring the plaintiff to submit to a private examination by the defendant's medical experts was sustained, it being held that the application was not seasonably made. For like reason, a similar ruling was upheld in *Railroad Co. v. Brunner*, 128 Ind. 542, 26 N. E. 178. In *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 800, an action for personal injury, the subject was more fully considered, and it was held that the courts of this state have no power to require a plaintiff in such a case to submit to an examination of his injuries by surgeons appointed by the court. It was said: "Should a litigant willingly submit, then there could be no legal objection to such an examination, and, should he refuse to submit to a reasonable examination, his conduct might possibly be proper matter for comment." This, as was stated by the court, was quite a different matter from that which was involved in the case before the court. It will be observed that the witness whose testimony we are considering did not testify to any statement of the physician, Dr. McCoy, but testified that, on his advice in the matter, the witness, and the attorney associated with him, determined that the examination would result injuriously to the appellee, and that they thought it their duty to him to refuse, as they were not required to submit to the examination. The appellee had a right to refuse to submit to the examination, without giving any reason. Any reason was sufficient. The objection to the examination could not affect the merits of the case. It having been proved—whether properly or improperly is not a question for decision—that the request had been made and refused, there was no available error in permitting the explanation given by the attorney testifying as a witness, which went to the jury simply as an explanation for the refusal to do a thing not at all obligatory, and not by way of proving facts affecting the merits of the cause.

One of the causes in the motion for a new trial was "error of the court in not allowing J. C. De Bar to testify as to whether a high-

geared bicycle was a fast or slow running bicycle." The question addressed to the witness, to which we are referred in the appellant's brief, was: "Is a high-gear or low-gear bicycle a fast or slow running bicycle?" This does not seem to be such a question as that described in the motion for a new trial, or one adapted to elicit such testimony as that which the court is by the motion represented as not allowing. Besides, it had not been shown that the witness was acquainted with the effect of differences in the gearing of bicycles. The question of speed entered into the question of negligence involved, and incidentally the capacity for speed of the bicycle on which the appellee was riding, when injured by collision with one of the horses attached to and drawing the appellant's beer wagon, was a relevant matter, but that capacity would not be proved or usefully illustrated by such a comparison.

The appellant submitted to the court a written series of interrogatories, to be answered by the jury when they rendered the general verdict, but the court refused to submit them to the jury. There could be no error in refusing to submit all of these interrogatories; for some of them did not call upon the jury to find specially upon particular questions of fact, but asked for the decision of questions of mixed law and fact, and by one they were asked to give the items of the finding for the plaintiff and the amount allowed him in each item. The appellant contends that, if some of the interrogatories did not relate to specific facts, yet the court would not, therefore, be justified in excluding the other interrogatories. But no particular interrogatories have been discussed by counsel, nor have we been referred in such connection to any evidence to which any of the interrogatories are by counsel regarded as applicable. We cannot regard the action of the court in relation to any of these interrogatories, separately considered, as properly presented by the appellant for our examination.

Among the instructions given to the jury was the following: "The law requires that persons who meet on the highway shall keep to the right. This, however, does not give a person a right to keep to the right of the road regardless of consequences. It simply means that his duty is to keep to the right, unless he has some warning to indicate to him that he must take some other course to protect himself or to avoid injury to others." The case on trial, as shown by the pleadings and the evidence, involved a collision of a bicycle ridden by the appellee with one of the horses drawing the appellant's wagon, and driven by its servant, upon a public highway. The jury would understand the instruction to relate to the meeting of such vehicles upon the highway, and to the rule that each of them should keep to his own right-hand side of the other. With such under-

standing, there was no available error in giving the instruction.

Among the instructions asked by the appellant, and refused, was the following: "The law of the road, requiring people in towns traveling on highways to turn to the right, does not apply to crossings." The law of the road to which this instruction expressly relates is a rule to be observed by travelers meeting each other upon a public highway, and it applies to persons who meet each other at any part of a highway, whether at a crossing or elsewhere. So, leaving out any question as to whether the instruction was not sufficiently precise as to the travelers affected by the rule, and also leaving out of consideration the question as to the propriety of instructing the jury upon mere abstract rules or principles of law, without applying them to the facts of the case, the instruction did not purport to state a rule for travelers crossing each other's course, and the rule applicable to travelers meeting was improperly limited. The evidence affecting the question of negligence on the part of each party was conflicting, and the case presented by the evidence was peculiarly within the province of the jury. The judgment is affirmed.

(22 Ind. App. 569)

ORMES' ESTATE v. BROWN.¹

(Appellate Court of Indiana. Feb. 22, 1899.)

ADMINISTRATOR DE BONIS NON—RIGHT TO SUE FOR DEVASTATION.

Under Horner's Rev. St. 1897, § 2240, imposing on an administrator *de bonis non* the same rights and liabilities as the administrator first appointed, he cannot bring a common-law action against the estate of his predecessor for a conversion of the trust assets. His remedy is under section 2453, which authorizes him to sue on the predecessor's bond for such misappropriation.

Appeal from circuit court, Rush county; E. A. Brown, Special Judge.

Action by Andrew C. Brown, administrator d. b. n. of Thomas W. Hilligos, against the estate of Henry Ormes, deceased. There was a judgment for plaintiff, and defendant appeals. Reversed.

Pullen, Martin & Megee, for appellant. Morris, Innis & Morgan, for appellee.

WILEY, J. This action presents a controversy between two estates. Henry Ormes, deceased, was administrator of the estate of Thomas W. Hilligos, deceased, and it is here sought to hold the estate of the former liable for an alleged misapplication and conversion of money and property belonging to the estate of the latter in a common-law action. The case was first put at issue upon the verified claim filed by appellee, by answer, and reply. Upon the issues thus joined the case was submitted to the court for trial, and, after the evidence was partly heard, a continuance was granted on appellee's motion, to the end that

¹ Rehearing denied.

he might amend his complaint. Subsequently an amended complaint was filed, upon which the case was finally tried. The amended complaint avers that John W. Hilligos died intestate, and at the time of his death was the owner of real estate of the value of \$4,500, and of personal property of the value of \$209; that Henry Ormes was appointed administrator of his estate, and took upon himself the settlement thereof; that there came into his hands as such administrator \$6,018.52 in cash, and personal property appraised at \$209; that on November 29, 1893, said Ormes died intestate, without having fully finally settled said estate; that he used all the assets of said estate except \$253.08, without having paid all the costs and expenses of administration, and without having paid the claim of the widow of \$500,—her statutory allowance; that he used the assets of said estate in the payment of unlawful claims, converted said assets to his own use, and leaving due the widow as her part of \$500 the sum of \$275, and a number of other due and unpaid claims. A list of the unpaid claims is then set out, and in all they aggregate, with interest, \$463.80. It is then averred that appellee was duly appointed and qualified as administrator de bonis non of said estate, and entered upon the duties of said trust. A demurrer was addressed to the amended complaint, which was overruled, and appellant excepted. The issues were joined by an answer in three paragraphs and a reply in two, but, as no questions are presented by the record for decision arising upon the answer or reply, we need not refer to them further. The case was tried by the court, resulting in a general finding and judgment for appellee. Appellant's motion for a new trial was overruled, and he has assigned errors: (1) That the court erred in overruling his demurrer to the amended complaint, and (2) that the court erred in overruling his motion for a new trial. We will determine the questions presented in their order.

Appellant enters upon a discussion of the alleged insufficiency of the complaint by referring to the common-law rule that an administrator de bonis non succeeds only to the rights of his predecessor in the particular assets of the trust which remain unadministered at the time of his appointment, and that he could not recover from the estate of his predecessor for a wrongful application or conversion of the trust assets. The settlement of decedents' estates is regulated in this state by statute, and the duty and authority of administrators and executors are likewise prescribed. There are provisions for the appointment of an administrator de bonis non, and when thus appointed he "shall have the same rights and be subject to the same liabilities as the administrator first appointed." *Hornor's Rev. St. 1897, § 2240*. The term "de bonis non" has a strict and limited meaning, and, being strictly interpreted, is, "of the goods not yet administered." The common-law rule is forcibly and succinctly stated in 8 Enc. Pl.

& Prac. p. 654, as follows: "At common law an administrator de bonis non succeeds to rights which belonged to the first executor or administrator, and is entitled to recover such assets of the estate as remain unadministered in specie, and such of the debts due the decedent as remain unpaid. But his authority does not extend to assets already administered, and he cannot sue his predecessor, or, in case of his decease, his personal representative, for any part of the estate sold, converted, or wasted by him." If, therefore, an administrator de bonis non has any right of action against his predecessor, either personally, or against his estate in case of his decease, it must be by virtue of some right conferred upon him by statute, for it is plain that he has no such right under the common law. The only statute now in force as to the right of an administrator to sue his successor is section 2458, *Hornor's Rev. St. 1897*, which is as follows: "Any executor or administrator may be sued, on his bond, by any creditor, heir, legatee, or surviving or succeeding executor or administrator, co-executor or co-administrator of the same estate, for any of the following causes, viz.: * * * Fifth. Embezzling, concealing or converting to his own use such property. * * * Tenth. Any other violation of the duties of his trust." There are ten causes specified which would authorize such action, but the two set out are the only ones that have any application to the facts here pleaded. It has been held that any misapplication of the trust fund is a conversion of it, and a suable breach of the official bond. *State v. Sanders, 62 Ind. 562; Fleece v. Jones, 71 Ind. 340*. The complaint in the case before us unquestionably shows a misappropriation of the funds of the estate, and hence shows a conversion for which the first administrator would be liable upon his bond. As to whether his estate is liable in an action by his successor depends upon the construction put upon the statute cited, and similar statutes concerning the same subject-matter. The case of *Anthony v. McCall, 3 Blackf. 86*, was very similar to the one now before us. There the action was by appellant, as administrator de bonis non of the estate of one Carey, against McCall, administrator of Samuel Carey; and it was to recover from the latter's estate for a conversion of funds of the estate of appellant's decedent while Samuel Carey was such administrator. The court said: "By one of the first rules of pleading, an action can only be brought by the person who has the legal right of action. The sufficiency of the declaration must, therefore, depend upon the legal rights and power of an administrator de bonis non. He is entitled to all the goods and personal estate, etc., which remain in specie, and were not administered by the first executor or administrator, as well as to all debts due and owing to the testator or intestate. The original representative, executor, or administrator, is liable for a devastavit, but such liability is not enforced at the suit of the admin-

istrator de bonis non. The administrations are distinct. Each has peculiar duties and responsibilities. In the event of a devastavit committed by either, the heirs, creditors, and others, whose legal rights are affected, by appropriate action may obtain redress. The administrator de bonis non, having no legal right of action, cannot be the medium of such redress unless authorized by statute."

In the case of *Coleman v. McMurdo*, 5 Rand. 51, it was held that the administrator de bonis non could not bring an action such as the one to which we have just referred, either in law or equity. The case of *Young v. Kimball*, 8 Blackf. 166, 167, was an action in chancery by an administrator de bonis non against the estate of his trust predecessor to recover for an alleged devastavit of the trust funds. In that case the court said: "The main question arising in the case is whether the bill will lie." "It charges devastavit,—a conversion of the goods of the estate to the use of the administrator. If the commission of a devastavit by an administrator amounts to an administration of the goods of the intestate to the extent of the devastavit, then neither a bill in chancery nor a suit at law can be maintained against the representative of such administrator by the administrator de bonis non for the recovery of the value of the goods, etc., included in the devastavit, for the plain reason that the power and duty of an administrator de bonis non, by the terms of his commission, extends only to the unadministered goods, etc., of the deceased. That a devastavit does constitute such an administration as places the goods (the value of them) converted or wasted beyond the authority of an administrator de bonis non seems settled by all the authorities, though it does not constitute such an administration as discharges the administrator guilty of the wrong from liability under the statute to those interested. This will plainly appear when we consider that at common law there was no remedy against the representative of a deceased executor or administrator for a devastavit committed by such decedent. The remedy being statutory, the statute will determine the nature of it,"—citing *Anthony v. McCall*, supra; *Coleman v. McMurdo*, supra; and *Hagthorp v. Hook*, 1 Gill & J. 270. The case of *Young v. Kimball*, supra, was decided while the statute of 1843 was in force. Section 382, p. 557, Rev. St. 1843, provided that "the executors and administrators of every person who, as executor, either of right or in his own wrong, or as administrator, shall have wasted or converted to his own use any goods, chattels, or estate of any deceased person, shall be chargeable in the same manner as their testator or intestate would have been if living." After quoting the section, the court said: "Which section, in this statute, renders them liable to creditors, distributees, etc. The remedy being given by statute to these persons, it clearly is not vested in administra-

tors de bonis non." A much later decision to the same effect is the case of *Lucas v. Donaldson*, 117 Ind. 139, 19 N. E. 758. In that case appellant was administrator de bonis non of the estate of Louisa C. O'Rear, and filed a claim against the estate of Joseph O'Rear, of which estate Donaldson was administrator. It was alleged that said Joseph O'Rear had been the administrator of the estate of Louisa C. O'Rear, and as such administrator had collected a certain sum of money belonging to said trust, and died without having paid over or accounted for the same. To the complaint a demurrer for want of facts was addressed. Mitchell, J., speaking for the court, said: "The remedy against the representative of a deceased administrator is wholly statutory, the rule of the common law being that a devastavit committed by an executor or administrator was a personal tort, which died with the person." Again referring to the statute of 1843, in force when *Young v. Kimball*, supra, was decided, the court further said: "This statute was available to heirs, legatees, creditors, etc., but a succeeding administrator had no power to sue under its provisions. Subsequently other modifications of the statute followed, and by section 2458, Rev. St. 1881 (section 2613, Burns' Rev. St. 1894), now in force, creditors, legatees, or succeeding executors or administrators are authorized to sue on the bond of any executor or administrator in certain specified cases, and for the violation of any of the duties of his trust." It was held, in the case from which we have just quoted, that the demurrer was well taken. Section 2458, Rev. St. 1881, supra, was the statute relating to the subject under discussion when *Lucas v. Donaldson*, supra, was decided. That statute, without change or modification, has been carried forward in Burns' Rev. St. 1894, being section 2613, and again in Horner's Rev. St. 1897, being section 2458. It is only by virtue of that statute that a right of action is given to an executor for a devastavit of his predecessor, and that right of action is upon the bond. The common-law rule to which we have adverted has not been changed by statute. In *Lucas v. Donaldson*, supra, the cause of action was founded upon the same principle and theory as the one at bar, and the supreme court referred to it in the body of the opinion as a "common-law action," and held that it would not lie.

The only case cited and relied upon by appellee in support of the sufficiency of the complaint is *Nelson v. Corwin*, 59 Ind. 489. The complaint in that case was upon a bond, and the facts averred, briefly stated, were as follows: That one William Griffith was the owner of certain land and personal property; that by his will he devised his real estate to his only child, Nancy J., and bequeathed to her \$200 in money on certain conditions; that by said will one Abel Griffith was appointed executor; that said Wil-

Ham died, leaving said will in force, and that said child survived him; that at William's death said will was probated, and said Abel, as such executor, executed a bond in the sum of \$500, with Allen Makepeace surety; that, as such executor, personal property came into the possession of said Abel of the value of \$1,200, being \$800 more than was required to pay the debts of said estate; that said Abel converted said property to his own use; that he died, and his estate was settled as insolvent; that said Nancy Jane, while still a minor, intermarried with one William L. Bird, and remained his wife till she died; that appellee became administrator of her estate; that said Allen Makepeace died, and appellee became administrator of his estate. Upon these facts it was held that a common-law action would not lie, but that, under the statute, an action upon the bond could be maintained. In deciding the case the court said: "The right of Mrs. Bird (née Griffith, the devisee) to sue on the bond for the conversion of the personal property is fully recognized by section 162, p. 549, 2 Rev. St. 1876. Her interest in the estate is sufficiently shown by the averments of the complaint as to the contents of the will. When Abel Griffith died, a separate right of action survived to her against Allen Makepeace, his surety, and she had the option to proceed against the estate of said Abel Griffith, or against Makepeace for any deficiency which the estate of said Griffith might not have been able to pay." From the complaint in that case and the language of the court it is plain that the only question for decision was appellee's right to proceed upon the bond of Abel Griffith to recover for the conversion of the personal assets of the estate of which he was administrator. And although Abel was dead, and his estate was insolvent, and his surety was also dead, yet the right of action survived to the devisee under the will, and hence to her administrator, her legal representative; and as such he could maintain an action upon the bond as against the estate of the surety. The case does not lend support to appellee's position, but is really against it. It does not overrule the earlier decisions, but is in harmony with them, and also in line with the principles discussed in *Lucas v. Donaldson*, supra. Section 162, 2 Rev. St. 1876, is identical with section 2458, *Hornor's Rev. St. 1897*. Appellee has his remedy under sections 2458 and 2459, *Hornor's Rev. St. 1897*, and as construed in *Myers v. State*, 47 Ind. 293, but he can have no relief in his action as presented by the record before us. As the only right of action given by statute to an administrator de bonis non for a conversion of any part of the personal assets of the estate of his predecessor is upon his official bond, and as an action will not lie in his favor for a tort of his predecessor, as such tort dies with him, it follows that, as the complaint proceeds upon the latter theory,

it was wholly insufficient. That it was the manifest intention of the legislature in section 2458 (2613) supra, to include an administrator de bonis non, we cite *Graham v. State*, 7 Ind. 470, *State v. Porter*, 9 Ind. 342, and *Myers v. State*, supra. These considerations lead to a reversal, and make it unnecessary for us to decide other questions presented by the record. Judgment reversed.

HENLEY, J., did not participate in the decision of this case.

(21 Ind. App. 621)

CLEVELAND, C., C. & ST. L. RY. CO. v. HUDDLESTON.

(Appellate Court of Indiana. Feb. 23, 1899.)

WATERS AND WATER COURSES—OBSTRUCTING NATURAL FLOW—PLEADING—CONCLUSION—SURFACE WATER.

1. A complaint alleged that defendant negligently placed and maintained an insufficient sewer in the line of a ditch called the "H. Ditch," through which water was accustomed to flow for 20 years, and obstructed the natural flow of the water of said ditch. *Held*, that this did not show the obstruction of a natural water course.

2. An allegation that "plaintiff was entitled to the free and unobstructed flow of water" in a ditch on a railroad right of way is the statement of a conclusion, and not a showing of facts entitling plaintiff to maintain such ditch on the right of way.

3. A person having no right to maintain a ditch across a railroad right of way cannot recover for the company's obstructing the ditch on its own land, the ditch carrying off surface water only.

4. The fact that surface waters from a man's land had flowed through a certain ditch for 20 years does not give a prescriptive right, it not being under claim of right, or against the owner's consent.

5. An averment that a culvert was constructed for the "purpose of allowing the waters therein to flow under the railroad, and to continue in the channel of said ditch, as had been done for 20 years," does not set out facts constituting a right by prescription to have the waters flow in the channel.

Appeal from circuit court, Hendricks county; J. V. Hadley, Judge.

Action by Fielding Huddleston against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Adams & Enloe, John T. Dye, and Elliott & Elliott, for appellant. Brill & Harvey, for appellee.

COMSTOCK, J. The complaint alleges that the plaintiff is the owner of the land thereindescribed; that his land was injured by an overflow of the water of a ditch running through it; that the ditch was known as the "Holloway Ditch"; that water was accustomed to flow therein, and that "the plaintiff was entitled to the free and unobstructed flow of water in the channel of said ditch below said land." The allegations referred to are followed by averments as follows: "That on the —"

day of —, 1893, the defendant, in making a sewer through and under the embankment, threw up for their grade on which their tracks were laid immediately in the line of said ditch, and for the purpose of allowing the waters therein to flow under said railroad, and to continue in the channel of said ditch, as has been done for twenty years previous thereto, negligently placed in the line of said ditch immediately below the premises of plaintiff, aforesaid, an insufficient sewer of but three feet in diameter, when for many years before there had been a bridge of some twelve feet in width at the same place, and it was necessary at said place to have a much larger sewer than the one so put in by defendant to carry water in its ordinary channel. That from said day to the present time the defendant has negligently maintained said sewer, and has thereby since said time, and during all of said time, obstructed and stopped the natural flow of the water of said ditch, and raised the water thereof on divers occasions within the last two or three years fifteen feet above its ordinary level, and caused it to back upon said plaintiff's said premises, and flood the same." A demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action was overruled, and exceptions taken. The cause was put at issue by general denial, submitted for trial to a jury, and a verdict returned in favor of appellee for \$458, for which amount the court, after overruling appellant's motions for a new trial and in arrest of judgment, rendered judgment in favor of appellee.

The first and second specifications of the assignment of errors question the sufficiency of the complaint. Appellant insists that the complaint does not show the obstruction of a natural water course. It will be noticed upon reading that it does not aver that the ditch was a natural water course, nor set out facts showing it to be such; while from the expression "Holloway Ditch" an artificial ditch would be inferred, construing, under the rule, the language used most strongly against the pleader. *Railway Co. v. Dugan*, 18 Ind. App. 435, 48 N. E. 238, and authorities cited. If the complaint is good, it must be because facts are stated showing a duty on the part of appellant to construct a larger sewer than the one it actually constructed. A complaint based upon negligence must state facts showing a specific duty owing to the party complaining, and a wrongful breach of the duty by the defendant. *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028; *Railroad Co. v. Stephenson*, 139 Ind. 641, 37 N. E. 720; *Thiele v. McManns*, 3 Ind. App. 132, 28 N. E. 327; *Morrow v. Sweeney*, 10 Ind. App. 626, 38 N. E. 187. The acts complained of were done by appellant on its own land, and in the use of its own property. It will not be presumed that they were wrongfully done. The allegation that appellee "was entitled to the free and unobstructed flow of the water

in the channel" is the statement of a conclusion. In *Field v. Railway Co.*, 76 Mo. 614, it was held that, where an action was grounded on a breach of duty, "the facts out of which the duty arose must be pleaded." From the facts pleaded, was the appellee entitled to have the water flow on through the lands of the appellant? If he had this right, it was derived from the existence of an artificial ditch, construing the complaint most strongly against the pleader. The complaint in the case before us does not show that the ditch carried any other than surface water. It is settled in this state that a railroad company is not under a duty to provide an outlet for surface water, nor liable for turning it upon the lands of adjacent proprietors. In *Railroad Co. v. Stevens*, 73 Ind. 278, the court said: "The complaint proceeds upon the theory that the defendant was lawfully in possession of its right of way across the land described, and for the distance of 10 miles southward, but whether by condemnation or by purchase is left to conjecture. The defendant was, therefore, guilty of no trespass in entering upon its said right of way, and in making all proper and necessary excavations and embankments for the construction of its roadbed. The gist of the complaint is in the averments that the defendant 'failed negligently and carelessly, in the construction of said embankment, to make any culvert, bridge, or drain in, through, or under said embankment, whereby the water coming on the land hereinbefore described could escape; and that within five years last past the water falling upon said real estate of the plaintiff, and the water flowing thereon from the river and from the surrounding land, has been stopped and hindered by said embankment from flowing off,' etc. No attempt is made to charge an interference with any natural water course, but only with the flow of surface water, and water overflowing from the river, and spreading over the adjacent bottom of low lands. The question presented is, therefore, whether the defendant, having acquired a right of way for the construction of its railroad, and having found it necessary or expedient to raise its track above the natural surface of the land, owed any duty to the plaintiff to provide culverts or other means of passage through its embankment for the surface water, or water overflowing from the river, and descending in that direction from or over the lands of the plaintiff. If, upon the facts of the complaint, such duty existed, a careless and negligent breach thereof, together with actionable damages, is shown, and the complaint is good. If such duty did not exist, the complaint is not good." The court held the complaint bad. The following authorities sustain the foregoing conclusion of the court: *Hill v. Railroad Co.*, 109 Ind. 511, 10 N. E. 410, and cases cited. *Jean v. Pennsylvania Co.*, 9 Ind. App. 56, 36 N. E. 159; *Railway Co. v. Speelman*, 12 Ind. App. 372, 40 N. E. 541; *Robinson v. Shanks*,

118 Ind. 125, 20 N. E. 713; *Johnson v. Railway Co.*, 80 Wis. 641, 50 N. W. 771; *Nichol v. Railway Co.*, 40 U. C. Q. B. 583; *O'Connor v. Railway Co.*, 52 Wis. 528, 6 N. W. 287. The court said: "The company had only obstructed a ditch which drained surface water from plaintiff's premises. We do not think that defendant was bound to keep that ditch open on its own land for the convenience of plaintiff. In other words, the owner of the land is under no legal obligation to provide a way for the escape of mere surface water coming onto his land from the land of his neighbor, but has the right to change the surface of the ground so as to interfere with or obstruct the flow of such water." To the same effect was the decision in *Railroad Co. v. Hammer*, 22 Kan. 763. The complaint does not show a right to construct and maintain a ditch through appellant's land. This can only be done by the statement of facts showing such lawful right.

An artificial water way may not be constructed or maintained, except by authority of law, or under a contract, in any case where it imposes a burden upon the property of an adjacent owner. Where, as here, a plaintiff seeks a recovery against a railroad company upon a theory that his land or property has been injured by an overflow, he must show by a statement of the facts that the ditch was rightfully established and constructed on or through the property of the company, and that the company was under a duty not to place culverts across such ditch. The company unquestionably had a right to construct culverts in the line of its right of way, and, indeed, to make a solid embankment, unless there was a lawful right to establish and maintain the ditch under its track. The right to change the track cannot be destroyed by constructing an artificial water way and conducting water to the bed on which the rails of the track rest, except only in cases where by contract, or by appropriate legal proceedings, authority to limit and restrict the rights of the company to enjoy the free use of its property has been secured. Such authority cannot be secured by the mere voluntary act of the interested parties. No man, of his own volition, can put a burden upon another, or restrict another's right to freely use and enjoy his property.

There are no facts averred showing a license from the appellant to construct a ditch to conduct water to or through its property. Such license will not be inferred. *Boltz v. Smith*, 3 Ind. App. 43, 29 N. E. 155. The law presumes that landowners have received full compensation for injuries resulting from the construction and operation of a railroad. The construction and operation of railroads include necessary changes in the roadbed and culverts. *Clark's Adm'x v. Railroad Co.*, 36 Mo. 202; *Hodge v. Railroad Co.*, 39 Fed. 449; *Aldrich v. Railroad Co.*, 21 N. H. 359; *Johnson v. Railroad Co.*, 35 N. H. 569; *Slatten v. Railroad Co.*, 29 Iowa, 148; *Van Schoick v.*

Canal Co., 20 N. J. Law, 249; *Porterfield v. Bond*, 38 Fed. 891; *White v. Railroad Co.*, 122 Ind. 317, 23 N. E. 782; 3 Elliott, R. R. § 1004. Where a right to build and maintain a railroad is acquired, the principal right includes the subsidiary right to make needed changes, since the presumption is that the company acquires all the estate, interest, and right necessary for the proper construction and maintenance of a railroad. *Hargis v. Railroad Co.*, 100 Mo. 210, 13 S. W. 680; *Railway Co. v. Telford*, 89 Tenn. 293, 14 S. W. 776; *Prather v. Telegraph Co.*, 89 Ind. 501; *Railway Co. v. Rayl*, 69 Ind. 424; *Campbell v. Railway Co.*, 110 Ind. 490, 11 N. E. 482; *Railway Co. v. Cochrane*, 3 Lea, 478; *Day v. Railroad Co.*, 41 Ohio St. 392; *Jones v. Railroad Co.*, 144 Pa. St. 629, 23 Atl. 251; *Railroad Co. v. Allen*, 22 Kan. 285; cases cited in 3 Elliott, R. R. p. 1304, § 938.

The learned counsel for appellee claim that the complaint is sufficient, because it shows a prescriptive right in the averment that the water had flowed through appellant's land for more than 20 years. The following are the allegations of the complaint upon this point: "The defendant, making a sewer through and under the embankment, threw up for their grade, on which their tracks were laid, immediately in the line of said ditch, and for the purpose of allowing the waters therein to flow under said railroad, as they had done for twenty years previous thereto, negligently placed in line of said ditch an insufficient sewer." Appellant insists that the statement, "as they had done for twenty years," is merely a recital. But if we concede, without deciding, that this is a statement of a fact, and not a recital, the averment would not show a prescriptive right, for the reason that allowing water to flow in a designated channel does not establish a prescriptive right, (1) because a mere permissive use does not create an easement in land; (2) because, in order that an easement may be created, the use must be under a claim of right uninterrupted, continuous, and adverse; (3) because the right to control surface water is not lost by a failure to exercise the right. *Gould, Waters*, § 338; *Silver Creek Cement Corp. v. Union Lime & Cement Co.*, 138 Ind. 297, 35 N. E. 125, and 37 N. E. 721. "The enjoyment must be under claim of right, and contrary to the interests of the owner. An enjoyment with the consent of the owner, or consistently with the rights of the true owner, has no tendency to prove a conveyance from him." *Brace v. Yale*, 10 Allen, 444; *Davis v. Railroad Co.*, 140 Ind. 468, 39 N. E. 495, and authorities there cited. In *McCardle v. Barricklow*, 68 Ind. 356, the court said: "The use and employment of what is claimed as an easement must have been adverse under a claim of right continuous and uninterrupted, besides being with the knowledge of the owner of the estate over which the easement is claimed;" citing *Washb. Ensem.* 131; *Palmer v.*

Wright, 53 Ind. 486; Peterson v. McCullough, 50 Ind. 35; Mitchell v. Parks, 26 Ind. 354; Snowden v. Wilas, 19 Ind. 10. The averment that the culvert was constructed for the "purpose of allowing the waters therein to flow under the railroad, and to continue in the channel of said ditch, as had been done for 20 years," is not an allegation of facts constituting a right by prescription. "A natural water course does not cease to be such by the fact that its channel is artificially deepened for the purpose of drainage. It makes no difference what appellations may have been given to it." 1 Am. & Eng. Dec. Eq. 47. An artificial ditch may carry other than surface water. The railroad company would have no right to obstruct a natural water course or a ditch through which flowed other than surface water, to the damage of another, without being liable therefor. For such injury appellant would be liable, but the complaint before us does not present such a case. For the reasons that the complaint does not show that the ditch carried other than surface water, and does not show a prescriptive right in appellee, it must be held insufficient.

We do not deem it necessary to pass upon the other questions raised by the assignment of errors, as they may not arise upon a second trial. Judgment reversed, with instruction to the trial court to sustain appellant's demurrer to the complaint, and for other proceedings not inconsistent herewith.

(21 Ind. App. 608)

F. C. AUSTIN MFG. CO. v. SMITHFIELD TP., DEKALB COUNTY.

(Appellate Court of Indiana. Feb. 21, 1899.)

APPEAL AND ERROR—TOWNSHIPS—AUTHORITY OF TRUSTEE—KNOWLEDGE OF VENDOR.

1. An exception to the court's conclusions of law on the findings of fact concedes that the facts are correctly found.

2. Under Burns' Rev. St. 1894, §§ 8081, 8082 (Horner's Rev. St. 1897, §§ 6006, 6007), requiring a township trustee to procure authority from the county commissioners to contract an indebtedness in excess of the tax fund for that year, a debt contracted in excess of such fund without such authority cannot be enforced against the township, and this though the township received and used the supplies sold, and never returned them.

3. There can be no recovery from a township for supplies furnished unless they are suitable and reasonably necessary.

4. A person selling supplies to a township is chargeable with knowledge whether they are suitable and necessary or are being purchased in violation of law.

Appeal from circuit court, Dekalb county; F. S. Roby, Judge.

Action by the F. C. Austin Manufacturing Company against Smithfield township, Dekalb county. There was a judgment for defendant, and plaintiff appeals. Affirmed.

F. L. Welschmer and John F. Shuman, for appellant. J. E. & J. H. Rose, for appellee.

OOMSTOCK, J. The complaint in this cause alleges that the appellant is the holder of a promissory note and township order, issued on the 15th day of May, 1894, by one James O. Blake, the then trustee of appellant township, to one Alfred Kelly, and indorsed by said Kelly to one B. L. Blair, and by said Blair to appellant; that the note and township order is in the sum of \$150 and is one of a series, and was given in part payment for two Austin road graders, the full purchase price of which was \$425; that said graders were necessary, suitable, and useful for the benefit of the public highways of appellee township; that the graders were taken possession of by said appellee, and by it used for the benefit of its highways; that they were reasonably worth the sum of \$425; that said note was due and unpaid; that payment had been demanded and was refused, etc. Appellee answered in five paragraphs; the first being a general denial; the second alleges that there was no consideration for the order; the third, that the purchase of the graders was wholly unnecessary; the fourth, that the purchase price was in excess of the real value of the graders; the fifth, that, at the time of the purchase of said machines and the execution of said order, the warrant sued on created a debt against the funds of the township out of which the same was payable in excess of the funds on hand, and of the funds to be derived from taxes assessed against said township for the year in which said debt was incurred, and that the appellee's trustee did not procure an order from the board of commissioners of the county authorizing him to contract the debt, —the defense set up in this paragraph of the answer being predicated upon Horner's Rev. St. 1897, §§ 6006, 6007, and Rev. St. 1881, §§ 6006, 6007 (Burns' Rev. St. 1894, §§ 8081, 8082). Appellant replied by general denial. The cause was submitted to the court without the intervention of a jury, and, upon request of appellee, a special finding of facts was made, and conclusions of law stated thereon. Appellant excepted to the conclusions of law, and moved for a new trial, and for judgment in its favor on the special finding. Both motions were overruled, and judgment rendered in favor of appellee for costs.

The specifications of the assignment of errors are that the court erred (1) in its finding of facts; (2) in its conclusions of law on the findings; (3) in overruling appellant's motion for a new trial; (4) in overruling appellant's motion for judgment on the special finding; (5) in sustaining appellee's motion for judgment on the findings. As to the first specification, it is only necessary to say that the exception to the conclusions of law concedes that the facts are correctly found. The following is a fair summary of the facts found: On May 15, 1894, James O. Blake, being the duly elected and acting trustee of appellee township, purchased of appellant's agent two road graders, and executed the or-

der in suit in part payment for the same. The graders were suitable, and were reasonably worth the price agreed to be paid. Said "trustee believed and considered that they were reasonably necessary for the use of appellee." They were not needed, appellee having other and sufficient graders in said township to do all the road work of appellee; and, "had said trustee exercised reasonable care, or had he made reasonable inquiry and investigation, he would have known that it was not necessary to purchase the same." They were received by him for the township, and used on its highways from May, 1894, the date of the purchase, until the spring of 1896, at which time the then trustee (the successor of said Blake) notified appellant that the order in suit would not be paid, from which date the machines had not been used. Appellee has never returned, or offered to return, them. The total amount of the order issued in payment of said graders exceeded the amount which the trustee was authorized to issue, and said trustee did not procure an order from the board of commissioners of said county authorizing him to incur said indebtedness and the execution of said orders. The order sued on is due and unpaid, and Kelly acted as the agent of appellant in selling said graders and accepting said orders. Under section 6839, Burns' Rev. St. 1894, township trustees are directed to provide tools and implements, with available funds, as may be necessary for road districts. But it is the law of this state that a township trustee has no power to bind the township by contracting a debt in excess of the fund on hand to which the debt is chargeable, and of the fund to be derived from the tax assessed against his township for the year for which such debt is to be obtained, without first obtaining an order from the board of county commissioners, as provided in said sections 6006, 6007 (sections 8081, 8082).

The authorities in this state are uniform that there can be no recovery from the township for supplies furnished unless the articles purchased are suitable and reasonably necessary, and are actually delivered to and accepted by the township. The authorities holding that the authority of a township trustee is wholly statutory, and that it is the duty of those dealing with him to ascertain his authority, are so numerous and familiar that we need not cite them. The court found that the graders in suit were not needed, that by reasonable diligence this fact would have been known to the trustee, and that they were purchased in violation of law. Under the decisions, the vendor was chargeable with knowledge of these facts. Appellant's counsel contends, earnestly and plausibly, that the question of necessity was not in issue, such question being for the determination of the trustee alone; and cites, in support of this proposition, Johnson School Tp. v. Citizens' Bank of Greenfield, 81 Ind.

518; Boyd v. School Tp., 114 Ind. 210, 16 N. E. 511. In both of these cases the court held, upon the facts presented, that the necessity for the purchase of the school furniture in question was properly determined by the trustee. The question of the purchase in direct violation of the sections of the statute heretofore referred to was not involved, and they do not, therefore, apply to the case under consideration. We think the proposition that a township trustee may purchase supplies that are suitable for use by the township, in violation of law, and that his judgment should conclusively determine the question of the necessity for such purchase, is an unreasonable one; especially when, as in the case under consideration, the trustee could have readily learned that the machines were not needed. Such power given to a trustee would enable him to nullify the sections of the statute that are found by the court to have been violated. When he acts in good faith, within the scope of his duties, and not in violation of law, the need of school furniture and tools for working the public roads in his township is properly a matter for his determination.

The fact the township received and used, and has not returned nor offered to return, the graders, and that they are valuable, cannot avail appellant, as against the township. The vendor was a party to the violation of law, and could acquire no rights, as against the township, through such violation. The law leaves a party, under such circumstances, where he places himself. *Brewing Co. v. Hartman*, 19 Ind. App. 596, 49 N. E. 864. *Wrought-Iron Bridge Co. v. Board of Com'rs of Hendricks Co.*, 19 Ind. App. 672, 48 N. E. 1050, will be found instructive upon the questions here presented. We find no error. Judgment affirmed.

(21 Ind. App. 614)

PATTERSON et al. v. EMERICK.

(Appellate Court of Indiana. Feb. 21, 1899.)

LANDLORD AND TENANT—CANCELLATION OF LEASE—PARTIES—APPEAL—WAIVER.

1. Where a landlord refuses to cancel a lease, and notifies the tenant he will hold him for the rent, he is not compelled to take possession on the tenant's quitting the premises, and try to rent them.

2. Where rent was to be paid to a bank, as agent for the lessor, which it was to disburse in a certain manner, an action on the lease was properly brought by the lessor, "suing for herself and for the use and benefit of the [bank], as its interests may appear."

3. Questions not discussed by counsel on appeal are deemed waived.

• Appeal from circuit court, Miami county; J. T. Cox, Judge.

Action by Louisa G. Emerick, for use and benefit of the First National Bank of Peru, Ind., against Samuel B. Patterson and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Charles A. Cole and De Witt C. Justice, for appellants. M. Winfield and Reasoner & O'Hara, for appellee.

ROBINSON, J. Appellant Patterson leased from appellee certain premises, and, for his compliance with the terms of the lease on his part, executed a bond, with his co-appellants as sureties. The bond was conditioned that if appellant "shall well and truly observe and carry out the terms of said lease, and pay the rents as therein specified," then the bond to be void. Suit was brought to recover certain rents, both the lease and the bond being made exhibits.

The first question discussed is the admission of certain evidence as to the value of attorney's fees. Appellant agreed in the lease to pay certain rent and attorney's fees for the collection thereof. The lease also provided that, if suit was brought by the lessor for possession, appellant should be liable for attorney's fees in said action. But this is not a suit for possession, nor is any condition attached to the payment of attorney's fees in the collection of rent. Appellant had expressly agreed in the lease to pay attorney's fees, and the bond secured the performance of the provisions of the lease by appellant. The penalty named in the bond is \$1,200, and, as against the sureties, this was the limit of liability. In a hypothetical question as to the value of attorney's fees, the amount stated to the witness as being involved was "between twelve and thirteen hundred dollars." As against the principal on the bond, the question was not open to objection. As against the sureties, the question should have limited the amount involved to the penalty of the bond. While the question was improper in that particular, yet, from the whole record, we cannot say that such error was committed as warrants a reversal of the case.

Complaint is next made of the court's refusal to give certain instructions to the effect that, upon the abandonment of the premises and the repudiation of the lease, it was the duty of appellee to take possession, and make the premises as remunerative as possible, and thus diminish as far as possible the loss accruing from appellant's breach of his contract, and that if the jury found that appellee might have used or leased the premises, but that she kept the building closed, and made no effort to use or lease it, such facts might be considered in estimating the damages. It appears from the record that, when appellant abandoned the premises, he sent the keys to appellee, but that they were immediately returned to appellant, and that appellee had never received the keys since that time. It does not appear that appellee ever consented that appellant might surrender the lease. In a letter written a few days after the keys were received from appellant, and at the time the keys were returned, she notified appellant that she refused to cancel the lease, and would hold appellant and his bondsmen for the rent. This she had

the right to do. Appellant had no right to abandon his contract at his discretion. Appellee was not compelled to take possession, but she could stand upon the terms of the lease. It cannot be said that it was any part of her duty to take possession, and try to rent it, and make something out of it, after appellant abandoned it. So long as she complied with the terms of the lease, she had the right to look to appellant for the agreed rent during the life of the lease. There is evidence in the record that she had complied with the terms of the lease on her part, and the jury have determined that question in her favor. Appellee could have taken possession, and what her duties would have been under such circumstances it is not necessary to decide, because it appears that she refused possession, and chose to stand upon the contract of leasing. There was no error in refusing the instructions requested.

In the lease it was provided that the rent was to be paid to the cashier of the First National Bank of Peru, Ind., as agent for the lessor; that he was to receipt for the money, and pay it out in a certain manner, set out in the lease. The suit was brought by appellee, "suing for herself and for the use and benefit of the First National Bank of Peru, Indiana, as its interests may appear." The suit was properly brought by the lessor for her own benefit and for the benefit of the party appearing on the face of the lease as having an interest. It is true, as argued, no use is created to the bank. The bank is simply named as agent of appellee, in the lease, to receive and pay out the rent for appellee. But it must be borne in mind that appellee did not sue alone in a representative capacity, but that she sued for her own benefit. The demurrer was properly overruled. The other questions reserved have not been discussed by counsel, and are deemed waived. Judgment affirmed.

(21 Ind. App. 571)

DULL v. CLEVELAND, C., C. & ST. L.
RY. CO.

(Appellate Court of Indiana. Feb. 17, 1899.)

RAILROADS—TRESPASSERS—NEGLIGENCE—WILLFULNESS—CHILDREN—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—SPECIAL VERDICT—PLEADING.

1. A single paragraph in a complaint for personal injuries may not charge both willfulness and negligence, but must proceed on the theory of either the one or the other.

2. A complaint for the death of a child, alleging that defendant's engineer could have seen the child on the track if he had looked, but that he negligently failed to see her; that he was carelessly and recklessly running the engine at an unlawful rate of speed, and by reason thereof was unable to control the train, and stop it, on seeing the child; and that she was willfully, recklessly, and negligently killed,—is based on the theory of negligence, and not of willfulness.

3. One who stands on a railroad track for two or three minutes in front of an approach-

ing train which can be seen for three-quarters of a mile, without taking any precautions, and is struck by it, is guilty of contributory negligence as a matter of law.

4. Even though the railroad company be culpably negligent in running its train at an unlawful rate of speed, such contributory negligence bars a recovery.

5. The failure of the engineer to attempt to stop the train after discovering such person on the track, even if negligence, was not the proximate cause of the injury, where it was impossible to stop the train in time to avert the accident, and he gave danger signals.

6. A child over seven years old, and of sufficient intelligence to know the difference between danger and safety, is a person *sui juris* so as to be chargeable with contributory negligence resulting in her being struck by a train.

7. Where the facts are specifically found and clearly stated in a special verdict, the court may disregard a conclusion of the jury stated therein, if but one reasonable inference can be drawn from the facts found.

8. One who has wandered on a railroad track, not at a public crossing, though but seven years old, is a trespasser, for injuries to whom the railroad company is not liable when caused merely by its negligence.

Appeal from circuit court, Delaware county; A. O. Marsh, Special Judge.

Action by Levi Dull against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Templer, Ball & Templer, for appellant. Ryan & Thompson and Elliott & Elliott, for appellee.

WILEY, J. Appellant sued appellee for the alleged negligent killing of his infant child. The complaint is in two paragraphs. In the first it is charged that appellee, on October 22, 1896, owned and operated a railroad passing through the city of Muncie; that appellant had a daughter, Vonnie Dull, seven years old, who, on said day, without his knowledge, consent, or fault, left his residence, which was near appellee's line of road, and wandered onto appellee's track; that when she was on said track she was in plain view, and could have been seen from the east for a distance of three-quarters of a mile; that there is nothing in the way to obstruct the view of the engineer, fireman, or other employé of appellee riding on a locomotive traveling west from seeing said child upon said track had they looked, and, if they had so looked, they could have seen her in ample time to have stopped the train before striking her; that on said day appellee ran its locomotive and train of cars westward on its track, which train was about 20 minutes late arriving at Muncie; that coming into said city said train was running about 60 miles per hour; that as said train approached said child she was standing on the main track, looking north, waving a flag to an engineer on a Lake Erie & Western train, whose track runs parallel with appellee's, and about 40 feet to the north; that some of the employés on the Lake Erie & Western train saw said child, and, seeing the danger she was in

from appellee's train, tried to warn her, but failed in their purpose; that she was so young that she mistook their warnings as a salute to her; that she did not see the approach of appellee's train, or hear the danger signals sounded, until said train was so near, and going so fast, that she could not get off the track in time to avoid being struck; that appellee's engineer negligently failed to keep a lookout ahead, and negligently failed to see said child when he could have seen her, and thus avoided the injury; that said engineer did not slack the speed of the train upon seeing said child, "but simply contented himself with whistling the danger signals about 550 feet away from her"; that he willfully and negligently allowed said train to rush on until it reached and struck said child; that, after so striking said child, the engineer for the first time applied the air brakes, and that the train then ran 250 feet before it could be stopped; that, if said train had been going at a lawful rate of speed, said accident could have been prevented, and said train stopped within 50 feet after said danger signals had been sounded; that by an ordinance of the city of Muncie the running of trains within the corporate limits at a greater rate of speed than 8 miles per hour was prohibited, and declared unlawful; that said train was being run at an unlawful rate of speed; that on account of the gross negligence, carelessness, and recklessness in so running said train at such unlawful rate of speed the employés in charge thereof were unable to control the same upon seeing said child, and that said child was willfully, carelessly, and recklessly killed; that said injury resulted without any fault, negligence, or carelessness of the said child or on the part of appellant. The only material difference between the first and second paragraphs of complaint is that in the second it is charged that the engineer in charge of the locomotive did see appellant's child a distance of 600 feet before reaching it, and, after seeing her, he did not stop the train, or slacken its speed. The case was put at issue by an answer in general denial. Trial by a jury, and a special verdict returned under the law of 1895. Appellant and appellee each moved for judgment on the special verdict; that of appellant being overruled, and that of appellee being sustained. Appellant's motion for a *venire de novo* and a new trial were respectively overruled.

Before proceeding to consider the special verdict, it is important that we first determine whether the complaint proceeds upon the theory of willfulness, or merely that of negligence. As we must be guided by the complaint itself, and not by what counsel say about it, we must consider its averments, and in doing this we must keep in view the marked distinction between the terms "willfulness" and "negligence." The meaning of willfulness, as given by Webster, is: "The quality of being willful; obstinacy; stubbornness; perverseness; voluntariness." The

supreme court of judicature of England has defined the word "willful" as follows: "Willful is a word of familiar use in every branch of law, and although, in some branches of law, it may have a special meaning, it generally, as used in courts of law, implies nothing blamable, but that merely that a person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of the will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent." In *re Young*, 31 Ch. Div. 174; *State v. Clark*, 29 N. J. Law, 96; *Commissioners v. Ely*, 54 Mich. 181, 19 N. W. 940; *Newell v. Whitingham*, 58 Vt. 341, 2 Atl. 172. In *Fuller v. Railroad Co.*, 31 Iowa, 204, it is said: "It is said by defendant's counsel that the word 'willfully' implies the idea of malice of a mild kind, an evil intent without excuse. Such may be its meaning in indictments and criminal statutes, but it is not to be so understood here. The word means 'obstinately, stubbornly, with design, with a set purpose'; and this definition must be applied to it where it occurs in the statute under consideration." In Texas it was said: "A willful act is one committed with an evil intent." *Bowers v. State*, 24 Tex. App. 542, 7 S. W. 247. There is a marked distinction between the words "willful" and "reckless," and recklessness does not necessarily imply willfulness. A grossly careless act may be characterized as reckless, and serious consequences may result from it. Yet such consequences would not necessarily be willfully brought about.

The complaint must be construed upon the theory which is most apparent and clearly outlined by the facts stated therein. *Railroad Co. v. Sullivan*, 141 Ind. 83, 40 N. E. 138; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Batman v. Snoddy*, 132 Ind. 480, 32 N. E. 327. As was said by Comstock, J., in *Railroad Co. v. Dugan*, 18 Ind. App. 435, 48 N. E. 238: "As only one theory can be contained in a single paragraph, the court must construe the pleading most strongly against the pleader, and determine the theory from the prominent or leading allegations of the pleading." As has been held, in many cases, there is no such thing in law as willful negligence, and the complaint must proceed upon either willfulness or negligence, and cannot charge both; that is, they cannot be charged in one and the same paragraph. *Railroad Co. v. Mann*, 107 Ind. 89, 7 N. E. 803; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *Railroad Co. v. Winn*, 93 Ala. 306, 9 South. 509; *Verner v. Railroad Co.*, 103 Ala. 574, 15 South. 872. In *Railroad Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807, appellee sued to recover damages for the alleged killing of his team at a crossing. One paragraph was based upon negligence merely, with the necessary averment that he was without fault. In the other he attempted to plead facts constituting willfulness. The charging part of the

latter paragraph was as follows: "And that said collision was caused by the reckless, negligent, and willful conduct of said employees and servants of said defendant in the management of said locomotive, in this, to wit: that said locomotive was being propelled at an exceedingly high and dangerous rate of speed, and was being propelled backwards, and that the whistle on said locomotive was not sounded, and the bell was not rung, to give warning of the approach of said locomotive; that said crossing was made extra dangerous by said track being hidden from view for some distance by intervening buildings; all of which was well known to said defendant, its servants," etc. In that case *Mitchell, J.*, said: "That the conduct imputed to the employees of the railway company was negligent cannot be doubted, but negligence, no matter how gross, cannot avail in an action where it is necessary, on account of the plaintiff's contributory negligence, to aver and prove that the injury was inflicted by design, or with actual or constructive intent. In such a case it is incumbent on the plaintiff to aver and prove that the injury was intentional, or that the act or omission which produced it was willful, and of such a character as that the injury which followed must reasonably have been anticipated as the natural and probable consequence of the act. * * * To constitute a willful injury, the act which produces it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involved conduct which is quasi criminal,"—citing *Canal Co. v. Murphy*, 9 Bush, 522; *Railroad Co. v. Filbern's Adm'x*, 6 Bush, 574; *Association v. Loomis*, 20 Ill. 235. In the case from which we have just quoted it was held that the facts charged failed to bring the case within either of the conditions expressed, or to indicate an actual or constructive intent on the part of the appellant. In that case the jury found for appellee on the second paragraph, and for the appellant on the first; in other words, they found for appellee on the ground that the injury was inflicted willfully. The learned judge further said: "That the appellee may have been grossly and culpably negligent may be admitted, but, until the plaintiff is willing to assert that he himself was without fault, he is not, upon the specific facts stated in the paragraph under consideration, entitled to maintain an action." "The words 'willful' and 'negligent,' used in conjunction, have not always been employed with strict regard for accuracy of expression. To say that an injury resulted from negligent and willful conduct of another, is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely designed. It seems to be supposed

that by coupling the words together a middle ground between negligence and willfulness, between acts of nonfeasance and misfeasance, may be arrived at. It is only necessary to say that the distinction between cases falling within the one class or the other is clear and well defined, and cases in neither class are aided by imparting into them attributes pertaining to the other." See, also, Beach, *Contrib. Neg.* pp. 67, 68.

It was held that the second paragraph did not charge a willful injury, and, as it did not aver that the plaintiff was free from fault, the demurrer to it should have been sustained. In *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504, it was said: "Willfulness does not consist in negligence. On the contrary, as illustrated by the Cases of Bryan and of Mann, heretofore cited, the terms are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such a degree as to become willfulness." See, also, *Railroad Co. v. Graham*, 95 Ind. 286; *Railroad Co. v. Tartt*, 12 C. C. A. 618, 64 Fed. 823. The complaint in this case avers that appellant and his child were free from negligence contributing to the injury. This allegation itself tends strongly to show that the complaint is based upon negligence, and not willfulness; for the averment of freedom from contributory negligence has no place in the complaint for an injury willfully inflicted. *Pennsylvania Co. v. St. Clair*, supra; *Railroad Co. v. Eaton*, 53 Ind. 307. Now, if we take each paragraph of the complaint, and group together the charging parts, we find the following facts stated: That the engineer could have seen appellant's child upon the track if he had looked, but that he negligently failed to keep a lookout ahead, and negligently failed to see said child; that the appellee wrongfully and negligently permitted its agents and employes to run a train at an unlawful rate of speed, in violation of the city ordinance; that said engineer carelessly and recklessly ran said locomotive engine, at the time and place where said child was killed, at an unlawful rate of speed; that on account of the gross negligence and recklessness of appellee, its engineer, conductor, the employes and agents, in running said locomotive and train at an unlawful rate of speed through the city, said employes and agents were unable to control said train, and stop it, upon seeing said child, and said child was willfully, recklessly, carelessly, and negligently killed, etc. Looking at the averments in each paragraph of the complaint in the light of the meaning of the terms "willfulness" and "negligence," and judged by the authorities we have cited, we must hold that the complaint is based upon the theory of negligence, and not upon willfulness. The very fact that the complaint averred that the train was being run at so high,

reckless, and negligent rate of speed that appellee's servants were unable to control and stop it after observing the danger the child was in, negatives every presumption of willfulness, for, as we have seen, when an act is willfully done, it is done with a purpose or design. Therefore, taking the complaint as a whole, construing its "prominent and leading allegations" most strongly against the pleader, as we must, we are unable to see anything in it which will authorize us to say that the act complained of was willfully done.

This leaves the complaint to rest upon negligence on appellee's part and freedom from negligence on the part of appellant and the child. Having determined the theory of the complaint, we will look to the special verdict for the facts. So far as the facts found are pertinent to the questions involved, they are as follows: That appellant's child was killed at about 10 o'clock a. m., by being struck by appellee's locomotive; that the locomotive and train drawn by it was running 25 miles per hour; that it was passing through the corporate limits of the city of Muncie; that there was an ordinance of said city limiting the speed of trains to 8 miles per hour; that appellant's child was standing on the south rail of appellee's main track, and facing north; that she had in her hand a sprig of cedar, and was waving it at persons on a Lake Erie & Western train, then passing parallel with appellee's track, and about 40 feet north; that her attention was attracted by said Lake Erie & Western train; that persons on said train made signals to her to warn her of her approaching danger; that she did not hear or see appellee's train approaching; that in standing on said track at the time and under the circumstances she exercised "such ordinary care as a reasonable and prudent child of the same age, experience, and capacity should have exercised under similar circumstances," considering her age; that the whistle on appellee's locomotive was sounded near the bridge over White river; that it was sounded repeatedly; that the danger signal was sounded continuously; that said child was used to going on errands, and crossing the railroad tracks in going on errands and to school; that she was capable of going on errands and making purchases without assistance; that the air brakes on the locomotive were not applied when the danger signals were given; that appellant's child, Vonnle Dull, understood that it was dangerous to stand on a railroad track when a train was coming; that she was used to railroads, and instructed as to their dangers; that appellant's back yard abutted on appellee's right of way; there was no fence or anything else between appellant's back yard and appellee's right of way to prevent the child from going on the railroad track; that the mother of appellant's child left her in the back yard a few minutes before she was killed, with no one with her but her sister, who was nine years old; that said child was killed about 130 feet

from the nearest street crossing; that she had been on appellee's right of way for several minutes just prior to her being killed; that no one was with her when she was killed; that the train that struck her stopped with the rear end thereof about 433 feet from where she was struck; that about 18 feet west from where she was struck there is a switch stand, from which a side track starts; that for quite a distance from where said child was killed appellee's track is on a descending grade from the east to the west; that appellant knew that trains passed over appellee's track near his premises frequently; that said child was seven years, three months, and one day old when she was killed; that she was physically vigorous for a girl of her age; that she was in good health; that she was "smart and intelligent" for a child of her age; that she had attended school for a part of two terms; that both appellant and his wife often instructed, cautioned, and commanded their children, including Vonnle, of the danger of going and playing on the railroad tracks; that neither the appellant nor his wife, by their negligence, contributed to the death of said child; that when said child went and stood upon said track she exercised all the prudence and caution which a child of her age and judgment should have used and exercised, under all the circumstances; that she was not too young and inexperienced to realize that it was dangerous to go and stand upon the railroad track; that she knew and appreciated the danger of going and standing upon the track.

Interrogatory 89 and answer are as follows: "On October 22, 1896, when Vonnle Dull went and stood on defendant's railroad track, and was there struck and killed by defendant's locomotive, considering her age and judgment, and all the other circumstances proven, and properly inferable from the evidence in this case, is she properly chargeable with contributory negligence for doing what she did at and just before she was killed? Ans. Yes." And, as relating to the same class of facts, we copy in full the following interrogatories and answers: "(94) Did Vonnle Dull, on said day, realize the danger to herself in going and standing upon the defendant's said track? Ans. Yes." "(100) Was Vonnle Dull of sufficient age and understanding to realize the danger she would occasion herself on said day by going upon defendant's said railroad track? Ans. Yes." "(103) Was the said Vonnle Dull, on the 22d day of October, 1896, too young and inexperienced to be chargeable with contributory negligence in going upon the defendant's said railroad track? Ans. No." "(152) On October 22, 1896, when Vonnle Dull went and stood upon the defendant's railroad track, and was there struck and killed by defendant's locomotive, considering her age, and all the other facts and circumstances proven, and properly inferable from the proven facts and

circumstances in this case, did her conduct, in going and standing upon said track, directly contribute to her death? Ans. Yes." That the death of said child was caused by reason of appellee's servants running said train at a greater rate of speed than eight miles per hour. That, if said train had been running at the rate of eight miles per hour, it could have been stopped after the conductor discovered her on the track, and before reaching her. That said child went upon appellee's track by being attracted by a train on the Lake Erie & Western Railroad. That appellee's engineer in charge of and running said locomotive was "reckless, negligent, and careless" in running the same at 20 miles an hour through the city of Muncie. That when the first danger signal was given said locomotive was about 430 feet from where the child stood. That the engineer discovered said child when he was about 500 feet from her, and the train was running at so high a rate of speed that he could not stop it before reaching her, after first seeing her. That there was nothing to prevent him from stopping the train, except the speed at which it was running. That the engineer made no effort to stop said train, and could not have stopped it before striking said child, on account of the speed at which it was running; and that it could not be stopped until passing about 400 feet beyond where said child was struck, and at the rate of speed at which it was going it would run 500 feet in $17\frac{5}{10}$ seconds.

The special verdict is quite lengthy, consisting of 188 interrogatories and answers, but we have given an abstract of every fact found that is material to the questions to be decided. From the facts found it is hardly necessary for us to remark that the appellee was grossly and culpably negligent in running its train in the manner it did, while passing through the corporate limits of the city of Muncie. It is shown that Muncie is a populous city, that appellee's track crosses many streets, and that appellee's train was running at a rate of speed far in excess of that allowed by an ordinance of said city then in force. True, the special verdict shows that the whistle was sounded, and warning signals given; but these facts do not relieve appellee from actionable negligence. The fact is found that, if the train had been running at the rate of speed fixed by the ordinance, it could have been stopped in time to have averted the injury, after the engineer discovered the danger that was imminent to the girl. This of itself is sufficient to constitute negligence. See *Shirk v. Railroad Co.*, 14 Ind. App. 126, 42 N. E. 656, and authorities there cited.

The next question which naturally arises is, was appellant's child guilty of negligence which contributed to her death? We enter upon the discussion of this question with the facts clearly established that Vonnle Dull was sui juris. From the facts found she was capable of fully understanding the danger

which might result from her conduct. We need not here repeat, in detail, the facts found which bear upon this question, but they may be properly grouped in the following statement: She had been in the habit of going on errands, crossing railroad tracks, and making purchases, without assistance; she had attended school a part of two terms; she understood that it was dangerous to stand on railroad tracks when trains were coming; she was used to railroads, and had been instructed of their danger; she was physically and mentally vigorous and intelligent for one of her age; her parents had frequently cautioned her about the danger of going and playing upon railroad tracks; she was not too young and inexperienced to realize that it would be dangerous to go and stand upon a railroad track; she appreciated the danger that might result to her by her standing on the track; she was not too young and inexperienced to be chargeable with contributory negligence in doing what she did, and that her conduct directly contributed to her death. The jury drew two conclusions, which may properly be disregarded by the court: (1) That the child was guilty of contributory negligence, and (2) that in going and standing upon a track in front of an approaching train she exercised such care as a child of her age and judgment should exercise. See 14 Ind. App. 126, 137, 42 N. E. 656. These two conclusions seem to be conflicting, and, as they are mere conclusions, will have to be disregarded. From the facts, which are specifically found and clearly stated, the court must draw both conclusions and inferences. The conclusion which the court must draw is that the child was a *sui juris*, and guilty of contributory negligence. The jury found that she exercised a care that a child of her age should exercise. It does not seem to us that what children should do is the criterion; but, if it were, there is but one reasonable inference which can be drawn from the facts found, and in such case it is the well-settled rule that the court must draw that inference. *Railroad Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. 1106; *Railroad Co. v. Costello*, 9 Ind. App. 462, 36 N. E. 299; *Shirk v. Railroad Co.*, 14 Ind. App. 126, 42 N. E. 656; *Smith v. Same*, 141 Ind. 92, 40 N. E. 270. Many other cases could be cited, but it is useless, as a rule is firmly established. As to whether or not it was dangerous for Yonnie Dull to stand on appellee's track, under all the facts found, considering especially the facts that she knew it was dangerous, leaves no room for inference as to what a reasonably prudent person would do under like circumstances. It is only where there is room for difference of opinion between reasonable persons as to the existence of facts from which negligence, if found, must be inferred, or where there is room for difference of opinion as to inferences which might be fairly drawn from conceded facts, that the question of negligence must be left

to the jury as one of fact. *Railroad Co. v. Grames*, 136 Ind. 89, 34 N. E. 714. Where it is shown that the child fully understood the danger and peril incident to her conduct, and that she trespassed and stood on appellee's track for some two or three minutes, without taking any precautions whatever looking to her safety, she was undoubtedly guilty of contributory negligence, and the court must so declare it, as a matter of law, from the facts found. What age a child must be before it can be said it cannot be chargeable with contributory negligence, the courts have not determined, and no inflexible rule could be established; but surely, when a child is old enough to know the difference between danger and safety, and is of sufficient age and intelligence to realize and appreciate that a certain course of conduct is attended with great danger, then it may be safely said that he or she can be chargeable with contributory negligence. Thus it was held by the supreme court that where a boy 7½ years old went upon a railroad track at a point where it crossed a public highway to play, and fell asleep on the track, and was injured by a passing train, he could not recover, because of contributory negligence. *Krenzer v. Railroad Co.* (Ind. Sup.) 43 N. E. 649. In that case there was a general verdict for appellant, and answers to interrogatories. It was found specially by the jury that the boy was of usual and ordinary intelligence; that he was of average physical strength and activity for a boy of his age; that he knew the track was a place to run cars and engines over; that he had sufficient intelligence to know that engines and cars were liable to pass, and that, if he remained on the track, and an engine or car passed, he would be run over and injured; that just before his injury he was playing jackstones upon the track; that he sat upon the rail of the track with his feet between the rails, and while so sitting fell asleep. It was further found that it was daylight; that the engineer was looking ahead, but did not see the child; that the train was running 10 miles an hour, and the bell was not ringing. *Howard, J.* says: "We are persuaded, from the answers to the interrogatories, that the appellant, notwithstanding his tender youth, was himself guilty of contributory negligence in sitting upon the rail of the track, and lying down to sleep, with his legs across the rail. We think he is shown to have had sufficient appreciation of the danger he incurred. * * * But to sit upon the track to play, and to lie down there and sleep, with one leg over the rail, seems such a reckless and foolhardy act that, as we think, a boy found to have sufficient intelligence to comprehend the danger must be held culpable for incurring it." In New York it was held that a boy seven years of age was guilty of contributory negligence in attempting to cross a railroad track in front of an approaching engine upon what the court designated "a nice calculation of

chances." In the last-cited case it was shown that the boy was bright and intelligent; that he had gone to school, and was frequently sent on errands by his parents, which required him to cross the railroad track. The case was tried upon the assumption that the boy was *sui juris*, and the court held that this implied that he had sufficient mental and physical capacity to be chargeable with some degree of care and prudence, and answerable for some degree of negligence. *Wendell v. Railroad Co.*, 91 N. Y. 420. This court, in the case of *Shirk v. Railroad Co.*, 14 Ind. App. 128, 42 N. E. 856, held that where a girl 12 years old, who was of ordinary intelligence, undertook to cross a railroad track in front of an approaching engine, which she could have seen, if she had looked when 5 feet from the track, while the bell was ringing, and after the whistle had sounded, was guilty of contributory negligence, and could not recover. In that case, among other facts, the jury found that "in approaching said crossing at the time and place she received the injury she was a child of immature years, and was exercising caution and prudence to the best of her judgment, and was without fault or negligence." Notwithstanding the jury found the facts last quoted, yet the court held that such a finding was a mere conclusion, and the general facts found showed contributory negligence on the part of appellant, and that the facts found raised the presumption that she neither looked nor listened, or that, looking, saw, or, listening, heard, but deliberately took the risk of attempting to cross, notwithstanding the approaching train. In a concurring opinion, *Davis, J.*, said: "The primary facts found in this case are not, in my opinion, sufficient to warrant the final inference or conclusion that the appellant was in the exercise of due care at the time she received the injuries." In a recent case in Wisconsin it was held to be contributory negligence for a boy 16 years of age to stand upon a railroad track with his back to an engine, which was then standing still only 20 feet from him, but liable to start at any moment. *Lofdahl v. Railroad Co. (Wis.)* 60 N. W. 795. In that case the court said, "Such conduct cannot be made ordinary care even by the verdict of a jury." In *Twist v. Railroad Co.*, 39 Minn. 164, 39 N. W. 402, it was held to be contributory negligence, as a matter of law, for a boy 10 years old to play upon a turntable, when he had been warned against so doing, although the jury found that he did not fully understand the danger. The supreme court of Massachusetts held that a boy 5½ years old was guilty of contributory negligence, as a matter of law, in attempting to cross a street 5 or 6 feet in front of a horse and wagon which were going about 5 miles an hour. The court said: "While he is only bound to show that he exercised such care as ordinary boys of his age and intelligence are accustomed to exercise under like circumstan-

ces, the standard is the conduct of boys who are ordinarily careful." *Hayes v. Norecross*, 162 Mass. 546, 39 N. E. 282. In *Collins v. Railroad Co.*, 142 Mass. 301, 7 N. E. 856, it was said: "It would seem that, if children unreasonably, intelligently, and intentionally run into danger, they should take the risks, and that children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have, and that they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless, because children are often reckless and mischievous." In many of the cases to which we have referred it was not shown affirmatively that the children understood and realized the danger that threatened them, but nevertheless it was held that they must be presumed to have so realized and understood, and that they were, therefore, negligent in assuming the risk incident to their surroundings. So we see at a glance that the case before us is a much stronger one, for here it is expressly and specifically found that *Vonnie Dull* had been duly warned, knew, and realized the danger she was in, and knew that peril to her was incident to her position. We think the rule is well settled that where a person voluntarily goes into a place of danger, which he understands and fully realizes, he takes upon himself the risk, and there can be no recovery for resulting injury, unless such injury is willfully inflicted.

Appellant contends that, even if *Vonnie Dull* was guilty of negligence, it does not bar a recovery, under the facts found, because the engineer was guilty of negligence after he discovered her. By this contention appellant seeks to invoke the doctrine that, though a person may have subjected himself to injury by his own negligence, yet he may recover for such injury if the person inflicting it could have avoided it after discovering his danger, or if he failed to use ordinary care. In *Railroad Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843, it was said: "It is sound doctrine, strongly intrenched by the authorities, that when one person sees another in danger or peril, from which he is unable to extricate himself with reasonable care and prudence, it is the highest duty of such person so to act as not to increase the peril; and if he does act in a manner to increase the danger, with a full knowledge of the facts, it is negligence, for which he may respond in damages." Of many cases so holding we cite the following: *Railroad Co. v. Lowe*, 12 Ind. App. 47, 39 N. E. 165; *Railroad Co. v. Long*, 112 Ind. 166, 13 N. E. 659; *Railroad Co. v. Pitzer*, 109 Ind. 179, 36 N. E. 310, and 10 N. E. 70; *Railroad Co. v. Judd*, 10 Ind. App. 213, 36 N. E. 775. Judge Thompson states the rule as follows: "Perhaps a better expression of this rule is that, although the plaintiff has negligently exposed himself or property to an injury, yet if the defendant, after discovering the exposed situation, inflicts the injury upon him

through a failure to exercise ordinary care, the plaintiff may recover damages." *Thomp. Neg.* 1157, note. See, also, *Beach, Contrib. Neg.* § 54; *Brown v. Lynn*, 31 Pa. St. 510; *Barker v. Savage*, 45 N. Y. 194; *Morris v. Railroad Co.*, 45 Iowa, 29; *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679. And so we think the rule would apply in a case where a person had subjected himself to danger, though he was unconscious of impending peril, if the person about to inflict the injury could, after discovering the peril, have averted it by the use of ordinary care and diligence. But this doctrine, as wholesome and sound as it is, and tenaciously as it should be adhered to and enforced, is not applicable here, under the facts found by the jury. Here we have a case where the injured party subjected herself by her own negligence to imminent peril. She was unconscious of her impending danger. Appellee's engineer discovered her danger when he came within about 500 feet of her, and then, as the jury found, it was impossible for him to stop his engine before reaching her. He did all he could do, by giving danger signals in the hope that the child might be warned, and extricate herself from peril. True, the engineer did not apply the air brakes, but it is found that, if he had, he could not, by any means within his power, have stopped the train; and hence, in the emergency, he did all that was possible for him to do, as above indicated. His failure to attempt to stop the train under these facts, even if negligent, was not, therefore, the proximate cause of the injury, but the proximate cause was the negligence of the child. By her own negligence she placed herself where it was impossible for the engineer to do anything to save her from injury after he discovered her peril. It looks to us, from all the facts found, that the engineer did all that was possible for him to do. In any event, an engineer running a locomotive engine cannot be expected to act in an emergency in the "twinkling of an eye," with the coolness and forethought that one would after he has had time to deliberate and plan. Here the engineer was running his engine at the rate of 25 miles per hour. He discovered the girl on the track when he was only 500 feet from her. In 17 seconds his engine would be upon her. At the speed he was running, he is presumed to have known that there was no possible means by which he could stop. He gave the danger signals in the hope and reasonable expectation that the girl would heed them, as the only possible means of her escape; and under these facts we cannot say that he was guilty of actionable negligence after discovering her. In *Kirtley v. Railroad Co.*, 65 Fed. 386, 391, it was said: "The evidence shows that the engineer did make an effort to notify the deceased of his danger, while it shows no response to this admonition on the part of the deceased. This, at least, manifests a willingness upon the part of the engineer to do all

in his power to save the deceased from harm; and we cannot justly presume, in the face of such actual efforts, that the engineer would have relaxed any efforts that, under the stress of circumstances, might have occurred to an agitated mind to avert the accident. We are not to judge of the care exercised under circumstances of this kind by a deliberate retrospect of the facts, because we can never place ourselves, by a calm analysis of the features of these occurrences, in precisely the same frame of agitation as those who are actors in such events. If the engineer did all that reasonably occurred to him to do, confronted, as he was, by a pressing emergency, we cannot censure him because, after deliberate reflection over the events, we can point out something else which he might have done to have averted the calamity. The extremity of the situation was not of the engineer's making. It was created by the deliberately unlawful act of the deceased, and it would be unjust to charge the engineer and defendant with fault because his mind did not operate with the same deliberation which we have a right to expect if he were confronting an anticipated occasion usually within the line of his experience." The above language is of great force, and peculiarly applicable to the facts in this case. We have already said that appellee was negligent in running its train through a populous city at the speed it was going, but this antecedent negligence cannot be invoked or considered, so as to bring it within the rule for which appellant contends. Under that rule we can only consider the conduct of appellee's servants after discovering the peril of the girl. There are many cases so holding, of which we cite the following: *Railroad Co. v. Graham*, 95 Ind. 286, 292; *Railroad Co. v. Monday*, 49 Ark. 257, 4 S. W. 782; *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504; *Baltimore Traction Co. v. State (Md.)* 28 Atl. 397; *Stone Co. v. Stewart*, 7 Ind. App. 563, 34 N. E. 1019; *Kirtley v. Railroad Co.*, 65 Fed. 386; *Woodruff v. Railroad Co.*, 47 Fed. 689; *Blanchard v. Railroad Co.*, 126 Ill. 416, 18 N. E. 799. Upon this question other authorities and further discussion seem unnecessary. But there is an additional reason why appellant cannot recover, under the facts found, and that is, *Vonnie Dull* is shown to have been a trespasser, and there is no finding of a willful killing. It is shown that where the child was killed was over 100 feet from the nearest street crossing, upon the private grounds and track of appellee. Because of her tender years, she was no less a trespasser. In *Railroad Co. v. Bradford*, 20 Ind. App. 348, 49 N. E. 388, it was held that a child two years old, who had wandered on a railroad track, not at a public crossing, was a trespasser. It is well settled in this and other jurisdictions that the only duty which a railroad company owes to trespassers upon its right of way and tracks is to refrain from willfully injuring them. It owes them no duty of active vigilance, and

is not liable for mere negligence. In support of this proposition we cite the following cases: Railroad Co. v. Graham, 95 Ind. 286; Railroad Co. v. Goldsmith, 47 Ind. 43; Pennsylvania Co. v. Meyers, 136 Ind. 242, 36 N. E. 32; Kirtley v. Railroad Co., 65 Fed. 386, 392; Railroad Co. v. Tartt, 12 C. C. A. 618, 64 Fed. 823; Nicholson v. Railroad Co., 41 N. Y. 525, 530; Walsh v. Railroad Co., 145 N. Y. 301, 39 N. E. 1068; Railroad Co. v. Hummell, 44 Pa. St. 375; Duff v. Railroad Co., 91 Pa. St. 458; Toomey v. Railroad Co. (Cal.) 24 Pac. 1074; Mulherrin v. Railroad Co., 81 Pa. St. 366; Wright v. Railroad Co., 142 Mass. 296, 7 N. E. 866; Morrissey v. Railroad Co., 126 Mass. 380; Baltimore & O. R. Co. v. State, 62 Md. 487; Cauley v. Railroad Co., 95 Pa. St. 398; Railroad Co. v. Godfrey, 71 Ill. 500. In Railroad Co. v. Goldsmith, supra, the court said: "But between the stations and public crossings the track belongs exclusively to the company, and all persons who walk, ride, or drive thereon are trespassers, and if such persons walk, ride, or drive thereon at the sufferance or with the permission of the company, they do so subject to all the risks incident to so hazardous an undertaking." In McClaren v. Railroad Co., 83 Ind. 319, it was said: "The law is that between the stations and public crossings a railroad track belongs exclusively to the railroad company, and that all persons who walk, ride, or drive thereon are trespassers, and, if such persons do so at the sufferance or by the permission of the company, they do so subject to the risks incident to so hazardous an undertaking, and, if injured by a train of the company, there is no liability unless the injury is willful." In Railroad Co. v. Tartt, 12 C. C. A. 618, 64 Fed. 823, Judge Baker said: "As he [the person killed] was a trespasser, no action will lie against the company causing his death, unless the act of its employes in charge of the train was willful. A trespasser cannot maintain an action where the tort complained of consists of nothing more than the omission to exercise care." We also cite the following Indiana cases: Ivens v. Railroad Co., 103 Ind. 27, 2 N. E. 134; Railroad Co. v. Adair, 12 Ind. App. 569, 39 N. E. 672, and 40 N. E. 822; Railroad Co. v. Stephenson, 139 Ind. 641, 37 N. E. 720; Pennsylvania Co. v. Meyers, 136 Ind. 242, 36 N. E. 32; Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028. The special verdict does not find a willful killing, and hence there can be no recovery, even if we assume that the theory of the complaint is based upon willfulness.

Other questions presented by the assignment of errors are waived by a failure to discuss them. The trial court did not err in rendering judgment for appellee on the special verdict, and there is no reversible error in the record. Judgment affirmed.

ROBINSON and COMSTOCK, JJ., concur in the conclusion.

(59 Ohio St. 483)

RAUH et al. v. AKNOVITCH et al.

(Supreme Court of Ohio. Jan. 27, 1899.)

EXECUTION AGAINST PROPERTY—JUDGMENTS SUED OUT IN SAME TERM—FILING OF TRANSCRIPTS.

Section 5382 of the Revised Statutes, providing that, "when two or more writs of execution against the same debtor are sued out during the term in which judgment was rendered, * * * no preference shall be given to either of such writs, * * *" applies alike to executions issued on transcripts of judgments of justices of the peace filed in the office of the clerk of the court of common pleas under section 5377, and to those issued on judgments of the court of common pleas.

(Syllabus by the Court.)

Error to circuit court, Jefferson county.

Action by Rauh Bros. & Co. against Joseph B. Aknovitch. Judgment for plaintiff. L. Levy & Co. ask to participate in the distribution of the proceeds of the execution sale. From a judgment of the circuit court affirming the judgment allowing them to participate, plaintiffs bring error. Affirmed.

This case involves the right of Levy & Co. to participate in the distribution of the proceeds of chattels sold by the sheriff of Jefferson county as the property of Joseph B. Aknovitch, being all the property which he possessed. The contending parties are execution creditors of Aknovitch, and their rights depend upon this state of facts: On the 14th of January, 1896, Rauh Bros. & Co. recovered a judgment against Aknovitch in the court of common pleas for the sum of \$1,401.60. On the same day, execution on that judgment was issued and levied upon the chattels of Aknovitch. On the 15th day of January, one Abe Aknovitch recovered a judgment against Joseph B. Aknovitch in the same court, for the sum of \$901, upon which execution was issued, and levied on the same day upon the same goods and chattels. On the 15th day of January, 1896, one Moses Esacovitch recovered a judgment against Joseph B. Aknovitch in the same court for the sum of \$560, upon which execution was also issued, and levied on the same day upon the same goods and chattels. All of said judgments were rendered upon notes with warrants of attorney attached for the confession of judgment. On the 21st of January, 1896, Levy & Co. recovered a judgment before a justice of the peace of Jefferson county for the sum of \$205.75, and, on the same day, filed a transcript of such judgment with the clerk of the court of common pleas of Jefferson county, which was by him on that day duly entered on the execution docket in his office; and, on the same day, said clerk, at the instance of Levy & Co., issued an execution upon said judgment to the sheriff of said county, and the sheriff, on the same day, levied that execution upon the same goods and chattels. The January term of the court of common pleas of Jefferson county commenced on the 6th day of January, 1896, and closed on the 15th day of February. On the 27th day of

January, 1896, the chattels so taken upon execution by the sheriff were sold for the sum of \$1,314. Upon these facts, the court of common pleas ordered a distribution of the proceeds of sale after the payment of costs to all the judgment creditors, including Levy & Co., in proportion to the amounts of their demands, and its judgment was affirmed by the circuit court.

John M. Cook, for plaintiffs in error. P. P. Lewis, for defendants in error I. Levy & Co.

PER CURIAM. It is provided in section 5382 that, "when two or more writs of execution against the same debtor are sued out during the term in which judgment was rendered, * * * no preference shall be given to either of such writs; but if a sufficient sum of money be not made to satisfy all executions, the amount made shall be distributed to the several creditors in proportion to the amounts of their respective demands." Section 5377 authorizes one who recovers a judgment before a justice of the peace to file in the office of the clerk of the court of common pleas a transcript thereof. The effect of such filing with respect to the seizure of the chattels of the debtor is defined in section 5379: "Execution may be issued on such judgment at any time after filing the transcript as if the judgment had been rendered in court." With respect to the issuance of execution, the effect and the return thereof, executions issued by the clerk upon such transcripts are placed upon the same footing with those issued upon judgments of the court of common pleas. Nothing inconsistent with the judgment below was decided in *Meier v. Bank*, 55 Ohio St. 446, 45 N. E. 907. Judgment affirmed.

(59 Ohio St. 497)

BAHMANN v. STONER.

(Supreme Court of Ohio. Jan. 24, 1899.)

TENDER BEFORE JUSTICE.

Section 5137, Rev. St., which provides that a defendant in an action on a contract for the payment of money, who seeks to have the advantage of a tender made before suit in the common pleas, must pay the money tendered to the clerk before the trial, applies to actions of like character before a justice of the peace; and in such case, to keep the tender good, the amount must be deposited with the justice before trial.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

Action by one Stoner against one Bahmann. Judgment for plaintiff before a justice was reversed by the circuit court, and defendant brings error. Affirmed.

Stoner sued Bahmann before a justice of the peace for rent, \$37.50, and for damages to premises, \$100, in all \$137.50, and recovered a judgment therefor, and for costs. On appeal to the common pleas, Bahmann pleaded and proved that, before action brought, he tendered Stoner the amount due under the

lease, \$38.85, which was refused. He also set up a counterclaim on which he asked judgment for \$50. A verdict was rendered in favor of plaintiff for the exact amount of the tender, \$38.85. It then being shown that the amount of \$38.85 had been paid in by defendant to the clerk of the court before trial, it was considered that the plaintiff pay all the costs of the action, and that the clerk apply the amount deposited to the payment of the costs, and, it appearing that the costs exceeded the amount of the tender by \$6.79, judgment was rendered in favor of defendant against plaintiff for that amount. On error the circuit court reversed this judgment, and tendered final judgment against Bahmann for the amount of the verdict, interest, and costs.

Aaron A. Ferris, for plaintiff in error. George W. Hengst, for defendant in error.

PER CURIAM. We see no error in the judgment of the circuit court reversing that of the common pleas. If the defendant desired to avail himself of his tender, he should have kept it good by depositing the amount with the justice of the peace. Section 5137, Rev. St., requires such deposit to be made where the action is first begun in the common pleas. By section 6705, the provisions governing practice in the common pleas which are in their nature applicable to actions before justices of the peace, and where no special provision is found, are made applicable to such actions; and no reason is perceived why the requirements of section 5137 should not govern like actions first brought before justices. They seem to be in their nature applicable, and no special provision relating to the subject is found in the Justice's Code. Such has been the practice, and is, we think, the understanding of the bench and bar throughout the state. See *Swan's Treatise* (17th Ed.) p. 861.

Nor did the circuit court err in rendering final judgment. The defendant was content with the judgment of the common pleas, and the only question before the reviewing court was as to the judgment so rendered. The question was not whether the trial had been properly conducted, nor whether the verdict was for the proper amount, but whether the judgment rendered upon the verdict was right. Judgment affirmed.

(59 Ohio St. 479)

MEGRUE et al. v. LENNOX.

(Supreme Court of Ohio. Jan. 17, 1899.)

ACTION FOR STOCK KILLED—ALLEGATION OF NEGLIGENCE—ERRONEOUS ADMISSION OF EVIDENCE.

Where, in an action against receivers of the property of a railroad company to recover for the killing of stock, the only allegation of negligence in the petition is that the defendants had neglected to maintain a fence sufficient to turn stock, it is error to admit evidence that the stock got upon the track through a gate at a farm crossing carelessly left open,

there being no claim that the gate itself was out of repair; and in such case it is also error to overrule a motion to arrest the evidence from the jury, interposed at the conclusion of the plaintiff's testimony, where there is no evidence bearing upon the negligence of the defendants except that so erroneously admitted. (Syllabus by the Court.)

Error to circuit court, Pike county.

Action by William Lennox against Joseph R. Megrue and N. E. Matthews, receivers of the Ohio Southern Railroad Company. From a judgment of the circuit court affirming a judgment for plaintiff, defendants bring error. Reversed.

W. B. Richie and W. H. Leete, for plaintiffs in error. F. E. Dougherty, for defendant in error.

SPEAR, C. J. The action below was by William Lennox against Joseph R. Megrue and N. E. Matthews, as receivers of the Ohio Southern Railroad Company, to recover the value of two horses killed on the line of the railroad. In his petition the plaintiff charged that the horses escaped through their inclosure, without fault or knowledge of the plaintiff, and into an adjoining field, to a point on the farm of one Worthen, on the railroad, where the defendants had failed to maintain a fence sufficient to turn stock, and, by reason of said omission of the defendants to fence the line of the railroad, the horses, without any fault of plaintiff, strayed upon the line of the railroad, and were run against and killed by a locomotive and cars managed by defendants' agents and servants. No other negligence was alleged, nor was any cause for the killing of the horses averred except their straying upon the track by reason of the failure by the receivers to maintain a fence sufficient to turn stock. These allegations were denied by the answer. At the trial, the plaintiff offered testimony tending to show that during the night season the horses got from plaintiff's field, into which they had been turned to pasture, and into the field of Worthen, by reason of the bars between the two fields having been thrown down, and that from the field of Worthen they strayed upon the railroad track through a gate leading to a farm crossing which had been put in by the company for the accommodation of Worthen, who owned land on both sides of the railroad. To the evidence respecting the gate, and the passing of the horses through it, the defendants objected and excepted. Plaintiff's evidence tended to show that the railroad land was fenced upon each side of its track, and that this fence was not down at any point, and no claim was made that the horses got upon the track save through the gate. No testimony was offered tending to show that the gate was out of repair, nor that the defendants were in any way responsible for the gate being open, nor that they had knowledge that it was open. At the conclusion of plaintiff's testimony, defendants moved to arrest the

case from the jury, which motion was overruled. A verdict for plaintiff followed, and, a motion for new trial being overruled, judgment was entered on the verdict, which was affirmed by the circuit court. Grounds of error alleged are the admitting of incompetent evidence, the overruling of the motion in arrest, and the overruling of the motion for a new trial.

Having in mind that one of the essential rules of pleading is that the facts constituting the cause of action must be distinctly stated in the petition, in order that they may be understood by the party who is to answer them, it is plain that this rule is not satisfied in the present case by the allegation charging a failure to maintain a fence sufficient to turn stock, unless it can be shown that, within the meaning of our statute, a gate is a part of a fence in such sense that there is placed upon the company the duty of care and watchfulness with respect to it equivalent to its duty in that regard concerning the maintenance of a fence. The affirmative of this, we think, cannot be maintained. Our statute imposes upon railroad companies the duty of fencing their lines, but it also recognizes the right of landowners whose premises adjoin both sides of a railroad to have a crossing for their accommodation, where they cannot be accommodated by a public crossing, and makes provision for enforcing this right. In the nature of things, such a crossing cannot be of use unless some method of getting through the fence is provided, such as bars or a gate. When such bars or gate are constructed, the duty of keeping the same closed, save when in use, primarily devolves upon the landowner, and not upon the company, and the mere fact that a gate is found open does not impute negligence to the company. *Railroad Co. v. McKee*, 43 Ill. 119; *Railroad Co. v. Magee*, 60 Ill. 529. These considerations make it clear, we think, that a gate is not a part of a fence in such sense as that an allegation of a failure to maintain a fence is the equivalent of an averment of negligence in carelessly allowing a gate to remain open; that is, a fence is not out of repair, nor can it be so presumed, merely because a gate is carelessly left open. *Railroad Co. v. McKee*, and *Railroad Co. v. Magee*, supra. Issue was taken upon the condition of the fence, and none respecting the gate. Hence, the rule which requires testimony to be confined to matters in issue was violated by admission of testimony tending to show that the gate was open, and that the horses got upon the track by that means. It was, therefore, error to overrule the defendants' objection to that testimony, as well as error to overrule the motion for new trial, and, clearly, prejudicial error. This conclusion would require a reversal of the judgment. But the court also overruled the motion of the defendants to arrest the testimony from the jury, interposed at the conclusion of the plaintiff's case. The gravamen of the action

was, as we have found, neglect in not keeping the fence in repair; and, the testimony tending to show that the gate was carelessly left open not tending in any way to sustain this charge, and there being no testimony of any kind tending to support it, but, in fact, an admission by plaintiff on the stand that the fence itself was in repair, the plaintiff's case wholly failed for want of evidence, and the motion should have been sustained. For these errors, the judgment below will be reversed, and judgment entered here for plaintiff in error. Reversed.

(59 Ohio St. 496)

THOMPSON et al. v. NEMEYER, Mayor, et al.

(Supreme Court of Ohio. Jan. 24, 1899.)

CITY—POWER TO SELL GAS PLANT.

Under subdivision 34, § 1692, Rev. St., a city or village has power to sell its gas plant. (Syllabus by the Court.)

Error to circuit court, Hancock county.

Suit by A. W. Thompson and Thomas Kelly against one Nemeyer, mayor of the city of Findlay, and others. From a judgment of the circuit court sustaining a judgment dismissing the petition, plaintiffs bring error. Affirmed.

In the year 1886, the city of Findlay, by proper action of its council, determined to establish and erect a natural gas plant, for the purpose of supplying the city, and the citizens thereof, with natural gas, for public and private use and consumption; and such a gas plant was properly established, and a board of gas trustees appointed, and afterwards elected, as authorized by law; and wells for natural gas were drilled, pipes laid, and natural gas furnished and supplied to the city for public lighting, and to the citizens for public and private use and consumption. And this gas plant was continued and operated, with considerable profit at times, until the latter part of the year 1898, when the city council, with the approval of the board of improvements and board of gas trustees, entered into a contract to sell the gas plant, together with a franchise to use the streets, alleys, and public grounds of the city by the purchaser, for the purpose of continuing and carrying on the business of supplying natural gas to the city and its citizens, the same as had been previously done by the city itself. Thereupon A. W. Thompson and Thomas Kelly, citizens and taxpayers, requested the city solicitor to apply to the proper court for an injunction to restrain the city from so selling and disposing of its gas plant. The city solicitor refused to commence such action, and thereupon Mr. Thompson and Mr. Kelly, on behalf of the city of Findlay, commenced this action against the mayor and the city council, naming them individually, to restrain the execution of said contract. The defendants

demurred to the petition, and the court of common pleas sustained the demurrer and dismissed the petition. The cause was appealed to the circuit court, and that court also sustained the demurrer and dismissed the petition. Thereupon a petition in error was filed in this court, seeking to reverse the judgments of the courts below.

George H. Phelps, for plaintiffs in error. Marion G. Foster, City Sol., and Ross & Kinder, for defendants in error.

PER CURIAM. By subdivision 34, § 1692, Rev. St., cities and villages are granted the power "to acquire by purchase or otherwise and hold real estate, or any interest therein, and other property for the use of the corporation, and to sell or lease the same." The city having acquired the property known as the "Gas Plant," and held the same for over 12 years, for some reason satisfactory to the officers of the city, concluded to sell and dispose of the same for a price agreed upon between the contracting parties. This was not in the nature of a speculation, but was disposing of property which the city did not desire to longer hold or use, and the statute just quoted clearly gives the city the power to make such sale whenever, in the judgment of the officers of the city, it becomes for the best interests of such city. The petition does not claim that there was any fraud or improper motive in the proceedings to sell the gas plant, but everything was in good faith, and, in the judgment of the officers of the city, for the best interests of the municipality. It is therefore clear that the city has the right and power to make such sale, and that the judgments of the courts below in sustaining the demurrer and dismissing the petition were right. Judgment affirmed.

(59 Ohio St. 446)

KERR v. CITY OF BELLEFONTAINE et al.

(Supreme Court of Ohio. Jan. 17, 1899.)

MUNICIPAL CORPORATIONS—PURCHASE OR ERECTION OF GAS WORKS—POWERS AND DUTIES OF TRUSTEES OF GAS WORKS—FUNDS ACCRUED FROM OPERATION OF SUCH WORKS—PLEADINGS.

1. An averment in a petition that an account for articles sold, which are the subject of the action, was presented to the defendants, and by them admitted to be correct, should, on motion, be stricken from the petition, in obedience to the rule that evidence should not be pleaded.

2. The provisions of section 2486 et seq., Rev. St., relating to the erection or purchase and management of gas works by municipalities, do not vest in the trustees of such works authority to charge the municipality with a general liability on account of machinery or appliances purchased by them for such works.

3. By the provisions of section 2489, Rev. St., money derived from the operation of such works under the management of trustees constitutes a distinct fund, which they have authority to control independently of the council.

4. A petition alleging a sale and delivery by plaintiff to such trustees of machinery and appliances for the use of such works, and the non-

payment of the purchase price therefor, though not alleging facts sufficient to entitle him to recover a judgment at law against the municipality, does allege a cause of action for the equitable appropriation of so much of the funds which have accrued or may accrue from the operation of the works as may be necessary to satisfy his just demand.

(Syllabus by the Court.)

Error to circuit court, Logan county.

Action by one Kerr against the city of Bellefontaine and others. Judgment for defendants was affirmed by the circuit court, and plaintiff brings error. Reversed.

The plaintiff's action in the common pleas court was against the city of Bellefontaine and the trustees of its gas works. His petition is as follows:

"(1) On and for more than ten years next prior to the 12th day of June, 1892, the defendant the village of Bellefontaine, which since the commencement of this suit has been advanced to the grade of a city, and is now the city of Bellefontaine, was, and it still is, the owner of gas works erected by said the village of Bellefontaine under the provisions of section 2486 of the Revised Statutes of Ohio, which gas works have during all said time, and down to the present date, been managed, conducted, and controlled by a board of trustees, as provided in sections 2487-2489 of the Revised Statutes of Ohio; and at the date of the commencement of this suit Sidney Nichols, Joseph F. Hunter, George W. Bartholomew, William Lane, and John Gauss were the duly elected and qualified and acting trustees of said gas works.

"(2) On or about the — day of June, 1892, the said gas trustees of Bellefontaine, for the defendant the village of Bellefontaine, purchased from one Joseph Askins, who then delivered the same, certain purifying boxes for use in the gas works of Bellefontaine, which were of the value of \$1.040, one-half of which value and price, to wit, \$520, and one-half of the freight charge thereon, to wit, \$7.80, to wit, a total sum of \$527.80, the said defendant the village of Bellefontaine, by its said gas trustees, then and there agreed to pay to said Askins.

"(3) On or about the 2d day of June, 1892, the said defendant the village of Bellefontaine, through its said gas trustees, by contract in writing, purchased from said Joseph Askins one condenser, valve, 10-inch pipe, and connections, which the said Askins then delivered, and, at the request of said gas trustees, put in place in the gas works of said village, for which the said defendant the village of Bellefontaine, by and through its said trustees of gas works, then and there agreed to pay said Askins the sum of \$1,507.

"(4) On said 2d day of June, 1892, the defendant the village of Bellefontaine, through and by its agents, the said trustees of gas works, purchased from said Joseph Askins, and employed him to place in position in said gas works of Bellefontaine, the following goods and material, which, with the skill and

labor of placing the same in position, were of the following values, to wit: 4 10-inch valves, at \$35.00 each, \$140; 3 10-inch tees, at \$16.80, \$50.40; 6 10-inch ells, at \$10.00, \$60; 15 10-inch screw flanges, at \$2.72, \$40.80; 204 $\frac{5}{8}$ bolts, at \$.05 each, \$10.20; 18 10-inch threads, at \$1.50, \$27 (erroneously carried in to account hereinafter mentioned as \$37); 6 10-inch cuts, at \$1.25, \$7.50. The said Joseph Askins then and there delivered all said goods and material, and placed the same, and the said defendant the village of Bellefontaine, by its said trustees of gas works, then and there agreed to pay him said sum of \$345.90, the aggregate thereof, for the same.

"(5) On or about the 2d day of June, 1892, the said defendant the village of Bellefontaine, by its said trustees of gas works, employed the said Joseph Askins to, and he then and there did, furnish, and set, and adjust a new meter, which was of the value of \$25, which the said defendant the village of Bellefontaine, by its said trustees of gas works, then and there promised and agreed to pay to said Askins.

"(6) On or about the 2d day of June, 1892, the said defendant the village of Bellefontaine, by its said trustees of gas works, employed the said Joseph Askins to furnish the means and materials, including a 10-inch outlet, and to furnish the skill and labor, in connecting the governor with the mains of said gas works, all of which the said Askins then and there did, and the same was of the value of \$50, and the said defendant the village of Bellefontaine, by its said trustees of gas works, then and there agreed to pay the same to said Askins.

"(7) On the 5th day of July, 1892, the defendant the village of Bellefontaine, by its said trustees of gas works, purchased from said Joseph Askins, who then delivered to said defendant the village of Bellefontaine, for use in said gas works, the following materials, which were of the values following, to wit: 21 $\frac{5}{12}$ ft. 10-inch pipe, at \$4.75, less 65 per cent., \$35.61; and 64 $\frac{1}{2}$ ft. 10-inch pipe, at \$4.75, less 65 per cent., \$106.96; and the said defendant the village of Bellefontaine, by its said trustees of gas works, then and there promised and agreed to pay said sums for the same to the said Askins.

"(8) On or about the 23d day of August, 1892, said Joseph Askins rendered an account to said defendant the village of Bellefontaine, by delivering the same to said trustees of the gas works, of all of the foregoing items of materials and labor, which were then and there computed to amount to \$2,598.27, but by correction of the extending thereof is in fact \$2,588.27. Copy of said account is hereto attached, marked 'Exhibit A.'

"(9) On the 23d day of August, 1892, the said account above mentioned, copy of which is hereto attached, marked 'Exhibit A,' was duly rendered to the defendant the village of Bellefontaine, and to said trustees of gas works, and the same was then and there

settled and agreed to, and the same then and there became an account stated between said Joseph Askins and the said defendant the village of Bellefontaine, now said city of Bellefontaine; and it was then and there settled, agreed, and determined that the sum of \$2,598.27 was then due to said Askins from the defendant, the village of Bellefontaine, and the same then and there and thereby became an account stated.

"(10) Plaintiff, as a further cause of action, says that about the 1st of November, 1892, by contract in writing, the defendant the village of Bellefontaine, through its said trustees of gas works, employed the said Joseph Askins to furnish for and place in said gas works of Bellefontaine one gas generator for the sum and price of \$500, which was then and there done and performed by said Joseph Askins.

"(11) Plaintiff says that all said materials, skill, and labor were so furnished and performed by said Joseph Askins to and for said defendant the village of Bellefontaine under contract with said trustees of gas works, for the use and maintenance of said gas works, and the same have all been had and used by said defendant the village of Bellefontaine ever since said dates, respectively, and no part of said aggregate sum of \$3,088.27 has ever been paid except as hereinafter stated.

"(13) Before the commencement of this suit, to wit, on the 5th day of August, 1893, said Joseph Askins, for value received, sold and assigned to plaintiff, in writing, all his said claims hereinabove set out against the defendant the village of Bellefontaine, now said city of Bellefontaine, and the same is now the property of said plaintiff, except that the same was assigned subject to the payment by plaintiff out of the same to the Buchanan Bridge Company of \$60, to George W. Emerson of \$20, to Howenstine & Huston of \$100, and such other and further sum to Howenstine & Huston as would be their reasonable charges and fees for collecting said claim.

"(14) Upon said indebtedness the said defendant the village of Bellefontaine paid to said Joseph Askins upon the items for purifying boxes set out in the second paragraph of this pleading the sum of \$450, and further paid upon said whole claim: July 1, 1892, or July 5, \$200; July 22, or July 5, \$500; July 22, 1892, \$24.75; Aug. 26, 1892, to Buchanan Bridge Co., \$25; Oct. 26, 1892, to Hackenger, on order, \$4; Oct. 26, 1892, to Earhart, on order, \$6; Dec. 1, 1892, to Buchanan Bridge Co., \$35; May 8, 1894, to B. M. Allen, \$100; June 5, 1894, to Hamilton, \$86.93,—total, \$1,431.68. Said items of \$25 and \$35 paid to the Buchanan Bridge Co., aggregating \$60, constitute the amount of \$60 reserved in said assignment for the benefit of said the Buchanan Bridge Co. The gross amount of said claim of plaintiff against the defendant the village of Belle-

fontaine, now the city of Bellefontaine, is \$3,088.27, upon which has been paid said aggregate sum of \$1,431.68, and no other or further payment has been made thereon, and there is due and remaining unpaid to this plaintiff, which he claims from the defendant the village of Bellefontaine, now the city of Bellefontaine, the sum of \$1,656.59, which plaintiff claims, with interest on \$1,156.59 thereof from August 23, 1892, and on \$500 thereof from November 1, 1892, and for the same he asks judgment against said defendant the village of Bellefontaine, now said city of Bellefontaine."

A motion by the city to strike from the petition the averment numbered 9 was sustained. Thereafter a general demurrer was interposed by the city, and sustained by the court, and the petition was dismissed. To the rulings on the motion and the demurrer, plaintiff excepted. The circuit court affirmed the judgment of the court of common pleas. The reversal of both judgments is sought here for alleged errors in sustaining the motion and the demurrer.

Howenstine, Huston & Miller, for plaintiff in error. West & West and William W. Riddle, for defendants in error.

SHAUK, J. (after stating the facts). The provisions of the Code afford no reason for the numbering of the several averments of the petition which relate to the same cause of action. Whether there are different causes of action which should have been separately stated and numbered, we need not consider, no motion to require it having been made. The common pleas court did not err in sustaining the motion to strike from the petition the averment numbered 9. The admission of the defendants that the account presented to them of the articles sold and delivered was correct did not foreclose inquiry as to its correctness. The remaining averments of the petition fully tender the issues upon which the plaintiff's right to recover for the several items of his claim would be determined. The admission alleged was, at most, but part of the evidence by which the plaintiff would maintain the issues on his part, and the averment is within the rule that evidence should not be pleaded.

The demurrer calls in question the authority of the trustees of the gas works to make valid contracts for machinery, appliances, and supplies deemed necessary to the operation of the work. Their authority, as well as that of the municipal council, over the subject-matter, is found in chapter 8, div. 8, and title 12, of the Revised Statutes. Section 2436 provides that the council of any city or village shall have power to erect gas works, or to purchase such works already erected. Section 2487 provides that, when such works have been purchased, erected, or authorized, the city council "shall create and appoint a board of trustees, * * * which shall con-

struct said works according to plans and specifications to be furnished by the council and shall manage such works when they shall have been constructed or purchased." Section 2489, which defines the powers and duties of the trustees with more particularity, provides that "the board may construct gas works, extend gas pipes, manufacture and sell gas and coke, collect gas bills and other moneys, due for gas, coke or other material sold by it; * * * and to carry into effect the provisions of this section said trustees may also purchase material, employ laborers, appoint officers, purchase or lease the necessary real estate and erect buildings thereon; * * * and all money collected for gas works purposes shall be deposited weekly, by the collectors thereof, with the treasurer of the corporation; * * * and all money so deposited shall be kept as a separate and distinct fund, subject to the order of the board; and all moneys levied or assessed by the corporation for the purpose of paying for public lighting shall be by the council paid and turned over to such trustees and be by them disbursed the same as if it had been received from private individuals. * * *" These sections are found in the same chapter of the Revised Statutes, and they relate to the same subject-matter. They should be construed together, so that, if it is possible, apparently repugnant provisions may be brought into harmony. Reading the sections with that object in view, it appears to be quite clear that the authority to contract which was conferred upon the trustees by section 2489 is not in conflict with, but in subordination to, the authority for that purpose which section 2486 confers upon the council. The trustees are not vested with authority to levy taxes or assessments upon the property of the citizens of the municipality, nor to accomplish that purpose indirectly by the creation of general obligations against it. Their authority to erect works is limited to cases where it may be accomplished by the use of funds raised by the council, and authorized to be devoted to that purpose, as contemplated by section 2487, or those funds which are realized from the operation of gas works under section 2489. This limitation upon the authority of the trustees is clearly indicated by the provision that "the council * * * shall have power, whenever it may be deemed expedient and for the public good, to erect gas works at the expense of the corporation," etc. But, while the trustees are denied the power to erect the gas works "at the expense of the corporation," the terms of section 2489 vest them with the absolute control of the moneys arising from the operation of the works, without any revisory authority in the council. It is for this purpose that moneys so arising are required to be kept as a distinct fund. There is no limitation or restriction to the provision that said fund "shall be subject to the control of the board," nor is there any other provision of the statute inconsistent

with the general terms in which the control of the fund so arising from the operation of the gas works is vested in the trustees. It follows that, while the trustees are without authority to enter into a contract effectual to create a general liability of the municipality, they have power to contract with reference to that particular fund for the purchase of such machinery, material, and supplies as may be necessary to the operation of the works.

Nor are the trustees, in the exercise of this authority, restricted by the provisions of section 2702 of the Revised Statutes that "no contract, agreement or other obligation, involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the appropriation or expenditure of money be passed by the city council or by any board or officer of a municipal corporation, unless the auditor of the corporation, and if there is no auditor, the clerk thereof, shall first certify that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose. * * *" Not only was this requirement of the statute designed to place a restriction upon the increase of municipal indebtedness, but its terms are inapplicable to a contract of this character. The requirement is that the certificate must show that the money required for the contract is in the treasury to the credit of the fund, and not appropriated for any other purpose. The fund from which the plaintiff is entitled to satisfaction of his demand is not raised by taxation. It is derived from the operation of the gas works, and made subject to the order of the board, whose authority is so limited that they can make valid contracts only for appliances and supplies for the gas works to which the fund is devoted. The fund can be appropriated to no other purpose, and the trustees can contract for no other purpose. It follows that, although the petition does not allege facts which show the general legal liability of the city, it does state a cause of action in equity for the appropriation of so much of the fund which has accrued or may accrue from the operation of the gas works as may be necessary to satisfy the plaintiff's demand. Judgment of the common pleas and circuit courts reversed.

(59 Ohio St. 491)

STATE v. POHLMAYER.

(Supreme Court of Ohio. Jan. 24, 1899.)

EMBEZZLEMENT—INDICTMENT—AGENT OF FOREIGN CORPORATION—DEFENSES.

On the trial of an indictment for the embezzlement of moneys coming into the possession of the defendant as the agent of a foreign corporation, it is not a defense that the corporation had failed to file with the secretary of

state the statement required by sections 148c and 148d of the Revised Statutes.

(Syllabus by the Court.)

Exceptions from court of common pleas, Hamilton county.

At the January term, 1898, one J. Pohlmeier was placed upon trial on an indictment charging that, as an employé, to wit, the agent, of the W. L. Douglas Shoe Company, he, the said Pohlmeier, did unlawfully and fraudulently embezzle and convert to his own use, without the assent of his said employer, the sum of \$287, which had come into his possession and care by virtue of his said employment. The state offered evidence tending to show that Pohlmeier was employed, on August 11, 1896, in Hamilton county, as the agent for the W. L. Douglas Shoe Company, a corporation organized under the laws of Massachusetts, doing business as a corporation, with its principal office at Brookton, Mass., and further tending to show that, about the time alleged in the indictment, the sum of money charged, being the property of said company, came into the possession of Pohlmeier as such agent, and that he embezzled and converted the same to his own use, without the consent of his employer. Thereupon the defendant called as a witness Charles Kinney, the secretary of state of Ohio, who testified that, as such officer, he is the custodian of the records, papers, and certificates of foreign corporations filed in the state of Ohio, is personally familiar with such records, papers, and certificates; that he has carefully examined them, and finds, from such examination, that the W. L. Douglas Shoe Company has not filed with the secretary of state the certificate required under section 148c and section 3269-5, and that said company has filed no paper or papers, certificate, or statement whatever, with the secretary of state, since the passage of the act. To this testimony the prosecuting attorney objected. His objection was overruled, and to that ruling he took an exception. The defendant thereupon rested his case. The court thereupon instructed the jury that, in view of this evidence, the accused was not, and could not be, the agent of the W. L. Douglas Shoe Company, and there could be no conviction under the indictment, and further instructed the jury to return a verdict for the defendant, to which instruction the prosecuting attorney excepted. Exceptions sustained.

John C. Schwartz, Pros. Atty., and Thomas H. Darby, Asst. Pros. Atty., for the State. H. M. Rullison, Jr., for defendant.

PER CURIAM. It is required by sections 148c and 148d of the Revised Statutes (the latter section being referred to in the record as "section 3269-5") that every foreign corporation incorporated for the purpose of profit, before it proceeds to do any business in this state, shall make and file with the secretary of state a statement, in such form as the sec-

retary of state may prescribe, showing the number of shares of authorized capital stock of the company, the par value of each share, and other facts affecting its organization and solvency, and the proportion of its stock which is represented by property owned and used in Ohio. The sections clearly disclose the purpose of the general assembly that foreign corporations shall be put upon the same footing with domestic corporations with respect to fiscal burdens, to the business which they may carry on in the state, and to service of judicial process within the state. They do not disclose a purpose on the part of the general assembly to make booty of the property of a corporation which does not comply with the provisions of the act. Under the statute defining embezzlement (section 6842) the offense consists in converting to one's own use "anything of value which comes into his possession by virtue of his employment as * * * agent, * * * servant or employé." The statutory definition of the offense regards the actual relation of the agent, servant, or employé, and not the legality of the mode in which it was created, nor the extent of the authority conferred. And the rule that one who receives money, or any other thing of value, in the assumed exercise of authority as agent for another, is estopped thereafter to deny such authority, applies in criminal prosecutions, as well as in civil actions. 2 Bish. New Cr. Law, § 364; State v. Spaulding, 24 Kan. 1; State v. Tumey, 81 Ind. 559; State v. O'Brien, 94 Tenn. 79, 28 S. W. 311; People v. Hawkins, 106 Mich. 479, 64 N. W. 736. Exceptions sustained.

STOPP v. WILT et al. (177 Ill. 629)

(Supreme Court of Illinois. Feb. 17, 1899.)

CONDEMNATION—DAMAGES—RIGHT OF MORTGAGOR AND MORTGAGEE—RELEASE OF MORTGAGE.

1. A mortgagee of premises part of which are condemned, so as to require reconstruction of the stable thereon and an expenditure of more than the amount of damages awarded to restore the property to as valuable condition as before, cannot complain that the court directs payment of the damages to the mortgagor, where he is required to restore the premises to their former value.

2. No release of mortgage on land condemned is necessary where the mortgagee is a party to the condemnation proceedings.

Appeal from appellate court, First district.

Bill by the Northwestern Elevated Railroad Company against Charles T. Wilt, Jr., and Edward J. Stopp, to determine the respective rights of the defendants to a fund. From a judgment of the appellate court affirming a judgment for Wilt (76 Ill. App. 531), Stopp appeals. Affirmed.

Edw. U. Fliemann, for appellant. Judson F. Going, for appellee Charles T. Wilt, Jr. L. W. Perce, for appellee Northwestern E. R. Co.

WILKIN, J. This is a bill in equity, begun in the superior court of Cook county by the Northwestern Elevated Railroad Company, against Edward J. Stopp and Charles T. Wilt, Jr., in the nature of a bill of interpleader, to determine the respective rights of the defendants in and to the sum of \$2,000, to be paid by complainant in response to a judgment rendered by the superior court of Cook county in an action by complainant to condemn a part of lots 20 and 23 in block 3 of Johnson, Roberts & Storr's addition to Chicago. The defendants appeared, and waived formal pleadings, and submitted the case to the court on a stipulation as to the facts.

The facts involved in the contention of the respective parties may be briefly stated, as follows: On December 24, 1895, the Northwestern Elevated Railroad Company filed a petition against appellant, Edward J. Stopp, in the superior court of Cook county, to condemn a part of the above-described property, together with the improvements thereon. This property stood at the time in the name of, and was owned by, appellant. On March 30, 1896, he entered into a written agreement for the sale of this entire property to Charles T. Wilt, Jr., for a consideration of \$12,000, providing for a certain cash payment, and the balance of \$8,000 to be secured by a mortgage on the property by Wilt to Stopp. On April 8, 1896, appellant, Edward J. Stopp, and his wife, in pursuance of the contract of March 30, 1896, executed a conveyance of the property to Wilt, who, in turn, made certain payments of the purchase price, and executed eight notes, of \$1,000 each, bearing interest at 6 per cent. per annum, payable 10 years after date, all secured by lots 20 and 23. At the same time, and as a part of the same transaction, appellant, Stopp, executed an instrument, as follows: "Whereas, said parties did on March 30, 1896, enter into a contract for the purchase, sale, and exchange of certain property; and whereas, said contract has this day been consummated by the delivery of deeds thereunder, and the payment of purchase money, and the execution of the note and mortgages therein referred to; and whereas, also, the Northwestern Elevated Railroad Company brought a condemnation suit, to which said parties were parties defendant, to condemn a portion of said lots 20 and 23, etc., being the same property described in said contract of March 30, 1896; and whereas, also, it was a part of the understanding and agreement between the parties that all the rights, causes of action, and remedies which said Edward J. Stopp might have or be entitled to against said railroad company in the above-entitled suit, or elsewhere or otherwise, should, as a part of said sale and transfer, pass to the said Charles T. Wilt, Jr.: Now, in consideration of the premises, said Edward J. Stopp does hereby set over, assign, and transfer to the said Charles T. Wilt, Jr., all his right of action,

causes of action, claims, and demands of every sort whatsoever which he may now have against said Northwestern Elevated Railroad Company, or which he had on the 24th day of December, 1895, by reason of the condemnation suit aforesaid, or which he may be hereinafter entitled to, being as compensation for the taking of a portion of said premises, by condemnation or otherwise, for the construction of said road, and also for damages to the remainder of said premises not taken, by reason of said construction." On September 29, 1896, a judgment was rendered in favor of Stopp and Wilt, under a stipulation that their interests should be tried together as one, for \$725.90, as compensation for the premises taken, together with the improvements thereon, and \$1,274.10, for damages to the part not taken, and the improvements thereon. The court found that the part of the lots condemned was a strip off the rear end, and the stipulation showed it was occupied by a stable building used by Wilt in his business; that the taking of this strip would necessitate the destruction of the stable, and the reconstruction of the premises, to afford to Wilt the same facilities for room as he had before; and that to restore this property to as valuable a condition as before would require the expenditure of more than the amount obtained from the condemnation, after deducting expenses of collecting that judgment. On the hearing of the cause, Wilt tendered a bond for \$2,500 to secure the use of the condemnation money in restoring the premises to as valuable condition as before the condemnation. This bond was accepted by the court, and ordered filed. The chancellor then rendered a decree in favor of appellee Wilt, directing the fund in dispute to be paid to him, and also directing appellant to release the Northwestern Elevated Railroad Company from the mortgage on the property condemned. The appellate court affirmed the decision of the lower court awarding the fund to Wilt, holding that after the transaction by which Stopp deeded the property to Wilt, and took a mortgage back in part payment of the purchase price, Stopp relinquished all interest in the condemnation proceeding to Wilt. The appellate court further held that the Northwestern Elevated Railroad Company was not entitled to a release from the mortgage by Wilt to Stopp, because the effect of the judgment in the condemnation proceeding was to remove the lien.

It is earnestly insisted on behalf of appellant that the contract between Stopp and Wilt of March 30, 1896, did not relinquish the right the former had to the condemnation fund, the argument being that, while he might have waived his right to have this fund reserved for his security, there is nothing in the agreement to this effect; that the execution of the relinquishment was founded on the same consideration as the agreement to convey, and was a part of the considera-

tion of that agreement, and was made simply to avoid any question that might arise as to the right of Wilt to proceed with the condemnation suit. It is undoubtedly true that, as a general rule, the fund would stand in place of the mortgage, and the mortgagee would be entitled to have it applied on the mortgage debt (*Railway Co. v. Brown*, 136 Ill. 322, 28 N. E. 501, and cases cited); and there seems to be force in the contention of counsel that this contract was not intended to relinquish that right. The language is, however, susceptible of the construction placed upon it by the appellate court. If, however, that court was correct in the view that the chancellor properly ordered the fund to be expended by Wilt, in rebuilding the barn, for the benefit of the property, as we think it was, the construction of the contract insisted upon becomes immaterial. Certainly, appellant could not claim the money to be applied on his mortgage debt, and at the same time Wilt be required to restore the premises to their former value. If this is done by Wilt, as the bond tendered and accepted provides, Stopp will have suffered no diminution of the security given him by his mortgage; and we see no reason why in this action the equities between the parties may not be adjusted in this manner. We agree with the appellate court that it was unnecessary, under the circumstances of the case, for the mortgagee to execute a release of his mortgage to the railroad company to perfect the latter's title. The condemnation proceedings were sufficient. The judgment of the appellate court will be affirmed. Judgment affirmed.

(178 Ill. 254)

HAMMOND et al. v. PEOPLE et al.

(Supreme Court of Illinois. Feb. 22, 1899.)

DRAINAGE—ASSESSMENT—ENFORCEMENT—COSTS.

1. The county court has no authority to make an additional assessment for drainage repairs in excess of the amount found necessary by a jury impaneled for that purpose, as provided by statute.

2. Costs follow the decree in proceeding in equity to enforce lien for drainage assessment.

Error to circuit court, Hancock county; Charles J. Scofield, Judge.

Bill by the people against William P. Hammond and others to foreclose a lien for drainage assessments, etc. There was a decree of foreclosure and a sale. Said defendants bring error against the people and Oliver J. Bailey, purchaser at the sale. Reversed.

Manier, Miller & Williams, Truman Plantz, and A. W. O'Harra, for plaintiffs in error. William N. Grover, for defendants in error.

PHILLIPS, J. This was a bill in chancery brought in the name of the people of the state of Illinois, as complainant, for the use of the people, the county of Hancock, the town of Rockey Run, school district No. 5 in said town, and the Hunt drainage district,

against plaintiffs in error, impleaded with Virginia W. Hammond and others, to foreclose a lien for taxes, special assessments, penalties, interest, and costs against the N. W. $\frac{1}{4}$ of section 8, township 3 N., range 9 W. of the fourth principal meridian, under section 253 of the revenue act; it being claimed that this tract had been legally forfeited for taxes for two or more years. Upon answers filed, the cause was referred to a master, and stipulation filed with him showing certain admitted facts regarding forfeiture of the land for taxes, interest, special assessments, and costs, and that such forfeited taxes were carried forward to the current tax for the next year, and was so done for several successive years, being more than two. The master found that the judgment rendered by the county court for the year 1893, amounting to the total sum of \$641.59, for taxes, interest, special assessments, and costs, including the special assessment of the Hunt drainage district, was legally chargeable upon said tract of land, and that the complainant was entitled to foreclose such lien in equity, as prayed for in the bill. Exceptions were filed to this report, which were by the master overruled. On hearing, the same exceptions were overruled, whereupon the court entered a decree approving the master's report, and ordering foreclosure, on June 25, 1894. Defendants prayed an appeal to this court, which was granted, conditioned upon the filing of bond within 30 days. That appeal was never perfected. On the 19th day of September, 1894, the county treasurer filed in the circuit clerk's office his report, showing sale made, on September 8, 1894, of the land in question, under the decree above mentioned, to Oliver J. Bailey, for \$707.64, which was paid, and the money distributed in accordance with the terms of the decree. The matter thus continued until September, 1896, when, on the day redemption would have expired under the statute, this writ of error was sued out against the people of the state of Illinois, and Oliver J. Bailey, the purchaser under the decree of foreclosure.

The first contention raised by plaintiffs in error is that a proceeding in equity will not lie in the name of the people for the foreclosure, under section 253 of the revenue act (*Hurd's Rev. St. 1897*, p. 1358), for taxes or special assessments, where there have been two or more forfeitures of the premises for nonpayment and want of bidders at the sale. It is urged this does not apply to special assessments for drainage purposes, and that a court of equity has no jurisdiction to entertain a bill brought for the purpose of foreclosing such a lien. We had occasion to pass directly upon this question, adversely to this contention, in the case of *Hammond v. People*, 169 Ill. 545, 48 N. E. 573, in which many of the same parties to the present suit were interested. We held in that case a bill of this character would lie under this section of the statutes, and that it was a proper remedy.

Without further expression of our views on that question, we hold a bill in chancery to foreclose drainage assessments which have been forfeited to the people for two years or more is a proper remedy to collect such assessments and to subject the land to their payment.

The second question raised by plaintiffs in error is that there was no valid forfeiture of the land against which the lien is claimed, and that, therefore, equity has no jurisdiction. This question also was fully considered by us in the case of *Hammond v. People*, supra. We held in that case that the question of whether there was a valid forfeiture could not be raised in a proceeding of this character.

Objection is urged against the decree of the circuit court in this case for the reason, as stated, that the amount found due the complainant in the original bill included the sum of \$28.30, repair assessment allowed to the drainage district by the county court in excess of the amount found by a jury impaneled for that purpose, and also \$6.16 penalties computed upon the forfeiture. In the case of *Hammond v. Carter*, 161 Ill. 621, 44 N. E. 274, which was an action for ejectment by a party holding a tax deed acquired upon a sale of lands for special assessments similar in character to these, we held the statute did not authorize the county court to make any order for any additional assessments for reparation purposes in excess of the amount found necessary by a jury impaneled for that purpose, as provided by statute. It is apparent, therefore, the above amount included in the decree of foreclosure in this case was excessive and erroneous to that extent. This is conceded by counsel for defendants in error in this cause, as is also the fact that the decree was excessive to the extent of \$6.16, excessive penalties.

It is also urged it was error for the chancellor to tax the costs of foreclosure against the land sought to be subjected to the lien of these assessments. These costs should follow the decree in the same manner as in other suits of similar character to enforce liens. The owner of the land refused or neglected to pay these assessments. This proceeding in equity, authorized by the statute, was necessary to collect them. Such being true, equity would require that he or the land be charged with payment of such legal costs. The decree of the circuit court, in including the sum of \$28.30, annual repair tax, and \$6.16, excessive penalties, was error. The decree of the circuit court of Hancock county is therefore reversed, and the cause is remanded.

(178 Ill. 276)

MUELLER et al. v. CONRAD et al.

(Supreme Court of Illinois. Feb. 22, 1899.)

EXECUTOR'S SALE—REQUIREMENT OF DEPOSIT—HOMESTEAD RIGHT—PRESUMPTION—WAIVER.

1. Where an executor, in compliance with a decree, sells realty belonging to the estate for

cash, to pay a widow's award, he may demand a deposit as a guaranty that the bidder will consummate the purchase if the court approves the sale.

2. There can be no sale of the property of an estate subject to the homestead right, unless the right is waived or assigned as provided by law.

3. It will not be presumed that property held as a homestead exceeds in value the \$1,000 exempt.

4. A homestead exemption is not the mere right of occupancy, but is the lot of ground occupied as a residence.

5. A petition by an executor prayed for the sale of an interest in a certain lot of decedent, subject to the homestead of the widow and the minor child. The widow answered, neither admitting nor denying the allegations of the petition, but praying for strict proof. Held, that the consent embraced in the entry of the appearance was not a consent by the widow to a sale of the homestead, but sought to sever the homestead from the fee, which was unauthorized.

Error to superior court, Cook county; John Barton Payne, Judge.

Bill by Sophia M. Mueller and others against Louis Conrad and others to set aside an executor's deed. There was a decree dismissing the original bill for want of equity, and allowing relief prayed by a cross bill, and complainants bring error. Reversed.

William H. Tatge, for plaintiffs in error. Scanlan & Masters and C. C. Bowersock, for defendants in error.

PHILLIPS, J. Carl W. F. Mueller was the owner of lot 18 in Phillips & Fay's addition to the city of Chicago, which was occupied by him as a homestead, and also owned certain other real estate of large rental value. He died testate, and the only indebtedness of his estate was the widow's award, amounting to \$1,260, of which \$512 was paid, and the balance, \$748, was not paid. The executor of the testator's will was Louis Conrad, one of the appellees herein; and, because of the unpaid residue of the widow's award, he filed a petition on June 7, 1894, in the probate court of Cook county, praying for the sale of the undivided one-half interest in said lot 18, subject to the homestead of the widow and of the minor child of the deceased. To that petition the solicitor of the widow and of the guardian of the minor child entered their appearance, and decree of sale was entered. The sale was duly advertised, and the widow appeared, and bid for the said lot the sum of \$600, but, failing to comply with the terms of sale, the court set the same aside, and ordered a resale. The executor amended his petition by striking out the words "an undivided one-half interest." The defendants, the widow and the adult child, entered their appearance, and the guardian of the minor filed an answer. A decree was entered on the amended petition, decreeing the sale of the said lot 18 subject to the homestead of the widow and minor child. A sale was duly advertised, and the property sold for the sum of \$300. The widow and her solicitor were

present at the time of the sale. The executor filed his report of sale, to which the widow, in her own right and as guardian of the minor, filed objections, which were overruled by the court, and the sale was confirmed. No appeal was taken by the defendants or objectors. The amended petition, decree, advertisement, and report of sale all contained the provision that the sale of said lot 18 was subject to the estate of homestead. More than a year thereafter, this bill was filed in the superior court of Cook county to set aside the executor's deed. It alleges the widow was prevented and hindered from bidding at the sale, because the executor announced before the sale that he would not receive any bid unless the same was accompanied by a cash deposit of \$300; that the premises sold were the homestead of the widow and minor child; and that there was other real estate besides the homestead that might have been sold to pay the deficiency found due. The defendants to the bill answered, admitting that Carl W. F. Mueller died leaving a will, which was duly probated, and that at the time of his death he was seised of two pieces of real estate, as described in complainants' bill; that lot 18 was the homestead of the widow; admitted the heirship as alleged, the appointment of the executor, the allowance of the widow's award, the balance due thereon, the filing of the petition for a sale of real estate to pay the widow's award, and the decree of sale subject to the homestead; denied that the real estate sold was of less value than \$1,000, or that any one offered to bid \$600 therefor; denied the refusal to accept a bid unless it was accompanied by a deposit, but admitted that it was announced at the sale that whoever bid on the lot would be required to deposit \$250 or \$300, as the terms of sale were for cash; admitted the sale to John C. Horn, he being the only bidder; admitted there was other property besides the homestead; but averred it was worth \$15,000, and a large sum was realized therefrom in rents; and alleged that the solicitor of the widow and heirs instructed the executor not to sell that piece of real estate, but to sell lot 18; and denied that the deed executed to the purchaser was a cloud on the title. The defendants to the original bill, the executor and purchaser, filed a cross bill, alleging the same facts appearing in the answer; that the executor did, by a clerical omission, fail to state that the sale was subject to the homestead rights of the minor; and that the executor offered to correct that error by the delivery of another deed: To this cross bill a demurrer was filed, which was overruled, and a rule entered on the defendants thereto, the widow and heirs, to answer the same. They failing to answer, their default was entered. A decree was entered dismissing the original bill for want of equity, and allowing the prayer of the cross bill, and directing the executor to issue a new deed upon the pay-

ment of \$300 in addition to the \$300 theretofore paid.

The contention of complainants in the original bill arises on these three propositions: First, that the widow was prevented from bidding on the sale of lot 18, subject to the homestead, because of the declaration of the executor that a deposit of \$250 to \$300 would be required to accompany the bid; second, that the premises were at the time of sale the homestead of Sophia M. Mueller and Anna Mueller, a minor; and, third, that there was other real estate belonging to the testator that might have been sold to pay debts without selling the interest in the land subject to the homestead.

By the terms of the decree, the sale by the executor was to be for cash; and, where such a decree is for debt, the executor has a right to demand that a bidder shall make a deposit as a guaranty that he will consummate the purchase if the court approves the sale; and, where such a demand is made by the administrator or executor, it will constitute no sufficient ground for setting aside a sale. *Allen v. Shepard*, 87 Ill. 314.

The allegation of the bill admitted by the answer is that the decree of sale of the property was made subject to the homestead right of the widow. The decree in this case required the deed theretofore made by the executor should be reformed, and that there should be inserted therein the words "subject to the homestead estate of Sophia M. Mueller and Anna Augusta Wilhelmena Mueller," and that the sale as made was made subject to the homestead estate. The decree further finds that Anna Augusta W. Mueller was over 18 years of age. There is no finding in the decree as to the age of Anna Augusta W. Mueller at the time the decree of sale was entered. There is no finding in the decree, nor in the decree of sale, of the value of the premises occupied as the homestead; and there was no attempt to conform to the requirement of the statute in setting off the homestead in the manner required by law. Where the homestead premises do not exceed in value \$1,000, there would be no valid sale of the premises by an execution or decree for the payment of debts or for other purposes, by which the right of homestead would be defeated. If the value of the premises exceeds \$1,000, no valid sale could be made under execution or decree without complying with the provisions of the statute, where the premises are susceptible of division. *Hartwell v. McDonald*, 69 Ill. 293. And this principle is true under our statute, so that there can be no sale of property subject to the right of homestead unless the latter is waived or assigned in the manner provided by law. *Hartman v. Schultz*, 101 Ill. 437; *Barrows v. Barrows*, 138 Ill. 649, 28 N. E. 983; *Bullen v. Dawson*, 139 Ill. 633, 29 N. E. 1038; *Oettinger v. Specht*, 162 Ill. 179, 44 N. E. 399. There is no evidence showing the value of the premises to be in excess of \$1,000. There can be no presumption that their value

exceeded that amount. Where they do not exceed that amount, they cannot be sold to pay debts by the administrator until after the termination of the exemption in favor of the widow and children; and it is error to decree a sale of such homestead premises subject to the homestead right of estate. *Hartman v. Schultz*, supra; *Oettinger v. Specht*, supra.

It was held with reference to our present homestead exemption act, in *Hartwell v. McDonald*, supra, that "It is not the mere homestead right of occupancy which is exempted from levy and forced sale, but it is the lot of ground occupied as a residence." Cognate questions were involved in *Bursen v. Goodspeed*, 60 Ill. 277, and *Wolf v. Ogden*, 66 Ill. 224; and while the exact question whether there could be a sale of the homestead property by the administrator not entitled to the exemption, in some manner known to the law, was not raised, it seems to have been conceded or assumed that it could not be done. The direct question presented by this record was before this court in *Hartman v. Schultz*, supra, where it was held that the homestead exemption was not the mere right of occupancy, but was the lot of ground occupied as a residence. It was further held there could be no valid sale of the same on execution or decree, for the payment of debts, where not exceeding \$1,000 in value, and could not be sold subject to the homestead right.

Our statute in relation to homesteads declares that no conveyance of the estate of homestead shall be valid unless in writing, duly subscribed, acknowledged, etc. It has been frequently held by this court that, where a conveyance is not executed as therein required, it can have no effect on property subject to the estate, where there has been no abandonment or delivery of possession. *Barrows v. Barrows*, 138 Ill. 649, 28 N. E. 983, and authorities cited. In *Moriarty v. Galt*, 112 Ill. 373, it was held that where the lot of ground did not exceed in value \$1,000, with its improvements, and was occupied as a homestead, the lien of a judgment did not attach to the property, as there was nothing subject to forced sale. Numerous authorities are cited sustaining this principle in that case. In *Bullen v. Dawson*, supra, the rule is stated, and numerous authorities are referred to as sustaining it, that a sale on execution of the homestead of the judgment debtor, without observing the requirements of the statute with reference to setting off the same, is void, and conveys no title. In *Oettinger v. Specht*, supra, it was held: "Where the homestead premises do not exceed \$1,000 in value, they cannot be sold to pay debts by the administrator of a deceased householder until after the termination of the exemption in favor of the widow and children, and it is error to decree a sale of such homestead premises subject to the homestead right or estate."

From these authorities it appears that the homestead of the householder comprises the tract of ground, with its improvements, not

exceeding in value \$1,000, occupied as a homestead; and no valid sale of the same could be had on execution or decree of court for the payment of debts, nor could the tract of ground be sold subject to the right of occupancy by a decree of sale to pay debts, or under execution. A conveyance of the same must be as required by the statute, in writing, signed and duly acknowledged. The evidence shows that the original petition, which prayed for a decree for the sale of an undivided one-half interest in lot 18, subject to the homestead of the widow and minor child, was presented, and the widow, in her own proper person and also as guardian, entered her appearance, and consented "to the entry of a decree of sale of the real estate of said deceased according to the prayer of the said petition." That petition was subsequently amended, and to the amended petition the widow and two of her sons, who were of age, entered their appearance by their solicitor, and consented "to the order of sale of the premises as prayed for in the petition and the amended petition." The widow, as guardian of Anna Augusta W. Mueller, filed an answer, neither admitting nor denying the allegations of said amended petition, but praying for strict proof. It is insisted by appellees that, by reason of such entry of appearance and consent to the entering of a decree of sale as prayed for by the petition, the widow lost her right to a homestead. One may consent to the entry of a decree by which a loss of homestead may result. *Allen v. Hawley*, 68 Ill. 164; *Cribben v. Cribben*, 136 Ill. 609, 27 N. E. 70. The provisions of the statute expressly create an estate of homestead, which shall continue after the death of the householder, for the benefit of the husband or wife surviving, so long as he or she continues to occupy such homestead, or of the children until the youngest child becomes 21 years of age. With reference to a sale of the premises under execution, or to pay debts by decree of court, as has been frequently held by this court, the estate of homestead cannot be severed from the fee of the land; and to admit that the consent to a decree in accordance with the petition would be to consent to an entry of a decree providing for severing the estate of homestead from the fee of the land would result in the creation of two estates under that proceeding, where but one exists as created by law. The consent embraced in the entry of appearance was not a consent by the widow to the sale of the homestead, but sought to sever the homestead from the fee, in a proceeding which was not authorized. We are of the opinion, therefore, that the entry of appearance and consent to the decree, as prayed for in the petition, did not authorize the court to create an estate under such proceedings unknown to the law, and not recognized, and hence was not a waiver of a right of homestead. It was not a consent to the sale of the homestead, and as the right of occupancy of the homestead cannot be sev-

ered from the fee of the land, so as to authorize a sale of the latter under a decree of sale to pay debts, the consent did not confer jurisdiction. Consent did not render valid the decree of sale.

It is insisted that the appellants, having taken under the will, and not having renounced the right of homestead, lost the same. In this case the will is not offered in evidence, and is not before us for consideration. We hold the decree did not authorize the sale and the execution of the deed as reformed on the decree entered in the cross bill, and the appellants had a right to ask to have the sale set aside, and the court erred in dismissing the original bill and entering a decree on the cross bill. The decree of the superior court of Cook county is reversed, and the cause remanded. Reversed and remanded.

(178 Ill. 212)

PHOENIX INS. CO. OF HARTFORD v. HEDRICK.

(Supreme Court of Illinois. Feb. 17, 1899.)

DEMURRER—HARMLESS ERROR—PLEA IN ABATEMENT—DEFAULT—ASSESSMENT OF DAMAGES—EXCEPTION.

1. Demurrer to replication to plea in abatement should be carried back and sustained to the plea, where it is bad; and, this not having been done, any error in overruling the demurrer to the replication is harmless.

2. A plea in abatement to a declaration on a fire policy, which, while admitting that some kind of proofs of loss were sent defendant, does not state their contents, but avers that they did not state and set out the title, is bad, because uncertain, in not showing whether the proofs were silent on the subject of title, or, while attempting to set out title, were so defective as not to be a compliance with the requirement of the policy in that regard; and, if the latter is meant, then it is bad as pleading a conclusion of law.

3. Defendant, by refusing to plead to the declaration on a fire policy, admits the cause of action stated, except the amount of damages.

4. Prac. Act, § 61, allowing an exception to final judgment on trial by the court without a jury and by consent of the parties, does not apply to an assessment of damages in case of default.

Appeal from appellate court, Fourth district.

Action by S. A. Hedrick against the Phoenix Insurance Company of Hartford, Conn. From a judgment of the appellate court (73 Ill. App. 601) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action of assumpsit brought by appellee against appellant to recover for a loss under a fire insurance policy issued by appellant on the buildings and personal property of appellee, described in the policy. It was made September 2, 1895, for a term of three years, and covered a loss not exceeding \$2,575. The greater part of the property covered by it was destroyed by fire the night of February 3, 1896. The particular provisions of the policy necessary to be referred to are as follows: "If the assured shall not be the sole and unconditional owner in fee of said

property, then this policy shall be null and void. In case of loss, the assured shall give this company immediate notice thereof, at its branch office in Cincinnati, Ohio, and within sixty days thereafter render, under oath, to its office aforesaid, a particular account of said loss, setting forth the date and circumstances of the same, the title and occupation of the property, and shall furnish an itemized statement of building or buildings, by some reliable builder; * * * and, until the proofs required herein are made, the loss shall not be payable." Immediately after the fire, appellee notified the company of his loss; and on March 16, 1896, he mailed to appellant certain preliminary proofs of loss required by the policy, with a letter requesting appellant to immediately notify appellee of any change desired in the proofs. On the 31st of March, appellant remailed the proofs to appellee, with a letter pointing out certain specific objections to them; but on the same date, and before the proofs and letter were received by appellee, this suit was commenced. To the declaration the appellant interposed a plea in abatement, the substantive portion of which, besides what is above quoted from the policy, is as follows: "And the defendant says that the plaintiff has not complied with all the terms, conditions, and stipulations of said policy above set forth, but avers that on the 16th day of March, 1896, said defendant received what was designated or purported to be a proof of loss, but the same did not state and set out the title of the property, and did not show the commercial value of the articles of personal property claimed to have been consumed and destroyed. And the defendant says that said writing designated as a proof of loss was not accepted by the defendant, and the defendant did, on the 31st day of March, 1896, refuse said writing, and wrote the plaintiff, to his post-office address, to wit, at Noble, Ill.; and on the 3d day of April, 1896, defendant wrote one Parke Hutchinson, attorney for plaintiff, and refused said writing designated as a proof of loss, and pointed out the specific objections to the same, and thereby pointed out wherein the same was defective, particularly setting forth that the same did not show the title to the property, and did not state the interest of assured to the property destroyed to be the owner in fee simple, and furthermore demanding and asking for certified plans and specifications and certified duplicate bills of purchase for the contents of the dwelling. And the defendant avers that, although the said writing designated as a proof of loss was refused by this defendant with specific objections to the same, the plaintiff has omitted and neglected to correct the same, and make a proof of loss as required by the terms of the policy, and forward the same to this defendant. And the defendant says that, by the terms of said policy, the loss is not payable until the proofs, as required by the policy, are made. And the de-

fendant says that the plaintiff has wrongfully and prematurely brought this suit. And this the defendant is ready to verify, wherefore he prays judgment of said writ, and that the same may be quashed," etc. To this plea appellee filed three replications: First, that the proofs of loss sent March 16th stated that "the property insured belonged at the time of the fire to S. A. Hedrick, and at the time of effecting the insurance it belonged to S. A. Hedrick"; second, that the preliminary proofs of loss were sent to the appellant on March 16, 1893, and that the appellant, though requested to immediately return them if defective, refused to answer said request for more than two weeks, and until too late to secure service of process at the coming term of court, by which appellant waived the supposed defects in the proofs; and the third replication set out, verbatim, the entire proofs of loss sent to appellant, concluding with the averment that thereby appellee had complied with all the provisions of the policy. To these replications appellant interposed a general as well as a so-called "special demurrer," which were overruled by the court; and thereupon the court ruled appellant to plead to the declaration, which it refused to do, and elected to stand by its demurrer. The court then entered judgment against appellant by default, and assessed the damages on evidence heard, and rendered judgment against appellant for \$2,359.90 and costs, from which appellant prayed an appeal to the appellate court, where the judgment was affirmed, and the present appeal is from such judgment of affirmance.

John Lynch, Jr., and R. W. Barger, for appellant. Parke Hutchinson and Richard S. C. Reaugh, for appellee.

PER CURIAM. The appellate court, speaking through Mr. Justice Bigelow, delivered the following opinion:

"The first assignment of error questions the ruling of the court in overruling the demurrer. In the view we take of the pleadings, it is unnecessary to pass upon that question, at least so far as the special demurrer is concerned. * * * If it be conceded that the court erred in overruling the general demurrer to the replications, no harm was done appellant, if its plea in abatement was bad, since in that case the demurrer should have been carried back and sustained to the plea. *Railroad Co. v. Neill*, 16 Ill. 269. A demurrer on a record presenting a plea in abatement searches the record back to such plea only, since the plea does not profess to answer the declaration, but only goes to the writ. *Ryan v. May*, 14 Ill. 50.

"Was appellant's plea in abatement good? Such a plea ought to be certain to every intent. *Parsons v. Case*, 45 Ill. 296. The plea, while admitting that some kind of proofs of loss were sent to appellant, does not state their contents, but avers that the proofs did

not state and set out the title to the property. This allegation is equally consistent with each of the two theories, viz. either that the proofs were absolutely silent upon the subject of the title to the property, or that, though attempting to set out title, they were so defective as not to be a compliance at all with the substantial requirements of the policy in that regard, and so the pleader says the title was not stated. If the latter is meant by the pleader, he is pleading a conclusion of law as applied to the proofs furnished by appellee. To have made his plea good, he should have stated precisely and particularly what the proofs showed appellee to have stated in that regard, especially since appellant admits by its plea that proofs of some kind were furnished. To say that a certain document does not state such and such facts may be argumentative, but lacks that precision which is required in saying what facts the document does state. That this plea is an attempt to plead a conclusion of law into the record is further evidenced by the fact that it avers that appellant wrote appellee that the proofs failed to show that he was sole and unconditional owner in fee of the property,—a requirement not demanded by the policy as to the proofs. He was only required to state his title, whatever it was, and that, we are of opinion, could be done by any equivalent terms to fulfill the title he represented himself, in the policy, to be possessed of. Technical nicety was not contracted for. We are of the opinion that the plea in abatement was bad, and that the demurrer should have been carried back to the plea, and sustained to it; but, because that was not formally done, it is of no consequence,—at least, appellant has no reason to complain of it.

"The admission of improper evidence on behalf of appellee, as well as the rendering of the judgment in his favor, are assigned for error. From the view we take of the matter, the judgment by default was properly rendered, since appellant refused to plead to the declaration, and the record is not in condition to pass upon the errors assigned. The entire cause of action, as stated in the declaration, was admitted by the default, except the amount of damages. Section 61 of the practice act, allowing an exception to the final judgment to be taken on trials by the court without a jury and by consent of the parties, has, in our opinion, no application to a case like this. The proceeding to assess the damages was not with appellant's consent, within the meaning of this section. Assessment of damage is in no sense a trial. It is more in the nature of a special proceeding. Under the early common law of this state, * * * the sheriff was authorized to execute the writ of inquiry anywhere in the county, and the proceeding need not be in a court at all. *Vanlandingham v. Fellows*, 1 Scam. 233. Notwithstanding the section of the statute above referred to, it is still nec-

essary to make a motion to set aside the assessment, and, if it is disallowed, to take an exception to the ruling of the court. *Beam v. Laycock*, 3 Ill. App. 43, and cases there cited. No exception was in fact taken to the introduction of evidence on the assessment of damages. We have examined the evidence, and find it not only relevant, but fully sufficient to support the judgment. As to the evidence introduced by appellee to prove title, that, also, we think, is sufficient to fulfill the requirements of the policy; but whether it is or not is immaterial, as the default admitted all the facts pleaded in the declaration, and its sufficiency has not been challenged. Finding no error in the record requiring a reversal of the judgment, it is affirmed."

Concurring in the foregoing views, we adopt the same as the opinion of this court. Accordingly, the judgment of the appellate court is affirmed. Judgment affirmed.

(177 Ill. 632)

HOOK v. PEOPLE ex rel. **BEGOLE**, County Treasurer.

(Supreme Court of Illinois. Feb. 17, 1899.)

DELINQUENT TAXES—PROCEEDING FOR JUDGMENT—DESCRIPTION OF LAND.

Description of land, in proceeding for judgment against it for delinquent taxes, "as part of lot 24," with nothing to show what part, is too indefinite.

Appeal from St. Clair county court; E. C. Rhoads, Judge.

Application by the people, on the relation of Henry C. Begole, county treasurer of St. Clair county, for judgment against land of Mary B. Hook. Judgment was granted, and said Mary B. Hook appeals. Reversed.

Morrison & Worthington, for appellant. M. D. Baker and Forman & Browning, for appellee.

CARTER, C. J. The county treasurer of St. Clair county applied to the county court of that county for judgment against, and an order of sale of, certain tracts of land in that county which had been returned as delinquent for the taxes of 1897, and for certain back taxes assessed for the years 1895 and 1896. Mary B. Hook, the appellant, appeared and objected to the rendition of judgment against the tract in controversy in this case, and which was described in the advertisement by the collector as "F. Farrell pt. lt. 24b. pt. N. E. 11, 8, 5, 683.10." The notice stated that the letter "b" indicated that the back taxes were due on the land for the years 1895 and 1896. It will be noticed that no reference is made to any survey or plat, or any other means of identification of the tract assessed, from which it could be ascertained what part of the northeast quarter of the section lot 24 was. But even if it be conceded that the burden was on the objector to show that there was not of record any plat, map,

or survey from a reference to which the description would have been rendered certain, still there would be nothing by which to determine what part of lot 24 was delinquent and advertised for sale. This precise question was decided in *People v. Rickert*, 159 Ill. 496, 42 N. E. 884, and it was there said, "In a direct proceeding for judgment against lands for taxes there can be no lien, and consequently no judgment, unless the lands are described so that they can be located and found." See, also, *People v. Eggers*, 164 Ill. 515, 45 N. E. 1074, and *People v. Reat*, 107 Ill. 581, where it was said that, even if the "lot were well located on the plat, the description 'part of lot 20' is wholly indefinite." *People v. Railroad Co.*, 96 Ill. 369; *Sanford v. People*, 102 Ill. 374. Other objections have been urged, but, as the one noticed disposes of the case, they need not be considered. The judgment is reversed, and the cause remanded. Reversed and remanded.

(178 Ill. 1)

MORRIS et al. v. CAUDLE et al.

(Supreme Court of Illinois. Feb. 17, 1899.)

DEED—DELIVERY—UNBORN PERSON AS GRANTEE.

1. An unborn child does not take under a deed to "I. and his brothers and sisters," though I. is the grantor's only living child, and there is expectation of another in a few days.

2. A deed by husband and wife to their children is not delivered where the husband merely places it in the hands of the wife for safe-keeping, and it is kept in their possession and under their control.

3. A child of the grantors, born after the signing and acknowledging of a deed to their children as grantees, but who was not only born, but died, before its delivery, does not take as a grantee.

Appeal from circuit court, Wayne county; E. E. Newlin, Judge.

Suit by Samantha E. Morris and others against Isham E. Caudle and others. Bill dismissed, and complainants appeal. Affirmed.

Edwin Beecher and Creighton & Thomas, for appellants. Creighton, Kramer & Kramer and W. T. Bonham, for appellees.

CRAIG, J. This was a bill for partition, brought by the appellants in the circuit court of Wayne county, wherein they prayed for partition of the lands described in the bill, as heirs at law of Samuel Caudle, deceased. Amy E. Caudle put in an answer to the bill, in which she denied that Samuel Caudle was the owner and seised of the lands named in the bill at the time of his death, and alleged "that on November 26, 1884, said Samuel Caudle and this defendant, who was at that time his wife, by warranty deed of that date conveyed the lands above described to the defendants Isham E. Caudle and Bertha M. Caudle, * * * reserving unto themselves their life estates therein, which said deed was on said date duly acknowledged, and afterwards, on the 22d day of July, 1885, filed for record in the recorder's office of the said coun-

ty of Wayne, * * * and that by reason of the said conveyance the entire estate, title, and interest which the said Samuel Caudle had, prior to the date of the said conveyance in the said lands, passed into this defendant and the said Isham E. Caudle and Bertha M. Caudle." The answer further denied that the complainants in said bill, and the defendants therein, except this defendant and the said Isham E. Caudle and Bertha M. Caudle, were seised in fee, as tenants in common by descent from said Samuel Caudle, of the said premises, or had any interest therein, and alleged that the same belonged solely to Isham E. Caudle and Bertha M. Caudle, subject to the life estate of Amy E. Caudle. The answer of Isham E. Caudle and Bertha M. Caudle set up the same defense as that of defendant Amy E. Caudle. Upon the coming in of the answer the appellants filed an amended bill, in which they alleged that the deed claimed to have been made by the said Samuel Caudle on November 26, 1884, conveying said described lands to Isham E. Caudle and Bertha M. Caudle, was never delivered to the grantees therein; that said Bertha M. Caudle was not at that time in being, but was born on the 3d day of January, 1890; that the said deed purported to be made to "Isham E. Caudle and his one brothers and sisters"; that he, said Isham E. Caudle, at that time had no brothers and sisters other than the defendants and complainants in this bill, as Bertha M. Caudle, one of the defendants, was not at that time born; that the only persons said term "one brothers and sisters" could have referred to were the other defendants and the complainants in this bill, except the said Bertha M. Caudle, who was not then born, and was not born until January 3, 1890, afterwards; that said deed was never delivered, and was never intended to be delivered, to said Isham E. Caudle, or any other of the defendants or complainants in this bill. It was also set up in the amended bill that, at the time of the making of said deed, the said defendant Amy E. Caudle was pregnant, and a short time after the making of said deed gave birth to a female child, to wit, on or about the 7th day of January, 1895; that the said child was born after the making of said deed, and was named Amy E. Caudle, but said child, Amy E. Caudle, died on or about March 11, 1895. To the amended bill Isham E. Caudle and Bertha M. Caudle filed a plea, in which they set up that in May, 1896, Amy E. Caudle, as guardian, filed a petition with the Wayne county court for leave to sell said lands as the property of Isham E. Caudle and Bertha M. Caudle; that thereafter Samuel Caudle filed his intervening petition in said court, wherein he stated that he and his wife had deeded to Isham E. Caudle and his brothers and sisters the land mentioned in the petition of Amy E. Caudle, together with other lands, by which statement he intended to admit, and did admit, that he signed, sealed, acknowledged, and delivered the deed referred to in complainants' bill; that by the admis-

sions above pleaded the said Samuel Caudle and his heirs, the complainants herein, were and are estopped from denying the execution and delivery of the deed.

From the foregoing statement of the pleadings it appears the appellants predicate their right of recovery on the ground that Samuel Caudle died seised of the lands in controversy, and that they inherited from him; that the deed executed November 26, 1884, by Samuel Caudle and wife to "Isham E. Caudle and his one brothers and sisters," was never delivered, and hence the lands did not pass by the pretended conveyance. But appellants, from their argument filed in this court, seem to have changed their position, and they now claim that the deed of November 26, 1884, was delivered, and that the title to the land passed under that deed to Isham E. and Amy E. Caudle, an unborn child; that upon the death of Amy E. Caudle they became possessed of an undivided interest in the land as her heirs. There is no substantial dispute between the parties in regard to the facts connected with the execution of the deed in question, nor in regard to what was said and done in regard to the delivery of the instrument. It appears from the record that Samuel Caudle, the grantor in the deed, was a man advanced in years, who had raised a large family of children, and having lost his wife he had married a young woman. As a result of the second marriage one child had been born, before the deed was made, another was expected to be born within four or five weeks, and others might reasonably be expected at regular periods so long as the health and vigor of the grantor continued. Having raised and educated his children by his first wife, and being desirous of making some provision for his children of the second marriage, he called upon a justice of the peace with a view of making a will, in which he desired to devise the land in question to Isham E. Caudle, a son of the second marriage, and such other children as might thereafter be born. Upon consultation with the justice, the latter told Caudle that a will might be broken. He then decided to make a deed, and directed the squire to prepare a deed conveying the land to "Isham E. Caudle and his own brothers and sisters." The justice prepared the deed as directed, but in writing the name of the grantees in the deed he used the word "one" instead of "own." After the deed was executed and acknowledged, the grantor, Caudle, took the instrument and carried it away. Upon arriving at his home, he gave it to his wife, saying, "Mother, here's your deed; take care of it."

Under the facts as shown by the record, the question presented is whether the unborn child, Amy E. Caudle, took title to the land under the deed of November 26, 1884, executed by Samuel Caudle and his wife to Isham E. Caudle and his own brothers and sisters. A grantee must be in esse at the

time of the execution of the deed; otherwise no title will pass by the deed. 9 Am. & Eng. Enc. Law, 131. In Tiedeman on Real Property (section 673) the author says: "The common law did not treat children en ventre sa mere as persons in esse for the purpose of holding or acquiring property. This capacity only attached upon their birth alive. Consequently, by the old common law children born after the death of the ancestor were precluded from participating with the others in the distribution of the intestate's estate. But this harsh rule has now been generally changed by statute." There is no doubt in regard to a posthumous child being entitled to inherit property by descent under our existing laws, and to also take by devise, but an unborn child has no such existence as will enable it to take a present grant of lands by deed. Indeed, in *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835, we held that in case of a grant of an immediate estate in possession the grantee must be in esse, and a deed of that kind may be avoided by showing the grantee came into being subsequently to the delivery of the deed. In speaking in regard to the necessity of the existence of a grantee in a deed of conveyance, Tiedeman (section 797) says: "For the grant of an immediate estate in possession it is necessary that the grantee be in esse, and if it be shown that the grantee came into being after the conveyance it will avoid the deed."

There is another fatal objection to the deed,—it was never delivered to the unborn grantee or to any person for her. As has been seen, the deed was executed November 26, 1884. The child was born January 7, 1885, and died March 11, 1885. After the deed was executed, the grantor, Caudle, took it home with him, and then handed it to his wife, and it was kept in the house where he and his wife resided, under his control, until the last of July, 1885, when the wife sent it to the county seat to be recorded. If, upon the execution of the deed, Caudle had delivered it to his wife to be by her held for the grantees therein named, we would not hesitate to hold that the instrument was delivered; but where one of the grantors merely places the deed in the hands of the other grantor for safe-keeping, as was the case here, and the instrument is kept in the possession and under the control of the grantors, the deed cannot be held to be delivered. Some time after the death of the child, the deed was placed on record, and thereafter, in May, 1896, the grantor admitted, as shown by the pleadings, that he had executed and delivered the deed. This rendered the deed valid as to the grantee Isham E. Caudle, but had no bearing as to the rights of the unborn child or any person claiming under her. As the appellants failed to establish title to the premises in question, the court properly dismissed the bill, and the decree will be affirmed. Decree affirmed.

(178 Ill. 160)

ANDERSON v. ANDERSON.

(Supreme Court of Illinois. Feb. 17, 1899.)

EXECUTOR—SETTLEMENT—FRAUD—IMPEACHMENT—EQUITY.

1. A judgment of the county court in a settlement by an executor may be impeached for fraud in a suit in equity.

2. An order of the county court approving the report of an executor, who conceals the fact that a legacy has been paid by testator in his lifetime, and who fraudulently claims a credit for having paid it, will be set aside at suit of the residuary legatee, for whom the executor was also guardian.

Appeal from appellate court, Fourth district.

Suit by Alexis D. Anderson against John P. Anderson. From a judgment of the appellate court affirming a decree for complainant (77 Ill. App. 533), defendant appeals. Affirmed.

John Anderson, the father of appellant and appellee, died, testate, April 11, 1876. His will was duly admitted to probate. By the twelfth clause he gave to the heirs of his body by his wife Margaret all moneys and personal property remaining after the payment of all other legacies and bequests. Margaret had then two infant children by the testator,—appellee and a daughter. The will provided that, in case of the death of one of these children without issue, the survivor should have the share of the deceased child. Some time after the death of the testator, the daughter died, leaving appellee as the sole residuary legatee. The testator had by a former marriage adult children, for whom he provided, either by gifts executed in his lifetime or by provisions in his will. Two of these, the appellant and David L., he made executors. They both duly qualified, and gave separate mortgages upon their real estate as security for the faithful performance of their trust. David L. assumed the active management of the trust, but he died within two years, at which time appellant took sole charge. Appellant was also guardian for appellee during the latter years of his infancy, but appellee did not reside with appellant. By the eleventh clause of the will the testator had provided a legacy of \$5,000 to a son R. W. Anderson. David L. made one or two reports to the county court during his lifetime, and appellant made such reports from time to time thereafter. After appellee came of age, he caused appellant to be cited by the county court to make final report and pay over the estate in his hands. Appellant appeared, and presented a statement, which was not satisfactory, and the matter was left open for further investigation. Subsequently the statement was amended by adding to the credit side thereof: "Legacy of R. W. Anderson paid soon after the death of testator, but not credited in former reports, \$5,000." This statement was sworn to by appellant, and the clause of the will providing the legacy was produced, and a credit for the amount demanded by appellant. This state-

ment was accepted as true and correct by appellee and his attorneys, and the item allowed to stand to the credit of appellant without further investigation. An order approving the account was prepared, the balance appearing to be due paid over, a receipt therefor executed, the account O. K. 'd by the attorneys, and the order entered without contention before the court. This occurred August 15, 1893. On May 20, 1897, R. W. Anderson, having learned that appellant had taken credit for this \$5,000 in his settlement with appellee, claimed he had not received it from the executors, as he in fact had not, and cited appellant to show cause why he should not pay it to him. In answer to this citation, appellant set up an ademption of this bequest by the testator in his lifetime. Upon the trial of this issue, June 7, 1897, appellant produced a receipt, dated August 13, 1875, after the will was made, and shortly before the testator died, signed by R. W. Anderson, to the testator, for \$14,143, covering certain advancements, and also this \$5,000 bequest; and appellant testified that this receipt was with the testator's papers; that David had it until he died; that he had had it ever since David's death; that he had been the only executor since David died, for about 16 years; that he was with the testator a day or two before he died, and that the testator told him that he had settled with all his grown children, except himself and David; that R. W. had never made any claim until recently; and that he had never known till that time that he pretended to have a claim against the estate on account of that legacy. The court held that the proof sustained the defense, and dismissed the citation, at cost of R. W. Anderson, the complainant. No appeal was taken from the judgment, and it remains in full force. About this time appellee first heard of the fact that this legacy was not a proper charge against the estate, and had not in fact been paid by the executors "soon after the death of testator" or at any other time. On the 18th day of June, 1895, appellee filed the bill in this case against appellant, setting up the facts, charging, in effect, deception, fraud, and mistake, and praying that the settlement made and approved in the county court be set aside, that the account be restated, and the correct amount due ascertained, and for payment to him of the sum of \$5,000, with interest thereon. To this bill appellant made answer, in effect denying all deception, fraud, and mistake, denying that the legacy provided to be paid to R. W. Anderson was in fact adempted, and discharged by the testator in his lifetime, and setting up laches, and that the proceedings in the county court upon said account, and the order entered thereon, are a complete and effectual bar to this proceeding. The hearing resulted in a decree in favor of appellee for the sum of \$6,071.20. To reverse this decree, appellant appealed to the appellate court for the Fourth district, where the decree of

the circuit court was affirmed. To reverse the judgment of the appellate court, appellant brings the case to this court.

Hadley & Burton, for appellant. Jas. R. Kinealy, for appellee.

CRAIG, J. (after stating the facts). Did the court err in affirming the decree setting aside the settlement made between appellant and appellee in the county court of Madison county, August 15, 1893? It is contended by appellant that the order entered by the county court is a bar to this proceeding, while appellee contends that the judgment of the county court is impeachable for fraud in equity. In 1 Story, Eq. Jur. § 187, it is said: "Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another; and courts of equity will not only interfere, in cases of fraud, to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done." In *Nelson v. Rockwell*, 14 Ill. 375, this court said: "Fraud is one of the broadest grounds of equity recognized by the courts, and relief may be obtained against a judgment at law, although the party might find a remedy in the court of law. It is the fraud which gives jurisdiction to this court, and the aggrieved party is not obliged to resort to another tribunal possessed of less power and appliances to ascertain the truth and grant the requisite remedy, although the other tribunal may have jurisdiction,"—citing *Hare & Wallace's* notes to 2 *Leading Cases in Equity* (47 Law Lib. 208), wherein it is held that "a fraudulent judgment is void in equity, as it regards the party defrauded, and cannot therefore preclude the exercise of equitable jurisdiction." While it is true that the county court is a court of record, and the same presumptions apply to its judgments as other courts of record, it is also true that a judgment of the county court in a settlement between an executor and trustee and a cestui que trust, or between a guardian and ward, may be impeached for fraud in a court of equity, in a proper case.

The next inquiry is whether the representations made by appellant to appellee at the time of the settlement in the county court—that the executors had paid a legacy of \$5,000 to R. W. Anderson, and that appellant was entitled to a credit for that amount in his report—are true or false. An examination of the evidence in the record shows that appellee was an infant four years old at the time of his father's death. The will appointed David L. and John P. Anderson, half-brothers of appellee, executors of the estate of John Anderson, appellee's father. Ap-

pellant was also guardian of appellee. When appellee reached his majority, and the time had come for a final settlement between appellant and appellee, and appellant was required to account, appellee discovered a discrepancy of \$7,000 and interest, according to appellant's reports, which appellee insisted should be paid or explained. Time was given appellant to investigate to see whether the discrepancy could be explained. After a delay of several weeks, appellant and appellee went to Edwardsville, and, in the presence of appellant's counsel, appellant admitted this discrepancy in his account, but claimed that he had found an error,—that a legacy of \$5,000, given by the eleventh clause of the will to R. W. Anderson, had been paid by the executors, but they had never taken credit for it in any of the reports made and filed in the county court. The will was produced, and the eleventh clause read, showing that R. W. Anderson was given a legacy of \$5,000. An examination of the reports made at the same time seemed to verify the representation made by appellant that the executors had never taken credit for the \$5,000 which appellant claimed they had paid. The credit was then entered by appellant in the report, on the credit side, in these words: "Legacy of R. W. Anderson paid soon after death of testator, but not credited in former reports, \$5,000." The discrepancy which appellee found was bonds of Madison county, amounting to \$7,000, that had never been charged in any of the previous accounts, which being added made the total amount in appellant's hands, as executor, \$18,852.04. The record shows that from this sum \$10,000 was taken, the executor being required to pay Margaret Young the interest on this amount during her life, leaving in the hands of the executor and trustee for appellee \$8,852.04. Before the \$7,000 was added, the balance, according to the report, was \$11,852.04. This was discovered by appellee, and after its discovery, and after the fund of \$10,000 was set aside for Mrs. Young, the balance found to be due appellee was \$8,852.04. Appellee allowed the sum of \$852.04 to be deducted for his contribution to the trustee for managing the interest of Mrs. Young in the estate. The appellee, relying on the representations of the appellant, who had been his guardian so many years, that the executors had paid this \$5,000 to R. W. Anderson, accepted \$8,000 as the amount due him, and gave his receipt therefor. The evidence shows that appellant was not entitled to the credit of \$5,000. It shows he falsely represented the executors had paid the legacy to R. W. Anderson "soon after the death of the testator," and took credit for that amount when he settled with his cestui que trust. The report was sworn to. The order was made, and the receipt given by appellee, August 15, 1893. Afterwards R. W. Anderson found out about the credit taken by appellant, and May 20, 1897, filed his petition for a citation to show cause

why he should not be paid the \$5,000 legacy given him by the terms of the will. Appellee for more than three years had remained in ignorance of the fraud perpetrated upon him in the settlement, until he learned from R. W. Anderson that the executors had not paid him the \$5,000 for which appellant took credit in his report at the time of the settlement with appellee. On the hearing of the citation, appellant produced the receipt of R. W. Anderson to the testator in his lifetime, and testified that this receipt was with his father's (the testator's) papers; that David, his co-executor, had it until he died; that the other papers were given to appellant after his death; that he supposed it was in the handwriting of R. W. Anderson; that he had been the only executor since his death; that he did not know whether the \$5,000 had ever been paid; that he was with his father a day or two before he died, and he told him that he had settled with all his children, and gotten receipts from them; admitted that he (appellant) did not pay it; that he supposed it had been paid. In the settlement with his cestui que trust he took credit for the \$5,000, and represented that the executors had paid it to R. W. Anderson, and swore to his report containing this credit. R. W. Anderson testified that David Anderson never paid it to him, and that appellant did not pay it to him. He (R. W. Anderson) admitted he gave his father the receipt to cover this advancement, and to cover his portion in his father's will.

From a careful examination of the evidence, we can come to no other conclusion than that appellant perpetrated an intentional fraud on appellee, his cestui que trust. When appellant made the settlement with appellee, August 15, 1893, the receipt given by R. W. Anderson to his father, the testator, "in full as my portion, according to his will, to this date," was in appellant's possession, and had been for more than 16 years. He knew he had not paid the \$5,000 as executor, and that his brother and co-executor, David L. Anderson, had not claimed to have paid it or taken credit for the \$5,000 in his reports up to the time of his death. This very receipt given his father he afterwards used to defeat R. W. Anderson when he had appellant cited before the county court asking to be paid this \$5,000 given him by the will.

Having come to this conclusion in relation to the facts in evidence, what is the law of the case as to setting aside the order of the county court approving appellant's report? Appellant concealed facts peculiarly within his knowledge, of which appellee and the county court could not know, and made false representations and statements which deprived appellee of \$5,000 which, under the will, belonged to appellee as part of his residuary estate. The relation of trust and confidence existed between appellant and appellee, and it was the duty of appellant to disclose the truth to appellee. In *Bruce v. Doo-*

little, 81 Ill. 103, where a guardian failed to report certain moneys belonging to his ward, and concealed the same, this court said (page 105): "While the approval of the guardian's account by the court in 1851 was a judicial act, yet if the guardian had received moneys which he failed to account for, or charged himself with too small an amount, no reason is perceived why the wards may not require the account to be correctly stated, and the guardian properly charged,"—citing *Bond v. Lockwood*, 33 Ill. 212. In *Perry on Trusts* (section 924) the author says: "It is, however, his [trustee's] duty to inform the court fully of all material facts within his knowledge, for a decree procured by any concealment or other management would be opened, and the trustee might be held responsible." And in section 923: "If a release is executed to a trustee by a cestui que trust just after coming of age, the courts will investigate the transaction, and require evidence that the trustee took no advantage of his position and influence. A release by the cestuis que trustent will not be binding unless the parties are made fully acquainted with their own rights, and the nature and full extent of the liabilities of the trustee. Any concealment, misrepresentation, or other fraudulent conduct will vitiate such a release." Under the facts in this case, a fraud was practiced by appellant upon appellee of such a character as to authorize a court of equity to set aside the order of the county court.

We have considered the cross errors urged by appellee, but, under all the facts as they appear, we are not inclined to disturb the judgment of the appellate court in regard to the mode adopted of computing interest on the \$5,000. The judgment of the appellate court is affirmed. Judgment affirmed.

(178 Ill. 295)

WOODARD v. WOODARD et al.

(Supreme Court of Illinois. Feb. 17, 1899.)

SPECIFIC PERFORMANCE—CONTRACT.

A parol contract between father and son that the son shall go on land of the father, improve it, and pay the taxes, and have it, is not sufficiently definite and unequivocal for specific performance; no time being fixed for giving a deed, and nothing being said as to the nature or character of the improvements.

Appeal from circuit court, Marion county.

Suit by Andrew J. Woodard against Charles Woodard and others. Bill dismissed, and complainant appeals. Affirmed.

Van Hoorebeke & Loudon (Henry C. Goodnow, of counsel), for appellant. L. M. Kagy, for appellees.

CRAIG, J. This was a bill in equity brought by Andrew J. Woodard against his father, Charles Woodard, and others, to enforce the specific performance of an alleged parol agreement to convey 40 acres of land in

Marion county. A hearing was had on the pleadings and evidence, and the court entered a decree dismissing the bill, to reverse which the complainant appealed.

It seems from the evidence introduced on the hearing that Charles Woodard, one of the defendants, about the year 1875 or 1876, owned a farm in Marion county consisting of 100 acres, upon which he resided. In addition to the home farm, he owned two 40-acre tracts of land about a half mile from his residence, and also 20 acres of timber land some three miles from the 40-acre tracts. He had two sons, the complainant and William Woodard. One of the 40-acre tracts was conveyed to the complainant by his father in 1884, and the 20 acres were sold by the father in 1886, so that there is but one 40-acre tract of land involved in this proceeding. The complainant does not claim that there was any contract in writing made between him and his father in relation to the land in question, but he relies solely upon a verbal agreement. A specific performance of a parol contract for the conveyance of land cannot be claimed as a matter of right in either party, but it is a matter resting in the sound and reasonable discretion of the court, and the circumstances attending each particular case will be carefully considered. *Cusey v. Hall*, 81 Ill. 160. In *Story's Equity Jurisprudence* (volume 2, § 764), the author says: "In order to take a case out of the statute upon the ground of part performance of a parol contract, it is not only indispensable that the acts done should be clear and definite, and referable exclusively to the contract, but the contract should also be established by competent proofs to be clear, definite, and unequivocal in all its terms." Was such a contract established by the evidence in this case? But a single witness undertakes to testify to the contract relied upon, and that is the complainant himself. He testified, in substance, that an agreement was made by which he was to go upon the home farm, cultivate it, pay the taxes, and support his father and mother out of the proceeds of the farm, and that he was to have the farm; that his brother, William, was to go upon the two 40-acre tracts, improve them, and pay the taxes, and he was to have them, and also the 20 acres of timber land. Complainant also testified that the next spring after this arrangement had been made it was agreed that he and his brother, William, should change places; that William was to take his place on the home farm, and he was to take the place of William on the two 40-acre tracts and the 20 acres of timber land; that, in pursuance of the arrangement so made, he moved on the two 40-acre tracts of land, improved them, and paid the taxes, as he had agreed to do.

If a contract was made as claimed by complainant, it falls short of the requirements laid down by *Story* as essential to the enforcement of a parol contract. It was not

definite and unequivocal. No time was set by the contract, as detailed by complainant, when, if ever, a deed should be made for the land. Nothing was said in regard to the nature or character of the improvements to be placed on the land. Whether they should be extensive or of little or no value is left to conjecture. But, aside from these considerations, when the evidence introduced by the defendants is considered in connection with complainant's evidence, it is clear no contract which a court of equity would enforce has been established. The evidence of complainant was squarely contradicted in each and every material point by Charles Woodard, the father of complainant, and by his brother, William Woodard. They unite in testifying that no contract was made whereby the complainant and William Woodard, or either of them, were to have any lands belonging to the defendant Charles Woodard. If a contract had been made, these witnesses would know it. They would know its terms and conditions, and when they come into court, and testify that no contract was ever made, so long as their credibility is not called in question the case attempted to be made by complainant is overcome. It is true, two witnesses, Frank and Charles Woodard, sons of the complainant, testify to statements they heard the defendant Charles Woodard make, to the effect that the land was their father's land; that it was in their father's name, and he (Charles Woodard) could not sell it. But loose, unguarded declarations of this character cannot overcome the positive evidence that no contract was ever in fact made. Moreover, the statement which those witnesses testify was made by the defendant Charles Woodard in all probability had reference to the 40 acres of land which he had conveyed to the complainant.

In the argument importance seems to be attached to the alleged fact that lasting and valuable improvements were made by the complainant on the land in question. Upon an examination of the record, it will be found that the two 40-acre tracts are not in the same quarter section, and the improvements which the complainant made were principally on the 40-acre tract which was deeded to complainant, and is not involved in this proceeding. The house, barn, and all other buildings were on that 40. No buildings had been erected on the 40-acre tract in question, and even the fence around the land had been removed. There were therefore no valuable and lasting improvements made on the land, and no rights can properly be claimed on the ground of improvements. *Fouts v. Roof*, 171 Ill. 568, 50 N. E. 653, has been cited as an authority to control the decision of this case. We find no fault with the rule laid down in the case cited, but the facts in that case are so different from the facts here that it cannot control. After a careful consideration of the evidence in the record,

we are satisfied that the decree dismissing the bill was correct, and it will be affirmed. Decree affirmed.

(177 Ill. 534)

CROWN COAL & TOW CO. v. THOMAS.

(Supreme Court of Illinois. Dec. 21, 1898.)

EQUITY JURISDICTION — ACCOUNTING — CORPORATIONS — CONTRACTS — ANNULMENT — EVIDENCE — CONTRIBUTORS — RIGHT TO REIMBURSEMENT — PAYMENT — APPEAL — FAILURE TO APPLY FOR RELIEF.

1. Equity jurisdiction of matters of accounting does not depend on the absence of a remedy at law, where the accounts are complicated, and involved with third persons, and methods peculiar to equity are required.

2. Where all persons interested in a reorganized corporation met, and distributed shares of stock, without reference to the amount contributed, parol evidence that at such meeting they agreed to reimburse the contributors is admissible, in the absence of any resolution or minute action at a stockholders' or directors' meeting, to explain the minutes of a subsequent meeting showing a ratification of such agreement.

3. A corporation issuing its stock without reference to the amount contributed, and bonds to all contributors except one, is under obligation to reimburse such one for his contribution.

4. Where corporate stock is distributed without reference to the amounts contributed, a contributor may recover reimbursements for his contribution, though he had received shares of stock, and had disposed of them.

5. In an accounting between a reorganized corporation and a stockholder of the original corporation for the value of his interest in the latter, the pendency of an action against the former for an alleged indebtedness of the latter is not alone sufficient to show that it was indebted.

6. It was not error not to stay proceedings for an accounting pending such action, in the absence of any application therefor.

On Rehearing.

After a corporation had resolved to pay a contributor in bonds for his contribution, the president of the corporation attached the bonds for a debt due to him individually. The corporation then agreed with the contributor that the settlement by which he was to receive the bonds set aside for him, for his contribution, was annulled. *Held*, that the amount due to the contributor for his contribution was not paid in bonds.

Appeal from appellate court, Fourth district.

Suit by Edward L. Thomas against the Crown Coal & Tow Company and others. From a decree for complainant, the coal and tow company appealed to the appellate court, which affirmed the decree (73 Ill. App. 679), and it again appeals. *Affirmed*.

Gustavus A. Koerner, for appellant. Charles W. Thomas, for appellee.

PER CURIAM. This is an appeal from a judgment of the appellate court affirming a decree of the circuit court of St. Clair county. We have carefully examined the record and the argument of counsel, and are satisfied the appellate court reached a correct conclusion. The judgment of the appellate court will

therefore be affirmed, and as that court, in its opinion, has fully considered the questions involved, its opinion will be adopted. That opinion, by CROMBIE, P. J., is as follows:

"This was a suit in chancery, commenced and prosecuted in the circuit court of St. Clair county, by Edward L. Thomas against the Crown Coal & Tow Company, Bart S. Adams, and John T. Taylor, and resulted in a decree for \$6,300.89, in favor of Thomas. The Crown Coal & Tow Company brings the cause to this court by appeal.

"In the year 1887 there was organized, under the laws of the state of Illinois, a corporation styled the Crown Coal Company; and in the month of March, 1893, appellee, Thomas, and the said Adams and Taylor, owned all of the stock of the said corporation, and the said corporation owned and was operating a coal mine, and had due it a large amount in book accounts for coal sold in course of business, and owed the expenses incurred in operating the mine the previous month. Thomas, Adams, and Taylor also owed, jointly, \$4,500 to one Meisenberger, a former stockholder in said corporation, for his stock jointly purchased by them. Taylor and Adams owned a coal mine known as the 'Harmony Mine,' and certain coal leases. Adams owned an interest in the Western Coal & Tow Company, and one Samuel H. Leathe owned certain coal lands and a line of tugs. The above-named parties co-operated together, with others, in a reorganization of the Crown Coal Company, increasing its capital stock from \$30,000 to \$200,000, and changing its name to the Crown Coal & Tow Company; and all the above-mentioned properties were by their respective owners contributed and turned over to the reorganized concern, and its business thereafter carried on with this property. The reorganization was completed at a meeting of all the parties interested, held March 25, 1893; and all the \$200,000 of stock was distributed among the contributors and certain other parties who had contributed nothing, without any reference to the amounts contributed by each, or to the fact that a number had contributed nothing. At this same meeting, and as a part of the reorganization scheme, it was orally agreed and understood that all who had contributed should be reimbursed by the corporation to the extent of the value of their respective contributions, but the minutes of that meeting contain no mention of such an agreement. The original plan for reimbursement was found to be impracticable; and thereupon, at a stockholders' meeting held March 1, 1894, the following resolution, as shown by the minutes of that meeting, was presented and adopted:

"Whereas, the capital stock of this company has been contributed by various stockholders in unequal proportion, the distribution of the stock having been made without reference to the amounts contributed; and

whereas, this company was originally projected and organized by the parties interested in a certain railroad, then known as the Belleville & St. Louis Railroad, and now known as the Belleville City Railway, as an adjunct to said railroad; and whereas, it was originally contemplated, understood, and agreed by the parties interested in the formation and organization of this company that all the amounts advanced by any of the stockholders to this company should be repaid out of the proceeds of bonds to be issued by the said railroad company, and guaranteed in part by this company, and that the stock of this company should be subject to the indebtedness created by said bonds; and whereas, various of the stockholders of this company, on the faith of the said agreement and understanding, have advanced large sums of money to this company, and have conveyed to it property of great value; and whereas, a doubt has arisen as to the legality of such proposed indorsement or guaranty by this company of the bonds of the said railroad company, or the application of the bonds of the said railroad company to the purposes of this company, and said plan has been, in consequence, abandoned; and whereas, it is the desire of this company that the true intent and meaning of said agreement and understanding be carried out, and that the persons conveying their money and property to this company on the faith thereof be protected: Therefore, be it resolved, that the president of the company deliver, to each stockholder who has contributed either money or property to the capital of this company, bonds of this company at par, to an amount equal to such contribution, with interest from the date thereof to this date.'

"There having arisen a dispute as to the amount at which the Crown Coal Company property and good will was taken, that dispute was at that meeting settled, as appears from the minutes: 'The dispute as to the amount at which the Crown Coal Company's property and good will was taken by this company was this day settled by agreement of all the stockholders present, and said figure was fixed at \$18,000 of March 1, 1893. the same not to include the book accounts belonging to the Crown Coal Company.' In pursuance of the action taken by the stockholders at their meeting of March 1st, the directors met March 10th, and, as shown by the records of that meeting, unanimously passed the following:

"Resolved, that the Union Trust Company of St. Louis, trustee in the mortgage given by this company to secure its bonds, be authorized and requested to make delivery of said bonds as follows, to wit: To Samuel H. Leathe, \$118,500; to Bart S. Adams, \$10,000; to John Taylor, \$4,000; to Edward L. Thomas, \$5,000; all the balance of said bonds to Samuel H. Leathe, treasurer, \$62,500.'

"Said trustees thereupon delivered bonds,

as directed in said resolution, to all the contributors, except the appellee, and stood ready to deliver to him; but those intended for him were, for some reason not explained, so far as we find in this record, attached by Leathe, who was president of the corporation. Pending this attachment, the following agreement was entered into by the Crown Coal & Tow Company, the appellant, and Edward L. Thomas, appellee:

"Whereas, Edward L. Thomas has certain claims against the Crown Coal & Tow Company, based upon what he claims to be his portion of the purchase price of certain coal pits which were turned over to said company by him and his associates; and whereas, a partial settlement of the said claims has heretofore been made, and certain bonds of said company were set aside to said Edward L. Thomas, as in satisfaction or settlement of a portion of said claims, in consideration of the surrender of whatever interest in said bonds the said Edward L. Thomas may have: It is agreed by the said company that any former arrangement or settlement made between the parties, namely, said Thomas and said company, growing out of the said transactions, shall be considered abrogated and annulled, and as though it had never been made; and the said Edward L. Thomas shall be relegated to any actions or suits that he may be advised may be proper for the purpose of adjusting and settling the differences between him and the said company, growing out of said purchase money or other moneys which he may claim to be due him on account of the transactions hereinbefore mentioned. Dated this eighth day of November, A. D. 1895. Crown Coal & Tow Co., by S. H. Leathe, President.

"We ratify the above, this November 8, 1895. Saml. Leathe, Director. John T. Taylor, Director. Bart S. Adams, Director. Fred B. Merrills."

"Upon the execution of this agreement, the bonds set apart to appellee were surrendered to the appellant, and thereafter appellee instituted his suit, which progressed under the original bill to the rendition of an interlocutory decree referring the cause to the master, who took testimony and made report to the court, from which it appears that the balance chargeable to appellant on account of the book accounts belonging to the Crown Coal Company, after deducting the debts of that company (including the \$4,500 due Melsenberger from appellee, Adams, and Taylor, which appellant had undertaken to pay out of this fund, and had so paid), amounted to \$10,281.56; that the Crown Coal Company's property and good will were taken by appellant at \$18,000; and that appellee's portion of the contribution made by himself, Adams, and Taylor to the property of appellant at the time of the reorganization was $\frac{29}{112}$ of these amounts; and that appellee owed appellant a small note, with ac-

rued interest, amounting to \$306.29, showing a balance in favor of appellee of \$6,309.89.

"Objections and exceptions were filed to the master's report, and a final hearing had upon an amended and supplemental bill, and answer thereto, and a decree rendered in favor of appellee, against appellant, for \$6,309.89. The following errors, in substance, are assigned and urged: The court erred in rendering the interlocutory decree, in not dismissing complainant's bill, in not sustaining exceptions to master's report, finding for complainant, and rendering the final decree. It is contended that there was no competent evidence in this record of any agreement to reimburse; that appellee was paid for his interest in the contribution to the property of appellant in stock; that he has been paid to the extent of \$5,000 in bonds set apart for him in pursuance of the resolution of March 10, 1894; that by the agreement of November 8, 1895, appellant is released from all obligation and duty to pay him; that, if any right to recover ever existed, it was as a stockholder; and that, before the decree in this case was rendered, he had sold his stock; and, finally, that, if appellee has any remedy, it is not in chancery, but in an action at law by himself, Adams, and Taylor.

"The Crown Coal Company had on hand cash to the amount of between \$2,000 and \$3,000, a considerable amount of supplies, a large number of items of book accounts due it for coal, amounting to near \$20,000, and owed current expenses and other indebtedness consisting of many items, and at the time its mine was turned over to appellant by appellee and his associates, Adams and Taylor, its then owners, it was a going concern. The new organization desired to keep this mine in continuous operation, and, to that end, the moneys, supplies, and book accounts of the Crown Coal Company were turned over to it as a part of the contribution of appellee, Adams, and Taylor to its property. Appellant absorbed the cash in its business, used up the supplies, and undertook the collection of the book accounts and the payment of the debts, opening a separate account with this fund. This account was intricate and involved, and a great portion of the testimony in this voluminous record relates to it, and to contests and investigations concerning items of it. The interest of appellee in both this fund and in the mine and good will was involved with Adams and Taylor, who were also made defendants.

"Where the state of accounts between the parties is complicated and intricate, where the state of accounts between the parties is involved with third parties, where to do justice requires the employment of methods of investigation peculiar to courts of equity, and where it would be very difficult for a jury to unravel the numerous transac-

tions, are conditions usually held to be sufficient to give a court of equity jurisdiction. The jurisdiction in equity does not in such cases depend upon the absence of a remedy at law, but upon its adequacy or practicability, and upon the discretion of the court. This case is sufficiently involved, complicated, and intricate to justify a court of equity in taking jurisdiction of it.

"It is true that the agreement and understanding that the contributors to the property of the reorganized concern should be by it reimbursed for the property contributed by them, respectively, as first made and understood, are not evidenced by any resolution or minute action taken at a stockholders' or directors' meeting; but the oral evidence clearly shows that such agreement was entered into, and that such understanding did exist. Leathe, Borman, Chipley, Thomas, Taylor, B. S. Adams, and B. F. Adams all testify to it, and it is not controverted. This evidence is competent and material to the proper understanding of the resolutions of March 1 and March 10, 1894. The oral testimony also clearly shows the truth of the recital in the resolution of March 1st that 'the capital stock of this company has been contributed by various stockholders in unequal proportion, * * * without reference to the amounts contributed.' With all these facts before them and clearly understood, the stockholders and directors did, as is properly proven by minutes of proceedings at their respective meetings of March 1 and March 10, 1894, fully ratify and confirm the agreement and understanding shown by the oral evidence. The obligation to reimburse is proven by competent evidence. The whole scheme, as shown by the evidence, manifests the fact that the value of the property of the appellant was to be in its bonds, and not in its stock. Appellee was not paid for his interest in the contribution to the property of the company in stock, and reimbursement was actually made in bonds to all the other contributors, which of itself is a condition calling, in equity, for like treatment of appellee. True, bonds were set apart for appellee; but before they reached him, by the agreement of November 8, 1895, he surrendered back to appellant all of such bonds, for no other consideration, so far as appears, than that he might prosecute a suit for recovery of the value of his interest in the contribution by himself and his associates to the property of appellant, without prejudice by the act of surrendering his claim to the bonds. Such transaction cannot, in a court of equity, be held to be payment. The 'former arrangement or settlement' which was 'abrogated and annulled' by that agreement is the arrangement to pay a portion of appellee's claim in bonds. The right to demand, and by suit to compel, payment is reserved; and, in our opinion, appellant is not, by that agreement, released from

all obligation or duty to pay appellee. Although appellee had disposed of his stock in appellant company before the decree in this case was rendered, we are of opinion he is not thereby barred. In our view of the case, his right to recover is not dependent upon his being a stockholder. The stock was distributed 'without reference to the amounts contributed,' and large blocks of it given to persons who had contributed nothing. His right to recover is not incident to his stock, but to his having contributed to the property of the appellant under an agreement and understanding that he should be reimbursed, and the ratification and confirmation of that agreement and understanding by appellant. There was no error in rendering the interlocutory decree, and refusing to dismiss complainant's bill.

"The objections and exceptions to the master's report are not abstracted. Appellant, in its reply brief, says: 'In the abstract it has not been thought necessary to set out the exceptions to the master's report in detail, because the court is not asked to consider the report in detail;' and 'it is not a question of computation and calculation. Our contention is the whole thing is wrong.' After this case was referred to the master, and while it was pending before him, a suit was instituted in the circuit court of St. Louis county, Missouri, by the St. Louis Dredging Company, against appellant, on an alleged note of the Crown Coal Company, and proof of the pendency of that suit was made before the master. Complaint is made that the master did not, in his statement of account, allow the demand in that suit against appellee, and that the court did not, on account of the pendency of that suit, arrest the further prosecution of this one. It is not contended that, should we look into the evidence taken before the master, we would find any testimony tending to show that this was a bona fide suit, that the Crown Coal Company really owed such a debt, or that the appellant was liable therefor, in any manner, on account of the Crown Coal Company. We have looked into the record, and do not find any such testimony. This was a proper item to bring before the master, and, if a valid charge against appellee, it should have been proven the same as any other item. It appears the master was of opinion that the mere pendency of the suit was not sufficient proof, and excluded it, and no exceptions to his report appear in the abstract. It does not appear from the record that any application was made to the court to stay the proceedings in this case until the St. Louis case could be litigated. Such an application, at any time before final decree, supported by a proper showing of probable liability on account of that demand, would doubtless have been granted, or some order made fully protecting appellant. We find no error in sustaining the master's report, in finding for

complainant, or in rendering the final decree."

Judgment affirmed.

On Rehearing.

(Feb. 22, 1899.)

In the petition for a rehearing in this case it is said: "The main item recovered by the decree is \$5,709.37, to 'amount from coal mines.' The main error in the finding of the appellate and supreme court is that the fact was overlooked that this amount had been paid in bonds of the Crown Coal & Tow Company." The appellant agreed to deliver to appellee, Thomas, bonds of the company in payment of \$5,000 due him for property turned over to the company; but, as we understand the decree, he never obtained the bonds.

It appears from the decree that at a meeting of the stockholders of the appellant company, on March 1, 1894, the following proceedings were had.

"The dispute as to the amount at which the Crown Coal Company's property and good will was taken by this company was this day settled by agreement of all the stockholders present, and said figure was fixed at \$18,000 of March 1, 1893, the same not to include the book accounts belonging to the Crown Coal Company."

A resolution was passed to issue \$200,000 as bonds, and secure them by mortgage to Union Trust Company as trustee. The following resolutions were also adopted:

"Whereas, the capital stock of this company has been contributed by various stockholders in unequal proportions, the distribution of the stock having been made without reference to the amounts contributed; and whereas, this company was originally projected and organized by the parties interested in a certain railroad, then known as the Belleville and St. Louis Railroad, and now known as the Belleville City Railway, as an adjunct to said railroad; and whereas, it was originally contemplated, understood, and agreed by the parties interested in the formation and organization of this company, that all the amounts advanced by any of the stockholders to this company should be repaid out of the proceeds of bonds to be issued by the said railroad company, and guaranteed in part by this company, and that the stock of this company should be subject to the indebtedness created by said bonds; and whereas, various of the stockholders of this company, on the faith of the said agreement and understanding, have advanced large sums of money to this company, and have conveyed to it property of great value; and whereas, a doubt has arisen as to the legality of such proposed indorsement or guaranty by this company of the bonds of the said railroad company, or the application of the bonds of the said railroad company to the purposes of this company, and said plan has been, in consequence, abandoned; and whereas, it is

the desire of this company that the true intent and meaning of said agreement and understanding be carried out, and that the persons conveying their money and property to this company on the faith thereof be protected: Therefore, be it resolved, that the president of the company deliver, to each stockholder who has contributed either money or property to the capital of this company, bonds of this company, at par, to an amount equal to such contribution, with interest from the date thereof to this date."

Immediately after the adjournment of the stockholders' meeting, a meeting of the directors was held, at which the president and secretary were directed to cause bonds and mortgage to be issued, as directed by the stockholders. At a meeting of the directors held March 10th, the following resolution was adopted:

"Resolved, that the Union Trust Company of St. Louis, trustee in the mortgage given by this company to secure its bonds, be authorized and requested to make delivery of said bonds as follows, to wit: To Samuel H. Leathe, \$118,500; to Bart S. Adams, \$10,000; to John Taylor, \$4,000; to Edward L. Thomas, \$5,000; all the balance of said bonds to Samuel H. Leathe, treasurer, \$62,500."

Under these proceedings, bonds were delivered to Leathe, Adams, and Taylor, but no bonds ever passed into the hands of Thomas. It is true, Thomas, on his cross-examination, was made to say that he secured the bonds; but such was not the case. He, no doubt, intended to be understood as saying that the bonds were yet open for him, or ordered to be delivered to him. What counsel for appellant understands to have been a delivery of the bonds to Thomas is fully explained in his argument, as follows: "Thus, we see from his own testimony he did get the bonds; that is to say, they were delivered to him by the trustee. That they did not reach his hands is not the company's fault. His testimony above quoted shows that they were arrested in the hands of the trustee by an attachment proceeding by Mr. Leathe, presumably a creditor of his. But, as far as the company was concerned, the delivery was complete. Its trustee was ordered to deliver them to Mr. Thomas, and did deliver them, or hold them subject to the order of the court in the attachment proceeding."

It thus appears that after the bonds which Thomas was to receive had been made out, and were ready for delivery, Mr. Leathe, who was president of the appellant corporation, and who held the controlling stock in the company, commenced in the city of St. Louis an attachment proceeding against Thomas, and attached the bonds, and thus prevented their delivery. The fact that a resolution had been passed by the appellant directing a delivery of the bonds did not constitute a delivery; nor did the act of the president of the corporation attaching the bonds before they passed out of the hands of the trustee

constitute a delivery. Whether Leathe was to blame for stopping the bonds, or whether Thomas was in fault, does not appear, nor is it material. The fact remains that the bonds did not pass from appellant to Thomas. Indeed, it is apparent from a subsequent contract made between the appellant and Thomas that the appellant did not regard the bonds as having been delivered to Thomas. That contract was as follows:

"Whereas, Edward L. Thomas has certain claims against the Crown Coal & Tow Company, based upon what he claims to be his portion of the purchase price of certain coal pits which were turned over to said company by him and his associates; and whereas, a partial settlement of the said claims has heretofore been made, and certain bonds of said company were set aside to said Edward L. Thomas, as in satisfaction or settlement of a portion of said claims, in consideration of the surrender of whatever interest in said bonds the said Edward L. Thomas may have: It is agreed by the said company that any former arrangement or settlement made between the parties, namely, said Thomas and said company, growing out of the said transactions, shall be considered abrogated and annulled, and as though it had never been made; and the said Edward L. Thomas shall be relegated to any actions or suits that he may be advised may be proper for the purpose of adjusting and settling the differences between him and the said company, growing out of said purchase money or other moneys which he may claim to be due him on account of the transactions hereinbefore mentioned. Dated this eighth day of November, A. D. 1895. Crown Coal & Tow Company, by S. H. Leathe, President.

"We ratify the above, this November eighth, 1895. Saml. Leathe, Director. John T. Taylor, Director. Bart S. Adams, Director. Fred B. Merrills."

In this agreement, between appellant and Thomas, it is not intimated that Thomas had secured the bonds, but it is stated in a mild form that the bonds were set aside for Thomas. The agreement there pretends that, in consideration of the surrender of whatever interest Thomas has in the bonds, the former arrangement made between the company and Thomas, under which he was to secure bonds in payment for his interest on the property turned over to the company, should be abrogated, and Thomas was left free to institute proceedings to recover of the company for the property he had turned over to it. The only fair inference that can be drawn from this contract is that the bonds originally designed for Thomas passed back into the hands of appellant corporation.

In view of the foregoing, the position announced in the petition for a rehearing, that Thomas was paid in bonds for the property he turned over to appellant, is not borne out by the facts in the record, and the petition for a rehearing will be denied.

(178 Ill. 15)

KIEHNA et al. v. MANSKER et al.

(Supreme Court of Illinois. Feb. 17, 1899.)

SCHOOL DISTRICT — BUILDING SITE — POWER OF BOARD.

A school-house site having been selected by a vote of the people, and thus become the site of the district (School Law, art. 5, § 31; Hurd's Rev. St. p. 1307), the board of directors, in the absence of a change in conditions, has no power to annul the action of the voters, under article 5, § 27, cl. 11, declaring that the board "shall have power to decide when the school-house site or school buildings have become unnecessary or unsuitable or inconvenient for a school."

Appeal from appellate court, Fourth district.

Bill by George Kiehna and others against B. H. Mansker and others. From a judgment of the appellate court affirming a decree for defendants (77 Ill. App. 508), complainants appeal. Reversed.

John Boyd and C. R. Hawkins, for appellants. W. T. Vaughn and Chas. D. Kane, for appellees.

CARTWRIGHT, J. Appellees are school directors of district No. 4, in township 6, range 3, in Perry county. The school house was built about 30 years ago, upon a site half a mile east of the center of the district, and, having become dilapidated and unfit for the purpose of a school, the board of directors, on January 25, 1897, called an election, and gave notice of the same, to be held February 6, 1897, for the purpose of voting on the following questions: For or against building a new school house; for or against purchasing a site for the new school house at the Derrington well; for or against building on the site at the center of the district; for or against issuing bonds to the amount of \$650, to be used in said building and site, if needed, etc. The election was held, and resulted in a majority of votes for building on the site at the center of the district and for issuing the bonds, and a record was made of such results. A conveyance was made to the township trustees, for the use of the district, of the premises selected, consisting of one acre in the N. W. corner of the S. W. $\frac{1}{4}$ of section 26, in said township. Advertisements to contractors for building a new school house were published, and bids received, and the contract was let to S. H. Carson for \$535. Bonds to the amount of \$600 were issued to Murphy, Wall & Co. A suit was instituted against the directors to declare the election void, and to enjoin them from building at the center of the district, but nothing was done under the bill, and they were not restrained in any way. At a meeting of the board, July 8, 1897, a petition of certain voters and residents of the district was presented, asking the board to rescind and annul the action locating the site chosen by the electors, to cancel the contract for building the school house, to rescind the order for issuing bonds, and to submit to the voters the

proposition to vote for or against building a new school house where the old school house stood, and for or against issuing bonds, not to exceed \$600, to pay for the same. The petition stated that there was no public highway at the site chosen at the election. At a special meeting of the board held July 12, 1897, an order was entered rescinding the contract with Carson, and revoking the order by which the bonds had been sold, and an election was ordered on the propositions so petitioned for. That election was not held, for the reason that appellants, who are residents and taxpayers of the district, filed the original bill in this case, and obtained a temporary injunction against the election. The temporary injunction so obtained was dissolved upon motion on vacation, September 11, 1897, whereupon the board again proceeded to call an election, and on October 4, 1897, ordered such election to be held on the following proposition: "To build a new school house on the old site and to issue bonds to the amount of \$600." This election was held, and a part of the electors, 26 in number, attended and voted in favor of the proposition, and there were no votes against it. Appellants then filed their supplemental bill, stating the proceedings at said meeting of October 4, 1897, and the holding of the election, and praying for an injunction against the carrying out of such proposition. A temporary injunction was granted, and the cause was heard upon the bill, answer, and proofs establishing the foregoing facts, when the injunction was dissolved and the bill dismissed. The appellate court has affirmed the decree.

The single fact from which it is claimed that appellees had a right to ignore and annul the action of the electors in choosing a site for the school house is that there was no public highway to the site so chosen. It appears from the evidence that the site was one-eighth of a mile from the public highway, and that it was conveyed by Theodore Walkinghorst, but it does not appear with any certainty whether the district acquired a way by necessity, on account of its being surrounded by land of the grantor, or whether a license for ingress or egress would be implied. Walkinghorst testified that he gave the directors the right to go in and build the school house, and one of the school directors testified that Walkinghorst gave the board permission to have a road to the site, while another witness speaks of land of Mr. Baker lying between the school house and the road. In *Wilson v. Garrard*, 59 Ill. 51, the school house was erected on a small lot forming a part of a tract owned by Wilson, and it was held that, until a highway was provided, children had the right necessarily to go to and return home from the school house over his land. Under the decision in that case, if Walkinghorst granted the land for a public use necessarily requiring that the children of the district should go and come to and from school, a license to pass over his land might fairly be implied. But,

however that may be, the site had been selected by a vote of the people, and became the site of the district. School Law, art. 5, § 31 (Hurd's Rev. St. p. 1307). In such a case, the directors have no power to select a site or to annul the action of the voters. The right to do so in this case is claimed by virtue of the eleventh clause of section 27 of said article 5, which is as follows: "They shall have power to decide when the school house site or school buildings have become unsuitable or unsuitable or inconvenient for a school." That clause confers a power to be exercised when changed conditions have rendered a site once chosen by the voters unsuitable or inconvenient in the opinion of the board, and the power given in such case is to take the initiative for the choice of another site by calling an election and submitting the question to the voters. A change in the center of population, or other conditions, may occur, and the language of the statute implies some such change of condition, which will authorize action by the board, and not a simple refusal to carry out the will of the voters. In this case, nothing had happened after the choice of the site by the voters to render it unsuitable or inconvenient, and the voters acted in view of the same conditions and with the same facts before them as the board when it attempted to annul their action. It does not even appear that there was not a right of way from the public highway, either by necessity or from an implied license, and, if there was not, it had not been determined that such a way could not be reasonably secured or a public highway laid out. The right, as claimed, is simply to repudiate any site selected by the voters if it does not meet the views or wishes of the board, and to call an election to build on an original site discarded and defeated at the election. We do not understand the statute as conferring such power. The question of the site had been settled at the election held in February, 1897, and until it should become unsuitable or inconvenient, or it had been found that the only objection made to it by the directors was not and could not be reasonably removed, there was no right to call an election to build a school house on the old site. The judgment of the appellate court and the decree of the circuit court are reversed, and the cause is remanded to the circuit court. Reversed and remanded.

(178 Ill. 46)

STOFF et al. v. McGINN et al.

(Supreme Court of Illinois. Feb. 17, 1899.)

WILL—CONSTRUCTION—JURISDICTION—PARTIES—POWER OF SALE.

1. A court of equity being authorized to construe wills, and having entertained a bill for that purpose, the fact that it was mistaken in the conclusion that it required construction and the appointment of a trustee does not make its decree void for want of jurisdiction.

2. An administrator de bonis non, who has a duty to perform in connection with the property disposed of by the will, requiring a con-

struction of the will and a sale of the property, may file a bill, on which the court may construe the will and appoint a trustee to sell.

3. Though one filing a bill for construction of a will is not entitled to bring the suit, this does not affect the court's jurisdiction, or make its decree void, but merely erroneous.

4. Though a will gives no express power to sell, such power is to be implied, where the will gives all testator's property, real and personal, to his executor, in trust to distribute in such manner that sale is necessary.

5. A decree construing a will, finding that the lands therein disposed of are personalty, to be sold and divided, is a bar to an action by the beneficiaries under the will for partition of the land, though the trustee to sell and distribute, appointed in the suit to construe, failed to give a bond as required by the decree, and the sale made by him was not confirmed.

Appeal from circuit court, Clinton county; S. L. Dwight, Judge.

Bill by Felix McGinn and others against B. H. Stoff and others. Decree for complainants. Defendants appeal. Reversed.

John J. McGaffigan and William Winkelmann, for appellants. A. W. Hope, Howett & Jett, Thos. E. Ford, and B. J. O'Niel, for appellees.

CARTWRIGHT, J. Appellees filed the bill in this case in the circuit court of Clinton county for the partition of 393½ acres of land, claiming title in fee simple in themselves and Ellen McKenna, who was made a defendant, as tenants in common under the will of Owen Mulligan, deceased, and asking to have certain deeds and a mortgage declared null and void, as clouds upon the title. It is alleged in the bill that Robert C. Lambe, administrator de bonis non with the will annexed of the estate of said Owen Mulligan, deceased, made sales and conveyances of said lands to B. H. Stoff, J. T. Zurleine, and Clem. Schoenhoff, appellants, and to August Peek and J. B. Boeling; that no title passed by said conveyances; that said J. B. Boeling has since died intestate, leaving certain of the appellants as his heirs at law; and that there has been a subsequent conveyance of a portion of the premises and a mortgage of another portion. These are the deeds and mortgage asked to be set aside. The amended answer of the defendants J. T. Zurleine, B. H. Stoff, Clemens Schoenhoff, August Peek, and the heirs at law of J. B. Boeling, deceased, set forth a proceeding in the circuit court of Clinton county for the construction of the will of said Owen Mulligan, and the appointment of a trustee for the purpose of selling the land, in which Robert C. Lambe, administrator de bonis non with the will annexed, was complainant, and the heirs and devisees of said Owen Mulligan were defendants, and in which the said sales and conveyances were made and a part of the proceeds distributed. The defendant Robert C. Lambe, administrator, also answered the bill, setting up the same proceeding. To all those portions of said amended answer which alleged the appointment of

Lambe as administrator de bonis non with the will annexed, and his qualifying as such, and the proceeding in the circuit court, and the sales and conveyances, and distribution of part of the proceeds, exceptions were filed by complainants, on the ground that the allegations were insufficient in law to present any defense to the relief prayed for in complainants' bill, and for the further reason that, as to the averment of distribution, it was not stated that the money was paid to, and received by, complainants, and accepted by them, with knowledge of the fact that it was a portion of the proceeds of the sales of the real estate. The circuit court sustained these exceptions, which eliminated everything in said amended answer in the way of defense; and upon formal proof being made that Owen Mulligan claimed the lands, and the testimony of a witness that the heirs of said Owen Mulligan and their interests were correctly set forth in the bill, the court entered a decree of partition. The only question here is whether the court was right in sustaining the exceptions.

All the parties stand upon the will of Owen Mulligan as the source of their rights and titles, respectively, and all allege the validity of both the nuncupative and written portions of said will as probated in the county court of Clinton county. This will, as so admitted to probate, is set out both in the bill in this case and in the bill of Lambe asking for its construction and the appointment of the trustee. A part of the will was made April 12, 1892, during the last sickness of Owen Mulligan, in a hospital in Aviston, by stating the same to Theodore G. Peek, in the presence of J. J. McAllilly and J. Twiss, and was reduced to writing and sworn to by McAllilly and Twiss on April 20, 1892, as follows: "I want all my debts paid first. I want an equal division of all my estate among all my relatives. I gave part of my estate, \$24,000, to my relatives in Ireland, in Jersey City, and New York. I want the rest to have just as much as I have paid these, and the balance to be divided equally among all my relatives. I want Theodore G. Peek to be executor of my estate without bond. I want him paid well for his trouble. You, Mr. McAllilly and Mr. Peek, can erect for me whatever kind of a monument or tombstone you choose, not to exceed \$150. I want this institution well paid." Being asked by Mr. McAllilly, "How much do you want the Sisters to have?" he answered, "I will settle with them myself." On the following day, April 13, 1892, Owen Mulligan made the will in writing, as follows:

"In the name of God, Amen. I, Owen Mulligan, of Aviston, Clinton county, Illinois, make this my last will and testament: First. I give and devise to Mr. Theodore G. Peek all my estate, both real and personal, wherever situated, for the purpose to divide it among my relatives, as I have advised in

the presence of Messrs. J. McAllilly and J. Twiss. Second. I nominate him sole executor of this my last will, and no bond or security shall be asked him as such.

"Given under my hand and seal, at Aviston, Ill., April 13, 1892.

his
"Owen X Mulligan."
mark.

The testator died April 17, 1892, and the statements as reduced to writing, and the written will, were admitted to probate as his last will and testament.

In the bill in this case complainants represent: That Owen Mulligan, the testator, in his lifetime, made advancements in money to certain of his heirs, which were received and accepted by them as such, as follows: To Patrick Connolly, \$3,000; to Bridget Smith, \$3,000; to Owen Mulligan, \$5,000; to Kate Murphy, \$3,000; to Rose McGough, \$2,250; to Bridget Carroll, \$2,250; to Eugene Hughes, \$400; and to Francis Hughes, \$400. That Theodore G. Peek, the executor and trustee named in the will, died January 12, 1893, without having executed the trust imposed upon him, and left, surviving him, at the time of his death, a widow and children, who are made defendants to the bill. That nothing remained for the trustee to do at his death but to divide the property, and that the title has vested in complainants. Although the bill avers the making of these advancements, and the direction of the testator that the rest should have as much as he had so advanced, and there should be an equal division of all his estate, the prayer of the bill, and the decree entered under it, seem to entirely ignore such advancements and direction, and to ask for and make division of the land itself, regardless of them.

Those portions of the amended answer to which exceptions were sustained alleged that, after the death of Peek, Robert C. Lambe was appointed by the county court of Clinton county administrator de bonis non with the will annexed of the estate of said Owen Mulligan; that he filed a bond, with security in the penal sum of \$15,000, conditioned according to law and approved by the county court; that he qualified as administrator and entered upon the administration of the estate; that it became necessary to obtain a construction of the will, and that Lambe filed his bill March 29, 1893, in the circuit court of Clinton county, for such construction and the appointment of a trustee to sell the premises and divide the proceeds in accordance with the intent and meaning of the testator. The bill so filed by Lambe stated that on March 1, 1892, Owen Mulligan, intending to distribute a portion of his estate to his relatives, directed distribution to be made as follows: To Rose Mulligan, widow of his deceased brother, Michael, \$1,000; to his nephew Owen Mulligan, \$5,000; to his niece Kate Murphy, \$3,000; to his nephew Patrick Mulligan, \$3,000; to his niece Rose McGough,

\$3,000; to his niece Bridget Carmoll, \$3,000; to his nephew Patrick Connolly, \$3,000; and to his niece Bridget Smith, \$3,000; but that the agents having the distribution in charge actually distributed the same in somewhat different amounts, set out in the bill.

It will be noticed that among those to whom advancements were made which were included in the \$24,000 mentioned by the testator as given to his relatives was Rose Mulligan, a sister-in-law, and that fact raised the question whether she was to be regarded as a "relative," within the meaning of the term employed by him, and whether in making the others equal and in the distribution of the balance she was to be so considered, and this question the bill submitted to the circuit court. It was also alleged to be uncertain what the term "relatives," as used by the testator, meant, and whether only legal heirs were included within its terms; whether the distribution made by the testator was to be considered as part of his estate and added to it for the purposes of a division, not giving to any who had received an advancement until the others had received a like amount; whether, under the will and facts, the testator intended that his relatives should share in the distribution per stirpes or per capita; whether the recipients of advancements should be charged with the amounts the testator directed paid to them or the amounts which they, respectively, did in fact receive; and whether the lands should be considered as real estate or personal property, for the purpose of the distribution. These questions were all submitted to the circuit court.

The amended answer further showed that the heirs of Owen Mulligan, descendants of his brothers and sisters, including the complainants in this bill, or the ancestors (who have since died) of the complainants, were made defendants. Rose Mulligan, the widow of the deceased brother, was also made a party. All the defendants to that bill were duly served, the nonresidents by publication and the residents by process of summons. Rose Mulligan and nine of the appellees having principal interests appeared and filed answers. A guardian ad litem was appointed for James Hughes, who was a minor, and said guardian ad litem appeared and answered for him. There was a hearing, and the court construed the will, and entered a decree accordingly, finding the meaning of the term "relatives," as used in the will, to be only such persons as were related to Owen Mulligan by consanguinity, who should take per stirpes, and excluding relatives by affinity; finding who were relatives and the interest of each of them in the estate; declaring that said relatives took no title to the lands, but that the same were to be considered personal estate; and appointing Lambe as trustee, to sell the same for the purposes of a division according to the terms of the decree, which also provided that the \$24,000 advanced should be deemed a part of the testator's

estate, and those to whom distribution and advancements were made should receive nothing until all those related in like degree to the testator should receive an equal amount. The decree required Lambe to file bond with surety in the sum of \$15,000, and to make the sale for one-third cash and balance secured by notes with security and a mortgage on the premises sold. Lambe did not file the bond, but advertised the premises, and on July 7, 1893, sold them in different tracts, at their highest market value. The sales amounted to about \$17,000. The purchasers paid one-third of the purchase money in cash, and gave their notes and mortgages, in compliance with the decree. At the November term, 1893, Lambe filed his report of the sales in the case, but no action was taken on the report. On December 5, 1893, he distributed \$5,000 of the purchase money to the complainants or their ancestors and the defendant Ellen McKenna, each receiving a pro rata share. On July 8, 1893, the purchasers took possession of the lands, and have since occupied them and made valuable and lasting improvements. At the May term, 1894, of the circuit court, an order was entered staying the distribution of the funds until the next term of court. These were, in substance, the averments to which exceptions were sustained.

There is no denial of the jurisdiction of the court in the former proceeding over the persons of the complainants in this case or those under whom they claim, but it is contended that the court was right in this case in disregarding such proceeding and the adjudication that the beneficiaries under the will took no title to the lands, and in entering an opposite decree and finding, on the grounds that the will was plain and needed no construction; that, the lands being devised to Peek to be divided among the testator's relatives, no power to sell was implied; that, even if there was a power to sell, it did not descend to Lambe as administrator with the will annexed, and he had no right to file the bill; and that the proceedings subsequent to the decree were so irregular, for want of a bond by the trustee and confirmation of the sales by the court, that the sales were void.

Of course, the conclusion of the court in this case, that the will of Owen Mulligan would admit of but one interpretation, or that it was plain and unambiguous in its terms, would not establish a want of jurisdiction under the bill filed by Lambe. Courts of equity are authorized by law to construe wills in proper cases, and, upon the filing of the bill by Lambe, the question of the proper construction of the will was brought within the jurisdiction of the court. If it could be said that the court was mistaken in the conclusion that the will required the construction and the appointment of the trustee, it would be merely erroneous. The court had jurisdiction of the parties and the subject-matter, and its decree is binding upon the parties. The decree could only be attacked for want of jurisdiction

in the court to adjudicate on the subject at all or to bind the persons of the parties, and the court in this case had no right to overturn the construction there given or the decree in that case. While it is only necessary that the court should have jurisdiction in order that its decree should be binding, we think that it was a proper case for the submission of the questions involved to a court of equity.

It is also insisted that Lambe had no interest in the subject-matter and was not authorized to file the bill. No one contends that, as administrator with the will annexed, he would have been authorized to make a sale by virtue of the will. Such a power is connected with a personal trust and confidence reposed by the testator in the executor, and without the aid of the court he could not sell the lands devised to such executor. *Nicoll v. Scott*, 99 Ill. 529; *Hall v. Irwin*, 2 Gilman, 176. But if Lambe, as administrator, had a duty to perform in connection with the property, which required a construction of the will and which rendered it necessary that a sale should be made, he was fully authorized to file the bill, and the court might properly construe the will on his application, and appoint a trustee to sell the land. *Wenner v. Thornton*, 98 Ill. 156; *Longwith v. Riggs*, 123 Ill. 258, 14 N. E. 840. Even if it should be held that he was not entitled to bring the suit, it would not show a want of jurisdiction or render the decree a nullity, but it would be merely erroneous, and must be corrected in a direct proceeding. *Wenner v. Thornton*, supra.

Although the will contained no power of sale, yet such power arises by implication wherever the duties to be performed under a will cannot be performed without making a sale. *Rankin v. Rankin*, 36 Ill. 293; *Hale v. Hale*, 125 Ill. 399, 17 N. E. 470; *Gammon v. Gammon*, 153 Ill. 41, 38 N. E. 890. The will declared the intention of the testator that there should be an equal division of all his estate among all his relatives, and he devised to his executor all that estate, both real and personal, wherever situated, for the purpose of such division, and stated that he wanted the rest to have just as much as those to whom advancements were made, and the balance to be divided equally among all his relatives. If the requirements of the will were such as to necessitate a conversion into personal property and a distribution in that form, Lambe, as administrator, was so connected with the trust that he could properly apply for the construction of the will and ask for the appointment of the trustee to sell the property. *Whitman v. Fisher*, 74 Ill. 147. His bill alleged that no division could be made according to these provisions without a sale. There was certainly such a question fairly involved as justified the filing of a bill and the assumption of jurisdiction under it. The court had jurisdiction of the questions submitted to it, and the correctness of its conclusion upon them was not before the circuit court in this case and is not before us for

consideration. Its decree cannot be ignored, and we shall not undertake to pass upon such questions or the validity of the titles claimed under the sales. It necessarily follows from what has been said that the action of the court in sustaining the exceptions was wrong.

The subsequent irregularities in the failure of the trustee to give a bond and the want of confirmation of the sales do not, in any manner, affect the question of the right to a partition in this case. While that decree stands, which finds that the lands are personal property to which appellees have no title, but which are to be sold and the proceeds divided, they cannot have a partition or recover the land itself in any form of action. Whether the decree in that case has been executed or remains to be executed, such decree is a bar to the right to maintain this bill, and the averments in respect to it constitute a good defense.

The court erred in sustaining the exceptions, and the decree is reversed, and the cause remanded, with directions to overrule them, and to thereafter proceed in conformity with what has here been said. Reversed and remanded.

(178 Ill. 130)

MULLIGAN et al. v. LAMBE et al.
(Supreme Court of Illinois. Feb. 17, 1899.)
WILL—POWER OF SALE—ADMINISTRATOR DE BONIS NON.

Though a power of sale given by a will to the executor cannot be executed by the administrator de bonis non, yet, sale being necessary for distribution according to the will, he may as trustee be authorized by the court to make the sale.

Error to circuit court, Clinton county; A. S. Wilderman, Judge.

Suit by Robert C. Lambe against Owen Mulligan, Jr., and others, for construction of a will. From a decree construing it, and appointing complainant trustee to sell lands disposed of by the will, certain defendants bring error. Affirmed.

A. W. Hope, W. A. Howett, B. J. O'Neill, and Thos. E. Ford, for plaintiffs in error. John J. McGaffigan and William Winkelmann, for defendants in error (except Lambe).

CARTER, C. J. The plaintiffs in error are legatees under the will of Owen Mulligan, deceased, whose will was probated in the county court of Clinton county. By the will the testator gave all of his property, real and personal, to Theodore Peek, his executor, in trust, to be distributed to his "relatives," as therein stated; and, while no power to sell was expressly given, the duties with which the executor was charged by the will could not be performed without a sale, and such power was therefore to be implied. See *Stoff v. McGinn*, 178 Ill. 46, 52 N. E. 1048, and cases therein cited. The executor died, and defendant in error Robert C. Lambe

was appointed administrator de bonis non with the will annexed, and filed the bill in this case for a construction of the will, and for the appointment of a trustee to sell the lands and distribute the proceeds, as provided by the will. A full statement of the case is set forth in the opinion in *Stoff v. McGinn*, supra, and will not be repeated.

The only point made by plaintiffs in error in their brief and argument is that the decree is void and a cloud upon their title. This contention is based upon the assumption that the administrator had no power over the real estate, and no standing in a court of equity to file the bill for the construction of the will and the appointment of a trustee to sell, and that the court had no jurisdiction. We have fully considered this question in the other case, where it was held that the court did have jurisdiction in this case, and that the decree, while in force, was a bar to the relief sought in that case. The cases cited by counsel do not seem to support their contention. Here the sale was under a decree of a court of equity, and where the court had found that there was an equitable conversion of real into personal estate, and we are unable to see that cases holding that an administrator cannot sell merely under power given by the will to the executor have any application. Mere irregularity of procedure would not render the decree void, when, as here, the court had jurisdiction of the subject-matter and the parties.

No question of any kind, except as to the ratio of division of the proceeds, was raised in the court below by any of the defendants to the bill, until after the sale and conveyances had been made; and as no error is insisted on except the alleged lack of jurisdiction, and as we have found in this as well as in the other case that the court had jurisdiction, this decree must be affirmed. Decree affirmed.

(177 Ill. 468)

REVELL v. PEOPLE.
(Supreme Court of Illinois. Dec. 21, 1898.)

INFORMATION IN EQUITY—REAL PARTY IN INTEREST—LAND UNDER LAKE MICHIGAN—TITLE—PRESTURES—ABATEMENT—RIPARIAN RIGHTS—COMMON LAW.

1. In an information in equity, in the name of the people by the attorney general, to enjoin an owner of land from reclaiming any of the bed of Lake Michigan, where the commissioners of a park, as a board, have taken no action whatever in reference to the commencement or prosecution of the action, and they have no interest in the result, except such as shared by the people at large, the contention that the people have no interest in the litigation, and that the real parties are such commissioners, is not tenable, though defendant, by a supplemental answer, undertakes to bring into the controversy the rights of such commissioners under an act of the legislature, where that matter is not responsive to anything in the information.

2. The title and dominion over lands covered

¹ Rehearing denied February 9, 1899.

by the Great Lakes belongs to the state in which the lands are located.

3. At common law, the erection of piers in Lake Michigan, in front of one's premises, without a grant or other authority from the state, is a purpresture.

4. An unauthorized encroachment on the soil of the shore, which is termed a "purpresture," though not injurious or a public nuisance, may be enjoined or abated on the information of the attorney general.

5. The construction of piers, by a shore owner on Lake Michigan, which extend into the lake, causing accretions extending the boundary of his land into the lake, is an act injurious to the state, which may be abated in equity on application of the attorney general.

6. The only common-law riparian rights of a shore owner on Lake Michigan are the right to the accretion, and the right of access from his land to the lake; and the common law in regard thereto has not been changed or modified in Illinois by statute, custom, or usage.

7. A shore owner on Lake Michigan has no title to, or right to build on, the land below high-water mark, under the common law, and the common law has not been changed in Illinois.

8. The shore owner of lands on Lake Michigan has no right to "wharf out" from his premises into the lake, though in aid of navigation.

9. An owner of land bordering on Lake Michigan has no common-law right, as riparian owner, to "wharf out" into the lake in order to protect the shore of his land from erosion, though he may erect structures on his own land for such purpose.

Appeal from circuit court, Cook county; John Gibbons, Judge.

Information in equity by the attorney general, in the name of the people, against Alexander H. Revell, to obtain an injunction, and an abatement of certain piers. From a decree for complainant, defendant appeals. The state assigns cross errors. Reversed on the cross errors.

This was an information in equity, brought in the circuit court of Cook county in the name of the people, by the attorney general, against Alexander H. Revell, as the owner of a certain tract of land bordering on Lake Michigan. The information alleges that so much of Lake Michigan as is included by lines running north from the point where the eastern boundary of the state of Illinois strikes the southern bend of said lake, to a point in the middle of the said lake in north latitude 42 deg. 30 min., and thence west along that parallel, is within the state of Illinois; that the soil or submerged land lying or being under the waters of Lake Michigan aforesaid, within the limits of the state of Illinois, to the line or point on the shores of said lake within the limits aforesaid, belongs to, and the title thereto is, by virtue of the common law in force in said state, vested absolutely in, the state of Illinois, free from the obstruction and interference of private parties therein; that it is the duty of the state to preserve such waters and submerged lands for the use of the public, to be used and enjoyed by them free and unmolested by erections and inclosures of any kind thereon made by private individuals, or oth-

ers claiming to own the adjoining shore, without the sanction or authority of said state of Illinois; that no municipal or private corporation or individual has any right, power, or authority to exercise exclusive control over the submerged land aforesaid, or to trespass and intrude on the same, by the erection of cribs, piers, jetties, breakwaters, bulkheads, obstructions, or inclosures of any kind, extending beyond the usual water line on the shore of Lake Michigan, or to reclaim by the means aforesaid, or otherwise, the submerged land so described, the same being subject to the supervision, ownership, and control of the state of Illinois as aforesaid; that Alexander H. Revell is now, and for a long time previous has been, the owner of, or interested in, a certain tract of land, described as follows: Sublot 1 in assessor's subdivision of lots 1 and 2 in the city of Chicago subdivision of the E. fractional $\frac{1}{2}$ of section 28, township 40, range 14, E. of the third P. M., and block 6 (except the west seven feet thereof) in Gehrke & Brauckmann's subdivision of the S. $\frac{1}{2}$ of the N. E. fractional $\frac{1}{4}$ of the N. W. fractional $\frac{1}{4}$ of section 28, township 40, range 14, E. of the third P. M., bordering on said lake, in the county of Cook, Ill.; that said Revell has, by the construction of piers, reclaimed from the bed of the lake a large amount of land (about 250 feet) lying east of the premises described; that the land so reclaimed belongs to the state; that said Revell has further constructed piers of timber and stone 130 to 200 feet at right angles to the shore, upon the submerged land opposite said premises, for the purpose of filling in and reclaiming further large tracts, said piers being extensions of or similar to the structures above mentioned; that the said Revell claims the right, as riparian owner, to reclaim the said lands and to reclaim other lands by the means aforesaid, and disputes the title of the state to such reclaimed and submerged lands; that said structures are solely for the purpose of reclaiming submerged land, and not in aid of navigation or commerce, or to protect the land of said Revell from erosion; that said Revell has no right to construct such piers even for the purposes aforesaid; that the said structures are an irreparable injury to the state, and a purpresture, and should be abated, or seized for the benefit of the state; that there is no remedy at law for the injury aforesaid, wherefore the informant prays a perpetual injunction against said Revell from further filling in and reclaiming; that said piers be abated; that defendant be enjoined from building piers in the bed of Lake Michigan, and from doing any work on said piers, or from filling in any of the bed or encroaching on the waters of Lake Michigan.

The answer of said Revell claims the ownership of the land in question from a time long prior to the filing of the information; denies that by the construction of piers he has

reclaimed the whole or a large portion of said premises from the bed of said lake; denies he has constructed piers, as alleged in the information, for the purpose of reclaiming land from the lake; avers that he constructed a pier of a permanent character on the south line of his premises, at right angles to the shore, but denies it was made to reclaim submerged land; and avers it was built lawfully, to protect his land from erosion; that prior to its construction there had been violent erosion, and his land was threatened with further waste; that said pier was erected to save and protect his land, and does not extend into the waters proper of the lake; denies that it is an intrusion or an interference with navigation; denies that it is a purpresture, and insists that the people have no interest or right in its removal. The defendant further set up in his answer that the information was not brought on behalf of the people, but by the commissioners of Lincoln Park, who are interested in getting a decision as to the rights of littoral owners, whose lands they may desire hereafter to condemn and acquire, and who, to get an expression of the courts on that subject, instigated this suit, which is therefore not brought in good faith. The answer concludes with a general denial of allegations not admitted, confessed, traversed, or denied. Subsequently a supplemental answer was filed, in which the defendant set up that since the filing of the answer the commissioners of Lincoln Park had prepared and adopted a plan for the enlargement of Lincoln Park, and the location of a boulevard over the bed of the lake opposite to, and about 1,200 feet east of, defendant's premises, the land under the water between said boulevard and the shore line as it existed at the time of the adoption of said plan to be reclaimed for park purposes, and had made an estimate of the cost of such improvement, all in accordance with an act of the general assembly approved June 15, 1895; that said plan was adopted and said action taken about March 20, 1896.

Replication was filed to the answer and supplemental answer, and the cause was referred to the master to take proofs. A hearing was had on the pleadings and evidence, and the court, in its decree, finds that the cribs, piers, breakwaters, or bulkheads described in said information and in the answer filed herein, constructed by the said defendant, Revell, as charged in said information and admitted by said answer to have been constructed, are trespasses on the submerged lands of Lake Michigan, the title of which lands was at the time of their erection in the state of Illinois, and that they are purprestures, but finds that they were built for the protection of the defendant's land from erosion by the waters of Lake Michigan; that they are not detrimental to the public interest, and will not become so until the state of Illinois wishes to reclaim and use the submerged lands on which they stand; "that the said defend-

ant and all claiming through or under him, be, and hereby are, perpetually enjoined from building hereafter, opposite to or in connection with his land described in the information, any pier, crib, breakwater, bulkhead, or other artificial device or construction on the submerged lands under Lake Michigan for the purpose of making any land or reclaiming any submerged lands for the purpose of protecting the lands above described from erosion by Lake Michigan, or for any other purpose whatever; that the said piers, breakwaters, or bulkheads now existing, opposite and connected with the said land, are, so far as they stand on the submerged lands of Lake Michigan, purprestures, and subject to abatement by the state of Illinois whenever said state shall desire to reclaim or use the submerged lands on which the said piers, breakwaters, or bulkheads stand; that because of its finding that the said purprestures are not detrimental to the public interests, and will not become so until the state of Illinois wishes and undertakes to reclaim and use the submerged lands on which they stand, the court does not now order the said purprestures abated; that the said defendant, and those claiming through, by, or under him, be perpetually enjoined and restrained from in any manner interfering with the state of Illinois, or with the commissioners of Lincoln Park, as the agents and trustees of the state of Illinois, in their taking possession of the submerged lands of Lake Michigan opposite to, eastward of, and adjoining the land of the defendant in said information described, up to the water's edge, and at the time such possession is taken, and reclaiming the same, and using the same for park purposes; that whenever the said state of Illinois, directly or by its said agents or trustees, may choose to take such possession and reclaim and use the said submerged lands up to the water's edge opposite and adjoining the land or lot of the defendant, it may abate and remove, without let or hindrance from the defendant, or those claiming by, from, or under him, any structure, piers, cribs, breakwaters, or bulkheads found standing on said submerged lands eastward of the said water line, and the said Revell, and those claiming by, through, or under him, is and are hereby perpetually enjoined and restrained from any interference with such abatement or removal." To reverse this decree the defendant prayed for and obtained an appeal. As will be observed, the court, in its decree, found from the evidence that the piers were built for the protection of defendant's land from the erosion of the waters of Lake Michigan, and that they were not detrimental to the public interest, and would not become so until the state of Illinois wished to reclaim and use the submerged land upon which they stood; and the court refused to order the said purprestures abated until the state of Illinois directly or indirectly took possession of, and reclaimed and used, the submerged lands

adjacent to the defendant's holdings. Upon these points the appellee has assigned cross errors.

Wilson, Moore & McIlvaine and Smith, Blair & Smith, for appellant. E. C. Akin, Atty. Gen., and Edward O. Brown, for the People.

CRAIG, J. (after stating the facts). It has been suggested in the argument of counsel for appellant that the people have no interest in this litigation,—that the real parties in interest are the commissioners of Lincoln Park. We do not regard this position as sustained by the record. The suit was instituted in the name of the people, by the attorney general. The commissioners of Lincoln Park, as a board, have taken no action whatever in reference to the commencement or prosecution of the action, nor have they any interest in the result, except such as may be shared by the people at large. So far as appears, the attorney general, representing the people, brought the action in good faith for and on behalf of the people. The commissioners of Lincoln Park were not made parties to the proceeding nor are they mentioned in the information. It is true that the defendant, by a supplemental answer, undertook to bring in to the controversy the rights of the commissioners of Lincoln Park under an act of the legislature; but that matter was not responsive to anything found in the information, and, in our opinion, it had no proper place in the record. When the commissioners of Lincoln Park undertake to condemn or otherwise appropriate any part of the submerged lands of the lake fronting upon the premises of appellant, then will be the proper time to determine their rights and their powers, but until that time arrives nothing need be said upon that question.

The appellant, as a shore owner, constructed from his premises into the lake two piers, extending from the shore into the waters of the lake some 200 feet, and the main question involved here is his right to build and maintain those structures. A description of the structures so built by appellant in the lake will be found in appellant's argument, substantially as follows: "Defendant purchased the premises in question in July, 1890. The pier at Barry avenue was built by Fitz Simons, at Revell's instance, in the fall of 1890, and the addition on the east end in 1891. The whole structure is about 220 feet in length,—20 feet on land, and 200 feet in water. The north side consists of close piling, and the south of piles six feet apart, with single sheeting. The two sides are about eight feet apart, and the space between is filled with riprap, with two lines of planking on the top to walk on. The pier at George street is not quite so long, and is made of a single row of piling, spaced and sheeted and anchored to piles to the south. At the east end is a bulkhead 8 by 15 feet, filled with riprap, and covered with plank. The latter was

built by the O. B. Green Dredging Company in 1893. Both piers are practically perpendicular to the shore."

The law is well settled in the different states that the title to and dominion over lands covered by tide waters within the boundaries of the several states belong to each state wherein the lands are located. The state holds the fee in trust for the public. The doctrine established in regard to lands covered by tide waters has also been held applicable to lands bounded by fresh water in our large lakes. *People v. Kirk*, 162 Ill. 138, 45 N. E. 830; *Shively v. Bowlby*, 152 U. S. 9, 14 Sup. Ct. 551. In the case last cited it is said: "By the common law both the title and the dominion of the sea, and all rivers and arms of the sea where the tide ebbs and flows, and of all the lands below high-water mark within the jurisdiction of the crown of England, are in the king. Such waters, and the land which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement, and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects. Therefore the title (*jus privatum*) in such land, as of waste and unoccupied lands, belongs to the king as the sovereign, and the dominion thereof (*jus publicum*) is vested in him, as the representative of the nation, for the public benefit." In *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 452, 13 Sup. Ct. 118, in speaking of this question, the court said: "That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subject to use. * * * It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." Indeed, the doctrine that the state holds the title to the lands covered by the waters of Lake Michigan in trust for the people is not controverted in the argument. It will not, therefore, be necessary to cite further authorities upon that question.

The appellant here owned the premises bordering on the lake, but his title to the premises extended only to the water's edge, and the fee in and to the lands covered by the waters of the lake was vested in the state, and held by the state in trust for the people. The fee being in the state, the important question presented is whether appellant, without a grant or other authority from the state, had the right to go upon the submerged lands and erect the structures complained of in the information. This state

has adopted the common law as it existed prior to March 24, 1606,—the fourth year of James I.; and, in the absence of any statute of the state changing the common law in regard to the rights of riparian or littoral owners, the common law as it then existed must control. Upon an examination of the authorities, we think it is clear that the act complained of in the information was a trespass upon the lands of the state; that the erection of the piers in the lake in front of appellant's premises was a purpresture. But it is said in the argument that the erection of the structures complained of was not injurious to the state, and hence there was no basis for the interference of a court of equity. We do not concur in that view. Although the act complained of was not injurious, and was not a public nuisance, still it was an unlawful act, of such a character as would properly authorize a court of equity to interfere, upon the information of the attorney general, as is well established by the authorities. Coulston and Forbes on the Law of Waters (page 15) say: "Any unauthorized intrusion or encroachment upon the soil of the shore, such as the building of quays, piers, moles, etc., is termed a 'purpresture,' and may be abated by the crown, or the owner of the shore, or restrained by injunction at suit of the attorney general, whether they create a nuisance or not. Such purprestures may or may not be nuisances to navigation. Whether they are so or not is a question of fact." On page 670 the authors say: "Any invasion of the right of the crown to the bed of the sea or navigable river is a purpresture, and may be restrained by injunction at the suit of the attorney general, whether it be a nuisance or not. If the act complained of be merely a trespass upon the property of the crown, and not a nuisance to the navigation, the court will generally direct an inquiry whether it is more beneficial to the crown to abate the purpresture or suffer it to remain." Wood on Nuisances (section 84) says: "A purpresture purely is not indictable; but, when a purpresture and encroachment is both a purpresture and a nuisance, it is indictable, abatable, and punishable as for a nuisance. The remedy for a purpresture simply is by information in equity at the suit of the attorney general or other proper officer." Eden on Injunctions (chapter 11), in discussing the question, says: "Purprestures—more properly pourprestures—is derived from the French *pourprise*, and, according to Lord Coke, signifies a close or inclosure; that is, when one encroaches and makes that safe to himself which ought to be common to many. It is laid down by all the old writers that it might be committed either against the king, the lord of the fee, or any other subject; but in its common acceptation it is at present understood to mean any encroachment upon the king, either upon part of the demesne lands, or in the highways, rivers, harbors, or streets.

The remedy for this species of injury is either by information of intrusion at common law, or by information at the suit of the attorney general in equity. In case of a judgment upon an information of intrusion, the erection complained of, whether it were a nuisance or not, was abated. But upon a decree upon an information in equity, if it appeared to be a purpresture without being at the same time a nuisance, the court might direct an inquiry whether it was most beneficial to the crown to abate the purpresture, or to suffer the erection to remain and be arrented." Story, in his *Equity Jurisprudence* (section 922), says: "In cases of purpresture the remedy for the crown is either by an information of intrusion at the common law, or by an information at the suit of the attorney general in equity. In a case of a judgment upon an information of intrusion, the erection complained of, whether it be a nuisance or not, is abated. But upon a decree in equity, if it appeared to be a mere purpresture, without being at the same time a nuisance, the court may direct an inquiry to be made whether it is most beneficial to the crown to abate the purpresture, or to suffer the erections to remain and be arrented." Gould on Waters (section 21) declares: "There is a broad distinction between the violation of the public right and an invasion of the proprietary interests of the crown. The one creates a public nuisance; the other, a purpresture. Any encroachment upon the king, either upon part of the demesne lands or any public rivers, harbors, or highways, is called a 'purpresture.' If a littoral proprietor, without grant or license from the crown, extends a wharf or building into the water in front of his land, it is a purpresture, though the public rights of navigation and fishery may not be impaired. * * * The remedy for a purpresture is, either by an information of intrusion at common law, or by information in equity at suit of attorney general." In Angell on Tide Waters (page 200) will be found this language: "A wharf or pier or other erection may therefore be below high-water mark, or even below low-water mark, but not necessarily a nuisance, though a purpresture. The remedy for a purpresture, it is laid down, is either by information of intrusion at common law, or by information at the suit of the attorney general in equity. The judicial department of the English court of exchequer is divided into one of equity and one of law, and the primary business of the former is to recover any lands belonging to the crown, so that purprestures upon arms and creeks of the sea are proper subjects of information in the court of exchequer. The king's attorney general, on the part of the crown, may proceed, for the purpose of protecting either the *jus privatum* of the king from the purpresture or the *jus publicum* of the subject from nuisance, by information on the king's remembrancer's side of the exchequer by English bill, praying a personal decree against the defendant in the suit."

See, also, *Attorney General v. Terry*, 9 Ch. App. 423; *Attorney General v. Burridge*, 10 Price, 350; *Same v. Parmeter*, Id. 378; *Same v. Corporation of London*, 8 Beav. 270. In opposition to the above authorities the case of *People v. Davidson*, 30 Cal. 379, is cited and relied upon. In that case it was held that the district courts of California have no power to decree the destruction, or to enjoin the erection of a wharf, unless it is or will be a nuisance, or is or will be followed by some form of irreparable damage, or unless it is or will be an appreciable hindrance to the execution of some legislative act relating to fishery or to commerce or navigation. So far as this case is in conflict with the rule established by the authorities cited, we are not inclined to follow it. We think the decided weight of authority is that a purpresture may be enjoined or abated in a court of equity, although it is not injurious or not a public nuisance.

But, aside from this position, it is apparent from an examination of this record that the construction of the piers was injurious to the state. It is true, the appellant testified that the piers were constructed to prevent erosion, and protect his shore bordering on the lake; but it is apparent from the evidence that the effect has been to add new land to his premises, and that the accretions resulting from the construction of the piers have extended the boundary of his premises into the lake. In other words, the erection of the piers has increased appellant's land, and diminished the land belonging to the state. This being so, it cannot be said that the construction of the piers was not injurious to the state. The appellant had no right to build piers or "wharf out" into the lake for the purpose of making land or increasing the boundary of his premises, nor had he the right to do any act which would produce that result. As has heretofore been said, the lands covered by the waters of the lake belong to the state, and appellant had no right, by any device whatever, to extend his boundary line beyond the water's edge; and when he did so an injury was inflicted on the rights of the state, which might be inquired into and abated in a court of equity on the application of the attorney general.

It is, however, insisted that the court erred in decreeing that appellant had no riparian rights as against the state. We do not understand that the decree goes to the extent claimed in the argument. But, however that may be, the main question presented by the record and discussed in the argument is, what are the riparian rights of appellant, as a shore owner, on Lake Michigan? There is one riparian right, which existed at common law, which is not disputed or called in question in the argument, and that is: Where land bordering on the lake gradually and imperceptibly encroaches upon the water, the accretion thus made belongs to the shore owner. This riparian right of appellant was not disturbed or interfered with by the decree. The shore

owner also has another riparian right which is undisputed,—the right of access from his land to the lake; in other words, the right to pass to and from the waters of the lake within the width of his premises as they bordered on the lake. This right cannot be diverted or taken from the shore owner without just compensation being made therefor as provided by law. These are common-law rights, and, as we understand the law, they are the only common-law rights possessed by the shore owner. Other rights may have been conferred in different states by statute, usage, or custom, but the question involved here is whether such additional rights exist in this state. In the well-known case of *Shively v. Bowlby*, supra, the supreme court of the United States, after a thorough examination of the authorities, held that the common law of England is the law of this country upon the question of the rights of a shore owner, except where it has been modified by the constitutions, statutes, or usages of the different states, or by the constitution and laws of the United States. The court also held that the rights of these owners have been committed to the several states, and that each state has dealt with the lands under tide water within its boundaries according to its own notion of right and public policy. We are aware of no statute of this state changing the common law, nor has there been established any custom or usage which modifies the common law. What, then, is the common law in regard to the right of a shore owner to build out from the shore into the waters of the lake, as was done by appellant in this case? In *Shively v. Bowlby*, supra, after declaring that it is settled in England that the title to the soil of the sea, or arms thereof, below ordinary high-water mark, is in the king, it is said: "It is equally well settled that a grant from the sovereign of land bounded by the sea or any navigable tide water does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. * * * By the law of England, also, every building or wharf erected without license below high-water mark, where the soil is the king's, is a purpresture, and may, at the suit of the king, either be demolished or be seized and rented for his benefit, if it is not a nuisance to navigation. [Citing many cases.] By recent judgments of the house of lords, after conflicting decisions in the court below, it has been established in England that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right to access from his land to the river, and may recover compensation for the cutting off of that access by the construction of public works authorized by an act of parliament, which provides 'for compensation for injuries affecting lands, including easements, interests, rights and privileges in, over or affecting lands.' The right thus recognized, however, is not a title in the soil below high-water mark, nor a right to build there-

on, but a right of access only, analogous to that of an abutter upon a highway. *Duke of Buccleuch v. Board*, L. R. 5 H. L. 418; *Lyons v. Fishmongers' Co.*, 1 App. Cas. 662. 'That decision,' says Lord Selborne, 'must be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*.' *Railroad Co. v. Plon*, 14 App. Cas. 612-620, affirming 14 Can. Sup. Ct. 677. The common law of England upon this subject at the time of the emigration of our ancestors is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states, or by the constitution and laws of the United States." Under the common law as declared in this case, —and it is fully sustained by the authorities, —it is apparent that appellant, as owner of premises bounded on Lake Michigan, took no title to any submerged lands under the waters of the lake; nor did he, by virtue of being a shore owner, have any right to construct piers upon the submerged lands without the consent of the state.

It is, however, suggested in the argument that this court, in passing upon the rights of riparian owners upon the Mississippi and other rivers in the state navigable in fact, but not navigable at law, has held that the shore owner may "wharf out" from the shore into the stream, and that the same doctrine should be extended to a shore owner on Lake Michigan. Those cases have no bearing here, for the reason that they all are predicated on the theory that the line of the riparian owner extends to the center thread of the stream. Being the owner of the soil under the water, he had the right to build such structures on his own land as he might desire, except such as might interfere with the navigation of the stream. Under the rule established in those cases, beginning with *Middleton v. Pritchard*, 3 Scam. 510, it was held in *Ensminger v. People*, 47 Ill. 384, that a riparian owner in the Ohio river, having the title to the land between high and low water mark, and the right to the exclusive use thereof, had the right to establish a private wharf on his land, and make reasonable charges for its use by those navigating the river. The right, however, as is apparent from the rule established in the case, rests upon the ownership of the underlying soil. Much reliance is, however, placed, in the argument, in *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110. It is true that the majority of the court in that case held that a littoral owner of lands bordering on Lake Michigan had the right to wharf out from his premises into the lake, in aid of navigation; but upon an examination of that case it will be found that the decision is predicated largely upon *Yates v. Milwaukee*, 10 Wall. 497, *Railroad Co. v. Schurmeir*, 7 Wall. 272, and *Dutton v. Strong*, 1 Black, 23, or two of them; and in *Shively*

v. Bowlby, supra, decided two years after the *Illinois Central Case*, the doctrine laid down in the three cases above cited seems to have been substantially repudiated. It is there said: "Some passages in the opinions in *Dutton v. Strong*, *Railroad Co. v. Schurmeir*, and *Yates v. Milwaukee* were relied on by the learned counsel for the plaintiff in error as showing that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide, has, independently of local law, a right of property in the soil below high-water mark, and the right to build out wharves, so far, at least, as to reach water really navigable. But the remarks of Mr. Justice Gifford in the first of those cases, upon which his own remarks in the second case and those of Mr. Justice Miller in the third case were based, distinctly recognize the diversity of laws and usages in the different states upon this subject. * * * And none of the three cases called for the laying down or defining of any general rule independent of local law or usage, or of the particular facts before the court. * * * In *Dutton v. Strong* there can be no doubt of the correctness of the decision, for, even if the pier had been unlawfully erected by the defendants as against the state, the plaintiffs had no right to pull it down or injure it, and, upon the facts of the case, were mere trespassers upon the defendants' possessions. * * * In *Railroad Co. v. Schurmeir* the question in controversy was whether the plaintiff's patent was limited by the main shore, or extended to the outside of the island. The supreme court of Minnesota held that, by the law of Minnesota, land bounded by a navigable river extended to low-water mark, at least, if not to the thread of the river, and that the plaintiff's title therefore extended to the water's edge at low-water mark, and included the island, and gave judgment for the plaintiff. 10 Minn. 82 (Gil. 59). This court affirmed the judgment, saying the express decision of the supreme court of the state was, etc. * * * In *Yates v. Milwaukee* the point adjudged was that the mere declaration of the city council that the wharf already built and owned by the plaintiff was a nuisance did not make it such, or subject it to be removed by the authority of the city. It was recognized in the opinion that by the law of Wisconsin, established by the decisions of its supreme court, the title of the owner of land bounded by a navigable river extended to the center of the stream, subject, of course, to the public right of navigation, and the only decision of that court which this court considered itself not bound to follow was *Yates v. Judd*, 18 Wis. 119, upon the question of fact,—whether certain evidence was sufficient to prove a dedication to the public. The later judgments of this court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable

waters are governed by the local laws of the several states, subject, of course, to the rights granted to the United States by the constitution." If the three cases cited did not call for the laying down of a general rule independently of local law or usage in the states, as was held in the *Shively Case*, the doctrine laid down in the *Illinois Central Case* could not be predicated upon those cases. Moreover, we regard the rule established by the common law as the safer and better doctrine, and as each state has the right to determine for itself the title and rights of riparian owners within its border, we regard it a better policy for all concerned to adhere to the common-law rule rather than follow the doctrine laid down in the *Illinois Central Case*. Moreover, the learned justice who delivered the opinion of the court in the *Illinois Central Case*, in *Webber v. Commissioners*, 18 Wall. 57, practically concedes the correctness of the doctrine laid down in the *Shively Case*. Mr. Justice Field, in delivering the opinion of the court, while recognizing the correctness of the doctrine that a riparian proprietor whose land is bounded by a navigable stream has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier into the stream, subject to such general rules and regulations as the legislature may prescribe for the protection of the public, said: "In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those states where the common law obtains. By that law the title to the shore of the sea and of the arms of the sea, and in the soil under tide waters, is in England in the crown, and in this country in the state. Any erection thereon without license is therefore deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a 'purpresture,' which he may remove at pleasure, whether it tends to obstruct navigation or otherwise."

Cases from other states have been cited by the appellant and appellee as sustaining their respective views of riparian rights, but it would extend this opinion to too great a length to enter upon a review of those cases. Moreover, local laws, customs, and usages enter so largely into the decisions of the courts in the different states that such decisions cannot, as a general rule, control as precedents here. But if the right to wharf out in aid of navigation existed, as held in the *Illinois Central Case*, the rule thus established could have no application here, as the piers erected by the appellant in this case were not constructed in aid of navigation. That is not claimed or pretended from anything appearing in the record. It is, however, insisted that owners of land bordering on Lake Michigan have the right, as riparian owners, to wharf out in order to protect the shore of their lands from erosion.

If a right of this character exists, it is one not recognized by the common law. As we understand the common law, any structure placed upon the land of the state below or beyond the water's edge in the waters of the lake is a purpresture, and may be abated in a proceeding instituted on behalf of the people. A shore owner may, no doubt, erect on his own land such structures as may be necessary to protect his land from erosion, provided such structures do not interfere with navigation, but he has no right to intrude upon the lands of the state, unless authorized by the state. Tyler, in his work on *Boundaries* (page 95), states the doctrine of protection in the following language: "There can be no doubt that by the law of England encroachments cannot be made upon the property of the crown or its grantee, but if an embankment which is lawfully made on a man's own land cause a silting up of sand and mud, whereby soil is gradually gained from the sea, the owner of the embankment would appear to be entitled to this increase, upon the principle laid down in respect to alluvion and reliction. An encroachment upon the king, or upon part of the demesne lands, or on the highways, public rivers, harbors, or common streets, is called a 'purpresture.' This word frequently occurs in the judicial reports of both this country and England, and invariably signifies an encroachment of this kind. * * * A man may raise an embankment on his own property to prevent the encroachments of the sea, although the fact of his doing so may be to cause the water to beat with violence against the adjoining lands, thereby rendering it necessary for the adjoining landowner to enlarge or strengthen his defenses." Wood on Nuisances (section 494) says: "Every proprietor of land exposed to the inroads of the sea may erect on his own land groynes or other reasonable defenses for the protection of his land from the inroads of the sea. * * * But a man has no right to do more than is necessary for his defense, and to make improvements at the expense of his neighbor." Gould on Waters (section 160) says: "The owners of lands exposed to the inroads of the sea or of inland waters may erect walls and embankments to prevent the wearing away of the land, or to protect it from overflow. * * * If a sea wall or embankment is erected in tide waters, beyond the limits of the owner's land, it is doubtless illegal at common law, as being a purpresture, since it does not appear that littoral proprietors are authorized, as against the crown, or without its sanction, to erect even defenses against the sea below high-water mark." *Reliance* is, however, placed by appellant in *Rex v. Commissioner of Sewers*, 8 Barn. & C. 355. Expressions may be found in that case that seem to sustain the view of appellant; but upon an examination it will be found that what was said was not necessary to a decision of the case, or

applicable to the facts involved therein, and we do not regard the expressions used in deciding the case as authority on the question. See *Coul. & F. Waters*, 32. It may be conceded that under the doctrine of protection a shore owner may erect structures on his own land for protection against erosion, but, as we understand the law, he has no right to enter upon the lands of the state and erect thereon such structures, and when he undertakes to do so he is a trespasser. The state, holding the submerged lands of the lake in trust for the people of the state, would be false to its trust, should it permit shore owners to encroach on the public domain, and gradually appropriate such property to their own use. Here, in the erection of the structures complained of in the information, there has been a clear violation of the law, and no reason occurs to us why the structures should not be abated on the application of the people.

The decree in this case was in favor of the complainant, but, after a careful consideration of the whole record, we do not think it goes far enough. We think the cross errors of appellee are well assigned. The decree will therefore be reversed, and the cause remanded, on the cross errors, with directions to the circuit court to enter a decree according to the prayer of the information, in conformity to the views here expressed. Reversed and remanded.

(172 Mass. 590)

HARDING v. BIGGS.

(Supreme Judicial Court of Massachusetts.
Suffolk. March 2, 1899.)

RAILROADS — LOCATION — CERTAINTY — ACQUISITION.

Where the location of a railroad states that "the width of line taken varies from two to five rods, according as the embankments or excavations require," the uncertainty of the taking, outside of the two-rod strip, does not invalidate the location to extent of the two rods, as against a landowner who acquiesced in the location for nearly 50 years.

Exceptions from superior court, Suffolk county; Albert Mason, Judge.

Action of tort by Ellen M. Harding against David M. Biggs for alleged trespass upon premises of the plaintiff. The court tried the case without a jury, and found specially that no act of trespass was committed upon the plaintiff's premises outside of a certain two-rod location acquired by the original location of a certain railroad, and plaintiff alleges exceptions. Overruled.

G. Philip Wardner, for plaintiff. Chas. F. Kittredge, for defendant.

BARKER, J. The plaintiff owns a tract of land through which the Dorchester & Milton Branch Railroad Company, about 50 years ago, built its railroad. In May, 1894, the defendant removed from land by the side of the railroad track a train load of sand and

gravel, there delivered to him, at a place where the railroad borders on the plaintiff's land, and this act is the alleged trespass. At the trial the plaintiff asked the court to rule that the location filed by the railroad company on April 15, 1847, was invalid, and that the company acquired no rights thereby, but had only such rights in the plaintiff's land as it had acquired by actual use and occupation. The court declined so to rule, and ruled that the location constituted a valid location, two rods in width, and no more, of which the center line was defined, and found that no act was done by the defendant outside of the railroad location. The question for decision is whether the court should have ruled that the location was not a sufficient compliance with the statute, and that the railroad company acquired no rights thereby.

The railroad company was chartered by St. 1846, c. 228, with authority to locate, construct, and maintain a railroad beginning at or near the depot of the Old Colony Railroad at Neponset village, in Dorchester, and thence to some convenient point in Dorchester or Milton, at or near the Upper Mills. See St. 1846, c. 228, §§ 1, 2, 4, 5. On April 15, 1847, the company filed a written instrument, and a plan purporting to be a location of its railroad, made in conformity with the statutes. In the year 1848 the existence of the company was recognized by the legislature, in the passage of St. 1848, c. 130, authorizing the company to increase its capital stock. See, also, St. 1849, c. 180, § 5; St. 1851, c. 283; St. 1852, c. 124; St. 1854, c. 421, §§ 2, 5, 6; St. 1857, c. 162; St. 1861, c. 51; St. 1863, c. 205. We are of opinion that, as to the owners of land through which the railroad was built and has been maintained, the location cannot now be held void, and that it gave to the company, at least, the right which the court below ruled that the location gave.

It appears from the charter that there was a depot of the Old Colony Railroad at Neponset village, in Dorchester, near which depot was the track of that railroad. The written location described a line which it declares is the center line for a single track, and which "commences at the center between the track of the Old Colony Railroad, opposite the southerly corner of Neponset Depot, in Dorchester." This terminus is fixed and defined by the two structures referred to, then existing. From this terminus the line is exactly described by definite courses and distances for a length of some 16,085 feet. The other terminus is not fixed by the written instrument otherwise than by the given courses and distances from the place of beginning; but the instrument further states that the described line conforms to the line described in the charter, which required that end of the railroad to be at some convenient point at or near the Upper Mills. It is not contended that this terminus could not be identified by the plan as being in fact near

the Upper Mills, nor that the written description of the location or the line laid down upon the plan do not coincide with the actual line of the railroad. The written location, after stating that the line described "is the center line for a single track," states, further, that "the width of line taken varies from two to five rods, according as the embankments or excavations require." Whether this instrument was effectual to give the company any rights in land outside of the two-rod strip, and whether an owner of land outside of that strip, which land was used in making embankments and excavations, could be heard at this late day to contend that, as to the land used for such embankments and excavations, the location gave the company no rights, there is now no occasion to consider, and upon those questions we express no opinion. The uncertainty which attaches to the taking outside that strip, "as the embankments or excavations require," does not make it necessary to hold the instrument invalid or void, so far as it makes an appropriation of a defined and ascertained strip two rods in width. None of the decisions cited by the plaintiff go to that extent. In *Hazen v. Railroad Co.*, 2 Gray, 574, the location was not held void, but the land occupied by the railroad was shown not to be within the location, and it was held that the defendant could not resort to extrinsic evidence to show that its intention was to have included the land. *Glover v. City of Boston*, 14 Gray, 282, was the case of laying out of a highway, and there was neither in the laying out or the plan any clear statement that the plaintiff's land was included in the lay-out. In *Wilson v. City of Lynn*, 119 Mass. 174, the plan was not referred to in the written instrument of taking, and did not appear to have been filed with it, and the land could not be identified by the description filed, although, if the plan has been referred to as part of the description, it might have been sufficient. In *Derby v. Railroad Co.*, 119 Mass. 516, the location was held void because the railroad company had no right to file it. In *Housatonic R. Co. v. Lee & H. R. Co.*, 118 Mass. 391, the location encroached without right upon land already devoted to a public use, and was also void because the location as filed did not state the width of the land taken or the boundaries, and the map on file was not referred to or made part of the location. In *Power Co. v. Allen*, 120 Mass. 352, the taking was void because no written instrument was filed. And in *Lexington Print Works v. Inhabitants of Canton (Mass.)* 45 N. E. 746, the taking was void because in excess of the power vested in the officials who made and filed the instrument of taking. It is also to be noted that in none of these cases had any considerable number of years elapsed between the time when the right to take land had been exercised and that when the validity of the taking was questioned. While, no doubt, as

against one who claims under an exercise of the right of eminent domain, the presumption is in favor of the owner of the land, that presumption, in a case like the present, is to be weighed with the presumption which comes from long acquiescence of the owner in uses of the land which can be justified only by a taking, the validity of which was at the time a question of importance to the commonwealth as well as to the landowners, and the validity of which seems not to have been questioned for nearly half a century. Exceptions overruled.

(173 Mass. 26)

ALLARD v. HILDRETH.

(Supreme Judicial Court of Massachusetts. Middlesex. March 2, 1899.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK.

Where a quarryman understanding quarrymen's work, and whatever danger there was, at request of the superintendent for some one to help clean out the tamping remaining in two holes in a ledge after an attempt to fire them and an explosion, held the drill while it was being struck by the superintendent and another, and continued so to do without any assurance that it was safe, after the superintendent, in reply to a suggestion of some one that water should be put in the hole before it was drilled out, said that he did not want to put any water in it, that he wanted to fire it out as soon as it was cleaned out, recovery cannot be had for injury to the quarryman from an explosion caused by such work.

Exceptions from superior court, Middlesex county; Edgar J. Sherman, Judge.

Action by one Allard, per pro. aml, against one Hildreth. Rulings requested by defendant were refused, and he excepts. Exceptions sustained.

W. H. Bent and A. O. Hamel, for plaintiff. F. E. Dunbar, for defendant.

HOLMES, J. This is an action for personal injuries alleged to have been caused by the negligence of a person in the service of the defendant exercising superintendence. The alleged superintendent was one Orrin Carlin, and we assume, for purposes of decision, that there was some evidence that he was a superintendent within the statute. There had been an attempt to fire two holes in a ledge of rock, followed by an explosion, but the tamping remained in the holes. The plaintiff saw Carlin dig the tamping out of one of these holes, and begin work upon the second. Then his son, Frank Carlin, took his place, and Orrin Carlin walked away. At a distance of 20 or 30 feet he turned towards a group of workmen, of which the plaintiff was one, and said, "Some one ought to help him clean that hole out." The plaintiff went to Frank Carlin, and held the drill while Carlin struck it with a hammer. A little later Orrin Carlin returned, and began striking the drill with his hammer also, the plaintiff spooning out the packing as it was loosened. The plaintiff heard some one say: "Somebody ought to put some water in that hole before

you drill it out," and Orrin Carlin reply: "Don't want to put any water in it. I want to fire it out as soon as we get it cleaned out." The work went on, and the explosion followed which hurt the plaintiff. One expert testified that in a case like this, when the hole is tightly packed, water ordinarily is poured in. Another testified that one of the methods employed was that adopted, except that it was not customary for two men to strike the drill. The plaintiff was a quarryman, understanding quarryman's work. He knew the purpose of pouring in water as suggested, knew that there might be an unexploded charge in the hole, and knew that driving in the drill in the manner adopted was liable to cause an explosion.

Upon this state of facts we are of opinion that the plaintiff is not entitled to recover. See *Kenney v. Shaw*, 133 Mass. 501. The only act of Carlin which could be called an act of superintendence was repudiating the suggestion that water should be put in the hole. It is going a little far, perhaps, to hold that this might be found to be negligent on the evidence reported, but we assume that it might be. But whatever danger there was the plaintiff understood as well as the superintendent, who shared his risk. He continued at work knowing all the facts and appreciating the risk. He received no assurance that it was safe, as in *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83, and *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071. The only ground on which it could be held that he was not on an equal footing with the superintendent or with his employer is his subordinate position. But, if that were enough, it would put an end to the defense of contributory negligence. We cannot make a distinction because of the presence of the superintendent. *Haley v. Case*, 142 Mass. 316, 322, 7 N. E. 877; *Wescott v. Railroad Co.*, 153 Mass. 460, 27 N. E. 10.

Exceptions sustained.

(173 Mass. 546)

KNIGHT v. ROTHSCHILD et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Feb. 28, 1899.)

EVIDENCE—OPINIONS—ADMISSIONS—AFFIDAVITS.

1. One who has been employed in a fur store for six years, in part as a salesman, and knows the cost and selling price of all garments that have come into the store during that period, may give an opinion of the value of certain of the goods.

2. Where a party states that he knows the contents of another's affidavit, and that the statements therein are true, such statements become his own, and may be offered against him as admissions.

3. Where an affidavit filed in another proceeding contains admission of a party, it is admissible against him.

Exceptions from superior court, Hampden county; Charles S. Lilley, Judge.

This was an action of tort, brought by Robert A. Knight, the assignee in insolvency

of one James McKeon, of Springfield, against Simon Rothschild and others, to recover the value of a quantity of fur garments, 49 in number, alleged by the plaintiff to have been conveyed by McKeon to the defendants, with a view to give them a preference, or with a view to prevent the property from coming into the hands of the assignee in insolvency, within the meaning of the insolvency laws. To these allegations the defendants made a general denial. The conveyance alleged to be in violation of the insolvency laws was made on the 20th of December, 1895; and McKeon was adjudicated an insolvent, and an assignee of his estate chosen, within six months of the conveyance. The suit was brought April 17, 1896. There was a verdict for the plaintiff for \$6,420, and the defendants alleged exceptions. Overruled.

The defendants objected to the admission of the evidence of the witness Dietz as to the value of the furs, on the ground that she was not qualified to give her opinion as to values, and duly excepted to its admission. The plaintiff, against the defendants' objection, was permitted to introduce a certified copy of the affidavit of Simon Rothschild, taken in the case of Simon Rothschild and Frank Rothschild against James McKeon, in the supreme court for the city and county of New York, and also certified copy of the affidavit of Benjamin F. Einstein, taken in the same case. These affidavits were taken and filed in said court in reference to a hearing upon a motion made in an action brought in said court by the defendants in this case against said James McKeon. These affidavits are respectively as follows, formal parts omitted, viz.:

"Simon Rothschild, being duly sworn, says: 'I am one of the plaintiffs in this action. The defendant is indebted to my firm, the plaintiffs, in the sum of thirty-eight hundred and sixty-five $\frac{25}{100}$ dollars, for goods sold and delivered by the plaintiffs to the defendant between the 18th day of July, 1895, and the 27th day of October, 1895, no part of which has been paid, and that the said amount is owing to the plaintiffs by the defendant over and above all counterclaims or offsets, and that this action is brought to recover upon the said cause of action. I was present at the interview mentioned in the affidavit of Mr. Benjamin F. Einstein, and I have heard the said affidavit of Mr. Einstein read, and know the contents thereof; and the statement therein contained of what was said and done at that meeting by Mr. Einstein, Mr. Frank Rothschild, Jr., the defendant, and myself is in every particular true. I know that the goods which were delivered by the defendant to Frank Rothschild, Jr. (my son), in Springfield, and which have been attached by the sheriff in this action, were not brought into this jurisdiction for the purpose of being attached. The plaintiffs never had any idea of commencing any kind of an ac-

tion against the defendant, or of attaching his property, or of attaching his goods in question until the suggestion that such should be done was made by Mr. Einstein at that meeting, and was concurred in by the defendant. On the 27th day of December, 1895, sixteen of the forty-seven fur garments which were attached by the sheriff in this action were replevied by L. Cohen & Bros., who claim that they were the owners thereof, and the same were reclaimed by the said sheriff, the undertaking therefor having been furnished by the plaintiffs, and that the said undertaking has been duly approved, and the said sixteen garments were returned to the said sheriff, and are now held by him, and the action in which the said sixteen garments were replevied is still pending."

"Benjamin F. Einstein, being duly sworn, says: 'I am an attorney and counselor at law, a member of the firm of Einstein & Townsend, and of the attorneys for the plaintiffs in this action. On Sunday, December 22d last, I was present at a meeting in the room of Frank Rothschild, Jr., between the said Frank Rothschild, Jr., the defendant in this action, Mr. Charles C. Spellman, and Simon Rothschild, one of the plaintiffs herein. I attended that meeting as the adviser of the plaintiffs. Mr. Frank Rothschild, Jr., stated to me, in the presence and hearing of the defendant, that the defendant, who was engaged in the retail business in Springfield, Massachusetts, was financially embarrassed; that he owed the plaintiffs about four thousand dollars; and that he had delivered to the plaintiffs, through the said Frank Rothschild, Jr., a number of fur garments, as security for the indebtedness, and to secure any moneys that the plaintiffs may advance to obtain a compromise for the defendant with his creditors. Mr. Frank Rothschild, Jr., further stated that the defendant was desirous of procuring a settlement or compromise. I asked the defendant what his assets and liabilities were, and also how much he expected to pay his creditors. The defendant gave me a statement of his assets and his liabilities, and said that he thought he was able to pay, and could get a settlement for, about twenty-five cents on the dollar. In making further inquiry as to the goods that had been delivered to the plaintiffs as security as aforesaid, I discovered that the goods were delivered by the defendant to the said Frank Rothschild, Jr., in Springfield, and that the defendant had delivered to the said Frank Rothschild, Jr., a bill or list of the goods, and that such bill or list was receipted. I then advised the plaintiffs, in the presence and hearing of the defendant, that the transaction had the appearance of a sale, while according to the statement of Frank Rothschild, Jr., and of the defendant, the goods were delivered as security only; and I further advised that the transaction ought to be made to appear precisely as it was, and that the receipt should

be torn from the bill, as the goods had not been paid for, and that the bill should be marked so as to show that the goods were consigned and not sold. Thereupon the defendant himself tore from the bill the receipt, and wrote on the bill the word abbreviation "Memo.," to indicate that the goods were on memorandum or consignment, and the defendant said that he would write to his bookkeeper that night, and have the entry in his books made to conform with the bill by writing in the word "Memo." The defendant and the others present discussed not only the feasibility of obtaining a settlement for the defendant, but also the manner in which it should be undertaken; and it was finally determined by all present, upon the suggestion of the defendant, that he should himself visit his creditors on the following day, and explain to them his condition and endeavor to get a settlement at twenty-five cents on the dollar. Mr. Simon Rothschild said that if it was necessary to accomplish the settlement either to part pay in cash, or to pay in cash such small claims as could not be included in the settlement, that the plaintiffs would advance the money necessary for that purpose. I advised Mr. Simon Rothschild, in the presence and hearing of the defendant, that the plaintiffs would be better secured by an attachment levied upon the goods in their possession, and which had been delivered to them by the defendant as aforesaid, than they were by simply holding them as security; and it was agreed between the defendant, Mr. Simon Rothschild, and myself, that an attachment should be obtained on the following day, and that the sheriff should levy upon the goods in question, and that the defendant should go to the place of business of the plaintiffs to be served by the sheriff with a summons; and Mr. Frank Rothschild, Jr., then and there, in the presence and with the knowledge of the defendant, delivered to me a copy of the plaintiffs' account against the defendant, for the purposes of preparing the papers to commence the action and to obtain the attachment. In pursuance of the aforesaid agreement and arrangement, the plaintiffs' attorney, on the following day, commenced this action to obtain an attachment therein, and directed the sheriff to go to the place of business of the defendant, which, according to the annexed affidavit of assistant to the Deputy Sheriff Dunphy, was done. From the statements that were made to me by Mr. Frank Rothschild, Jr., by the defendant and Mr. Spellman, who acted as attorney for the plaintiffs in Springfield, and by the arrangement for the commencement of this action, and obtaining and procuring the said attachment, which was entirely my suggestion, I am sure that the said Frank Rothschild, Jr., did not induce the defendant to deliver to him the goods in question to have them brought within the jurisdiction of this court and attached; and I am further sure that the plain-

tiffs had no idea of commencing any kind of an action against his property until I suggested it, and the suggestion was made by me in absolute good faith towards the defendant, and also because I believed, and still believe, that the plaintiffs would be in better position if they sold the goods in question under judicial process than otherwise."

The affidavit of this witness in the case of Simon Rothschild and Frank Rothschild against James McKeon, in the supreme court of the city and county of New York, was offered in evidence, and was admitted, against the defendants' objection, and the defendants duly excepted. No objection was made that the occasion of the statements was not sufficiently designated.

H. W. King, Charles M. Rice, and Robert A. Knight, for plaintiffs. Spellman & Spellman, for defendant.

KNOWLTON, J. The only exceptions that were argued in this case were to the admission of evidence against the defendants' objection.

1. The witness Dietz was rightly allowed to testify to the value of the fur garments taken away by the defendants. She had been employed in McKeon's store for six years, and knew the cost and selling price of all garments that came into the store during that period. She knew the fair value of such goods, and it was a part of her business to sell them to customers. She saw all the goods that were taken away by the defendants. She well might be permitted to give her opinion of their value.

2. The affidavits of the defendant Simon Rothschild and of his attorney Einstein, filed in the case in New York, were rightly admitted. This defendant said that he was present at the interview referred to in the affidavit of Einstein, and that he knew the contents of Einstein's affidavit, and that the statements therein were true. These statements thus became admissions of the defendant, and they tended to establish the plaintiff's contention that McKeon was insolvent, that the defendants had reasonable cause to believe that he was insolvent, and that the goods were delivered as a preference.

3. The affidavit of the defendants' agent, Frank Rothschild, filed in the same case in New York, was competent. It tended to contradict some parts of his testimony in the present case which were unfavorable to the plaintiff, and, although the plaintiff called him as a witness, his adverse testimony might be contradicted by showing what he had previously stated, first directing his attention to the former statements by a question. Pub. St. c. 169, § 22. No contention was made that the requirements of the statute were not sufficiently complied with by the interrogating counsel. Exceptions overruled.

(172 Mass. 504)

McCOY v. TOWN OF WESTBORO.

(Supreme Judicial Court of Massachusetts. Worcester. Feb. 28, 1899.)

MASTER AND SERVANT—INJURIES TO SERVANT—SUPERINTENDENCE—NEGLECT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

1. General control of the work of digging a sewer trench was given the superintendent of sewers of a town, and, while workmen were digging it, he walked to the edge of the bank, and, while looking at them, the bank caved, injuring a workman below. *Held*, that a finding that, while standing on the bank, he was engaged in an act of superintendence, was warranted.

2. The bank where the superintendent stood having been cracked before he went on it, the question whether he was negligent in standing there without warning the men in the trench was for the jury.

3. Where, in an action to recover for injuries received by a workman while blasting a sewer through the caving of the bank, it appeared that the bank had been cracked some time before it caved, and there was no evidence to indicate that such cracks are liable to occur in digging and blasting sewer trenches, the question whether the workman assumed the risk was for the jury.

4. An experienced workman directed generally to blast rock in a sewer trench, with the superintendent's knowledge, went to work without inspecting the banks, though at some places the earth had fallen so that the top extended partly over the ditch below. *Held*, in an action to recover for injuries received by the workman through the caving of the bank, that the question of his contributory negligence was for the jury.

Exceptions from superior court, Worcester county; Daniel W. Bond, Judge.

Action by John McCoy against the town of Westboro for personal injuries. There was a verdict for plaintiff, and defendant excepted. Exceptions overruled.

W. A. Gile and F. H. Kelly, for plaintiff. J. E. Beeman, for defendant.

MORTON, J. The defendant contends that the court erred in refusing to rule—First, that the accident was one of which the plaintiff had assumed the risk; and, second, that the acts of the superintendent in walking along the bank and stopping to look down at the workmen were not acts of superintendence.

The exceptions do not state what instructions were given in regard to what would constitute acts of superintendence. It appears that the superintendent "had general control of the whole work of digging the new trench"; and we think that it was competent for the jury to find that in walking along the bank, and in stopping to look down at the workmen, the superintendent was exercising an oversight of the work, and therefore was engaged in an act of superintendence. *Cashman v. Chase*, 156 Mass. 342, 31 N. E. 4. It was for the jury to say whether, in view of the crack in the earth, it was negligent for the superintendent to stand where he did without giving any warning.

It is true, as the defendant contends, that

the workman assumes the risk of such transitory charges as are incident to, and ordinarily may be expected to occur in, the prosecution of the work in which he is engaged, whether arising from the operation of natural causes or otherwise. *McCann v. Kennedy*, 167 Mass. 23, 44 N. E. 1055; *O'Neill v. Keyes*, 168 Mass. 517, 47 N. E. 416; *Belque v. Hosmer*, 169 Mass. 541, 48 N. E. 338. But in the present case there was nothing to show whether cracks like that shown to have existed here are liable to occur in digging and blasting out trenches for sewers, and, if so, how frequently, and whether the plaintiff should have anticipated it. And we think, therefore, that it could not be ruled, as matter of law, that the risk was one which the plaintiff assumed. Though the plaintiff was not set to work in the particular place where he was injured, and was an experienced workman, we think that he had a right to rely somewhat upon the superintendent as to the safety of the place where he was working, and it was for the jury to say whether he was in the exercise of due care. *Hennessey v. City of Boston*, 161 Mass. 502, 37 N. E. 668; *Coan v. City of Marlborough*, 164 Mass. 206, 41 N. E. 238. The exceptions state that "the jury were fully instructed as to the duty of the plaintiff to prove that he was in the exercise of due care," and "as to the duty of the defendant towards the plaintiff," to all which, as we understand, no exception was taken. We think that the exceptions must be overruled. So ordered.

(172 Mass. 544)

FORD v. MT. TOM SULPHITE PULP CO.
(Supreme Judicial Court of Massachusetts.
Hampshire. Feb. 28, 1899.)

INJURY TO EMPLOYE — DANGEROUS MACHINERY — WARNING—EVIDENCE—CUSTOM.

1. One employed to take charge of machinery cannot recover for injuries caused by his being caught, while attempting to throw off a belt, in a projecting set screw that fastened a collar near the end of the revolving shaft, which was put in without his knowledge, and without any warning of the danger of its use, where he was not acting in reliance on his former observation of the machinery.

2. In an action by a factory employé for injuries caused by his being caught in a projecting set screw fastening a collar near the end of a revolving shaft, the court, in its discretion, may exclude evidence as to whether it is customary for factories to use set screws in such manner.

Report from superior court, Hampshire county; Justin Dewey, Judge.

Action by one Ford against the Mt. Tom Sulphite Pulp Company. A verdict was ordered for defendant, and the case was reported to the supreme court. Judgment for defendant.

John B. O'Donnell, for plaintiff. Brooks & Hamilton, for defendant.

HOLMES, J. This is an action by one of the defendant's workmen, brought under the

statute and at common law, for personal injuries caused by being caught by a set screw fastening a collar near the end of a revolving shaft. According to the evidence for the plaintiff, the set screw had been put in since the beginning of his employment, and, although he had charge of the machinery in the room, and oiled the shaft and bearing, he never had seen this screw. It seems not to have been disputed that there were other similar set screws in the place. The shaft referred to was about 13 feet from the floor, and at the time of the accident the plaintiff was on a platform 3 feet lower than the shaft, trying to throw a belt off a pulley at the end of it, on the other side of the bearing, and 1 foot distant from the set screw. There was not much light. The presiding judge took the case from the jury, and it is here on report.

We are of opinion that the ruling was right, and that the case cannot be distinguished from the numerous other cases in this commonwealth already decided concerning set screws. *Donahue v. Manufacturing Co.*, 169 Mass. 574, 48 N. E. 842, and cases cited. This case shows that down into 1897 a set screw was a common device. There is no evidence that it has ceased to be one. In *Goodnow v. Emery Mills*, 146 Mass. 261, 267, 15 N. E. 578,—a case very like the present,—it was said that "there was no danger which, in view of the plaintiff's knowledge and capacity, must not have been well understood by and apparent to him, and there was, therefore, no negligence on the part of the defendant in exposing him to it." See, also, *Hale v. Cheney*, 159 Mass. 268, 271, 272, 34 N. E. 255. In *Rooney v. Cordage Co.*, 161 Mass. 153, 36 N. E. 789, it was held that an employer did not need to warn an adult workman of the presence and dangers of a set screw when employing him. As has been said or implied in other cases, where the danger is obviously great, as in the case of a revolving shaft, it is not necessary to give warning of elements which merely enhance the risk. *Carey v. Railroad Co.*, 158 Mass. 228, 231, 33 N. E. 512. See, also, *Keats v. Machine Co.*, 13 C. C. A. 221, 65 Fed. 940. The same considerations apply to the subsequent introduction of a set screw, when, as here, there is no pretense that the plaintiff remembered the alleged previous condition of the shaft, and was acting in reliance upon his former observation; and when, further, it was the plaintiff's especial business to take charge of the machinery, and therefore to inform himself of its construction.

The question "whether or not it is customary in factories to have a collar with a projecting set screw placed near a pulley where it is necessary for a person to go frequently to do something with reference to putting on a belt," etc., was properly excluded. See *Rooney v. Cordage Co.*, 161 Mass. 153, 161, 36 N. E. 789. The question, in this highly specific form, supposing it to admit of an

honest answer, must have been intended to furnish a pattern upon which the jury were to model the defendant's duty, and it was at least within the discretion of the judge to exclude evidence directed to that point. It would have been admissible, no doubt, to show that set screws were going out of use, and no longer were to be expected or looked out for without special warning. But that was not what the evidence meant.

Judgment for defendant.

(172 Mass. 548)

DEMERS v. MARSHALL.

(Supreme Judicial Court of Massachusetts.
Bristol. March 1, 1899.)

MASTER AND SERVANT—PERSONAL INJURIES.

A servant cannot recover for injuries caused by a set screw which is part of the machinery with which he has to do in his work.

Exceptions from superior court, Bristol county; Justin Dewey, Judge.

Action by John B. Demers, by next friend, against James Marshall. There was a verdict for plaintiff, and defendant brings exceptions. Sustained.

J. W. Cummings and E. Higginson, for plaintiff. J. F. Jackson and R. P. Borden, for defendant.

BARKER, J. This case offers another instance of injury sustained by the presence of a projecting set screw as a part of machinery with which the plaintiff had to do in his work, and is governed by *Rooney v. Cordage Co.*, 161 Mass. 153, 38 N. E. 789, and by *Ford v. Pulp Co.*, 172 Mass. —, 52 N. E. 1065. Exceptions sustained.

(172 Mass. 530)

MARLEY v. WHEELWRIGHT.

(Supreme Judicial Court of Massachusetts.
Bristol. Feb. 28, 1899.)

LANDLORD AND TENANT—DEFECTIVE PREMISES—COMMON STAIRWAY—DUTY TO MAKE REPAIRS—NOTICE.

1. A landlord who let an entire tenement is not liable for injuries to a subtenant of one of the tenements, through defects in a stairway used as a common entrance for several of the tenements, since he was no longer in possession of it, and was not obliged to make repairs.

2. Failure to make repairs which the lease required the landlord to make does not render him liable for personal injuries to the tenant or subtenant through defects in the premises, unless he had notice thereof.

Exceptions from superior court, Bristol county; John Hopkins, Judge.

Action by Mary Marley against Abby S. Wheelwright. Verdict for defendant, and plaintiff excepted. Exceptions overruled.

R. P. Coughlin, for plaintiff. F. S. Hall and G. C. Hodges, for defendant.

HAMMOND, J. The plaintiff had lived for eight months before the injury with her son

in the tenement hired by the latter from one Pierce, who during all that time was, and for some time before had been, the tenant of the whole premises of which this tenement was a part, having a lease of the same from the defendant. The entire premises thus let to Pierce by the defendant comprised an old building, with two stores in the lower story, and two tenements in the upper story, one of which the plaintiff's son occupied. It thus appears that the defendant was no longer in control of the stairway. It had been included in the lease to Pierce, and the rule stated in *Looney v. McLean*, 129 Mass. 33, and in several other cases, concerning the liability of a landlord who retains control over a staircase over which his tenants have a right to pass in common, is not applicable. The owner who has let the entire premises, staircases and all, has parted with his control, and is therefore free from this duty of due care, as between him and his tenant or any subtenant. *McLean v. Warehouse Co.*, 158 Mass. 472, 33 N. E. 499. There is no implied warranty that a house is safe and fit for habitation, nor, in the absence of any agreement otherwise providing, is the landlord under any obligation to make repairs. *Looney v. McLean*, 129 Mass. 33; *Watkins v. Goodall*, 138 Mass. 536; *McLean v. Warehouse Co.*, 158 Mass. 472, 33 N. E. 499.

The bill of exceptions recites that, "when the tenement was let to plaintiff's son by Pierce, there was evidence, not objected to by the defendant, tending to show that it was stated by Pierce that the defendant, the owner, had made a lease, which was still in effect, in which it was stated that all the outside repairs of every kind and description were to be made by the owner, and all the interior repairs of the entire building were to be made by the lessee, Pierce; and no evidence was offered by the defendant to control this statement. The defendant was not present at the trial." If this is to be taken as sufficient proof, the defendant not objecting, that the defendant had agreed with Pierce that she would make the outside repairs, it must be implied, under the circumstances of this case, that she was to make such repairs only upon reasonable notice. *Hutchinson v. Cummings*, 156 Mass. 329, 31 N. E. 127; *McLean v. Warehouse Co.*, supra; *Gerzebek v. Lord*, 33 N. J. Law, 246. See, also, 7 Am. & Eng. Enc. Law, § 24, for collection of authorities. The mere want of repair, therefore, shows no such negligence as will support an action of tort in favor of Pierce or any subtenant of his for injury caused by an accident due to the want of repair. Neither the plaintiff nor her son made any complaint, nor does it appear that Pierce ever did, nor that the defendant knew the condition of the steps. Therefore no negligence on the part of the defendant is shown. She was not in default, as between her and her tenant, or any subtenant of his, until after notice. Exceptions overruled.

(173 Mass. 50)

DIXON v. WILLIAMSON et al.(Supreme Judicial Court of Massachusetts.
Suffolk. March 1, 1899.)**WRITTEN CONTRACTS—MODIFICATION BY PAROL
AGREEMENT—SALES—TIME OF PAYMENT.**

1. A conversation of parties to a written contract, held immediately after its execution, with reference to its meaning, is inadmissible to vary its terms.

2. A written order for merchandise that does not specify the time of payment is an agreement to pay cash.

Report from superior court, Suffolk county; James R. Dunbar, Judge.

Action by J. B. Dixon against George Williamson and others on a breach of a contract of sale. A finding was made for defendants, and the case was reported at plaintiff's request. Sustained.

J. B. Dixon, in pro. per. Clapp & Glover, for defendants.

HOLMES, J. The plaintiff, after inspecting birch logs in the defendant's mill yard, went into their office, and drew up the following memorandum in duplicate, which was signed as shown below:

"Kingsbury, P. Q., April 9th, 1896.

"Dear Sirs: Please cut your birch logs for us so as to make 1,400 ft., running measure, 20" and up wide, nice stock. Cut the balance so as to make as much as possible 2½" and 1½" thick of straight-grained stock Nos. 1 and 2, and the 1" either Nos. 1 and 2 or clear face, at \$13.50 per M. on cars at mill. We will inspect the 2½" and 1½" at mill, and, if the inspection you make of the 1" is not satisfactory to us, we will inspect it also at the mill.

"Yours truly, J. B. Dixon & Co.
"Messrs. Williamson & Cromble."

"We accept the above order.

"Williamson & Cromble."

The defendants afterwards shipped three car loads of wood ordered by the plaintiff, and sent the bills of lading, attached to drafts, to their bank. The plaintiff contended that the defendants had no right to draw at sight, but that the plaintiff had a right to 30 days on two of the cars, and 60 days on the third. To make his contention, he offered evidence of a conversation with the defendants in their office shortly after the memorandum was signed. The judge who tried the case found that the alleged conversation, if it took place during that interview, was part of the transaction which produced the memorandum, and excluded the evidence. The only question here is whether he was right.

Of course, parties who have made a written contract may change it 30 seconds after it is made, if they want to. But, on the other hand, they may talk it over, and attempt to explain and construe it, without any intent to modify it, or make a change; and if the talk takes place soon after the writing

is signed, and at the same interview, the latter kind of conversation is the more likely of the two. Perhaps, in the absence of express evidence, it would be presumed, certainly it is open to the tribunal of fact to find, that the latter, rather than the former, was what took place. Upon such a finding, the conversation becomes inadmissible, so far as it attempts to modify what otherwise would be the construction or effect of the writing. *McGuinness v. Shannon*, 154 Mass. 86, 27 N. E. 881. In this case the writing expressed a promise to pay cash. *Ryan v. Hall*, 13 Metc. (Mass.) 520, 523.

If the case is within the Massachusetts statute of frauds, there is a further ground for the decision. But this it is unnecessary to discuss. *Clark v. Nichols*, 107 Mass. 547. See *Tracy v. Wetherell*, 165 Mass. 113, 115, 42 N. E. 497.

Finding for defendants to stand.

(172 Mass. 513)

GRAFTON NAT. BANK v. WING.(Supreme Judicial Court of Massachusetts.
Worcester. Feb. 23, 1896.)**NOTES—INDORSEMENT.**

An indorsement of negotiable paper, "Estate of Wheeler, Wing Executor," does not bind the executor individually, though the estate may not be bound.

Exceptions from superior court, Worcester county; John Hopkins, Judge.

Action by the Grafton National Bank against Oliver M. Wing, the administrator of the estate of Henry F. Wing. Ruling in favor of plaintiff, and defendant excepted. Exceptions sustained.

Frank P. Goulding and Wm. C. Mellis, for plaintiff. John B. Scott and T. H. Gage, Jr., for defendant.

HOLMES, J. These are two actions of contract against the administrator of the estate of Henry F. Wing, seeking to hold him upon two indorsements made by Henry F. Wing, as executor of the will of Jonathan D. Wheeler. The indorsements were in the following form:

"Estate of Jona. D. Wheeler,
"Henry F. Wing, Executor."

A majority of the court are of opinion that these words mean, "Estate of Wheeler, by Wing," and therefore that, at least, they failed to bind Wing by contract. It is quite true that the law does not know the estate of a dead man as a contractor, and that, unless the fact that these indorsements were the renewal of indorsements by Wheeler in his lifetime makes a difference, they did not bind the estate. But that merely shows that the indorsements were made by Wing under a mistake of law, as the testimony also proves to have been a fact. But the presence of Wing's name upon the paper, and his failure

to bind his supposed principal, are not enough to make the contract his own. *Jefts v. York*, 4 Cush. 371, 10 Cush. 392, 395, 396; *Abbey v. Chase*, 6 Cush. 54, 56, 57; *Taylor v. Shelton*, 30 Conn. 122. If a man does not purport to be a party to negotiable paper, he is not a party to it. See, further, 1 Daniel, Neg. Inst. (4th Ed.) §§ 306-308; *Bartlett v. Tucker*, 104 Mass. 336. It is true that it is suggested by Mr. Daniel that, in such cases, an ambiguous expression may be interpreted to bind the agent; but neither that suggestion, nor a presumption that the agent knew the law, can pervert words from their meaning, if the meaning is plain. The so-called "presumption" is a requirement, not a presumption of fact, and has no bearing or weight upon the construction of instruments.

We are of opinion that the court should have ruled that the defendant was not liable.

Exceptions sustained.

(172 Mass. 521)

ADAMS v. SWIFT et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Feb. 28, 1899.)

HIGHWAYS—COLLISION BY OVERTAKING CARRIAGE —NEGLIGENCE.

1. A mother and her minor daughter were invited for a drive, and the daughter accepted unconditionally, and the mother on condition that she pay half the expense. The daughter drove the team, and collided with a carriage, injuring its occupant. At the time of the collision, a bystander asked what they were trying to do. The daughter replied that she could not hold the horses, and the mother, that the daughter was all right. Afterwards the mother requested another occupant of her carriage not to mention the collision, but to let the injured person find out their names as best she could. *Held*, in an action to recover for injuries received in the collision, that a finding that the mother was a principal, and that the daughter was driving under her control, was warranted.

2. A carriage in a procession of a number of carriages collided with the one in front of it when going down an inclined road, just as the carriage ahead of it had reached the level. All carriages were going at a slow trot, and the distance between the overtaking carriage and the one immediately in its rear did not appear. The evidence whether the carriage run into had suddenly slowed up when reaching the level was conflicting. *Held*, that a verdict that the overtaking carriage was driven negligently was warranted.

3. On an issue whether the occupant of a carriage which collided with another was a mere guest or a principal controlling the carriage, her statement at the time of the collision, in response to a question what the driver was trying to do, that the driver was all right, is admissible.

4. Evidence that, after the collision, she attempted to conceal the fact that she was in the carriage, is likewise admissible.

Exceptions from superior court, Bristol county; J. B. Richardson, Judge.

Action by Annie E. Adams against Caroline F. Swift and another for personal injuries from a collision between the carriages in which the respective parties were driving on the 15th day of August, 1894, on a road lead-

ing from New London to Sunapee, in the state of New Hampshire. There was testimony tending to show that defendant Helen L. Swift, a minor, 19 years of age, was stopping with her mother at an hotel in said Sunapee, and that the father was then at his home, in New Bedford; that the defendants and a Mrs. Page, of Norfolk, Va., were invited by a Mr. Borden to drive with him from Sunapee to New London on said date, to witness a coaching parade; and that defendant Helen L. Swift accepted unconditionally, and the defendant Caroline F. Swift upon condition that she should be permitted to reimburse Mr. Borden for one-half the cost of the carriage, and that Mrs. Swift testified upon this point, "I do not know what was paid for the hire of the team, but only know that my daughter and I were invited to go by Mr. Borden, and I told him I would accept his invitation provided he would let me pay one-half of it, and, after some discussion with Mr. Borden, he finally consented, and I paid him \$2.50;" that defendant Helen L. Swift drove the team from Sunapee up to and at the time of the collision; that, upon the return from New London to Sunapee, the plaintiff was driving in a buggy with her husband directly in front of the carriage occupied by the defendants, which latter was a two-seated surrey, drawn by two spirited horses, driven by the defendant Helen L. Swift, Mr. Borden and Miss Swift being upon the front seat, and Mrs. Swift and Mrs. Page upon the back seat; that the carriages of plaintiff and defendants formed part of a procession on the road of seventy-five or one hundred carriages returning home, being in line close together, except that the actual distance between defendants' carriage and that next in rear did not appear, and that they maintained their relative positions substantially in the line until the accident complained of; that, just prior to the accident, the attention of the plaintiff and her husband was drawn to the carriage in which the defendants were driving, at which time the carriage in which were the defendants was coming down the end of an incline in the road to a level stretch upon which the plaintiff's buggy had just entered; that all the carriages came down said incline upon a slow trot, and that, just as the plaintiff's buggy entered upon the level, the end of the pole of the carriage in which the defendants were driving (which at the time the attention of the plaintiff was drawn to it was not more than eight feet distant from the back of the plaintiff's buggy) came in contact with the back of the plaintiff's buggy, and made a dent in the leather, which was followed by a second collision of the pole of the carriage in which the defendants were driving coming in contact with plaintiff's back, causing the injury sued for. The defendants claimed that there was but one collision, the first above named, occasioned by the sudden and unwarranted slowing down of the plaintiff's buggy, which under the circumstances was a want

of due care, and was a contributing cause of the injury; the plaintiff claiming that there was no material slowing down of the speed of the plaintiff's buggy, and that the injury complained of was due to the carelessness of the driver of the defendants' carriage, the defendant Helen L. Swift. Said Helen L. Swift testified that at the time of the accident she weighed 108 pounds; that she had driven a one-horse team before, and thought she had driven a pair of horses, but had never driven in New Hampshire roads before; and both Helen and Mr. Borden testified that Caroline F. Swift had nothing to say about who should drive, and exercised no control of the excursion, or gave any direction as to the management of the team. Mrs. Griggs, a witness for the plaintiff, testified that she was seated in her carriage at the side of the road at the time of the accident, was acquainted with defendant, and witnessed the collision, and that she called out to the occupants of defendants' carriage, and said, "Well, what are you trying to do?" that Helen L. Swift replied, "Well, I can't hold them," and Caroline F. Swift said, "She's all right." There was testimony tending to show that plaintiff had endeavored unsuccessfully to find out who were the occupants of the carriage in which defendants were at the time of the accident, and did not discover till long afterwards, and that this was known to defendant Caroline F. Swift, and that, while plaintiff was endeavoring to ascertain the identity of the parties, said Caroline F. Swift asked Mrs. Griggs not to mention it, and said to her, "Let them find out as best they can." There was no other evidence relating to Caroline F. Swift. The defendant Caroline F. Swift asked the court to rule that there was no evidence of any negligence upon the part of defendant Caroline F. Swift, and no evidence of any negligence on the part of any person for whose acts or omissions Caroline F. Swift was legally responsible, and that the verdict on the evidence must be for defendant Caroline F. Swift. The court refused to rule as requested, to which the defendants duly excepted.

L. Le B. Holmes and A. B. Collins, for plaintiff. Orapo, Clifford & Clifford, for defendants.

BARKER, J. The evidence justified a finding that the excursion was a joint undertaking, of which Caroline F. Swift, the mother of the young woman who was driving when the accident happened, was an equal promoter and manager, and not a mere guest; and that, under her control and direction, her daughter, so inexperienced a whip that it might be negligence to allow her to drive upon such an occasion, was driving, and driving carelessly. Therefore the case was for the jury. The evidence of admissions was for the jury, and the rulings were right. Exceptions overruled.

(173 Mass. 8)

JOHN F. BETZ & SON v. McMORROW.
(Supreme Judicial Court of Massachusetts.
Suffolk. March 1, 1899.)

SALE—TITLE.

In an action for goods sold, the evidence showed that an order was given to the agent, in Boston, of the vendor, in Philadelphia, for such goods; that they were shipped to Boston, the purchaser paying the freight. One bill of lading was sent to the defendant, and one to a forwarder for a steamship company, who delivered the goods at defendant's place of business. *Held* to justify a finding that the sale was made with intent that the title should pass in Philadelphia.

Exceptions from superior court, Suffolk county; Daniel W. Bond, Judge.

Action by John F. Betz & Son, a corporation, against Philip McMorow. Judgment for plaintiff, and defendant excepts. Overruled.

Charles W. Janes, for plaintiff. John H. Blanchard, for defendant.

HOLMES, J. This is an action for the price of ten hogheads and two barrels of ale sold by the plaintiff to the defendant. The defense is that the ale was sold in Boston without the license required by law. The judge who tried the case found for the plaintiff, and found that the intention of the parties was that the title to the ale should pass in Philadelphia; and the only question before us is whether there was evidence warranting these findings, or whether the judge should have ruled that the defendant was entitled to judgment.

The defendant testified that he bought the goods of the plaintiff, a Philadelphia corporation, through one Hayes, an importing agent in Boston, through whom he often had bought of others, and told him to deliver the goods the same as before, at the defendant's place of business, in Boston. Hayes, who had no authority to accept orders for the plaintiff, wrote to it, requesting it to ship the ale to the defendant, 1358 Dorchester avenue, Boston. The plaintiff accepted the order, and shipped the goods by the Philadelphia Steamship Company, taking bills of lading, making them deliverable to the defendant. One of these bills was sent to the defendant, and one was given to a forwarder for the steamship company, who took the goods from the company's office, and carried them to the defendant's place of business. The defendant paid the freight.

On this state of facts, we cannot say that the finding of the court was unwarranted; for, in view of the defendant's paying freight, it was entirely reasonable for the court to find that the defendant's direction to Hayes to deliver the ale at his place of business (assuming the court to have believed that it was given) was meant only to give the address of destination, and neither had nor was intended to have any effect on the question where the title passed. If this

view be taken, then the case is governed by the general rule that a shipment by a seller with an independent common carrier, to the order of the buyer, passes the title as soon as the carrier receives the goods. *Merchant v. Chapman*, 4 Allen, 362; *Suit v. Woodhall*, 113 Mass. 391, 394; *Frank v. Hoey*, 128 Mass. 263; *Brewing Co. v. Smith*, 155 Mass. 100, 28 N. E. 1130; *Smith v. Edwards*, 156 Mass. 221, 30 N. E. 1017.

If the goods were appropriated to the contract, subjected to the defendant's order, and made the defendant's property in Philadelphia, it is unnecessary to go more fully into the relation of Hayes to the bargain, or to consider whether the executory contract also was made in Philadelphia by the plaintiff's acceptance of the order there, or was made in Massachusetts, by the dealings between the defendant and Hayes; for even in the latter view the plaintiff may recover. *Abberger v. Marrin*, 102 Mass. 70; *Sortwell v. Hughes*, 1 Curt. 244, Fed. Cas. No. 13,177; *Well v. Golden*, 141 Mass. 364, 368, 6 N. E. 229.

Exceptions overruled.

(173 Mass. 45)

GREVE v. WOOD-HARMON CO.

(Supreme Judicial Court of Massachusetts.
Norfolk. March 1, 1899.)

TRESPASS—TITLE TO MAINTAIN—EVIDENCE—OFFER OF JUDGMENT.

1. An assignee of an agreement by trustees to convey land when the price should be paid has no such possession of the land as to enable him to maintain trespass against an agent of the trustees for removing gravel prior to such payment.

2. Under Pub. St. c. 187, § 76, providing that an offer of judgment not accepted shall not be evidence against the party making the same, an offer of judgment in an action of trespass, if not accepted, cannot be considered.

Exceptions from superior court, Norfolk county; James R. Dunbar, Judge.

Action by one Greve against the Wood-Harmon Company for trespass for taking stone and gravel. From a judgment dismissing the action, plaintiff excepts. Exceptions overruled.

John H. Sherburne and Conrad Reno, for plaintiff. Colby & Bayley, for defendant.

HOLMES, J. There was no evidence of the plaintiff's possession or right of possession before February 21, 1896, when the land was conveyed to him, and no evidence of any trespass by the defendant afterwards. Before the date mentioned, the plaintiff was merely assignee of an agreement by trustees to convey the land when the last installment of the price should be paid, time being declared to be of the essence of the contract. The defendant was agent and manager for the trustees, and the plaintiff could not complain, at least in this form, if the defendant did enter and remove the soil. After the date, the only evidence was that several men dug and car-

ried off gravel in blue wagons, and that the defendant's wagons were dark blue. Even when taken in connection with previous lawful acts of the defendant, this seems to us too little to make it safe to infer that he was guilty of unlawful acts, and to allow a verdict against him.

The offer of judgment did not affect the case. It was not a pleading, and by Pub. St. c. 187, § 76, it was not evidence.

Exceptions overruled.

(172 Mass. 525)

WASHBURN v. INHABITANTS OF EASTON.

(Supreme Judicial Court of Massachusetts.
Bristol. Feb. 28, 1899.)

DEFECTIVE HIGHWAYS—SHADE TREES.

Under Pub. St. c. 54, § 6, providing that the road commissioners of a town may authorize the planting of shade trees in roads wherever it will not interfere with the public travel or private rights, etc., the town is not liable in an action for personal injuries to one traveling on the highway, based on the claim that such trees were located in a position dangerous to public travel, where it did not appear that the trees were otherwise dangerous, or that there had been any change since the road commissioners located them.

Exceptions from superior court, Bristol county; John Hopkins, Judge.

Action by William D. Washburn against the inhabitants of Easton for personal injuries. Judgment for defendants, and plaintiff excepts. Exceptions overruled.

F. S. Hall, for plaintiff. H. J. Fuller, for defendants.

HAMMOND, J. The plaintiff, while traveling with his team in a southerly direction on the highway, overtook another team, and while he was attempting to pass it on the left his carriage came in contact with some shade trees, and he was hurt. These trees were in a line substantially parallel with the easterly wall of the highway, and about 6 feet distant therefrom, and were in the shoulder of the part of the road which was worked for travel, and distant easterly from such part 2 feet and 9 inches. The trees had been set out about 10 years before, under Pub. St. c. 54, § 6, by the road commissioners of the town, who had charge of all matters pertaining to shade trees. The road was about 40 feet wide between the walls, and the part worked for travel near the place of the accident was about 13 or 14 feet wide. On the west side of the road at the place of the accident there was a level space of about 3 feet, covered with grass to the shoulder of the road, and from there there was a gradual descent to the westerly wall. From the westerly shoulder of the road to the wall the ground was not very even, and some low brush and cobblestones were there. It was not claimed that the trees were in a dangerous or decayed condition, or that they endangered or hindered public travel in any way

except by their location. It did not appear that any complaint about the trees ever had been made to the commissioners, or that these officers had ever made any adjudication as to whether the trees were a nuisance to public travel, except such as may be implied from the fact that the trees were set out by their order, and in the place directed by one of their number. The extent to which the duty imposed by statute upon towns and cities to keep the streets reasonably safe and convenient for travelers thereon is modified by the fact that the objects complained of have been placed within the limits of the street by public authority, has been heretofore somewhat considered by the court. In *Young v. Inhabitants of Yarmouth*, 9 Gray, 386, it was decided that a town was not liable for damages sustained by a traveler upon a highway by reason of a telegraph post erected within the limits of the highway by an electric telegraph company, in a place prescribed by the selectmen of the town, under St. 1849, c. 93, § 3. Section 2 of that statute authorized any electric telegraph company to erect posts upon and along any highway, provided the posts did not incommode the use of the highway. Section 3 made it the duty of selectmen of a town or the mayor and aldermen of a city to give the company "their writing specifying where the posts may be located, and the kind and height of the same," and it was further provided that after the erection of the posts the selectmen should have the power to direct any alteration in the location. The trial court instructed the jury that, "if they were satisfied that the telegraph post complained of was an obstruction, rendering the highway dangerous and unsafe for the purposes of ordinary travel, it would be such a defect in the highway as would render the town liable to any one injured thereby." This court held this instruction erroneous, and Mr. Justice Dewey, after stating that the selectmen do not act in this matter as the agents of the town, but as public officers, and that there is no appeal, goes on to say: "The consequence of this necessarily must be that the location of the telegraph posts by the selectmen is conclusive upon all parties. The town cannot interfere, and remove them; and their existence upon the highway, if in exact conformity with the regulations prescribed by the selectmen, does not constitute any defect or want of repair in the highway for which the town can be held responsible in case of any injury thereby occasioned to any person traveling on such highway. If an improper location of telegraph posts has been allowed by the selectmen, the power is fully vested in the selectmen of the town to direct an alteration in such location, and thus obviate any inconveniences that may be found to exist to the traveler or the public generally. But this is not a matter which the town, in its corporate capacity, can regulate, or for which the town is responsible." In *Com. v.*

City of Boston, 97 Mass. 555, which was an indictment for suffering a highway to be incumbered by posts erected under substantially the same statute as re-enacted in Gen. St. c. 64, §§ 2, 3, it was said by the court: "And it seems impossible to conclude that the legislature, when they gave to a board of public officers the power and duty to direct the places in highways which should be occupied by telegraph poles, and required that their orders should be placed on record, could have intended to leave the existence and continuance of the poles at the places designated to the revision and control of a highway surveyor, or to the discretion of any jury before whom the question might come upon an indictment or action;" and also: "It is not according to the usual policy of the law to commit to one tribunal, in advance, the decision of a simple question of fact, and leave it just as much open to controversy afterwards." The same principle was applied where watering troughs were maintained under St. 1872, c. 84; *Cushing v. Inhabitants of Bedford*, 125 Mass. 526. As was stated by Mr. Justice Morton in *Johnson v. Bridge Corp.*, 109 Mass. 522, 528: "In such cases the liability of towns depends upon the test whether they have the power and it is their duty to remove the obstruction, and put the highway in a safe condition." In the case now before us it is conceded by both parties that the trees were set out about 10 years prior to the accident, by order of the road commissioners, acting under Pub. St. c. 54, § 6, and that the provisions of section 10 of that chapter, and of St. 1885, c. 123, are applicable to them. These statutes, in substance, provide that "the * * * road commissioners * * * of a * * * town to whom the care of the * * * roads may be intrusted, may authorize the planting of shade trees therein wherever it will not interfere with the public travel or with private rights," and trees so planted "shall not be deemed a nuisance;" "but upon complaint made to the * * * road commissioners they may cause such trees to be removed * * * If the public necessity seems to them so to require." Pub. St. c. 54, § 6. Section 10 of the same chapter and St. 1885, c. 123, forbid the removal of such trees except as therein authorized. These statutes have been considered by this court in two recent decisions. In *Chase v. City of Lowell*, 149 Mass. 85, 21 N. E. 233, it was said that the question whether such a tree incommodes or endangers travelers, and should be removed, is to be determined not by the summary discretion of a highway surveyor or by a vote of the town, but by the adjudication of a tribunal designated by the statute; and in the same case it was also said: "We think that the statute limits the duty of the surveyor of highways in such a case to procuring an adjudication that the tree is dangerous and shall be removed, and, until it shall be so removed, to taking due precau-

tions against the danger." This case came again in this court (*Chase v. City of Lowell*, 151 Mass. 422, 24 N. E. 212), and it then appeared that the shade tree had become decayed, and that it was blown over upon the plaintiff, a traveler in the highway. The evidence warranted a finding that it had been in a decayed condition so long a time that the persons having charge of the streets ought to have known of it, and the plaintiff recovered. It was said by Mr. Justice Knowlton, in giving the opinion, that, if such "a tree is in danger of falling, the authorities whose duty it is to keep the way safe and convenient for travelers should do what they reasonably can to protect the public from it." In the light of these and similar decisions we think that, so far as material to the present case, the law relating to the liability of towns and cities under Pub. St. c. 52, § 6, for injuries to travelers by reason of shade trees set out under Pub. St. c. 54, § 6, may be stated as follows: (1) The question whether a shade tree so set out is, by reason of its locality, dangerous to public travel, and for that reason should be removed, is a question over which the town has no control, but it is to be decided by the public tribunal duly appointed for that purpose (in this case the road commissioners), and the decision is not subject to review by a jury. (2) This decision, when made, is, until changed, to be assumed as correct under the circumstances existing at the time it was made, and is to be taken as the authoritative declaration of the law that the tree so set out is not dangerous to public travel simply by reason of its locality, under such circumstances; and in the absence of any subsequent physical change in the road, or in some other material respects, the town is justified in assuming that there is no duty to apply for a change in the decision. But, should there be any such subsequent material change, the questions whether the tree is thereby made dangerous, and whether it is the duty of the town to provide against such danger, either by application for a change in the location or otherwise, may be submitted to a jury. (3) The only question decided by the public authorities under the statute being whether the public travel is incommoded or endangered by the locality of the tree in a natural, healthy state, and not whether the tree is dangerous by reason of its decayed condition, and consequent liability to fall, the question whether a tree is dangerous from such a liability, and whether the town has used due care to protect the public travel from it when thus dangerous, are always questions which may be submitted to a jury. In this case there is nothing to show that there has been any change since the road commissioners located the trees. The law has, therefore, declared that, under the circumstances existing at the time of the accident, they did not incommode or endanger the public travel, and this decision cannot be revised by a jury. It

is not claimed that the accident was due to any defect in the trees themselves. Exceptions overruled.

(172 Mass. 555)

WHELTON v. WEST END ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. March 1, 1899.)

INJURY TO EMPLOYEE—NEGLIGENCE OF SUPERINTENDENT—DEFECTIVE APPLIANCES—EVIDENCE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

1. A car shifter, whose only duties were to get cars ready for conductors and motormen, starting the turntable at a car house, was not a foreman, nor engaged in an act of superintendency, in so turning the table, within St. 1887, c. 270, authorizing recovery by one injured by negligence of a superintendent.

2. Where plaintiff was injured by alleged defective appliances, evidence of a change in such appliances after the accident is inadmissible.

3. Where a servant knew of the danger of the work in which he was engaged, he cannot recover having assumed the risk.

4. Where a conductor of a street car had an experience of three or four years with transfer car tables, he was guilty of contributory negligence, where he was injured by an obvious danger in the use of such table, though he had not observed it.

Exceptions from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by one Whelton against the West End Street-Railway Company. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

Robert W. Nason and Thomas W. Proctor, for plaintiff. George H. Mellen, for defendant.

BARKER, J. The plaintiff had had nine years' experience as a street-car conductor in the plaintiff's service. He went into a car house for a car. The car had to be moved to the main track, by means of a transfer table moved by electric power, operated by another employé, a car shifter, who, with the plaintiff, were the only persons in the car house. The car shifter ran the car onto the table. The trolley rope then had to be shifted to the other end of the car. The car shifter handed the trolley rope to the plaintiff, saying, "Here is the rope." The plaintiff, taking the rope, started with it, walking on the floor of the car house. When he was half way around to the middle of the car, the car shifter started the table. The plaintiff called out to him to wait. A spring attached to the roof of the car was caught, and this caused the plaintiff to walk back the other way; and while so doing, and looking up and trying to free the spring, a track rail, which was part of the fittings of the table, and which projected some 18 inches from it over the car-house floor, with a space of about an inch and a half between the bottom of the rail and the floor, and which was in motion with the table, caught the plaintiff's toe, threw him down, and pushed him along the floor, and against

another rail fastened to the floor. This occurred on June 12, 1895. The transfer table had been put in on June 2, 1894, replacing one to which power was applied in a different manner, and with rails projecting only about half as far. The plaintiff had been in the habit of using such a transfer table five or six times a month since the defendant had used electricity as a motive power. He might have got upon the car before the transfer table started; and the trolley rope was long enough so that if, in shifting the trolley pole, he walked on the car-house floor, he could have kept himself beyond the reach of the projecting rails. At one point in his testimony, he gave an affirmative answer to the question whether, of course, he had not noticed the projections before; but he testified that he took no particular notice of them, and that his attention had never been called to the fact that there was a space between them and the floor. He also testified that he was shifting the trolley pole in the same way he had always been in the habit of doing it at the times when he had done it, and that he had performed exactly the same operation in transferring a car probably a week before, and knew what was to be done. There was a foreman who had charge and control of the car house, to whose orders the plaintiff was subject when he went to the car house for a car, but the foreman was not present at the time of the accident. The declaration has one count, under St. 1887, c. 270, for negligence of a superintendent, and one, under the common law, for negligently failing to furnish a reasonably safe place in which to work. A verdict for the defendant was ordered upon each count. The questions for decision are whether the verdict was rightly ordered, and whether evidence that after the accident the floor of the car house was raised so that the projecting rail lay flush with the floor, filling the space in which the plaintiff's foot was caught, and that after the change the table worked perfectly, offered by the plaintiff, was rightly excluded.

There was no evidence to support the count, under St. 1887, c. 270. The foreman, who was about, had no connection with the accident, nor was it in any way due to his absence. The whole evidence as to the duties of the car shifter is that it was his duty to get cars ready for the conductors and motormen. Neither his starting of the table, nor his failure to stop it, was an act of superintendency.

The evidence as to the raising of the car-house floor after the accident was properly excluded. While evidence that other safer appliances then known might have been used would have been competent, as in *Wheeler v. Manufacturing Co.*, 135 Mass. 294, the evidence excluded was not of that character. *Dacey v. Railroad Co.*, 168 Mass. 480, 47 N. E. 418, and cases cited.

Upon the common-law count, the verdict for the defendant was rightly ordered, for the reason that, upon the circumstances to which

the plaintiff himself testified, the risk of having his foot caught by the moving projecting rail, if, looking upward at the trolley, he walked within reach of the projection, was one which he either knew and appreciated, or ought, from his opportunities for observation, to have known and appreciated, and which he could have avoided by doing his work in such a way as to keep out of reach of the projection. If he knew the danger, he is prevented from recovering, both because he was careless in not avoiding it, and because he accepted the risk. If he did not know the danger, it was because of a negligent omission to observe what was obvious, and what due care required him to observe and to avoid. Besides an experience of three or four years with quite similar transfer tables, he had for more than a year had numerous occasions to do the same work, in connection with this table, which he was doing when hurt. *Goldthwait v. Railway Co.*, 160 Mass. 554, 38 N. E. 486, and cases cited; *Goodes v. Railroad Co.*, 162 Mass. 287, 38 N. E. 500; *Cassady v. Railroad Co.*, 164 Mass. 168, 41 N. E. 129; *Quigley v. Thomas G. Plant Co.*, 165 Mass. 368, 43 N. E. 205; *Barnard v. Schrafft*, 168 Mass. 211, 46 N. E. 621; *Bell v. Railroad Co.*, 168 Mass. 443, 47 N. E. 118. Exceptions overruled.

(172 Mass. 559)

BROWN et al. v. HENRY et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. March 1, 1899.)

PRINCIPAL AND AGENT—RATIFICATION.

Where an agent makes a contract which is unauthorized in several particulars, the mere fact that the principal, in repudiating it, gives as his reason that it is unauthorized in a certain particular, in which, however, it is authorized, does not constitute a ratification, where the third party is in no way injured by the form of the principal's objection, so as to raise an estoppel.

Exceptions from superior court, Suffolk county; Henry K. Braley, Judge.

Action by Jacob F. Brown and another against W. S. Henry and another. A verdict was rendered for plaintiffs, and defendants took exceptions. Sustained.

This action is one of contract, to recover damages for defendants' refusal to deliver about 25,000 pounds of Alabama wool, alleged to have been sold to the plaintiffs by Richard J. Salter, a wool broker, by memorandum dated January 23, 1897, of which the following is a copy: "Boston, January 23, 1897. Brown & Adams, City—Gentlemen: We beg to advise having bought for your account, to-day, of Messrs. Henry & Parsons, about 25,000 lbs. Ala. wool, stored in the Fort Hill storage warehouse, at 16¼c. per pound. Terms, 60 days. The wool to be paid for within 60 days, and interest allowed for the unexpired time. Buyers to have the benefit of unexpired storage and fire insurance, and to assume charges therefor. Sacks at

value. Tare, three pounds per sack. Respy., Salter Brothers, Brokers."

The defendants asked the court to rule as follows: "(1) On the evidence the defendants are entitled to a verdict. (2) Salter Bros. had no authority to bind the defendants to 'Terms, 60 days.' (3) There is no evidence that the defendants waived any right to object to 'Terms, 60 days,' or ratified Salter's action in inserting that clause. (4) There is no evidence that the defendants waived any right to object to provision, 'Buyers to have the benefit of unexpired * * * fire insurance,' or ratified Salter's action in inserting that clause. (5) The term, 'Buyers to have the benefit of unexpired * * * fire insurance,' means whatever fire insurance there was unexpired upon this wool. (6) The evidence of a custom concerning unexpired fire insurance does not, even if believed, control the meaning of these words, so that they shall mean a part of the unexpired fire insurance. (7) Salter had no authority to insert the clause concerning unexpired fire insurance. (8) There is no evidence that a seller's giving a broker a price on wool, without more, gives him authority to bind the seller to sell upon 60 days' credit, even if the purchaser is in good credit."

The plaintiffs based their case on the existence of a custom giving the brokers authority to act as they did, and also on ratification of the contract made by the brokers. The defendants excepted to the refusal to give their requests for rulings, and to the instructions as given, so far as in conflict with said requests, and to the instructions as to what would amount to a ratification of the alleged sale; but the defendants requested no other or further instructions on that subject. The jury returned a verdict for the plaintiffs for \$375, and were then asked by the court whether they found that there was such a custom in the wool trade as was claimed by the plaintiffs, and replied "that they found that there was not such a custom."

Sherman L. Whipple and W. R. Sears, for plaintiffs. Elder, Walt & Whitman, for defendants.

KNOWLTON, J. It appeared upon the undisputed evidence that the broker inserted in the written memorandum of sale certain provisions which were not expressly authorized by the defendants. The jury found that there was no custom under which he could bind the defendants by these agreements. He was not the defendants' general agent, and the terms of his authority to make a sale could be inquired into. He could bind the defendants only by such contract as they authorized him to make. *Coddington v. Goddard*, 16 Gray, 436; *Remick v. Sandford*, 118 Mass. 102. Under the instructions of the court, and the finding above stated, the verdict for the plaintiffs must rest on a finding that the defendants ratified the broker's contract. The jury were

allowed to find ratification on the ground that the plaintiffs were right, and the defendants wrong, in regard to the defendants' contention that the broker was not authorized to sell the wool at the price named in the contract; it appearing that the defendants stated, as their reason for repudiating the contract, that the broker had no authority to sell the wool at that price, and failed to make any objection to the provisions of the contract about credit, and the allowance of interest, unexpired storage, and fire insurance. These latter provisions were inserted in the contract by the agent without authority. There was no evidence that the situation of the plaintiffs was changed, or that their rights were in any way affected by reason of the form of the defendants' objection and disavowal.

Where something is to be done by one of two parties as a condition precedent to his exercise of a right against the other, the other may waive the performance, either wholly or in part. If there is an attempt at performance, which falls short of the requirement, and if objection is made by the party for whom it is done, with a statement of the grounds of his objection, the objector often is held to have waived his right afterwards to object, on other grounds, when the other has gone forward, relying upon the implied representation that the performance is satisfactory in other particulars. *Clark v. Insurance Co.*, 6 Cush. 342; *Searle v. Insurance Co.*, 152 Mass. 263, 25 N. E. 290; *Curtis v. Aspinwall*, 114 Mass. 187; *Insurance Co. v. Norton*, 96 U. S. 234; *Titus v. Insurance Co.*, 81 N. Y. 410. These cases rest upon the ground that, when one is stating objections, a failure to disclose a ground of objection, in a particular which easily could be remedied, tends to mislead the other party to his detriment, and is so contrary to justice and good morals as to work an estoppel against doing it afterwards. No such principle is applicable to the present case. We have an unauthorized contract made by an agent. The plaintiffs had no rights under it immediately after it was made. They have no rights under it now, unless the defendants ratified it. "Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of the principal. No legal obligation rests upon him to sanction or adopt it." *Combs v. Scott*, 12 Allen, 493; *Bank v. Crafts*, 2 Allen, 269. If, however, one is acting in the execution of a general power, but in a mode not sanctioned by its terms, and if any benefit comes to the principal from the act, ratification may be implied pretty quickly from lapse of time with knowledge of the circumstances. *Foster v. Rockwell*, 104 Mass. 167.

The evidence is undisputed that, within a reasonable time after being informed of the contract, the defendants in the present case repudiated it. The naked question is presented whether, if a principal, on learning of an unauthorized contract of an agent, repu-

diates it, giving a reason for so doing which proves to be without foundation, such repudiation is equivalent to an adoption of it. In the absence of anything beyond this to work an estoppel, we are of opinion that it is not. Ordinarily, ratification of an agent's act is a mere matter of intention. In the present case, the defendants, as soon as the facts were ascertained, manifested in the clearest manner their intention not to ratify, and their subsequent conduct has all been consistent with their original repudiation of the attempted sale. They could not repudiate it in part, and adopt it in part. 1 Am. & Eng. Enc. Law (2d Ed.) 1192, and cases cited. There is a class of cases in which the principal receives a direct benefit from an act of an agent, and it is held that, if he retains this benefit for a considerable time after he obtains full knowledge of the transaction, he thereby ratifies the act. *Brigham v. Peters*, 1 Gray, 139; *Sartwell v. Frost*, 122 Mass. 184; *Coolidge v. Smith*, 129 Mass. 554. Here, too, there is an element of estoppel which does not exist in the case at bar. One cannot have the benefit of an unauthorized act of an agent without confirming it. Ordinarily, a principal is not called upon to give reasons for declining to be bound by an act undertaken without authority. The controlling reason is that it was unauthorized. The particulars in which it lacks authority, usually, are of no importance. If the other party relies upon it, he has the burden of showing ratification. If the principal insists that it is unauthorized, and does nothing and says nothing which warrants the other party in treating it as ratified, the mere fact that he is incorrect in his statement of the particulars of the want of authority does not change his repudiation of the act into an adoption of it.

We are of opinion that the instructions in regard to ratification were erroneous, and that the jury should have been instructed that there was no evidence that the defendants ratified the contract declared on. See *Price v. Moore*, 158 Mass. 524, 33 N. E. 927. Exceptions sustained.

(173 Mass. 40)

GANNON v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts. Barnstable. March 3, 1899.)

CARRIERS—INJURY TO PASSENGER.

A lamp in defendant's car opposite where plaintiff was sitting blazed up, and she changed her seat to the other end of the car, next to the baggage car, while a bystander, and then the conductor, unsuccessfully tried to fan out the flame. A brakeman tried to smother it with oily waste, which caught fire, and part of it dropped to the floor, and the flames came out under the lamp, and the brakeman rushed for the rear of the car, and it looked as if the car was on fire. Plaintiff rose to go into the baggage car, and struck and injured her arm. There was evidence that the lamp needed more care than ordinary lamps; that the means used to put out the fire were dangerous; and that, with proper skill, the trouble could have been

avoided. *Held*, that the case was properly left to the jury, as, if her fear was reasonable, and her action the natural and reasonable consequence of the situation as it appeared to her, her conduct was the consequence of defendant's mismanagement, for which it is responsible.

Exceptions from superior court, Barnstable county; Edgar J. Sherman, Judge.

Action by one Gannon against the New York, New Haven & Hartford Railroad Company. There was a refusal to take the case from the jury, and defendant excepts. Exceptions overruled.

H. H. Baker, for plaintiff. H. P. Harri-man, for defendant.

HOLMES, J. This is an action for personal injuries suffered by the plaintiff while a passenger upon a train of the defendant. The case, as stated by the plaintiff's witnesses, was as follows: A lamp opposite where the plaintiff was sitting blazed up. A bystander, and then the conductor, tried to fan out the flame with their hats, but did not succeed, and the plaintiff changed her seat to the other end of the car, next to the baggage car. Then a brakeman tried to smother the flame with oily waste, which caught fire, and blazed, part of it dropping on the floor. The flames came out underneath the lamp. The brakeman got down, and rushed for the rear end of the car, and it looked as if the car was on fire. Thereupon the plaintiff rose to go into the baggage car, presumably in some haste and fright, and struck her arm, hurting her ulnar nerve so badly that she fainted and fell.

An expert on lamps, who was a passenger, testified that the lamp needed more care than ordinary lamps; that the means used to put out the fire were dangerous; and that, with proper skill, the trouble could have been avoided. The judge refused to take the case from the jury, and the defendant excepted.

The judge who tried the case was right. We cannot say, as matter of law, how frightened the plaintiff was or ought to have been, or how great the peril of fire may have seemed. There is no question before us of the degree of firmness which the plaintiff was bound to exhibit, or, more accurately, of the defendant's immunity from consequences due to unstable nerves. *Spade v. Railroad Co.* (Suffolk, Jan. 16, 1899) 52 N. E. 747. If the peril seemed imminent, more hasty and violent action was to be expected than would be natural at quieter moments; and such conduct is to be judged with reference to the stress of appearances at the time, and not by the cool estimate of the actual danger formed by outsiders after the event. See *Linnehan v. Sampson*, 126 Mass. 506, 511, 512; *Hawks v. Locke*, 139 Mass. 205, 209, 1 N. E. 543; *Pomeroy v. Inhabitants of Westfield*, 154 Mass. 462, 465, 28 N. E. 899. We cannot say that an impulsive, and somewhat unguarded, rise from her seat was not

a natural and reasonable consequence of the situation as it appeared to the plaintiff. If it was, and if her fear was reasonable,—which, as we have said, we cannot pronounce it not to have been, whatever we may conjecture that we should have thought had we been the jury,—then the plaintiff's conduct is recognized by the law as a consequence of the defendant's mismanagement, for which it is responsible. *Ingalls v. Bills*, 9 Metc. (Mass.) 1; *Sears v. Dennis*, 105 Mass. 310, 313; *Cody v. Railroad Co.*, 151 Mass. 462, 468, 469, 24 N. E. 402.

The case of *Spade v. Railroad Co.*, 168 Mass. 285, 47 N. E. 88, does not establish a principle contrary to that of the foregoing decisions. It admits that principle, and merely sets a limit to its logical extent, upon practical considerations.

Exceptions overruled.

(173 Mass. 12)

NEW HAVEN & N. R. CO. et al. v. COUNTY COM'RS OF HAMPSHIRE COUNTY.

(Supreme Judicial Court of Massachusetts. Hampshire. March 2, 1899.)

RAILROAD CROSSINGS — CONSTRUCTION — ALTERATION.

1. Pub. St. c. 49, §§ 60, 63, imposing the duty of constructing highways, laid out and ordered to be constructed, on towns and cities within which they are located, and providing that the county commissioners shall, on default of a town or city, cause the highway to be completed, applies to highways laid out under chapter 112, § 125, across a railroad previously constructed.

2. Where a change in the place of a crossing over a railroad is made by abolishing a grade crossing by proceedings under Pub. St. c. 112, §§ 129, 134, a highway cannot be laid out across the railroad at the same point by proceedings, under section 125, for laying out a new highway across a railroad, but it must be by fresh proceedings, under sections 129 and 134, for a further alteration.

Report from supreme judicial court, Hampshire county; Walbridge A. Field, Judge.

Petition by the New Haven & Northampton Railroad Company and another for certiorari to quash proceedings of the county commissioners of Hampshire county in laying out a highway across petitioners' railway. Granted.

J. C. Hammond, for petitioners. Wm. G. Bassett, for respondent.

BARKER, J. South street, in the city of Northampton, is a highway which crosses the petitioners' railroad, and which formerly crossed it at grade. By proceedings begun on November 14, 1889, upon petition of the mayor and aldermen of the city, under the provisions of Pub. St. c. 112, §§ 129, 134, as amended and modified by St. 1882, c. 135, St. 1884, c. 280, St. 1885, c. 194, and St. 1887, c. 295, these crossings were separated, and the highway was carried over the railroad at another point. These proceedings were before this court in *Davis v. Commissioners*, 153

Mass. 218, 26 N. E. 848, where it was held that so much only of South street as was within the location of the railroad was discontinued, and that the deflection or alteration of the street by which it was carried over the railroad was within the powers conferred by the statutes cited. On April 6, 1897, the mayor and aldermen presented to the county commissioners a petition representing that the public convenience and necessity required a highway to be laid out across the railroad between two points described in the petition, and which points, it is not disputed, are in the outer lines of the railroad location, and at the place where the street crossed the railroad before the proceedings of 1889; so that the petition, in effect, merely asked the commissioners to again lay out and locate as a highway, or to authorize the city to lay out and locate as a highway, that part of the street which had been discontinued by the proceedings of 1889, in separating the grade crossings of the railroad and South street. On May 11, 1897, upon this petition, the commissioners adjudicated that common convenience and necessity required that a highway be laid out as prayed for across the railroad and under its tracks, and on October 5, 1897, made a final decree laying out and locating the highway as prayed for across the railroad and under its tracks, and ordering the construction of the highway within one year by the present petitioners, who are, respectively, the owner and the lessee of the railroad. The petitioners contend that the proceedings of the commissioners under the petition of April 6, 1897, should be quashed, because they had no power to lay out a highway across the railroad, or to authorize the city so to do, at the point where the railroad and the street formerly crossed at grade, and because, under the charter of the city, its city council alone had power to lay out highways within the city, and because the county commissioners had no authority to order the present petitioners to construct the highway, and because the order for construction is indefinite, and because the carrying out of the order will involve an alteration in the grade of tracks which has been fixed by other proceedings under the grade crossing act (St. 1890, c. 428), and also because the carrying out of the order will result in endangering the railroad by the action of Mill river, and will destroy part of a city sewer.

If the county commissioners had any jurisdiction of the petition of April 6, 1897, their only authority was under the provisions of Pub. St. c. 112, § 125, which is the section authorizing the laying out of highways and townways across a railroad previously constructed. This section gives the county commissioners no power to order the construction of the highway by the railroad company. Such highways are left to be constructed by the usual agencies whose duty it is to make highways when the same are laid out and order-

ed to be constructed. This duty rests upon the towns and cities within which the highway is located, and, if a town or city does not perform this duty, the commissioners themselves are to cause the highway to be completed. Pub. St. c. 49, §§ 60, 63. This general provision is applicable as of course to all highways where no contrary provision is specifically made, as it is made in the case of the alteration of crossings, under Pub. St. c. 112, §§ 129, 134, and of the separation of grade crossings under the new grade crossing act (St. 1890, c. 428); and this general provision is the one applicable to the construction of highways laid out under the provisions of Pub. St. c. 112, § 125, across a railroad previously constructed. The county commissioners therefore had no power, even if they could lay out the way, to order its construction by the present petitioners; and this alone would require us to quash a material portion of the final decree.

But we are of opinion that the county commissioners had no power, upon the petition on which they made their adjudication, to lay out and locate, or to authorize the city to lay out and locate, a highway across the railroad at the point where it was formerly crossed by South street. The provisions of Pub. St. c. 112, § 125, were not intended to apply to such a case. The crossing of the street and the railroad at that point having been altered by proceedings under Pub. St. c. 112, §§ 129, 134, if thereafter public convenience and necessity required a further alteration, it could be ordered by fresh proceedings under the same statute (Boston & A. R. Co. v. Hampden Co. Com'rs, 164 Mass. 551-554, 42 N. E. 100); and, in our opinion, it could be ordered in no other way. To permit the county commissioners, under the guise of laying out a new highway across the railroad, to restore the former crossing, although at a different grade, would be to disturb the former decree by means which the legislature never intended should be used for that purpose, and which are not adapted to do justice between the railroad corporations and the city, in a case which is clearly within the provisions regulating the alteration of existing crossings, and not within those regulating the laying out of new highways across railroads previously existing. This objection goes to the whole of the proceedings, and requires that they should be quashed. The substance of the situation is that when a change in the place of crossing is made in abolishing a grade crossing, if, after the change is made, it remains a crossing of the same street with the same railroad, accommodating substantially the same travel, it is really the same crossing, though removed to a new location. *Norwood v. Railroad Co.*, 161 Mass. 259, 37 N. E. 109. If further alterations or changes are further required for the convenient passing of the travel of the same street across the railroad, they are to be made by new proceedings for the altera-

tion of existing crossings. *Boston & A. R. Co. v. Hampden Co. Com'rs*, ubi supra.

We do not think it advisable to discuss any of the other questions raised. Whether, if there were occasion to lay out a highway in Northampton, under the provisions of Pub. St. c. 112, § 125, it could be laid only by the city council, is an interesting question, which might involve an exhaustive examination of the charters of the cities of the commonwealth, and the comparison of their provisions with those of the general statute provisions regulating the laying out of highways. Neither the decision of this question, nor that of the other questions which we have only stated, is material to the result. Writ of certiorari to issue, and the proceeding of the county commissioners to be quashed.

(173 Mass. 353)

SPRAGUE et al. v. McDOUGALL et al.

(Supreme Judicial Court of Massachusetts.

Middlesex. March 1, 1899.)

MECHANIC'S LIEN—PRIORITIES.

One contracted to furnish all the lumber of certain kinds for a house and barn, and, after part thereof was furnished, the owner mortgaged the land, and thereafter the balance of the lumber was furnished. Pub. St. c. 191, § 5, provides that the lien provided for in the chapter shall not avail against a mortgage made and recorded before the contract under which the lien is claimed. *Held*, that a lien could be enforced for materials furnished after the mortgage was recorded.

Exceptions from superior court, Middlesex county; James B. Richardson, Judge.

Petition by Sprague and another against McDougall and another to enforce a mechanic's lien. The court found in favor of petitioners, and respondent Bates excepted. Exceptions overruled.

C. H. Innes and J. H. Vahey, for petitioners. Jabez Fox, for respondent.

BARKER, J. The exception founded on the date of the last two debits having been waived, the only question for decision is that raised by the request for a ruling that the pleadings and evidence do not show a ground for maintaining the lien. In support of the exception, the only contentions made are that the materials charged for in the last two items of the account were not furnished under the same contract with the materials charged for in the earlier items; and, next, that the contract under which the materials were furnished was not such a contract as would give the petitioners a lien as against a subsequent mortgagee, under the provisions of Pub. St. c. 191, § 5.

1. The evidence justified a finding that the petitioners agreed to furnish, at defined prices, all the lumber for the house and barn, except the material for what the parties called the "inside finish," which the owner got at other places. The last two items charged were for floor boards and white wood. It is

natural enough that a builder should, by an error of calculation, order too little of any particular kind of lumber, and, when the deficiency is ascertained, order enough more to finish the work. Upon the evidence, it was competent for the court below to find that the last two items were for lumber furnished in accordance with the original agreement between the petitioners and the owner of the land,—that the former should furnish at agreed prices all the lumber for the house and barn, except the "inside finish."

2. The agreement between the petitioners and the owner of the land was made on September 25, 1895. The petitioners began to furnish materials in compliance with this agreement on October 2, 1895. The owner mortgaged to the trustees who are defending, on December 4, 1895; and at that time materials had been furnished by the petitioners under the agreement to the amount of \$717.80. After that date, further materials were furnished by the petitioners, under the same agreement, to the amount of only \$5.70. The remaining question for decision is whether this agreement of September 25, 1895, was a contract under which a lien could be established for materials furnished after the recording of the defendant's mortgage, as well as before. We are of opinion that the agreement was such a contract. It contemplated the sole furnishing by the petitioners of all the materials of certain specified kinds which should be used in the construction of the house and barn, and the purchase of all those materials by the other party, at prices which were agreed upon at the outset. Looking at the purpose of the statute as to liens on buildings and lands, it is impossible to think that it is not such a contract as, under Pub. St. c. 191, § 5, will prevail over a mortgage recorded after the date of the agreement. This view is supported by previous decisions. See *Wilson v. Sleeper*, 131 Mass. 177; *Batchelder v. Hutchinson*, 161 Mass. 462, 37 N. E. 452; *Dodge v. Hall*, 168 Mass. 435, 47 N. E. 110; *Buck v. Hall*, 170 Mass. 419, 49 N. E. 658. *Simpson's Case*, in *Batchelder v. Hutchinson*, *supra*, differs from the present case in this: that, when Simpson stopped work to serve upon a jury, there was no contract between him and the owner for future services. Here there was a contract, made before the date of the mortgage, for the lumber furnished on February 3, 1896. Exceptions overruled.

(173 Mass. 10)

MUGFORD v. BOSTON & M. R. R.
(Supreme Judicial Court of Massachusetts.
Suffolk. March 1, 1899.)

RAILROADS—NEGLIGENCE—TRESPASSERS.

A boy of 11½ years was stealing a ride on a freight train, and was hanging by his hands from the side door of the car, with his feet on the truss bar. A brakeman raised his hand, and said, "Get off." The boy looked to see

where he was jumping, and then jumped, landing on a pile of cinders, and slipped under the car, and was injured. The train was moving from four to eight miles an hour, and increasing in speed. The boy intended to jump off later. While the command frightened the boy into obedience, he did not lose his judgment and self-control, and had he waited he could have jumped clear of the cinders. *Held*, that the railroad company was not liable, and this though the track was not fenced.

Exceptions from superior court, Suffolk county; Franklin G. Fessenden, Judge.

Action by Royal C. Mugford against the Boston & Maine Railroad. There was a judgment for defendant, and plaintiff excepts. Exceptions overruled.

Wm. Schofield and R. G. McClung, for plaintiff. Lincoln & Badger, for defendant.

HOLMES, J. The plaintiff, a boy 11½ years old, was "stealing a ride" upon a freight car of the defendant. He was on one side of the car, with his feet on the truss bar, and one or both hands on the handle of the door. The train was moving slowly from a station in East Boston, and starting for Revere. A brakeman on top of the car saw the boy, came towards him, raised his hand, and said, "Get off." The boy looked to see where he was jumping, and then jumped off, landing on a pile of cinders, as he seemed to have intended to, and slipped under the car, which cut off both his legs. This is the injury for which he sues. The court below directed a verdict for the defendant, and the case is here on exceptions.

If we assume, without deciding, that the brakeman was acting within the scope of his authority, nevertheless we are of opinion that the ruling was right. This is not the case of a person being driven by threats of personal violence to jump off a car going at such a high rate of speed as to make it unreasonably dangerous immediately to insist upon the right to have the trespass ended. See *Lovett v. Railroad Co.*, 9 Allen, 557-561; *Railroad Co. v. Kelly*, 38 Kan. 655, 14 Pac. 172. There is no doubt that the car was moving slowly. The highest rate at which its speed was set by any witness was eight miles an hour. Others said four or six. The speed naturally would increase as the train went on. The command given by the brakeman was no other than the command of the law, and a command to do what the plaintiff, by his own testimony, intended to do a little later, when, at least, it would have been no safer, so far as the speed of the train was concerned. It frightened the plaintiff to the point of obedience, but not to the point of automatic action, or loss of judgment and self-control, as seems to have been the case in *Ansteth v. Railroad Co.*, 145 N. Y. 210, 39 N. E. 708.

The ground of liability on which the plaintiff seems most to rely is the particular place at which he got off. But, as we have said, the command did not cause the plaintiff to drop in a blind collapse. As it left the plain-

tiff in command of his reason, it left him free to obey in any reasonable way. Obedience was not a matter of seconds, and the cinders covered only a very short distance. The case, in some respects, is not so strong as *Planz v. Railroad Co.*, 157 Mass. 377, 32 N. E. 356. See, also, *Leonard v. Railroad Co.*, 170 Mass. 318, 49 N. E. 621. The absence of a fence to the railroad makes no difference as to the defendant's liability. The plaintiff's trespass was deliberate and intentional, and he cannot ask us to say that, if a fence had been there, it might have changed his purpose, and therefore that the absence of the fence is the cause of his misfortune. We see no sufficient evidence of breach of duty on the part of the defendant or of due care on the part of the plaintiff. Exceptions overruled.

(173 Mass. 569)

PUTNAM NAT. BANK v. SNOW et al.
(Supreme Judicial Court of Massachusetts.
Suffolk. March 3, 1899.)

BILLS OF EXCHANGE—AUTHORITY TO DRAW—DISCOUNT—PROMISE TO ACCEPT—EVIDENCE.

1. In an action by a bank on the alleged promise of defendants to accept and pay drafts drawn on them by L., and discounted by plaintiff, there was evidence that defendants promised L., by letter, to accept drafts by him on them against shipments of fruit; that L. showed such letter to plaintiff; that one of defendants told plaintiff's cashier that L. was to purchase and ship fruit for his house, that he had authority to draw on the house, and that his drafts would be honored. L. testified that he drew many such drafts on defendants, and that they were discounted by plaintiff and paid by defendants. *Held*, that a finding that L. had authority to draw drafts on defendants, and that plaintiff discounted them on the faith of assurances made to it by defendants, was warranted.

2. An action will lie for the breach of an oral or written promise to accept an existing bill of exchange, in favor of the holder of a bill drawn pursuant to such promise, and taken by him on the faith of it.

Exceptions from superior court, Suffolk county; Daniel W. Bond, Judge.

Action by the Putnam National Bank against E. A. Snow and others. The court found for plaintiff, and defendants except. Exceptions overruled.

Williams & Copeland, for plaintiff. Sherman L. Whipple and C. W. Bond, for defendants.

MORTON, J. The finding was for the plaintiff on the ninth count for the three drafts that were drawn for oranges from the "Hard Bargain Grove," at \$1.10 per box, and the exceptions are to the refusal to give the rulings requested, so far as they related to that count. The other counts, and the rulings relating to them, are immaterial. The ninth count was upon a promise to accept, and alleged, in substance, a provision in writing by the defendants to Long to accept and pay drafts drawn by him on them equal to \$1.10 per box of oranges shipped, and also a verbal promise to the plaintiff to accept and

pay such drafts; and that, relying on their written and verbal promises, the defendants discounted the drafts in suit for Long, and upon presentation the defendants refused to accept or pay them.

One question is whether there was any evidence to warrant the finding. The letters of October 8th and November 30th from the defendants to Long, which were shown by him to plaintiff's cashier, plainly imply authority on the part of Long, if they do not expressly confer it, to draw on the defendants for the fruit that he was to ship. There was also evidence tending to show that one of the defendants told plaintiff's cashier, in substance, that Long was to purchase and ship fruit for his house, that he had authority to draw on the house at Boston, and that his drafts would be honored; and later in the trial this defendant testified, among other things, "that there was an agreement, as to the oranges from a grove known as 'Hard Bargain Grove,' that Snow & Co. would advance \$1.10 per box while Long should keep his account margined up." The letter of November 30th also spoke of a draft at the rate of \$1.10 per box. Long denied that anything was said to him about keeping his account margined up, and further testified "that he drew many drafts on the defendants, * * * which were discounted with the plaintiff bank, and paid by Snow & Co., during the months of October, November, and December, 1894." We think that there was evidence warranting a finding that Long had authority to draw the drafts in question, and that the plaintiff discounted them on the faith of assurances made to it by the defendants that drafts drawn by Long would be accepted and paid.

It is clear that, in the absence of any statute to the contrary, an oral acceptance of an existing bill of exchange is valid in this country, and that an indorser of a bill so accepted may maintain an action on such acceptance against the acceptor. *Cook v. Baldwin*, 120 Mass. 317; *Pierce v. Kittredge*, 115 Mass. 374; *Bank v. Rice*, 98 Mass. 288; *Carnegie v. Morrison*, 2 Metc. (Mass.) 381; *Coolidge v. Payson*, 2 Wheat. 66; *Townsend v. Sumrall*, 2 Pet. 170; *Russell v. Wiggin*, 2 Story, 213, Fed. Cas. No. 12,165; *Spaulding v. Andrews*, 48 Pa. St. 411; *Bissell v. Lewis*, 4 Mich. 450; *Nelson v. Bank*, 43 Ill. 36. This was formerly the law in England, but it is now otherwise. It is clear, also, that, for the breach of an oral or written promise to accept a non-existing bill, an action will lie by the holder of a bill drawn pursuant to such promise, and taken by him on the faith of it. *Boyce v. Edwards*, 4 Pet. 111, 122, 123; 1 Daniel, Neg. Inst. (3d Ed.) § 559; 4 Am. & Eng. Enc. Law (2d Ed.) 238, 239, cases supra.

Whether an oral promise to accept a non-existing bill constitutes a virtual acceptance of it when drawn is a question on which the cases are not in entire accord, and which we have no occasion to consider here. See *Storer*

v. Logan, 9 Mass. 55, 58. The ninth count, as has been observed already, is a count upon a promise to accept, and not upon an acceptance. We discover no error in the refusals to rule as requested. Exceptions overruled.

(172 Mass. 542)

HENDERSON v. GREENFIELD & T. F. ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Franklin. Feb. 28, 1899.)

STREET RAILROADS—PERSONAL INJURY—FRIGHTENING HORSE—NEGLIGENCE.

A horse drawing a buggy in which plaintiff was seated was driven in a public street near defendant's electric car, which made a loud noise and threw sparks from its wheels. When the motorman rang the gong, the horse took fright, and plaintiff was injured. It did not appear that the noise and sparks were due to any defect in construction, or negligence in operating the car, and the horse did not appear to be frightened until the gong sounded. *Held* no evidence of defendant's negligence.

Exceptions from superior court, Franklin county; J. B. Richardson, Judge.

Action by John Henderson against the Greenfield & Turners Falls Street-Railway Company for personal injury. At the close of plaintiff's evidence, a verdict was instructed for defendant, and plaintiff brings exceptions. Exceptions overruled.

The following is plaintiff's bill of exceptions:

"This was an action of tort to recover for personal injuries received by the plaintiff by being thrown from a wagon while riding with one Moreau at Turners Falls in the town of Montague, June 7, 1897. The accident occurred on a public street, about fifty feet wide, known as 'Avenue A,' in said Turners Falls, near where the avenue is crossed by a street called 'Fourth Street,' and near the store of one Rist. The plaintiff claimed that the horse which said Moreau was driving became frightened at the noise of the gong or bell on an electric car belonging to and operated by the defendant and its employés, and by reason of such noise as was made by the wheels of the car, and by reason of the sparks coming from the wheels of such car. The declaration and answer are made a part of the bill of exceptions.

"John Henderson, the plaintiff, testified as follows: 'On June 7, 1897, I was riding from Greenfield to Turners Falls in a wagon with Mr. Moreau. I sat upon the left-hand side of the wagon. Moreau was driving the horse. We struck Avenue A near the southerly end, by the watering trough. I could see an electric car up near the other end of the avenue, between a quarter and a half mile away, at its starting place. The street-railway track is in the center of the avenue. Moreau and I drove up the avenue on the right-hand side of the railroad track. The horse was not trotting fast. He was going at a regular gait, and the Millers Falls car, which was ahead of another car, stopped on the cross walk on

Fourth street,—the cross walk on the avenue. The horse came close up to the car, and the cars, as I thought, started pretty quick after getting out a passenger, and the horse acted as though he was a little afraid when they came face to face,—the car and him. The horse turned round quick, all in an instant, but before that the horse didn't seem to be scared of it, till the man on the car commenced ringing the alarm bell,—the gong. Then the horse went out. Before the horse shied, I hollered to the motorman to stop it. He didn't answer me. I said, "Stop that gong." I hadn't time to holler a second time, when the horse turned round quick, like that (showing), and threw me out on the curbstone. The appearance of the car was unusual. It sounded to me as though the car were running over pebblestones or something on the track. It made a loud noise, and I could see a little fire—a little light—come from the wheels. I suppose it came from the rail and flew out. It was on the side that I was on, but it didn't come out so I think either the motorman or the passengers or the conductor could see it. I think it was caused a good deal from the pebblestones the wheels were running over. It made a loud noise. The horse shied off to one side. He didn't run back; he turned right around quick. I was thrown upon the ground, and I didn't come to immediately. The car, when I next saw it, was pretty near opposite to me. It was stopped. May have been two or three yards away; might have been five. It was only a very short distance. The Greenfield car was close behind this car, and followed it right up. The spark came from the front car.' In cross-examination the witness testified as follows: 'Mr. Moreau works for the Montague Paper Company on boilers, and has been the owner of horses, and he traded on that day for the one he was driving at the time of the accident. Moreau was driving me home, with the intention of going back to his own home. The car track of the defendant is in the center of the avenue. There was room enough on either side for a carriage to pass the car. The first notice that I took of the car coming towards us was when it was at Third street. Moreau and I drove along. We made no stops, and kept along at about the same gait. The car came to a stop at Fourth street. I think the first place that he showed any signs of being alarmed at the car coming was at the sound of the gong. He acted shy when he heard the bell. The car was moving at this time. At the time that the horse turned round, they were face to face. The horse, when he first showed any disturbance, might have been ten yards, or five, from the car. I don't think it was five yards, to the best of my knowledge. I don't think the car stopped before I was thrown out. The bell rang. I can't say how many times it rang. It might have rung a dozen times, might not have been more than half a dozen, but I noticed he kept pounding at it all the time. I couldn't tell

how many times. It seemed as though it was as much as half a dozen times, anyway. That is what frightened the horse. I don't think the spark had much to do with it. It was the bell and the flapping of the wheels. The wheels made a big noise,—a kind of flapping, rattling noise. The car ran betwixt thirty-five and forty yards from the place it stopped at Fourth street. I think, if the man hadn't rung the bell, we would have gone by safely. The horse started at the first sound of the bell. He kind of acted,—put up his ears and acted as though he was pretty lively. He didn't do no plunging, not a bit. He did nothing besides put his ears up. He was a young horse, I suppose, high-lifed. I don't know how old he was; couldn't have been over eight or nine years old. The first that I noticed was the ears of the horse. I was watching the car more than the horse, but I noticed the horse so far as that was concerned, that when he got up face to face he didn't do any plunging. Probably he acted a little shy, about as far as from here to you. In order of events the first thing was the sound of the bell or gong, and the horse showing disturbance at it. The next thing was that he came up to the car, and turned right around like that [showing], and upset the team, and I got thrown out. It might have taken half a minute for it to happen; might be a minute. I don't believe it was more than half a minute. We were right opposite the car at the time we heard the bell and tipped over. Moreau had the reins in his hands all the time that we drove up the avenue. There was no slip or loss of control on his part, and the horse behaved well. The horse turned round, I think, because he was stronger than the man. The horse was too spry for him and too strong for him. I suppose that was the reason he turned around, because Mr. Moreau is a good man with a horse, well used to them; a good driver.'

"Moreau, a witness called by the plaintiff, and the person with whom he was riding and who was doing the driving at the time of the accident, testified as follows: 'I have almost always owned horses. I was taking Henderson home on the day of the accident. As I got part way up the avenue, I saw the cars at the end of the street. I paid no attention to them because the man I got this horse of told me he was not afraid of the electric cars. I crawled along up to the cars. I had my reins in my hand, and was watching the horse, and he heard the bell ring, and just cocked his ears a little mite. I turned to Henderson then, and I said, "This horse is not afraid of the cars," and went right along, and, just as we came opposite the car, the bell clanged, and the horse bolted right round. His forward feet came over the curbing, and the buggy turned over onto the two hubs. I jumped out, and it threw Mr. Henderson out, and my cushions came out on the street. I held the reins with one hand, and with help that came from the street we righted the bug-

gy up again. After the accident I drove around the electric cars, and went right back where the cars were. The horse didn't appear to be afraid of the cars. There were two cars, and I went between them. It was the head car that caused the trouble. The accident occurred in the afternoon. It was not dark. I didn't notice the car stop until after my horse had bolted. My horse's feet were then on the car tracks, and I looked around to see if the car was coming, and my wagon was turned over. After the horse turned the wagon over, he turned back in the same direction we had come. I heard Henderson say something to the motorman, but I couldn't say what, because my attention was taken up with the horse all the time. I didn't notice the fire fly out from the wheels. My attention was on my horse. That was what I was looking after. My horse wasn't acting bad. He was not until that bell clanged, but, as soon as that clanged, the horse bolted in an instant. It didn't take half a minute before we were turned wrong side out. I couldn't say how many times the bell clanged, but just as I got near the car it clanged, and that called the horse's attention, but he merely pricked his ears up and went right along; and when he got to the car the bell clanged again, and the horse went round so quick I couldn't tell what happened afterwards.' In cross-examination the witness testified as follows: 'I had owned the horse about fifteen minutes. I had just made the trade. I had never seen the horse before. I should think he was between eight and nine years old. I don't remember the name of the man with whom I traded. I should think he was a Yankee, by his conversation. He told me that the horse was not afraid of the electric cars, and I believed him; but he said he was a little afraid of the steam cars. The horse behaved all right as we drove up the avenue. I remarked to Henderson, "The horse is not afraid of the electric cars." I was perhaps within two hundred feet of the car when I made the remark. I think the car was standing still at Fourth street, though I won't be certain. The car was at about Fourth street, and it is my best judgment that it was standing still. I should judge it was about two hundred feet off when I made the remark that he wasn't afraid of the cars. We went right along towards the car. I had hold of the reins,—one rein in each hand. My feet were against the foot brace, and I had no idea of any trouble. The car was coming towards us, and we were going towards the car. The first thing that called the attention of the horse was the ringing of the bell. When he got up opposite the car, and the bell rang, the horse bolted short round. When the bell first rang, the horse just held up his head, pricked up his ears, and didn't seem to act as though he wanted to do anything wrong; only looked up towards the car, and kept going right along. There wasn't anything strange about a horse pricking up his ears when a bell rings. There

wasn't anything about the horse that showed unruliness whatever. He was going on a trot at the rate of about four or five miles an hour. I suppose it was at the sound of the second bell that he bolted short round. When he got up nearer to the car, when the bell clanged, he bolted right short round. I couldn't say how many times the bell struck, but I know, before he got to the car, the bell struck, and that called his attention, and just as he got there that bell clanged again, and he bolted right round. I can't say how many times they rung the bell, but I was right opposite the car when the bell clanged and the horse went round. Q. Can you tell whether the horse was frightened the second time the bell rang? A. Yes, sir. Q. Was it before the sixth time? A. Why, yea.

"After the examination of Moreau, the plaintiff was recalled, and testified as follows: 'The horse, when it first showed evidences of fright, might have been four or five yards from the car,—twelve or fifteen feet. The car was opposite when I was thrown out. The car had gone probably forty-five yards before it stopped. I should think, when the horse put up his ears and looked a little shy, it was at the noise of the gong,—the bell on the car. There was nothing else before we got the tip. The horse went right along in a well-behaved manner until he got right up to the car, and then he turned right round and upset the buggy; not as quick as I indicate by my finger, but pretty quick. We were right opposite the end of the car, and the car was running at the time. I think the clanging of the gong sounded a little faster and louder than it generally does. It was a continual clanging.'

"It is agreed that defendant had a right to operate its cars on said Avenue A; it is agreed that the track, cars, and the servants operating them were the defendants; and it is agreed that the plaintiff received injury. This is all the evidence material to a determination of this bill of exceptions.

"At the close of the testimony for the plaintiff, the defendants requested the court to rule that the evidence was insufficient to warrant a verdict for the plaintiff. The court so ruled, and instructed the jury to find a verdict for the defendants, to which ruling the plaintiff duly excepted, and, being aggrieved thereby, prays that these exceptions may be allowed."

B. H. Winn and L. W. Griswold, for plaintiff. John A. Aiken and Dana Malone, for defendant.

MORTON, J. The ruling was right. Up to the moment of the accident there was nothing in the behavior of the horse which rendered it negligent on the part of the motor-man to ring the gong, and it cannot be said that to ring the gong on an electric car in a public street half a dozen or a dozen times, which the plaintiff says was done, is of itself, without anything more, evidence of negli-

gence. There was nothing to show that the noise and sparks were due to any defect in construction or negligence in operation. Exceptions overruled.

(172 Mass. 496)

JEWETT v. TURNER et al.

(Supreme Judicial Court of Massachusetts. Hampden. Feb. 28, 1899.)

EXECUTORS—APPOINTMENT—JURISDICTION.

Pub. St. c. 129, § 8, provides that, where one of several executors named in a will refuses to accept the trust, the probate court may grant letters to the others; and chapter 130, § 6, provides that, before letters of administration with the will annexed are granted, the court may grant letters testamentary, etc. *Held* that, after a decree is rendered appointing one of two executors named in a will on the refusal of the other to act, the power of the probate court is exhausted, and it cannot consider an application of the latter withdrawing his renunciation, and asking his appointment as co-executor.

Report from supreme judicial court, Hampden county; Marcus P. Knowlton, Judge.

Application by Joseph D. Jewett withdrawing his renunciation of refusal to act as executor, and asking his appointment as co-executor of the estate of William W. Thayer, deceased. From an order of the probate court granting the application, John B. Turner and Henrietta B. Thayer appeal. Decree reversed on report.

John L. Rice, for petitioner. Walter S. Robinson, for respondents.

HOLMES, J. Jewett, one of two executors named in the will of Thayer, declined appointment in January, 1897. In February, Turner, the other executor, filed a petition for probate of the will and for letters testamentary. On March 11, 1897, the will was proved, and letters were granted to Turner. An appeal was taken, and on June 11th the decree of the probate court was affirmed. On July 1, 1897, Jewett filed a petition asking leave to withdraw his renunciation, and to be appointed executor jointly with Turner. On July 2d, Turner filed his bond, and took out his letters. On July 29, 1897, the probate court made a decree that letters testamentary should issue to Jewett, as co-executor with Turner. This decree was appealed from, and the question whether it was within the power of the probate court to make it is before us by report.

We are of opinion that after letters of administration have been granted, while the decree which granted them stands, the power of the probate court is exhausted. When one of two persons named as executors refuses to accept the trust, the court is required to grant letters to the other, if he is willing to accept. Pub. St. c. 129, § 8. By Pub. St. c. 130, § 6, under certain circumstances, "before letters of administration with the will annexed have been granted, the court may grant letters testamentary," etc. This im-

plies that the power is exhausted when letters have been granted; and the question is narrowed to fixing the point of time when the grant shall be deemed complete for this purpose. This question would not be illuminated by lengthy discussion. We appreciate what can be said in favor of regarding the proceedings as open, at least, until a bond has been filed; but we think that convenience on the whole is in favor of the moment when the decree is passed. It follows that after June 11th it was too late for Jewett's petition to be entertained, supposing that further proceeding upon it would not have been cut off on July 2d by Turner's receipt of his letters after giving bond.

Decree reversed.

(173 Mass. 536)

TYLER v. IDEAL BEN. ASS'N.

(Supreme Judicial Court of Massachusetts.
Essex. Feb. 28, 1899.)

INSURANCE — APPLICATION — FALSE REPRESENTATIONS.

An applicant for insurance omitted to state that, some 15 years before, he had sprained an ankle, so that he applied some liniment to it, and it troubled him for 4 hours. *Held*, that a finding that the omission was not a misrepresentation which increased the risk (St. 1895, c. 281) was justified, notwithstanding the testimony of the insurer's examining physician that a sprain never fully recovers, and that such an injury to one leg would make an injury to the other more probable 15 years afterwards, and that, if the insurer had been informed of the sprain, it would not have written a policy covering injuries to the ankle.

Exceptions from superior court, Essex county.

Action by one Tyler against the Ideal Benefit Association. The court found for plaintiff, and defendant brings exceptions. Overruled.

F. M. Farnham, for plaintiff. D. W. Quill, for defendant.

BARKER, J. The sole defense relied upon at the trial was that the plaintiff omitted to state in his application for insurance the fact that, some 15 years before, he had sprained his left ankle, so that he applied to it some liniment, and it troubled him for 3 or 4 hours. Notwithstanding the testimony of the defendant's examining physician to the effect that a sprain never fully recovers, that such an injury to one leg would make an injury to the other leg more probable 15 years afterwards, and that, if the insurer had been informed of the previous sprain, it would not have written a policy covering injuries to the ankle, we think it was competent for the court to find as a fact that the omission of the plaintiff to state the previous sprain was not a misrepresentation which increased the risk of loss. The evidence that the plaintiff did in fact state the circumstance of the former sprain to the agent, who assisted him in making out his application, and did not put it in the application because the agent said

it was too trifling, and so did not write it down, would further justify a finding that the omission or misrepresentation was not made with actual intent to deceive. The rights of the parties are governed by the provisions of St. 1895, c. 281, relative to misrepresentations in applications for membership in fraternal beneficiary corporations; and under those provisions the court was justified, upon the evidence, in refusing the defendant's requests, and in finding for the plaintiff. Exceptions overruled.

(173 Mass. 581)

EDGAR v. JOSEPH BRECK & SONS CORP.

(Supreme Judicial Court of Massachusetts.
Suffolk. March 1, 1899.)

SALES — WARRANTY — DESCRIPTION — RESCISSION — DAMAGES — EVIDENCE — STATUTE OF FRAUDS — AGENCY — RATIFICATION — PROVINCE OF JURY.

1. Where a buyer gave an order for longiflorum lily bulbs on the seller's statement that he would supply him with bulbs true to name, and the seller delivered bulbs of an inferior variety, which were not distinguishable from longiflorum, it was a question for the jury whether the seller warranted that the bulbs were longiflorum.

2. A description of an article to a prospective buyer may become a warranty after a sale and acceptance, where the correspondence between the article and the description cannot be ascertained until after acceptance.

3. Where a sale with warranty is within the statute of frauds when made, but the goods are afterwards delivered, the fact that at the time of delivery a bill is sent, bearing a printed notice that the vendor sells no goods with warranty, does not prevent the parol warranty from attaching by delivery of the goods, except in so far as the printed notice tends to show a rescission of the parol contract.

4. Such notice does not show a rescission as a matter of law.

5. Where a buyer sues for breach of a warranty made by the seller's agent without authority, the seller ratifies the warranty by declaring in set-off for the price.

6. The measure of damages for a breach of a warranty that lily bulbs sold by the warrantor would produce a certain kind of lily is the difference between the value of the crop which the buyer raised and a crop of the kind warranted.

7. In an action by a florist against a seed dealer for breach of warranty that lily bulbs sold by defendant to plaintiff would produce a certain kind of lily, on an issue of the market value of the crop actually produced, evidence of the price paid for a wholesale quantity of lilies at a retail store may be rejected as unimstructive with regard to growers' prices.

Exceptions from superior court, Suffolk county; Elisha B. Maynard, Judge.

Action by W. W. Edgar against the Joseph Breck & Sons Corporation. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

The plaintiff is a florist and grower of flowers. He bought of defendant, a dealer in seeds, a bill of lily bulbs amounting to \$125. It is for a breach of warranty as to the kind of lily the bulbs would produce that this action is brought.

Anthony Leuthy testified that he is and he

has been a florist 21 years. Has been growing lilies for 10 years to any extent. Has grown longiflorum, Harrisii, candidum, and callas. Sold his lilies in the Boston market as a grower. Sold lilies to the Boston market in the Easter season of 1894. Sold some Harrisii and some longiflorum. Fifteen dollars was the fair market value of longiflorum in the Easter season of 1894. Sold some Harrisii and some longiflorum. Knows the price paid for Harrisii by some other people. Has seen quotations. In his opinion, the market price of Harrisii was from \$12 to \$12.50 a hundred. The Harrisii lily bulb grows on the average one to two more marketable lilies than the longiflorum of the same size. "Q. I believe you bought some of these Harrisii lilies from Mr. Edgar, didn't you? A. Yes, sir. Q. What price did you pay for them? (Objected to.) Mr. Ivy stated that he offered this as tending to show what the market value of Harrisii lilies was, as contradicting the plaintiff's testimony as to what the market value of the flowers was, and as going in reduction of the plaintiff's claim for damages. Maynard, J.: Upon that I think it will be competent for you to ask this witness if he made this sale. It may go in simply for the purpose of contradicting. Q. Did you buy some of these Harrisii lilies from Mr. Edgar? A. Yes, sir. Q. What did you pay? Mr. Bartlett: One moment. I would like to know where. Maynard, J.: Of course, it must be in Boston. Q. Where did you buy them? A. Bought them at his store on Tremont street. Mr. Bartlett: Now, I object on another ground. Maynard, J.: That is, that he said he kept a retail store? Mr. Bartlett: Yes, sir. Mr. Ivy: He may have sold them at wholesale. Maynard, J.: I do not know about that. You may inquire as to the quantity. Q. How many? A. Fifty. Q. Now I ask at what price? (Objected to.) Mr. Ivy: I will ask the witness this question, with the permission of the court: Q. Mr. Leuthy, is the sale of lilies to the number of fifty at a time a wholesale sale? A. I should say it is. Mr. Bartlett: I will object. Maynard, J.: I think I must exclude the whole question, and save you an exception if you desire. (Mr. Ivy saved an exception.) Mr. Ivy: I understand your honor excludes the answer as to whether that was a wholesale sale or not. Maynard, J.: Yes. Mr. Ivy: Your honor will save me an exception."

C. W. Bartlett, E. R. Anderson, and Fred C. Allen, for plaintiff. Jesse C. Ivy and Lowell, Smith & Lowell, for defendant.

HOLMES, J. This is an action for breach of a warranty that certain lily bulbs sold by the defendant to the plaintiff were of the kind known as "longiflorum." The case has been tried, and is here on exceptions.

The first exception to be considered is to a refusal to direct a verdict for the defend-

ant. The plaintiff testified that the manager of the defendant's seed department spoke to him about supplying him with bulbs for the following Easter; that the plaintiff asked about the lilies being true to name, and that the manager replied that he would supply him with those true to name, whereupon the plaintiff gave him the order. Afterwards the bulbs were sent, and turned out to be in great part of an inferior variety (Harrisii), of which the bulb is not distinguishable from the longiflorum.

The defendant objected that the foregoing facts do not show anything importing a warranty, and, whatever their import, are no evidence of a warranty, because the sale was executory, and that the plaintiff's only remedy on such a contract would be for failure to deliver the goods; that the agreement, when made, was within the statute of frauds, and did not become binding until the delivery of the bulbs, which were sent with a bill having a printed notice that the defendant sold no seeds with a warranty; and that there was no evidence of the agent's authority.

As to the first of these objections, we do not think it necessary to say more than that it was a question for the jury. With regard to that based upon the sale being executory, the answer is that, when an executory contract is made for the sale of a described article, the correspondence between which and the description cannot be ascertained until after acceptance, words which before are words of description may be found to operate as a warranty after the goods are accepted, and the sale is complete. It might work injustice to treat an essential term of the contract as performed or waived at a time when the purchaser still is unable to tell whether it has been performed or not. *White v. Miller*, 71 N. Y. 118, 129; *Shaw v. Smith*, 45 Kan. 334, 338, 25 Pac. 886. See *Henshaw v. Robbins*, 9 Metc. (Mass.) 83.

The contract was made when the parties made their oral agreement. It does not matter that at that time it was not evidenced by a memorandum in writing. The statute of frauds could be satisfied later as effectually as at the time. It was satisfied by delivery of the bulbs. The general printed warning on the bill head that the defendant did not warrant seeds could have no effect unless it led to the inference that the old contract had been rescinded, and a new one substituted, by mutual agreement. Even if the bill had been receipted, it would not have excluded proof of warranty, and, whether it was evidence of a rescission or not, it did not establish one as matter of law. *Atwater v. Clancy*, 107 Mass. 369; *Dunham v. Barnes*, 9 Allen, 352; *Hazard v. Loring*, 10 Cush. 267, 268. Perhaps *Lamb v. Crafts*, 12 Metc. (Mass.) 353, would prove reconcilable with the latter cases if the instrument then before the court were set out. The case is not like *Rope Co. v. Brigham*, 170 Mass. 518, 522, 523, 49 N. E. 1022, where a series of bills were sent and received with-

out objection, containing a term as to which, so far as appears, there had been no previous agreement, and which, as pointed out by the court, was a proposition in favor of the buyer of the goods. In that case there was nothing to prevent a presumption of the buyer's assent.

Finally, we should hesitate to say that a contract which was within the authority of an agent so long as it was an executory contract for the sale of a thing of a certain kind ceased to bind the principal after delivery, when it operated as a warranty that the thing was of that kind. But by declaring in set-off for the price of the bulbs, after notice of the alleged warranty by the declaration, the defendant affirmed the sale, whatever it turned out to be, and must take it with its burden.

Several exceptions raise the question of the measure of damages. Evidence was admitted of the fair market value per hundred of longiflorum and of *Harrisi* lilies in the Easter market of 1894, and the jury were instructed that, if the bulbs were sold for the understood purpose of raising lilies for that market, the measure of damages would be the difference between the value of the crop which the plaintiff raised and a crop of longiflorums. This rule has the sanction of decisions elsewhere, and is within the principle of a recent decision by this court. *Johnston v. Faxon* (Mass.) 52 N. E. 539; *Randall v. Raper*, 111, Bl. & El. 84, 90; *Passinger v. Thorburn*, 34 N. Y. 634; *White v. Miller*, 71 N. Y. 118, 132, 133; *Wolcott v. Mount*, 36 N. J. Law, 262, 38 N. J. Law, 496.

An exception was taken to the exclusion of evidence of a purchase of 50 *Harrisi* lilies at a retail store, offered by the defendant to contradict the plaintiff's evidence. The witness had been allowed to state the market value of these lilies, and it is enough to say that the judge was warranted in regarding the sale as uninformative with regard to growers' prices.

We have dealt with the questions argued, and have examined the record. We are of opinion that the exceptions should be overruled.

Exceptions overruled.

(173 Mass. 54)

JEWETT v. WEST SOMERVILLE CO-OPERATIVE BANK.

(Supreme Judicial Court of Massachusetts. Middlesex. March 2, 1899.)

CO-OPERATIVE BANK—POWER OF TREASURER.

The treasurer of a co-operative bank has no power to bind it by acceptance of an order drawn on it, such banks not being authorized to do a general banking business, their rights and powers being strictly limited for protection of their members, and it being provided by statute (Pub. St. c. 117, § 17) that "all payments made by the corporation for any purpose whatsoever, shall be by order, check or draft upon the treasurer, signed by the treasurer and secretary," and that the "treasurer shall dispose

of and secure the safe-keeping of all moneys, securities and property of the corporation in the manner designated by the by-laws," and there being no authority therefor in its by-laws.

Exceptions from superior court, Middlesex county; Albert Mason, Judge.

Action by one Jewett against the West Somerville Co-operative Bank. A ruling requested by defendant was refused, and it excepts. Exceptions sustained.

J. H. Barnes, Jr., for plaintiff. D. C. Delano, for defendant.

KNOWLTON, J. This action is brought on an acceptance of an order for the payment of money drawn on the defendant corporation, and accepted by its treasurer. To maintain his action, the plaintiff must establish the validity of the acceptance. The defendant is a co-operative bank, established and doing business under the laws of the commonwealth. See Pub. St. c. 117; St. 1882, c. 251; St. 1883, c. 96; St. 1885, c. 121; St. 1887, c. 216; St. 1889, c. 159; St. 1890, c. 78; St. 1894, c. 342; St. 1895, c. 171; St. 1896, cc. 277, 285, 361; St. 1897, c. 161; St. 1898, c. 247. Such banks are subject to the supervision of the savings bank commissioners, and in their organization and general features are closely allied to savings banks. *Atwood v. Dumas*, 149 Mass. 169, 21 N. E. 236. They are not authorized to do a general banking business, and their rights and powers are strictly limited for the protection and benefit of their members.

The defendant contends that, under the statutes of this commonwealth, it could not, even under an express vote, accept such an order as the plaintiff has declared on. We do not find it necessary to determine the question thus presented. If we assume, in favor of the plaintiff, that the making and acceptance of this order were so connected with the payment of the money which the mortgagor was to receive as a loan that the corporation might have bound itself by an acceptance, we come to the question whether the treasurer could bind the corporation by such an undertaking without express authority so to do. The statute (Pub. St. c. 117, § 17) provides that "all payments made by the corporation for any purpose whatsoever, shall be by order, check or draft upon the treasurer, signed by the president and secretary," etc., and that the "treasurer shall dispose of and secure the safe-keeping of all moneys, securities and property of the corporation in the manner designated by the by-laws," etc. We find nothing in the nature of the business to be done by such corporations, or in the express provisions of the statutes, which indicates that their treasurers can create liabilities on the part of such corporations by their signatures to commercial paper, or by their indorsement or acceptance of such paper. There is no reason why the power of the treasurer of a co-operative bank should be greater than that

of a treasurer of a savings bank. A treasurer of a savings bank cannot bind the corporation by such indorsements, nor by any similar transaction. *Tappan v. Bank*, 127 Mass. 107; *Com. v. Bank*, 133 Mass. 20; *Holden v. Upton*, 134 Mass. 177; *Holden v. Phelps*, 135 Mass. 61. Treasurers of other similar corporations, as well as of parishes and municipalities, are also of limited authority. *Craft v. Railroad Co.*, 150 Mass. 207, 22 N. E. 920; *Webber v. Williams College*, 23 Pick. 302; *Packard v. Society*, 10 Metc. (Mass.) 427; *Torrey v. Association*, 5 Allen, 827; *Lowell Five Cents Sav. Bank v. Inhabitants of Winchester*, 8 Allen, 109. There is a material difference between the implied powers of treasurers of manufacturing and trading corporations and those of treasurers of corporations organized for special purposes, which ordinarily do not have occasion to use commercial paper in the transaction of their business. It is plain that the defendant's treasurer had no implied authority by virtue of his office to bind it by his acceptance of the plaintiff's order. The defendant's by-laws, which were put in evidence, and the oral testimony, tended strongly to show that the treasurer had no actual authority to sign an acceptance of this kind for the bank, and they furnish no evidence to sustain the plaintiff's contention in this particular. We are of opinion that the ruling requested by the defendant, that "the treasurer had no authority to accept the order declared on in the name and behalf of the defendant, and to make the defendant liable on the order to the plaintiff, and that, on all the evidence, the plaintiff is not entitled to recover," should have been given. Exceptions sustained.

(173 Mass. 23)

FRISCHBERG v. HURTER.(Supreme Judicial Court of Massachusetts.
Suffolk. March 2, 1899.)**LANDLORD—LIABILITY TO STRANGERS.**

A landlord is not liable to a stranger for injury received in falling into the coal hole in front of and connected with the leased premises, due merely to failure of the tenant to fasten the cover, which was in good condition.

Appeal from superior court, Suffolk county; Daniel W. Bond, Judge.

Action by Lena Frischberg, per prochein ami, against Mary E. Hurter, for injury received by falling into a coal hole in front of and connected with premises owned by defendant, and leased to another. Verdict was ordered for defendant, and plaintiff excepts. Exceptions overruled.

E. O. Achorn, for plaintiff. H. R. Bailey and J. H. Appleton, for defendant.

MORTON, J. At the time of the accident the premises were in the occupation of a tenant, to whom the defendant had let them. The general rule is that under such circumstances the landlord is not liable to strangers for injuries caused by a defect or want of

repair in the premises, unless he has agreed to make repairs, or the defect or want of repair existed at the time of letting, and was of such a character as to constitute a nuisance, or make the premises permanently dangerous. See *Caldwell v. Slade*, 156 Mass. 84, 30 N. E. 87; *Clifford v. Cotton Mills*, 146 Mass. 47, 15 N. E. 84; *Delay v. Savage*, 145 Mass. 38, 12 N. E. 841; *Mellen v. Morrill*, 126 Mass. 545; *Leonard v. Storer*, 115 Mass. 86; *Grinnell v. Eamer*, L. R. 10 Q. P. 658; *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Nelson v. Brewery Co.*, 2 Q. P. Div. 311; *Gandy v. Jubber*, 5 Best & S. 78; *Todd v. Flight*, 9 C. B. (N. S.) 377; *Tayl. Landl. & Ten.* (7th Ed.) § 175. We think that there was no evidence fairly tending to show that the defendant had agreed to keep the premises in repair. The most that can be said of the evidence, as it seems to us, is that the defendant agreed to make certain specific repairs, which she made as agreed, but did not agree generally to keep the premises in repair. The case in our own reports which comes nearest to this is *Delay v. Savage*, supra. In that case, however, there was a rope, but no chain, to the cover, and the coal hole was so worn that the cover would slip when stepped on, whether tied or untied. In this case the cover itself was in good condition, and there was an "S" attached to it, through which a piece of iron could be put, so as to fasten it down securely, and this was done after the accident by a boarder of the tenant by means of a piece of gas pipe which was found in the cellar, and which, for aught that appears, may have been there for that purpose. Landlords are not obliged to see that the covers on coal holes in premises which are in the occupation of a tenant are kept securely fastened, and we think that the cause of the accident in this case was the neglect of the tenant to fasten the cover, rather than the worn condition of the hole. We assume that the plaintiff was in the exercise of due care. The evidence tends to show—if that is material—that the coal hole was upon the defendant's premises. Exceptions overruled.

(173 Mass. 6)

GLOBE FIRE INS. CO. v. TOWN OF LEXINGTON.(Supreme Judicial Court of Massachusetts.
Suffolk. March 1, 1899.)**DESTROYING GYPSY MOTH—DAMAGES.**

Under St. 1891, c. 210, § 2, providing that the owner of land entered upon by the board of agriculture, in executing measures to exterminate the gypsy moth, may recover the damages caused by such entry, and acts done thereon, of the city or town in which the lands so claimed to have been damaged are situated, a landowner may not recover for the loss of personal property caused by a fire set by the agents of the board, the statute contemplating a recovery for damage merely to land.

Report from superior court, Suffolk county; Daniel W. Bond, Judge.

Action by the Globe Fire Insurance Company against the town of Lexington. Judgment for defendant on report.

Johnson, Clapp & Underwood, for plaintiff. Colby & Bayley, for defendant. Franklin T. Hammond, for the Commonwealth.

HOLMES, J. This action is brought under St. 1891, c. 210, § 2, to recover damages for the destruction of some cord wood, etc., by a fire which was set by the agents of the state board of agriculture for the purpose of exterminating the gypsy moth, and which escaped their control. The plaintiff sues under a written assignment of the claim by the owner of the land and of the personal property destroyed.

The fundamental question is whether the statute extends to losses of personal property caused by the negligence of an agent of the board. If it does not, we need not consider some other questions which have been argued, although we do not mean by this to express any great doubt as to the validity of the assignment. *Hustisford Farmers' Mut. Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 66 Wis. 58, 28 N. W. 64; *Home Ins. Co. v. Northwestern Packet Co.*, 32 Iowa, 228.

The first section of the statute authorizes and directs the state board of agriculture to provide and to carry into execution all reasonable measures for the extermination of the gypsy moth, and gives the board the right to enter upon the lands of any person. This right of entry upon lands is the only express authority to deal with the property of others which is given to the board. The second section goes on: "The owner of any land so entered upon, who shall suffer damages by such entry and acts done thereon" by the board, "may recover the same of the city or town in which the lands so claimed to have been damaged are situate," etc. We are of opinion that these words do not extend to giving the owner of the land an action for personal property destroyed as this was. There is no pretense that they would give an action for the destruction of personal property upon the land belonging to a third person. The words do not lend themselves to an irrational distinction in favor of the owner of the land. They are dealing with the entry which was authorized at the end of the preceding section. They confine themselves to the owner of the land so entered upon, and the words, "the lands so claimed to have been damaged," show that damage to land is damage under contemplation. The remedy which the statute provides has reference only to the damage which the statute has contemplated and authorized in terms. See *Mill Corp. v. Gardner*, 2 Pick. 83-87.

Besides the cord wood, some surveyors' stakes, marking the boundary lines of building lots, were burned. The judge ruled that there could be no recovery in respect of them. All we can say is that enough does not appear

for us to pronounce the ruling wrong. It may be that the stakes were driven into the ground for temporary use only, and remained personal property, under the law as understood in Massachusetts. *Carpenter v. Walker*, 140 Mass. 418, 5 N. E. 160; *Bank v. Mason*, 147 Mass. 500, 18 N. E. 406. No question is saved as to possible damage to land, if it be such, by the loss of surveyors' lines, nor does it appear that the surveyors' lines did not remain perfectly distinct.

Judgment for defendant.

(172 Mass. 516)

SIMMONS v. SHAW et al.

(Supreme Judicial Court of Massachusetts.

Plymouth. Feb. 28, 1899.)

SET-OFF—JOINT DEMANDS—CORPORATIONS—BONDS—RATIFICATION—REVIEW.

1. Under Pub. St. c. 168, § 8, providing that, where there are several defendants, a demand to be set off shall be due to them jointly, a judgment against a party in favor of others cannot be set off in an action against the latter and another.

2. The president of a corporation executed a bond for the review of a judgment against the company under which it obtained a stay of execution, and prosecuted the petition for more than a year. At the trial of an action on the bond, the company admitted its liability, and agreed to a judgment. *Held*, that there was a ratification.

Exceptions from superior court, Plymouth county; H. K. Braley, Judge.

Action by one Simmons against one Shaw and others. There was a judgment for plaintiff, and defendants except. Exceptions overruled.

A. E. Avery, for plaintiff. W. R. Bigelow and R. O. Harris, for defendants.

BARKER, J. The judgment against the plaintiff, which the defendants Shaw and Jaquith sought to set off against him in this action, was in form a judgment against him and two other persons. Whether, by reference to Pub. St. c. 167, § 4, it could be construed as a several judgment against the present plaintiff, it is not necessary to decide. When the present action was brought, that judgment had been assigned to the defendants Shaw and Jaquith; and the Scituate Water Company, their co-defendant in this suit, had no interest in that judgment. For the reason that the judgment was not due to all of the defendants jointly, it could not be set off in the present action. Pub. St. c. 168, § 8. See *Walker v. Leighton*, 11 Mass. 140; *Warren v. Wells*, 1 Metc. (Mass.) 80.

The contention that the present action must be treated as a suit against the defendants Shaw and Jaquith alone is without a shadow of foundation. The Scituate Water Company was a co-defendant with them, although it had not been served with process, or entered its appearance, when the declaration in set-off was filed. Without intimating that the circumstance that their co-defendant was not

brought into court would have made any difference with the competency of the set-off if the Scituate Water Company had never been served with process, or appeared in this suit, when that company did appear the rights of all parties were to be determined upon the basis that it was a co-defendant with Shaw and Jaquith, and the ruling that judgment in which they alone had an interest could not be set off was right. From the evidence it would be competent for the jury to find the following facts: The defendant Jaquith was president and the defendant Shaw was a director of an incorporated bank. This bank had lent a large sum of money on notes given for the purchase of all the assets of the Smith & Winchester Company from the assignees of that company, and those assets were held by Shaw, as a trustee, for his bank. Among those assets was a claim against the Scituate Water Company, and, if the judgment of the present plaintiff against that company should stand, it would impair the value of the claim against the company held by Shaw as trustee, and which he wished to enforce for the benefit of the bank. Thereupon Jaquith, who was also a member of a law firm, directed his law partner to bring a petition for review of the judgment which had been rendered in favor of the present plaintiff against the Scituate Water Company. In this petition for review it became necessary to give a supersedeas bond, which must be executed by the Scituate Water Company as principal, and by sureties. Henry H. Winchester was president of the water company, and he affixed the signature and seal of that company to the bond now in suit, and the defendants Jaquith and Shaw executed it as sureties. The bond was then approved by a justice of the court, and a stay of execution was granted. The petition for review was signed with the name of the water company by Winchester as president. This petition was conducted by the defendant Jaquith's law partner as attorney for the petitioner, was heard in the superior court, and there denied, and the petitioner's exceptions were overruled in this court by the decision reported in *Water Co. v. Simmons*, 167 Mass. 313, 45 N. E. 750. The most natural inference from the evidence is that the petition for review was in fact instituted and prosecuted under orders from the present defendant Jaquith, with the knowledge and assent of the defendant Shaw, for the benefit of the bank of which the former was president, of which both were directors, and of which Shaw was also a trustee. Under these circumstances it would require but slight evidence to justify a finding against the defendants Jaquith and Shaw that the execution of the supersedeas bond by Winchester as the bond of the Scituate Water Company had been in fact ratified by that company. The petition for review was filed on September 25, 1895. It was heard in the superior court in November, 1895. The petitioner's exceptions were heard in this court in November, 1896,

and were overruled in January, 1897. During the long period in which the petition was pending no suggestion was made that the petition and the bond, given as one step in its prosecution, were not the acts of the Scituate Water Company. On the contrary, the water company took advantage of the bond to obtain a stay of execution, and thereafter prosecuted the petition for more than a year. Besides this, the water company, at the trial of the present action, by the same attorney who now acts for the defendants Jaquith and Shaw, admitted its liability on the bond, and agreed that judgment should be entered against the company in this action. No vote of ratification was necessary. *Canal Bridge v. Gordon*, 1 Pick. 297. There was sufficient evidence to support the finding of the jury that the company ratified the action of its president in executing the bond, and that finding is decisive of the case. Exceptions overruled.

(172 Mass. 538)

SMITH v. JAGOE.

(Supreme Judicial Court of Massachusetts.
Essex. Feb. 28, 1899.)

APPEAL—CHattel MORTGAGES—SIGNING IN BLANK
—EVIDENCE—FRAUD—ESTOPPEL.

1. Objections that questions were leading cannot be first raised on appeal.

2. On the issues whether a chattel mortgage in suit was executed in blank, with the understanding that the blanks should be filled by the mortgagee, and whether he exceeded the authority thus impliedly given, so as to avoid the instrument, the situation of the parties and all that was said when the authority was given are competent evidence.

3. Though a chattel mortgagor who signed in blank, with the understanding that the blanks should be filled by the mortgagee, may not testify as to his "expectation," to affect the construction of the language of the mortgage, yet evidence of such expectation is material in determining whether a fraud was practiced on him by the mortgagee in filling the blanks, and also in determining whether he is estopped to assert that the blanks were improperly filled.

Exceptions from superior court, Essex county; Edgar J. Sherman, Judge.

Action by Robert B. Smith against George R. Jagoe. There was a judgment for plaintiff, and defendant excepts. Exceptions overruled.

Wm. H. Niles and Geo. J. Carr, for plaintiff. Ira B. Keith, for defendant.

BARKER, J. The action is replevin, and the plaintiff was required to show that he had the right to the possession of the property taken upon the writ. He was the general owner of the property, and the defendant relied upon a mortgage which purported to have been made by the plaintiff to one Moody, who had assigned it to the defendant. The course of the trial is not very clearly disclosed by the bill of exceptions. It is stated that the plaintiff made a *prima facie* case, and rested. It would seem that, in putting in his defense, the defendant introduced in evidence the mortgage and the as-

signment of the same to himself, and testified that, after he had received the assignment, he gave the plaintiff written notice that he owned the mortgage, and that thereafter the plaintiff paid interest upon it at four different times, for which payments he gave the plaintiff receipts, which were produced by the plaintiff, as we suppose. The mortgage seems to have been drafted by the use of a printed form, containing blanks. The blank to be filled with the description of the mortgaged property was followed by these printed words: "Meaning hereby to convey to the said — all furniture, of every description, useful and ornamental, beds, bedding, printed books, printed music, carpets, rugs, curtains, and their fixtures, draperies, pictures, engravings, mirrors, and their frames, statuary, works of art and ornament, plate and plated ware, china, glass, crockery, tin, and iron ware, clocks, musical instruments, trunks and other traveling equipments, sporting goods, and each and every other article of personal property contained in —, situated No. —, on said —." The descriptive clause of the mortgage as produced at the trial contained, before the printed words above stated, the written words: "(1) One Norris upright piano, No. 5,045; plush parlor suit; tap. carpet; cherry center table; hanging lamp; marble clock; mantel mirror; four pictures; range and ware; crockery, glass, and silver-plated ware." And the first blank in the printed portion of the descriptive clause was filled with the name of the mortgagee, and the remaining blank with words which designated the plaintiff's dwelling as the place in which the mortgaged property was contained. The bill of exceptions does not state whether the defendant rested his case upon the production of the mortgage, his own testimony relating thereto, and the production of the four receipts given to the plaintiff by him for payments of interest made after notice of the assignment to the defendant. It does state that it was claimed by the plaintiff—and it seems a fair inference that this contention was made in that part of the trial commonly called the "rebuttal"—that there had been a material alteration of the mortgage since he signed it, and that the defendant knew of the alteration before the mortgage was assigned to him; and the bill also states that the plaintiff, his wife, and the defendant all testified.

At the end of the trial, four questions were submitted to the jury, and answered by them, from which it appears that the jury found: That there was an alteration of the mortgage after it was executed, the alteration consisting of the writing in of the words, "plush parlor suit; tap. carpet; cherry center table; hanging lamp; marble clock; mantel mirror; four pictures; range and ware; crockery, glass, and silver-plated ware." That the plaintiff signed the mortgage in blank, with an understanding that

Moody was to fill the blanks. That Moody filled the blanks in violation of what was understood and agreed, that violation being the insertion of the words last quoted. And that the defendant had knowledge of this alteration before or at the time of the assignment to himself. The bill of exceptions does not purport to contain any statement of instructions requested or given to the jury; and it is to be assumed that the questions which were submitted to the jury, and answered, were upon issues as to which the parties were contending at the trial; that they were properly left to the jury, and under correct rulings and instructions. The only question which the bill of exceptions presents for our decision is whether certain questions put to the plaintiff when under direct examination as a witness were improperly allowed, the defendant having objected to them, and saved his exception to their allowance. It was suggested by counsel at the argument that some of these questions were in fact put to the witness by the court; but it is not so stated in the bill, and we assume that they were asked by the plaintiff's counsel. The plaintiff seems to have testified without objection that he signed the mortgage and mortgage note in blank, at his house, to which Moody brought them to be signed, and that there was no writing on the mortgage or the note when the plaintiff signed them, and that he did not read the printed matter, because he was in a hurry. The bill of exceptions next states that the plaintiff was further questioned, under the defendant's objection and exception, and states at length 16 questions and their answers; so that it appears that the only error which the defendant can urge to sustain his bill is the admission of these questions to the plaintiff.

It is to be noticed that, owing to the nature of action and the previous course of the trial, the bill of exceptions does not enable us to know with much certainty or precision just what contentions of the parties were actually upon trial when the questions excepted to were allowed to be put to the plaintiff; and it should also be observed that it is incumbent upon the excepting party to show by his bill of exceptions that the rulings excepted to were wrong, and, further, that he was harmed by the error. His first contention is that the questions were leading in form. But the bill of exceptions does not show that the questions were objected to for form, and the contention is not now open to the defendant.

The substance of the testimony given by the plaintiff in response to the questions admitted under exception was that, at the interview where the mortgage was signed in blank, Moody said that he would have it filled out, and the plaintiff expected him to do so; that what was said as to what should be written in was said by Moody; and that it was that he had no claim on anything but

one upright piano; and that, while it was not said in explicit words that Moody might write in the words "one upright piano," the plaintiff expected him to write in words to make the mortgage cover a piano, and nothing else; and, further, that the amount then due Moody was about \$35, according to certain receipts. When, as in the present instance, it is for a jury to determine, first, whether an instrument upon which the rights of the parties depend was in fact executed and delivered in blank, with the understanding and intention that the blanks should be filled up by the party to whom it was so delivered, and, further, whether that party has so exceeded the authority impliedly given him to fill out the blank as to render the instrument void as against its maker, the situation of the parties and all that was said at the time when the implied authority was given are relevant and competent. Furthermore, it is competent for one who holds or claims under a document so made and delivered to contend that one who has intrusted a blank document bearing his signature to another person, with the expectation that the latter will fill the blanks, is estopped from repudiating the insertion in the blanks of anything which the signer of the instrument should have expected would be inserted either by reason of the transaction of which the instrument was a step, or of the usual course of business with reference to such instruments. *White v. Duggan*, 140 Mass. 18, 2 N. E. 110. While the expectation of the grantor in a mortgage cannot be given in evidence to affect the construction of the language of the document, it may well be a material element in determining whether a fraud has been practiced upon the maker of a mortgage delivered in blank by the filling of the blanks, and also in determining the further question whether the maker of such a mortgage is estopped from asserting that the blanks were improperly filled. So far as the bill of exceptions enables us to understand the issues which were pending before the jury, we think that, in the attitude which the trial had then assumed, the evidence given under the defendant's exception was competent in some aspect of the case. Exceptions overruled.

(172 Mass. 533)

DALEY v. PEOPLE'S BUILDING, LOAN & SAVINGS ASS'N.

(Supreme Judicial Court of Massachusetts. Bristol. Feb. 28, 1899.)

REVIEW—RULINGS ON EVIDENCE—BUILDING AND LOAN ASSOCIATION—COVENANTS OF STOCK CERTIFICATE—CONSTRUCTION.

1. Where a series of questions put and excluded clearly show what the party intends to prove thereby, no formal tender of proof need be made, to secure a review on exceptions to the rulings.

2. The covenants of a certificate of stock in a building and loan association are subject to the statute under which it is incorporated,

though there is no express stipulation to that effect.

3. The sums promised to be paid in a certificate of stock in a building and loan association were expressly made payable in the manner and on the conditions set forth in its articles and by-laws, and on the conditions printed on its back. The statute under which the association was incorporated (Laws N. Y. 1851, c. 122, § 1) declared that its final purpose was to accumulate funds, to be returned to its members, who did not obtain advances, when its funds should amount to a certain sum per share, to be specified in its articles. Article 17 provides that whenever the dues paid and dividends declared should equal the par value of the shares held by any shareholder, said shares of stock should be canceled, and the shareholder should be entitled to receive the par value of the shares named, and no more. *Held*, that the covenant contained in the certificate to pay \$100 a share, five years from date, bound the association only to the extent of the funds accumulated and available by its articles for the cancellation of unredeemed shares.

Exceptions from superior court, Bristol county; John Hopkins, Judge.

Action by Michael R. Daley against the People's Building, Loan & Savings Association. There was a verdict for plaintiff, and defendant brings exceptions. Exceptions sustained.

J. W. & C. R. Cummings, for plaintiff. C. M. Elliott and H. L. Phillips, for defendant.

HOLMES, J. This is an action upon a covenant to pay \$100 a share, five years from date, contained in a certificate that the plaintiff is a shareholder in the defendant corporation. At the trial the defendant offered evidence that there were withdrawals of other members on file, that the corporation had suffered losses since the certificate was issued, and that the directors had taken steps to reduce the assets; the object being, of course, to show that the corporation had not funds applicable to the payment of the alleged debt. The evidence was rejected. The defendant also moved for a nonsuit on the ground that by the conditions of the contract any action brought by a shareholder was required to be brought in the county of Ontario, in the state of New York. This was refused. The plaintiff had a verdict, and the case is here on exceptions.

As we understand that a decision upon the first point mentioned is likely to dispose of the case, we shall confine ourselves to that, and shall not decide the second, although, if we were prepared to assent to the defendant's contention without further consideration, it would be logical to dismiss the plaintiff to New York. Compare *Nute v. Insurance Co.*, 6 Gray, 174-184, with *Greve v. Insurance Co.*, 81 Hun, 28, 30 N. Y. Supp. 668.

With regard to the evidence offered, the plaintiff takes the preliminary objection that it does not appear what the defendant expected to prove. *Shinners v. Proprietors*, 154 Mass. 168, 169, 28 N. E. 10. But the rule referred to is a rule of substance, not of form. There must be reasonable ground to believe that the excepting party has been harmed by

the exclusion of a question, but there need not be a formal tender of proof. In this case the series of questions put and excluded showed the defendant's purpose and expectation so clearly that it would be unjust not to deal with the offer of evidence on its merits.

On the merits the plaintiff's position is that he has an absolute covenant, and that that is the end of the matter. But we are of opinion that the case cannot be disposed of so simply. By the express words of the certificate, the sums promised are "payable in the manner and upon the conditions set forth in the articles of association and by-laws and terms and conditions printed on the back of this certificate." By the law, and without express words, the contract is subject to the statute under which the defendant is incorporated, and will be construed with reference to it. *Hutchins v. Mining Co.*, 4 Allen, 580, 582; 1 *Thomp. Corp.* §§ 1136, 1137. The exceptions state that this statute was put in evidence, and we assume that it was intended that we should refer to it.

Upon looking at the statute (Laws N. Y. 1851, c. 122, § 1), we find that the final purpose of such association is stated to be that "of accumulating a fund to be returned to its members, who do not obtain advances as above mentioned, when the funds of such association shall amount to a certain sum per share, to be specified in the articles of association." See, also, *Id.* § 7. The seventeenth article of association provides that "whenever the dues paid and dividends declared shall equal the par value of the shares held by any shareholder, said shares of stock shall be canceled," and the shareholder "shall be entitled to receive * * * the par value of the shares named * * * and no more." The sum specified in the covenant is the par value of the shares, and, considering that the covenant is made with a shareholder, we think it tolerably plain that it must be read as subject to the implication of the statute and the articles, and must be taken as binding the corporation only to the extent of the funds accumulated and available by the articles for the cancellation of unredeemed shares.

The interpretation which we adopt would have strong reasons in its favor, even if we did not have the words of the act before us,—perhaps, in view of the nature of the corporation (*Brett v. Society* [1894] 1 Q. B. 367, 370), even stronger reasons than those which induce courts generally to limit a guaranty of dividends by a corporation to profits (*Field v. Manufacturing Co.*, 162 Mass. 388, 393, 38 N. E. 1126, and cases cited). And the ground for the last-mentioned decisions extends further than the mere use of the word "dividends," which has not prevented an undertaking specially authorized by statute being construed as absolute. *Williams v. Parker*, 136 Mass. 204. But in the case at bar, to quote the language of a decision of the supreme court of New York upon the point

which we are considering, and with regard to the same corporation, "the authority to issue a certificate with a fixed period of maturity is not expressly given, either by the statute, or by the articles of association or by-laws of the association. We are of the opinion that the defendant did not possess the power or authority to issue a certificate specifying a fixed maturity period, and that the clause in the certificate in question should be construed as an estimated period of maturity." *O'Malley v. Association*, 92 Hun, 572, 577, 36 N. Y. Supp. 1016. See *Engelhardt v. Association*, 148 N. Y. 281, 42 N. E. 710; *Heinbokel v. Association*, 58 Minn. 340, 59 N. W. 1050; *Association v. Kerr* (Tex. Sup.) 13 S. W. 1020.

The view which we take makes it unnecessary to consider whether the plaintiff was affected by the later changes in the articles of association and by-laws.

Exceptions sustained.

(172 Mass. 597)

ORR v. FULLER et al.

(Supreme Judicial Court of Massachusetts. Suffolk. March 2, 1899.)

MECHANICS' LIENS—LAND SUBJECT TO—INCOMPLETE CONTRACT—AMOUNT OF RECOVERY.

1. When work is done and materials furnished to erect a building for the owner of a whole tract of land, which has no visible divisions, it warrants a finding that the whole tract is one lot, and that there is a lien on the whole for the sum due, under Pub. St. c. 191, § 1, providing for a lien on the "lot of land" on which the building is situate, and for which labor and material are furnished.

2. Under Pub. St. c. 191, § 23, in relation to mechanics' liens, giving a contractor who has, without default, been prevented from completing his contract to build, compensation for as much as he has done, in proportion to the price stipulated for the whole, it is error to give a lien for the fair value of work and materials, exceeding the contract price less the work not done.

Exceptions from superior court, Suffolk county; Henry K. Braley, Judge.

Petition by one Orr against one Fuller and others for the establishment of a mechanic's lien. There was a judgment for petitioner, and respondents bring exceptions. Exceptions sustained.

Brandels, Dunbar & Muttter, for petitioner. Francis Burke, for respondents.

HOLMES, J. The facts that the work was done and the materials were furnished under one contract with the owner of the whole tract, coupled with the absence of any visible divisions, warranted a finding, if not a ruling, that the whole tract was one lot, and that there was a lien upon the whole of it for the whole sum due, under Pub. St. c. 191, § 1. *Batchelder v. Rand*, 117 Mass. 176. See, also, *Lincoln v. Com.*, 164 Mass. 363, 379, 41 N. E. 489; *Wellington v. Railroad Co.*, 164 Mass. 380, 381, 41 N. E. 652.

The contract was broken by the owner of the land, and the jury on that ground were allowed to find the fair value of the work and materials, even though it should exceed the contract price less the work not done, as they found that it did. We are of opinion that this was contrary to Pub. St. c. 191, § 23, which gives the plaintiff in a case like this "reasonable compensation for as much as he has performed, in proportion to the price stipulated for the whole." *Hale v. Johnson*, 6 Kan. 137. The question is not what personal remedy he might have against the other party to the contract, but to what extent it is proper to charge the land with a lien when it may have gone into the hands of strangers. Of course, it would be possible to say that they must take notice of all possible consequences of the contract, but it seems more reasonable to fix the limit and the proportion from the only measure of which they can have notice,—the contract price. For that reason, no doubt, the statute has established a general rule.

The result is that the exceptions must be sustained, but the petitioner may be able to avoid a new trial by consenting to the reduction. Exceptions sustained.

(158 N. Y. 231)

PALMER v. LARCHMONT ELECTRIC CO.
(Court of Appeals of New York. Feb. 28, 1899.)

**ELECTRIC LIGHTS—ERECTION OF POLES IN STREETS
—ADDITIONAL SERVITUDE—DISCRETION OF
TOWN BOARD—PUBLIC POLICY.**

1. The erection of electric light poles in a highway for the purpose of lighting such highway is one of the burdens incident to the use for which it was taken as a highway, whether it is within incorporated city or village or not.

2. Under Transportation Corporations Law, §§ 60, 61, authorizing the incorporation of companies for lighting streets in cities, towns, and villages, and providing that they may erect poles and wires on such streets "with the consent of the municipal authorities thereof, and in such manner and under such reasonable regulations as they may prescribe, the necessity for a light in a highway within an unincorporated town is to be determined by the town board, and not by the court in ejectment by an abutting owner against the company.

3. Transportation Corporations Law, §§ 60, 61, authorizing cities, villages, and towns to grant to electric light companies the right to erect poles and wires in the streets, in such manner as the municipal authorities may determine, for the purpose of lighting such streets, and furnishing heat, light, and power to public and private buildings, is not against public policy, since all abutting owners share in the benefits of the improvement which imposes the burden on the streets.

Martin and Vann, JJ., dissenting.

Appeal from supreme court, appellate division, Second department.

Action in ejectment by William D. Palmer against the Larchmont Electric Company. From a judgment of the appellate division affirming a judgment for plaintiff (30 N. Y. Supp. 522), defendant appeals. Reversed.

Wm. Sam. Johnson, for appellant. William Porter Allen, for respondent.

HAIGHT, J. This is an action in ejectment to compel the defendant to remove its poles and wires from Palmer avenue, in front of the plaintiff's premises. The plaintiff is the owner of lands at the corner of Palmer and Rushmore avenues, in the town of Mamaroneck, Westchester county, and his fee extends to the center of the highways, subject to the easements of the public therein. The defendant is an electric corporation, organized under the transportation corporations law of this state, having for its objects the manufacture and use of electricity, for producing light, heat, or power, and in lighting streets, avenues, public parks and places, and public and private buildings of cities, villages, and towns within this state. On the 14th day of March, 1894, it obtained a grant from the town board of the town of Mamaroneck, giving it the right to construct and maintain suitable lines of wire for the purpose of conducting electricity to such points within the corporate limits of the town as may seem fit to the company, subject, however, to certain rules and restrictions specifically mentioned, among which were the requirements that the wires should be insulated, conducted upon poles of a specified size and uniformity, made straight and attractive in appearance, on which wires should be strung not less than 18 feet from the ground. The grant contained the further condition that the company shall furnish to the town \$100 worth of light, free of charge, each and every year, and for every \$1,000 worth of light bought by the town from the company an additional \$100 worth of free light shall be furnished, the lights to be placed in such locations as shall be designated by the town board. Pursuant to this grant, the town contracted for certain lights at the rate of \$22.50 per light per year; and thereupon, pursuant to the grant and contract, the defendant constructed its line of wire through Rushmore and Palmer avenues, locating a light on the corner of those avenues in front of plaintiff's premises, and erected on Palmer avenue, in front of his premises, two poles, on which the wires were strung, and which the evidence shows were necessary to enable the company to perform its contract with the town. This action was prosecuted to recover the possession of the lands occupied by these poles, and for damages.

The care, management, and control of the public ways devolve upon the local municipal government in which they are located; and it is the duty of the local government to maintain them in such condition that the public, by the exercise of due care, may pass over them in safety. In the darkness of the night, in crowded thoroughfares, light is an important aid, largely tending to promote the convenience, as well as the safety, of the traveling public. It is not only one of the uses to

which the public ways may be devoted, but, in the case of crowded thoroughfares, a duty devolves upon the municipality of supplying it. In such cases it is one of the burdens upon the fee which must be borne as an incident to the public right of traveling over the way, and is deemed one of the uses for which the land was taken as a public highway. *Johnson v. Electric Co.*, 54 Hun, 469, 7 N. Y. Supp. 716; *Consumers' Gas & E. L. Co. v. Congress Spring Co.*, 61 Hun, 133, 15 N. Y. Supp. 624; *Witcher v. Waterworks Co.*, 66 Hun, 619, 20 N. Y. Supp. 560, affirmed 142 N. Y. 626, 37 N. E. 565; *Hequembourg v. City of Dunkirk*, 49 Hun, 550, 2 N. Y. Supp. 447; *Sun Printing & Pub. Ass'n v. City of New York*, 152 N. Y. 257, 265, 46 N. E. 499; *Van Brunt v. Town of Flatbush*, 128 N. Y. 50, 56, 27 N. E. 973.

As we understand the opinion of the learned court below, its views are in accord with our own as applied to public highways in cities and incorporated villages; but it reached the conclusion that the rule was different with reference to country highways, and that the density of population ought not to be made the test in determining the line in respect to easements which separate the urban from the rural districts. 6 App. Div. 12, 39 N. Y. Supp. 522. That court was also of the opinion that this case was controlled by the case of *Eels v. Telegraph Co.*, 143 N. Y. 133, 38 N. E. 202. Our views are somewhat different. We think the *Eels Case* is clearly distinguishable from that under consideration. In that case ejectment was brought to remove the poles of a telegraph and telephone company which were not used in any sense for a street purpose. It is urged that the wires might be used for the purpose of notifying the fire department of a municipality of the breaking out of a fire. Undoubtedly, and so far as they are used for that purpose, it clearly would be for a municipal purpose; but there is a broad distinction between a municipal purpose and a street purpose. The primary object of highways is for the public travel by persons and animals, and by carriages or vehicles used for the transportation of persons and goods, other than by railroads. Sewers drain the surface water from the highways, and thus relieve them from impairment and destruction. In this respect sewers are for a street purpose. In addition, they may drain also the abutting property and houses, and thus tend to promote the public health. In this respect they are for a municipal purpose. Water supplied by mains through the highways may be used for cleansing and sprinkling the streets. In this respect it is for a street purpose. It may be used by the abutting owners for cleansing and for domestic purposes, and is also used for the extinguishment of fires. In this respect it is for a municipal purpose. Light is, as we have seen, an aid to the public in the nighttime in traveling upon the highway. It is therefore used for a street purpose. All of the street purposes which we have referred to are clearly incident to

the highway, and are deemed within the grant of lands for highway purposes whenever the necessity for these uses arises. Not so with telegraph and telephone wires. They in no way preserve or improve the streets, or aid the public in traveling over them.

We are thus brought to a consideration of the difference between urban and rural streets. That there is a distinction between such streets has long been recognized by the authorities; but a careful examination of the cases discloses the fact that the distinction arises out of the necessary requirements of the public in the use made of them. Dillon, in his work upon *Municipal Corporations* (volume 2, § 688), says: "In the author's judgment, the uses to which streets in towns and cities may legitimately be put are greater and more numerous than with respect to ordinary roads or highways in the country. With reference to these, all the public requires is the easement of passage and its incidents; * * * but, with respect to streets in populous places, the public convenience requires more than a mere road to pass over and upon them. They may need to be graded and brought to a level, and therefore the public or municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street or elsewhere, and may make culverts, drains, and sewers upon or under the surface." This same distinction was made in *Gaslight Co. v. Calkins*, 62 N. Y. 386, in which it was held that a gaslight company could not lay its pipes in a country highway without compensation to the owner of the abutting land, where its pipes were not used for the lighting of the highway through which the company sought to lay its pipes. But the owner of the fee in a country highway, taken, opened, and dedicated for a public use, is entitled to no further compensation after the territory has become thickly settled and the highway has become a street of an incorporated city. This was recognized in the *Eels Case*, and it is therefore apparent that, at the time the land was taken for a highway, it was impliedly dedicated to the uses which the public might in the future require. Light may not be necessary in an ordinary country highway, and yet there may be country roads in which the travel is so great as to make light a necessity in order to avoid collisions and injuries in the nighttime. The inhabitants of our large cities are in a measure supplied with food and other necessities of life from the surrounding country. Scarcely a city can be named in which there will not be found one or more great public highways leading into the country, which, day and night, are thronged with teams transporting the produce of the farm to the markets of the city. Towns, in some instances, have recognized the public necessity, and have caused some of these thoroughfares to be lighted. In many of our towns there are

villages of considerable size remaining unincorporated, in which lights in the street would be of great convenience, and materially add to the safety of the public. May not towns properly supply these streets and thronged highways with light? If they may, they may properly contract with others to supply the light. The court below appears to have feared trouble with reference to the determination of the question of the necessity for light by the courts, and thought that each case would have to be determined on its own facts, and that the decision in each would vary with the varying minds and judgments of the courts and petit jurors; but we apprehend no difficulty in this regard. We think that question should be left to the determination of the parties specified by the statute. Indeed, it appears to us that the question under discussion is entirely controlled by the statute. The statute not only authorizes the incorporation of companies for supplying gas for the lighting of streets in cities, towns, and villages, but it also authorizes the incorporation of companies for the manufacturing and supplying of electricity for lighting streets, avenues, public parks, and places in cities, villages, and towns. It then provides that such corporations using electricity for light, heat, or power may carry on the business of lighting "by electricity or using it for heat or power in cities, towns and villages within this state, and the streets, avenues, public parks and places thereof, and public and private buildings therein; and for the purposes of such business to generate and supply electricity, * * * and to lay, erect and construct suitable wires or other conductors, with the necessary poles, pipes or other fixtures in, on, over and under the streets, avenues, public parks and places of such cities, towns or villages, for conducting and distributing electricity, with the consent of the municipal authorities thereof, and in such manner and under such reasonable regulations, as they may prescribe." Transportation Corporations Law, §§ 60, 61. The town law provides that a town is a municipal corporation, comprising the inhabitants within its boundaries. Section 2.

It will be observed that no distinction is made by the statute between cities, towns, and villages; that a corporation organized under the provisions of the act may, with the consent of the municipal authorities, under such reasonable regulations as they may prescribe, construct suitable wires or other conductors with the necessary poles, pipes, or other fixtures in, on, over, and under the streets, etc., of the town, as well as that of the city or an incorporated village. Who can better determine the necessity for light in a highway than the inhabitants of the town through which it runs? Shall the courts assume the prerogative of saying that a town shall or shall not have light, when the statute provides that its municipal authorities

shall determine the question? No citizen of the town is here complaining with reference to the action of the municipal authorities of the town of Mamaroneck in contracting with the defendant for light. If these town officers have exceeded their authority, and wasted the public moneys, the courts are open to correct the abuse and prevent the waste in a suit by a taxpayer; but no such person is here complaining of the action of the town authorities. The plaintiff is not complaining of the contract or of the supplying of his premises with light. He is seeking compensation for the ground occupied by the poles of the company in the highway in front of his premises. The authorities of his town having determined the necessity for the lights, and contracted with the defendant to furnish it, and the light being for a street purpose, we think no burden is placed upon the fee that was not within the implied contemplation of the parties at the time the land was taken and dedicated to highway purposes.

Our conclusion is supported by authority. In the case of *Van Brunt v. Town of Flatbush*, 128 N. Y. 50, 27 N. E. 973, Earl, J., refers to the question we have had under consideration in discussing the right to construct a sewer in the town of Flatlands. He says: "If the legislature had authorized a system of sewerage in the town of Flatlands, for the convenience, health, and welfare of the inhabitants of that town, and this sewer had been projected with lateral sewers, with the privilege of the owners of adjacent lots to connect their lots therewith, then we are inclined to believe, for reasons we need not now state, that the character of the avenue and of the locality was such, and the population is such, that the sewer could be built in the avenue without the consent of the fee owners, and without compensation to them." In the case under consideration, as we have seen, the legislature has authorized the municipal authorities of the town to contract for the providing of light for street purposes. Again, in the case of *Witcher v. Waterworks Co.*, 66 Hun, 619, 20 N. Y. Supp. 560, an action was brought by an abutting owner to recover the possession of lands in a public highway, occupied by the defendant with water pipes and a hydrant. The village of Holland was unincorporated. A water pipe had been laid through the highway, and hydrants had been established, from which the water might be taken for street purposes. It was held in the general term that there was a public necessity for the water, and that, it being for street purposes, the plaintiff was not entitled to recover, and that conclusion was affirmed in this court. 142 N. Y. 626, 37 N. E. 566. And in the case of *People v. Deehan*, 153 N. Y. 523, 47 N. E. 787, we held that a grant by the authorities of a town to a gaslight company to lay conductors for conducting gas through the public highways of the town was valid.

There is no question of public policy that is

adverse to our contention. It may be that the owners of the fee in highways should not be burdened with sewers, conductors, or wires in which they have no interest or right to use, but which are intended for the use of other localities; but sewers, conductors, and lighting wires intended for the use, benefit, and improvement of the highway through which they pass, and of the abutting owners thereon, which promote the comfort and safety of the traveling public, stand upon a different footing, and are no burden upon the fee not intended by the grant for highway purposes. It may be that some prejudice exists against wires strung on unsightly poles; but the statute empowers the citizens of the locality, through their duly-constituted authorities, to determine the manner and the regulations in and under which the wires should be constructed. They may specify, as was done in this case, the character of poles that shall be used, or they may require that the wires shall be placed in conduits under ground. The whole matter is left to their judgment and discretion. If the people of a town want light in their highways, and are willing to pay for it, no reason is apparent, founded upon public policy, morals, or law, why the courts should interfere to prevent it. If the highway be but a country road, lightly traveled, and no necessity exists for light, then a taxpayer has a right to object; but, until such objection is made, we think it may fairly be assumed that the necessity for the light exists. The statute has given to the authorities of a town the power to determine whether they will have light. The question of necessity must, in the first instance, be determined by such authorities, and in this case no person is in court seeking to review the determination made by the authorities of the town of Mamaroneck in contracting with the defendant. The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except MARTIN and VANN, JJ., dissenting. Judgment reversed, etc.

(158 N. Y. 150)

FALL BROOK COAL CO. v. HEWSON.

(Court of Appeals of New York. Feb. 28, 1890.)

WITNESSES—RIGHT TO CONTRADICT.

1. By merely swearing a witness, and asking him a question having no bearing on the issue, a party does not make him his own, so that he cannot thereafter contradict him when testifying for the adverse party.

2. Error in the charge does not require a reversal where the exception is so indefinite as to call the court's attention to a part which is correct, and not to the erroneous part.

Appeal from supreme court, general term, Fifth department.

Action by Fall Brook Coal Company against Robert C. Hewson. From a judgment of the general term affirming a judgment for defendant (36 N. Y. Supp. 1124), plaintiff appeals. Affirmed.

Albert H. Harris, for appellant. C. W. Kimball, for respondent.

PARKER, C. J. The defendant called as a witness one Wilson, who, after being sworn, testified as follows: "I reside in Penn Yan. I know the defendant. I did not work for him in the spring of 1893; I was at the cold storage at that time about ten minutes, in the fore part of April." No other questions were asked him, nor did he give any further testimony, and the testimony quoted had no bearing whatever upon the issues on trial. It is suggested that he was called under a misapprehension; but, be that as it may, we shall assume merely, in passing on the question growing out of his being called and sworn, that, before any material question was asked, the party calling the witness excused him from the witness stand. When the plaintiff came to present evidence in rebuttal of the testimony adduced on the part of the defendant, it called Wilson to the stand, and he gave material testimony in favor of the plaintiff. The defendant, claiming the right to cross-examine him, asked him whether he had not, at specified times and places, made to other persons statements tending to contradict the testimony given by him upon the plaintiff's examination. Wilson denied having made them, and the defendant afterwards called witnesses who testified that Wilson had made the contradictory statements that he specifically denied having made. To this evidence the plaintiff objected, upon the ground that it was incompetent, in that the defendant, having first sworn and examined Wilson as a witness in his own behalf, could not be allowed to discredit him by giving testimony that he had made statements out of court differing from his statements as a witness in court. The exception to the ruling of the court admitting the evidence notwithstanding the objection presents one of the questions which, on this review, it is urged, call for a reversal of the judgment. Upon a motion for a new trial, this question was very carefully considered by Mr. Justice Rumsey, who reached the conclusion that no error had been committed, and the general term has affirmed the position thus taken. As the question is a novel one, we shall briefly state the reasons that persuade us that the view taken by the learned court was the correct one.

The rule is well settled in this state that a party cannot show inconsistent statements made by his own witness for the purpose of impeaching him. *Coulter v. Express Co.*, 56 N. Y. 585; *Nichols v. White*, 85 N. Y. 531; *Hankinson v. Vantine*, 152 N. Y. 20, 27, 46 N. E. 292. This rule, which was originally established by authority, came to us from England, where, as in some of our sister states, it has since been either abrogated or modified by statute. *Steph. Dig. Ev. (Chase's Ed.)* 329, note; *Selover v. Bryant* (Minn.) 21 Lawy. Rep. Ann. 418, note (s. c. 56 N. W. 58); 2

Am. Law Rev. 261. Greenleaf on Evidence (volume 1, § 442) states the reason for the rule as follows: "When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and, having thus presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their credibility by general evidence tending to show them to be unworthy of belief; for this would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him." See, also, Whart. Ev. § 549. The rule being established beyond change, save by legislative enactment, that one cannot impeach his own witness, the question presented here is whether Wilson became the defendant's witness, within the meaning of the rule. Would he have become such had his name been simply called without administering the oath? If not, would he have become such through the additional act of administering the oath? If the propounding of questions be also necessary, would an inquiry as to his name and residence have made him the party's witness in such a sense that he would be bound to support his character from the beginning to the end of the trial, or would that have happened only upon some question being asked him material to the issues on trial?

It often happens that a witness is intentionally but unadvisedly called, the counsel for the moment laboring under the impression that the witness has knowledge of some fact it is desirable to establish; but, before his examination has proceeded far enough to bring about an inquiry touching any material fact to the controversy, counsel is advised by an associate, or by the party, that the wrong witness has been called, and that some other person is possessed of the information he desires to have given to the court. In such a case it would clearly seem to be a hardship that an error thus committed, which quite frequently happens, in the press of trial, should burden a party with the responsibility of having the person called treated as a witness for that purpose throughout the trial.

So far as the diligence of the counsel and our examination have disclosed, this precise question has not been before the court of last resort in any of the states except Connecticut where many years ago, in the case of *Bebee v. Tinker*, 2 Root, 160, a witness was called and sworn. As to the point regarding which the plaintiff had called him to testify, the court ruled that it was not relevant to the issue; and thereupon the defendant took the witness, and asked him several questions, the answers made by him being against the plaintiff. Thereupon the plaintiff offered to introduce witnesses to impeach, which was objected to on the ground that he was the plain-

tiff's witness. The report of the case concludes with: "The court admitted the witnesses to impeach his character, on the ground that, although the plaintiff introduced him, yet, as the defendant only improved him, in that respect he was to be considered as the defendant's witness." In England, where the rule originated, the tendency of the courts seems to have been not to apply it unless the party has proceeded so far with the witness as to ask him some question bearing upon the issues on trial. In *Creevy v. Carr*, 7 Car. & P. 64, a witness was called for the defendant, and asked, "Are you the landlord of the house at which the fire occurred?" The witness answered, "I am, sir." Thereupon the court asked the defendant's counsel, "What do you propose to prove more?" and he replied, "My lord, I will close my case here." The counsel for the plaintiff said, "I wish to cross-examine the landlord;" and the court said, "Oh, no; I stopped his evidence." Counsel: "He was asked a question, and he answered it, and I have therefore a right to cross-examine him." The court: "Not where the witness, as here, has only been asked an immaterial question, and his evidence is stopped by the judge." In *Wood v. McKinson*, 2 Moody & R. 273, a witness was called for the plaintiff, and sworn in the usual way; but, before he had put any questions to the witness, counsel stated that he had been misinstructed as to what the witness was able to prove, and he should not examine him at all. The witness being about to retire, counsel for the defendant claimed the right to cross-examine him, but the court said: "Here the learned counsel explains that there has been a mistake, which consisted in this: that the witness is found not to be able to speak at all as to the transaction which was supposed to be within his knowledge. This is I think such a mistake as entitles the party calling the witness to withdraw him without his being subject to cross-examination." In *Bracegirdle v. Bailey*, 1 Fost. & F. 536, the plaintiff was sworn and tendered as a witness for cross-examination, but was not examined in chief. The defendant's counsel asked several questions touching his conduct and life; but the court ruled that these questions could not be asked, inasmuch as he has proved nothing "that you could cross-examine him on to discredit him." In *Rush v. Smith*, 1 Crompt., M. & R. 94, it was held that a witness called to produce documents, and sworn by mistake, and a question put to him that he does not answer, does not entitle the opposite party to cross-examine him.

The general view upon which these cases proceeded is that a party does not necessarily make a person his witness by merely calling and swearing him; and we are not able to discover any good reason for disagreeing with them. On the contrary, it seems to us that the rule is not properly applicable save in cases where a party attempts to elicit,

from a witness called to the stand, testimony material to the issues upon trial; that, until such an attempt is made, the party has done nothing that can by any possibility affect the trial, either to his own benefit or to the harm of his opponent, and therefore he has not offered a witness in proof of his cause, and is not within the reason of the rule that burdens him with the necessity of supporting the character of the witness to the end of the trial. His mistake, however caused, has not harmed the other party, and the interests of justice can in no wise be promoted by permitting that other party to take such advantage of the mistake as will fasten upon his opponent the responsibility of vouching for the character of a witness actually hostile, and from whom he has not attempted to secure any proof in the cause.

The learned counsel for the appellant urges that his exception taken to that portion of the charge in which the court stated "that the plaintiff was not entitled to recover if the plant was not properly run" calls for a reversal of the judgment. The defendant admitted the making of the contract upon which the plaintiff sued, but alleged that the contract had not been properly performed by the plaintiff, and sought to recover his damages. In the charge to the jury the court did say that the plaintiff could not recover for the services, unless it convinced the jury by a fair preponderance of evidence that it did keep the apples in proper cold storage, etc. But, as we read the exception, it was not intended to have, nor is it likely it had, the effect of calling the attention of the court to the fact that the counsel for the plaintiff claimed that there was error in the charge as to the burden of proof. The language of the exception apparently related solely to another portion of the charge, in which the court said that, if the jury should find "that the rotting was the result of the plant having been improperly run, it follows that the plaintiff has not performed its contract. It also follows that whatever damage has been thus caused to the defendant he should be compensated for in this action." This portion of the charge was not error, and the exception to which our attention is called pointed to this, and to no other, part of the charge. The judgment should be affirmed, with costs. All concur. Judgment affirmed.

(158 N. Y. 369)

VALENTINE v. HEALEY et al.¹

(Court of Appeals of New York. Jan. 10, 1899.)
TENANCY IN COMMON—LEASE FROM CO-TENANT—
HOLDING OVER—ACQUIESCENCE.

1. Where tenants in common lease the property for one year to a firm of which one of them is a member, and the lessees hold over after the expiration of the year without exercising a privilege of renewal given by the lease, under an arrangement between the firm and the co-tenant in possession, it does not continue

the tenancy for another year, as it will not be presumed that such co-tenant continues to hold under the lease; and it is error to exclude evidence of the lessees showing that he had assumed his relation to the premises as owner, and given his consent to the company to hold over.

2. Where a lease is executed by a tenant in common to a firm of which he is a member, and it is acquiesced in by his co-tenant by the acceptance of the rent for a year, the lessees may assume that the tenant in common has authority to deal with them with reference to the property, and, if they hold over for a short period after the expiration of the lease, under an agreement with him, it does not continue the tenancy for another year.

Parker, C. J., and O'Brien, J., dissenting.

Appeal from supreme court, appellate division, First department.

Action by Henry C. Valentine against Warren M. Healey and John H. Zabriskie for rent. A judgment for plaintiff, on a verdict directed by the court, was affirmed by the appellate division (37 N. Y. Supp. 287), and defendants appeal. Reversed.

Elihu Root, for appellants. William Allen Butler, for respondent.

HAIGHT, J. This action was brought to recover a quarter's rent of premises Nos. 311-319 West Forty-Third street, in the city of New York, alleged to be due and owing from the defendants to the plaintiff. It appears that the plaintiff and defendant Warren M. Healey are the tenants in common and owners of the premises; the plaintiff owning an undivided three-fourths, and the defendant Healey an undivided one-fourth. The defendants were general partners, and one William Williams was a special partner, constituting the firm of Healey & Co. On the 30th day of May, 1891, the defendants leased the premises from the plaintiff and Healey for the term of one year from the 1st day of May, 1891, at the yearly rent of \$8,500, payable quarterly, with the privilege to the defendants of continuing the lease for two years more upon giving notice in writing to each of the owners on or before the 1st day of February, 1892, and not otherwise. The lease was in writing, and was signed by the defendant Healey and Healey & Co., but was not signed by the plaintiff. The notice to renew the lease was not given, and the defendants continued to occupy the premises for a few weeks after the expiration of the year. This action is prosecuted upon the theory that the holding over by Healey & Co., after the expiration of the term of the lease, created a liability to pay the rent for another year, under the rule that, where tenants hold over after the expiration of the term, the law will imply an agreement to hold for a year upon the terms of the prior lease, if the landlord elects to so regard it. *Haynes v. Aldrich*, 133 N. Y. 287, 289, 31 N. E. 94. The defendants, in their answer, admitted that after the 1st day of May, 1892, they continued and remained in the occupation and possession of the premises, but they denied that they thereby elected to continue their ten-

¹ Rehearing denied March 7, 1899.

ancy for another year, and alleged that prior to the 1st day of May, 1892, they notified, in writing, Valentine and Healey, the owners, that they elected to discontinue their tenancy on the expiration of the term, and declined to renew the lease, and that they remained in the occupation of the premises under a new and an express agreement entered into with Warren M. Healey, one of the owners. Upon the trial, the defendants offered in evidence two letters bearing date April 29, 1892,—the day before the lease terminated,—which are as follows:

"Warren M. Healey, Esq., 1478 Broadway—Dear Sir: We desire to inform you that as indicated by our failure to exercise the option expressed in your lease to us for the past year, and as verbally stated to you yesterday by our representative, Mr. Thorne, that we shall not renew said lease. We understand that the premises have not been rented for the coming year, and shall be pleased to continue to occupy the same for a few weeks from the first of May next, in order to suit our convenience in moving, paying pro rata rent for such use and occupation. Very truly yours, [Signed] Healey & Co."

"New York, 29 April, 1892. Messrs. Healey & Co., 1478 Broadway—Gentlemen: Your letter of even date to hand. You are at liberty to continue to occupy the premises numbers 313 to 319 West 43d street at a pro rata rent for the period of such occupancy. This privilege is accorded you only with the understanding and agreement that such occupancy is to be terminated on a week's notice from either party, in order that we may take advantage of any opportunity that may offer to rent the premises for another year. Very truly, [Signed] Warren M. Healey."

Healey testified that the first of these letters was received by him from Healey & Co., and identifies the second letter as written by himself and delivered to Healey & Co. The letters were excluded by the trial court, and an exception was taken by the defendants. After the plaintiff rested, the defendants moved for a dismissal of the complaint upon the ground that the defendant Healey, being an owner in fee of one-fourth of the premises, had a legal right at any and all times to occupy each and every part of the common property, and that his exercise of that legal right, in the absence of any evidence tending to show infringement of the rights of his co-tenants or a legal ouster, could not raise against him, by a presumption of law, any liability. This motion was denied, and an exception was taken. Upon the conclusion of the evidence the court directed the jury to render a verdict in favor of the plaintiff for the amount claimed by him. To this direction an exception was also taken by the defendants.

In the case of *McKay v. Mumford*, 10 Wend. 351, Nelson, J., in delivering the opinion of the court, says: "As to a tenant who has no title, except by the lease under which he enters, if he continues after its expiration, his

possession, in contemplation of law, is in subordination to the landlord's rights, because the law will not presume him disloyal. But no such presumption exists against the tenant in common. The fact of his not leaving possession does not authorize the inference that he still intends to hold under the lease; on the contrary, the presumption is that he holds under his own title, which gives him a right to the possession and enjoyment of the whole estate, liable, however, to account to his co-tenant at law." This rule was recognized by the general term in this case. 86 Hun, 259, 33 N. Y. Supp. 246. But that court distinguished that case from this. Healey is not the sole lessee. The lease ran to a firm of which he was a member. In this respect the cases are distinguishable; but we fail to see why Healey, at the termination of the lease, may not assume his authority over the premises as an owner and a tenant in common. As such tenant in common he had the right to take and occupy the whole of the premises, and preserve them from waste or injury, so long as he did not interfere with the right of his co-tenant to also occupy the premises. Had the letter of Healey & Co. of April 29, 1892, been received in evidence, it would have shown conclusively that the company did not intend to hold over and renew the lease, but that they sought permission to remain in the premises for a short time, to suit their convenience in moving; and if the letter of Healey of the same date had been received in evidence it would have shown that he not only gave his consent to the company to hold over, but that he assumed his relation to the premises as owner. It would also have explained the admission in the answer that the firm continued in possession after the expiration of the lease, and established the facts that justified such action on the part of the tenants.

There is another view of the case which we think may properly be adopted. It may be, and doubtless is, the law, that a tenant in common cannot bind a co-tenant, without his consent, by a contract or a lease with reference to the property of which they are the owners; but in this case, as we have seen, the lease was executed by Healey, and was not executed by the plaintiff, but for a whole year the plaintiff accepted the rent and acquiesced in the lease made, and by the bringing of this action has adopted it as his lease, basing his right to recover of the defendants upon it on the ground that they are presumed to have taken the premises for another year upon the same terms and conditions expressed in the lease. It appears to us that the plaintiff, by thus adopting the lease, has recognized the authority of Healey to make it in his behalf. It ran for one year, with the privilege of two years, at the option of the defendants, and, under the circumstances, the other members of the firm had the right to assume that Healey had the authority to treat with them with reference to the leasehold premises. Under this view the letters exclud-

ed were proper evidence in the case. Had they been received, they would have shown that the retention of the premises by the defendants was under a permit given by one of the owners, whose authority to act for the other owner they had the right to assume by reason of his adoption of the lease under which they had previously occupied the premises. The judgment should be reversed, and a new trial granted, with costs to abide the event.

O'BRIEN, J. (dissenting). The question in this case is whether a partnership firm which goes into possession of real property under a lease from the owners is exempt from the general rules of law governing the relations of landlord and tenant, by reason of the circumstance that one member of the firm happens to be the owner of a small, undivided share of the property as a tenant in common. It is not a case of one tenant in common leasing to another, but a case where all the co-owners unite in a demise of the whole property to a distinct legal entity, known in law as a "limited partnership," of which one of the owners is also a member. The courts below have held that in such a case the obligations of the lease, and the rules of law applicable to the relations of landlord and tenant, are not changed or in any way affected by the circumstance that the owner of the small share in the realty demised is, at the same time, a member of the legal entity or artificial person to which the demise is made. This decision, in my opinion, was clearly right, and no one would ever question it but for the introduction into the discussion of principles that have nothing whatever to do with the law of landlord and tenant, since they apply only to the relations of common owners of estates.

This is a case between landlord and tenant, and not between tenants in common, and it is only when we confuse the one with the other, or attempt to apply to the former relation rules of law applicable solely to the latter, that there can be any doubt about the case. The facts are all admitted on the record, and they are so clear and simple that it is impossible to be misled by any suggestion outside of the controversy. The plaintiff is the owner of an undivided three-fourths of certain real estate in the city of New York, and the defendant Healey is the owner of the other fourth. The plaintiff and the defendant Healey, as such owners, united in a written lease to the defendants, composing the firm of Healey & Co., for one year from the 1st of May, 1891, at a yearly rental of \$8,500, payable quarterly, as follows: To the plaintiff, as owner of three-fourths, the sum of \$1,593.75, and to the defendant Healey, as the owner of the remaining fourth, \$531.25, on the first day of each quarter. The firm of which the defendant Healey was a member entered into possession of the premises pursuant to this lease, and remained therein until after the 1st of May, 1892, thereby electing, as the plaintiff claims,

to continue their tenancy for another year. The defendants failed to pay to the plaintiff the installment of rent which became due, as claimed, on the 1st of August, 1892, and this action was brought by the plaintiff to recover that sum. These facts are all alleged in the complaint, and the answer admits the execution of the lease, its terms, and the fact that the defendants continued in possession after the expiration of the term. But they denied that they thereby elected to continue the tenancy for another year, which, of course, was nothing more than the denial of a legal conclusion arising upon conceded facts.

The only defense to the action is that Healey, the co-owner with the plaintiff, permitted his firm to remain in possession after the expiration of the year, and it is claimed that he not only had the right to do that, but to continue in possession by virtue of his right as a tenant in common, although it is conceded that he and his firm went into possession only by virtue of the terms and conditions of the lease. It was one of the condition and covenants of the lease that the parties of the second part—that is, the defendants—would quit and surrender the demised premises at the expiration of the term. The contention on the part of the defendants virtually asserts that, although they went into possession under this lease, they were entitled, in virtue of Healey's co-ownership, to violate this covenant, and thus remain in possession for an indefinite period, against the will of the plaintiff, who owned three-fourths of the property. There can be no doubt that, where lands are held by different parties in common as tenants in common, unity of possession and right of possession is a distinguishing feature of those relations. The possession of one tenant in common is the possession of the others. One tenant in common cannot bring an action of trespass against another for entry upon and enjoyment of the common property. The growing crop put in by one tenant in common, who took possession exclusively without contract, goes in severalty as the property of each, on partition made while the crop is growing. The rules of the common law governing the rights of tenants in common are quite well understood. But they have no application to this case. The unity of possession and right of possession which attaches to an estate held in common may, of course, be severed or suspended by agreement of the parties. A deed in fee by one tenant in common to another severs this unity forever. So, too, a lease, which is nothing more than a conveyance of an estate for years, severs or suspends the unity of possession and right of possession, and all relations as co-owners, at least for the time being, and, when such a lease is made, the parties bear to each other all the relations, and are subject to all the obligations, and entitled to all the rights, of landlord and tenant. The lease was made in this case. The two owners in common were the landlords. The tenant was the legal entity or partnership, of

which the defendant Healey was a member; and the circumstance that he was such a member did not change the effect of the lease in the slightest particular. *Freem. Co-Ten. §§ 29-33, 86, 88, 89, 164, 198, 268; 4 Kent, Comm. 370; O'Hear v. De Goesbriand, 33 Vt. 504.* All this is very clear, if we consider the relations of the co-owners to each other and to the property before and after the execution of the lease. Before the lease was executed, either or both were entitled to possession, and neither could lawfully exclude the other. But this situation was completely changed after the lease. Then the plaintiff, although he was the owner of an undivided three-fourths of the property, could not enter upon it or enjoy it without becoming a trespasser. His rights were, then, governed solely by the lease. He could demand rent. He could institute summary proceedings under the statute regulating the rights and duties of landlord and tenant. In a word, during the existence of the lease, his peculiar rights as a tenant in common were suspended, and the unity of possession and right of possession had been severed, and, for the time being, abrogated by his own agreement. This was equally true of the defendant and his firm. Although he owned but an undivided one-fourth of the property, yet he or his firm was entitled to the exclusive possession as against his co-owner. He could maintain an action of trespass, not only against the other owner, but any stranger, which, of course, he could not do in virtue merely of his co-ownership. In a word, his rights and powers over the property as a tenant in common were suspended during the existence of the lease, and his firm was then in possession as tenant, entitled to all the rights as a tenant, and subject to all the obligations and incidents of that relation. His relations to the plaintiff as a lessee continued until the lease was terminated; and it could not be terminated in any other way, so far as the defendant is concerned, except by fulfilling the covenant of the lease, which was to surrender up possession at the expiration of the term. This the firm refused to do, and, by so refusing, it is said that they have thrown off all their obligations as a lessee under a written lease, and without the plaintiff's consent have assumed the rights of a tenant in common; that is, the right to remain in possession notwithstanding the lease, so long as the tenancy in common continues.

No one can question the rule of law that, where a tenant holds over after the expiration of the term, the law will imply an agreement to hold for another year, and that the landlord is entitled to demand rent accordingly. *Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. 94.* The defendants in this case continued in possession after the year expired, and unless they had in law the right to remain in possession, in defiance of their covenant to surrender, then there is no defense to the action. They assumed, by the lease, all the obligations of tenants to the landlord,

and one of these obligations was to pay the rent stipulated for another year in case they remained in possession after the term expired. I am not able to understand how this obligation is changed by the circumstance that Healey, one of the co-owners, was a member of the firm that took the lease. His right of possession as co-owner was suspended by the lease, and could not revive until all of its covenants were fully performed by the surrender. Healey was not the landlord or the tenant. The owners, as a unit, were the landlords, and the firm, as such, was the tenant. It might just as well be urged that if this lease, instead of running to the firm of which Healey was a member, ran to a corporation in which he was a shareholder, that circumstance would change the legal effect of holding over by the corporation. It is plain that Healey could not, by act or word, change the obligations of the lease as against the plaintiff. It is just as plain that he could not, by act or word, change the legal effect of holding over by his firm, or change the legal character of the act of the firm in continuing the possession after the term expired. The law declares that this act is an election on the part of the tenant to attorn to the landlord for another year, and entitles the landlord to so regard it. Healey had no more power to change the legal effect of the act than any other member of the firm. He could not be a lessee one day, and a tenant in common the next, as his interest might require. The firm being bound by the lease, he was also, and not until after all of its covenants and conditions had been performed by surrender of the possession could he resume his relations to the property as a tenant in common.

This anticipates the principal defense to the action, which, as disclosed by the record, was a very transparent device that ought not to mislead any court. It appears that on the 29th of April, 1892, just as the year was about to expire, Healey, in his individual name, addressed a letter to his firm in which he consented that the firm might remain in possession after the year expired. Thus the writer, though bound, by the covenants of the lease, to surrender the possession at the end of the year, has, by writing a letter virtually to himself, succeeded, as is claimed, in abrogating the lease and abolishing the relation of landlord and tenant. The letter, when offered in evidence, was excluded by the court under the plaintiff's objection, and to this ruling there was an exception which it is said is ground for reversing the judgment. All that the letter proved was Healey's permission to his firm to remain in possession, and, unless that permission changed the legal character and effect of holding over or continuing in possession, it was utterly immaterial. If he could change the obligations of the lease and the law of landlord and tenant in this respect, he could, of course, in every other respect. He could,

when possession had been obtained under the lease, write a letter to himself, or to his firm, permitting them to occupy the property at a reduced rental, or without any rent at all. The moment that we concede the principle that Healey could do something to change the relations of the parties after the possession under the lease which his partners could not do, the most absurd consequences must follow. The only just and consistent rule in such cases must be that when a tenant in common unites in a lease, as the parties here did, their rights and obligations are governed by that lease while it is in force, and the lease is continued or abrogated in such cases in the same way and by the same acts that leases are continued and abrogated in all cases. The presence of one of the joint owners in the firm to which the demise was made cannot take this case out of the general law of landlord and tenant. The plaintiff, by the lease, surrendered to the firm to which the demise was made as a firm, and not to any individual member thereof, his right to the possession as a tenant in common so long as that lease remained in force. Thus, while he lost the right to the possession, he acquired the right to demand the stipulated rent. The right of his co-owner was affected by the lease in precisely the same way. His individual right to the possession as a tenant in common was suspended for the demised term, and his firm, as such, acquired the right to the exclusive possession. The duration of the lease was fixed by its terms and by the law, and one of the parties could not change it without the consent of all. The legal effect of that instrument was to vest in the firm, as such, the exclusive possession and enjoyment of the premises for one year, in case they were surrendered at the end of that time, but if they were not, and the firm still retained the possession, then for an additional year, at the option of the plaintiff. It was a legal right which the plaintiff acquired by the contract to treat the defendants as tenants for another year when they continued the possession, and Healey could not change or destroy that right any more than the plaintiff could change or nullify any right which the firm acquired by the demise. Healey could no doubt waive his right to his share of the rent, or give it to his firm, if he chose to do so, but he could not relieve the firm from their obligations to pay to the plaintiff his share, either before the year expired, or after, if they remained in possession, and he elected to treat them as tenants. The firm, being a tenant under the lease, could not, through Healey, one of the members, change the terms or obligations of that contract any more than it could if Healey was not a member, or any more than than the plaintiff could, to the prejudice of the tenant. The letter of Healey to his firm, or to himself, attempted to do all this. It was an attempt on his part to extend the

right of the tenant under the lease to remain in possession without incurring the legal consequences which the law attaches to that act. He had no more power or right to do that than the plaintiff would have to resume possession as tenant in common after receiving a quarter's rent on the second year; and, if the owner of three-fourths of the common estate could not change the legal rights of the parties under the lease, it is difficult to see how the owner of one-fourth could. What Healey said to his firm and to himself was virtually this: "We will remain in possession after the year notwithstanding our covenant to surrender, and by virtue of my relations to the property as tenant in common I absolve you and myself from all the legal consequences of the act; and, although we have obtained the exclusive possession under a lease, we can now continue to hold it indefinitely, without regard to the lease or its obligations, but as tenants in common." The learned trial court very properly held that proof of such a transparent device to nullify a solemn contract was not admissible.

The only ground of defense presented at the trial was that Healey had at all times, as tenant in common, the right of possession, and that he could, under that right, keep his firm in possession indefinitely. Both sides moved for the direction of a verdict, and neither party asked to have any question presented to the jury. The court directed a verdict for the plaintiff, thus determining all questions of fact, if any, as well as the questions of law, against the defendants. They are now precluded from raising any questions in this court, except such as arise from undisputed or admitted facts. They must stand or fall upon the proposition urged at the trial, which, in effect, was that although the unity of possession and right of possession were severed by the lease and suspended for the whole period of its duration, yet Healey retained the right to extend the term of the demise at his own will and without the consent of the plaintiff, and could absolve his firm, which was the tenant, from all the legal consequences of holding over. If that proposition is law, then this action was well defended. In my opinion, such a proposition is utterly indefensible, and hence I conclude that the plaintiff was entitled to recover, and that the judgment below is right. We have no right in this court to draw inferences of fact from the evidence for the purpose of reversing a judgment, though we may in order to sustain it. Nor have we any right to assume that this is a hard case, where the harshness of the law should be tempered by the spirit of equity. There is nothing in the record before us to show that this is a hard case, if that were of any consequence. So far as we know, or can know from the record, the defendants remained in possession of the premises during the whole quarter for which the plaintiff recovered rent,

and, if that be so, the judgment compelled them to pay only the agreed rent for the premises which they have possessed and enjoyed. If they have moved out, and the plaintiff has resumed possession or relet the premises, their obligation to pay rent has ceased, since the plaintiff could not recover double rent. If they have moved out and left the premises vacant and unrented, it is their own fault, since, if Healey could, while they were in possession under the lease, extend the right of possession, he certainly could, after moving out, sublet or relet the premises. In any aspect in which the case is viewed, no reason can be found for disturbing the judgment, and it should therefore be affirmed.

It may be proper, before closing, to notice the grounds upon which the prevailing opinion rests. It is based upon two inferences,—one of fact and the other of law: (1) That since the plaintiff's signature does not appear from the printed copy of the lease contained in the record to be attached, and that of both Healey and his firm do so appear, then it may be that Healey executed the lease for the plaintiff as his agent; and (2) being agent for the plaintiff to make the lease, he had authority also, as agent for the plaintiff, to bind him by giving his firm permission to remain in possession after the year expired. The inference of agency or actual authority from the plaintiff is based solely upon the absence of his signature from the copy of the lease as printed in the record, which may be due to a blunder of the printer or scrivener. This inference of fact is made, not only against the findings of the trial court that no such authority in fact or in law was possessed by Healey, but against the admission of the pleadings that both of the common owners united in making the lease; and that, too, not for the purpose of sustaining the judgment, but of reversing it. If the lease had not been printed in the record at all, the plaintiff's case would stand admitted upon the record, as it does now. It is hardly necessary to add that a fact admitted by the pleadings cannot be contradicted or qualified by equivocal inferences from the proofs in any case, and much less is it permissible in this court, for the purpose of reversing a judgment based not only upon the admission, but upon the findings of the trial court, which negative the existence of such fact. The proposition of law that an agent, to execute a lease for a definite term, has power to bind his principal by a renewal or extension of the time, will, I venture to say, be found equally difficult to maintain.

It may finally be observed that the circumstance that the plaintiff's signature does not appear upon the copy of the lease in the record has not the slightest significance, and is not even referred to in the defendants' brief, and was not mentioned at the argument. We might as well, upon the same reasoning, reverse a judgment upon a promissory note ap-

pearing in the record without signature, when the execution and delivery were admitted by the pleadings.

HAIGHT, J., reads for reversal and new trial. GRAY, BARTLETT, MARTIN, and VANN, JJ., concur. O'BRIEN, J., reads for affirmance, and PARKER, C. J., concurs.

Judgment and order reversed, etc.

(158 N. Y. 152)

PEOPLE ex rel. WM. J. MATHESON & CO., Limited, v. ROBERTS, Comptroller.
(Court of Appeals of New York. Feb. 28, 1899.)

TAXATION—CORPORATIONS—FRANCHISES—EXEMPTIONS.

1. Where part of the business of a manufacturing corporation is selling imported goods from broken packages, it is not exempt from taxation as a manufacturing corporation, under Laws 1880, c. 542, § 3, as amended, exempting corporations wholly engaged in manufacturing within the state.

2. A state tax on a corporate franchise, to be computed on its dividends, is not a tax on its property, and in violation of Const. U. S. art. 1, § 10, forbidding a state to tax imports, though the corporation engages in foreign commerce.

Appeal from supreme court, appellate division, Third department.

Certiorari by the people, on the relation of William J. Matheson & Co., Limited, against James A. Roberts, as comptroller, etc. From an order of the appellate division, affirming a determination of the comptroller and dismissing the writ to review his proceedings (50 N. Y. Supp. 1132), relator appeals. Affirmed.

John B. Green, for appellant. G. D. B. Hasbrouck, for respondent.

HAIGHT, J. This appeal brings here for review an order made upon the return to a writ of certiorari, sued out by the relator, for the purpose of reviewing the determination of the comptroller, whereby the relator was adjudged liable to pay certain taxes and penalties to the state, under chapter 542 of the Laws of 1880, and the laws amendatory thereof, providing for the assessment and payment of taxes to the state by certain corporations. The relator is a domestic corporation, organized under chapter 611 of the Laws of 1875, for the purpose of "importing, manufacturing, buying, and selling aniline colors, dyestuffs, dyewood, and sumach extracts, and such other articles of manufacture and merchandise as shall be incidental to, or of the same general nature and description as, the foregoing." The comptroller imposed taxes upon it, under chapter 542 of the Laws of 1880 and the acts amendatory thereof (chapter 361, Laws 1881; chapter 501, Laws 1885; chapter 463, Laws 1888; chapter 522, Laws 1890), for the six years, ending November 1, 1895, computing the taxes upon the basis of \$250,000 capital em-

ployed within this state, at the rate of $2\frac{1}{2}$ mills, aggregating \$3,750, and penalty of \$375, making \$4,125. Upon a rehearing, such decision was revised by reducing the rate of taxation to $2\frac{1}{4}$ mills, and the amount of the tax and penalty from \$4,125 to \$3,884, which amount was paid to the state treasurer by the relator on the 24th day of December, 1896. On the 26th day of January, 1897, the relator obtained a writ of certiorari to review the determination of the comptroller. The appellate division affirmed his action, and the relator has appealed to this court.

The relator claims that its business in this state, other than manufacturing, was solely foreign commerce, and that, being a manufacturing corporation, it was not taxable under section 3 of chapter 542 of the Laws of 1880, as amended, which provides that every corporation, except manufacturing or mining corporations or companies, wholly engaged in carrying on manufacturing or mining ores within this state, shall be subject to taxation as provided by said chapter. The relator further claims that any tax based upon its capital stock thus employed in foreign commerce is forbidden by section 10 of article 1 of the federal constitution, which is as follows: "No state shall, without the consent of the congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and clause 3 of section 8 of article 1 thereof, which provides that congress shall have power "to regulate commerce with foreign nations and among the several states." It appears that the relator was engaged in the business of manufacturing aniline dyes in this state, and for that purpose imported in part its raw material, and in part purchased it from domestic dealers; that it also was engaged in the business of importing manufactured dyes, which were placed in stock with its manufactured goods, and sold as a part of its general stock in trade, some in the original packages in which it was imported and some in broken packages. It is contended on behalf of the relator that the goods imported for sale were merely incidental to its business of manufacturing; that many houses preferred to purchase all of their goods from the relator; and that, in order to accommodate and supply its customers, it purchased and kept on hand other dyes than those manufactured by it, so that it might have a complete assortment, from which the wants of its customers might be supplied. With reference to this contention, it appears that about one-half of the relator's business consisted in the sale of goods other than those manufactured by it, and, under such circumstances, a court which is limited in its review to questions of law would hardly be justified in holding that such a volume of business was merely incidental to the company's business of manufacturing.

It is well settled that, under the constitution of the United States, congress has the exclusive power to regulate commerce, both foreign and interstate, and to impose taxes on importations. It is equally well settled that property imported, after it has been entered at a port and the duty has been paid, and it has passed from the jurisdiction of the United States to that of the state, and become mixed with other property, so as to lose its distinctive character as an import, becomes subject to the taxing power of the state. This was conceded by Chief Justice Marshall in the case of *Brown v. State of Maryland*, 12 Wheat. 419, 441, in which he held that an act of the legislature requiring that persons engaged in the business of selling imported goods should pay a license fee was invalid. In speaking of the power of the state, under this article of the constitution, he says: "There must be a point of time when the prohibition ceases and the power of the state to tax commences." He then speaks of the difficulty in determining the time, and likens it to the difficulty in distinguishing the intervening colors between white and black when they approach so closely as to perplex the vision in marking the distinction between them, and concludes: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while retaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." *Low v. Austin*, 13 Wall. 29; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 295; *Waring v. Mayor*, etc., 8 Wall. 110, 121; *Cook v. Pennsylvania*, 97 U. S. 566, 573; *Machine Co. v. Gage*, 100 U. S. 679. It will thus be seen that the supreme court of the United States has had difficulty in determining the precise time when imported goods pass from under the clause of the constitution referred to, and come under the taxing power of the state. The court, however, in all of the cases, concedes that where the original packages in which the goods were imported have been broken, and the goods taken therefrom and placed in store upon sale, thereby becoming mixed with other property, they become subject to the taxing power of the state.

In this case it does not become necessary to pursue the subject further, or to determine any question with reference to original packages. As we have shown, a portion of the relator's business was that of selling goods from the broken packages, and the question presented for our determination is whether the relator is exempted as a manufacturing corporation. It is not, if it is engaged in other business. The state has the

power to tax, so far as the relator's business is that of selling goods from broken packages, and it consequently follows that no exemption exists as to its business of manufacturing. *People v. Campbell*, 145 N. Y. 587, 40 N. E. 239.

We have thus far considered the case upon the theory that the tax was a tax upon property, which at some time had been imported from a foreign country; but the tax imposed is, we think, in no sense a tax upon property. It will be observed that the relator is a domestic corporation, organized under the laws of this state, and is doing business within the state. It is a creation of the state, subject to the laws of the state, enjoying the benefits and protection afforded by the state, and as such should bear its part of the burdens necessary to maintain the government of the state from which it derives its life and income. The statute provides that it shall pay taxes upon its franchise annually, to be computed upon its dividends declared. Such is the tax imposed in this case. No tax is imposed upon its property, nor is there any discrimination made between this and other corporations. We do not understand that a statute imposing such a tax is violative of any provision of the constitution of the United States. In the case of *Home Ins. Co. v. State of New York*, 134 U. S. 594, 10 Sup. Ct. 593, it was held, as stated in the headnote, that "a tax which is imposed by a state statute upon 'the corporate franchise or business' of all corporations incorporated under any law of the state or of any other state or country, and doing business within the state, and which is measured by the extent of the dividends of the corporation in the current year, is a tax upon the right or privilege to be a corporation and to do business within the state in a corporate capacity, * * * and, being thus construed, its imposition upon the dividends of the company does not violate the provisions of the statute exempting bonds of the United States from taxation." While, as we have seen, the decision of that case had reference to the statute exempting bonds from taxation, the discussion involved the cases arising under the constitution with reference to taxes on imports, and, in effect, covered the exemption in such cases. That case was an affirmation of the decision of this court (92 N. Y. 328), and was followed in the case of *People v. Wemple*, 131 N. Y. 64, 29 N. E. 1002. The order should be affirmed, with costs. All concur. Order affirmed.

(158 N. Y. 168)

PEOPLE ex rel. AMERICAN SODA-FOUNTAIN CO. v. ROBERTS, Comptroller.

(Court of Appeals of New York. Feb. 28, 1899.)

TAXATION—CORPORATIONS—CAPITAL—EXEMPTIONS.

1. Where part of the business of a foreign corporation, engaged in manufacturing in the state, is carrying on interstate commerce, it is not exempt from taxation, under Laws 1880,

c. 542, as amended by Laws 1890, c. 522, exempting corporations wholly engaged in manufacturing within the state; there being no hostile discrimination against the corporation in the assessment of the tax.

2. A state tax on a corporation's capital employed in manufacturing, when it also sells goods manufactured outside the state, is not within the constitutional inhibition against a state taxing imports or regulating interstate commerce.

Appeal from supreme court, appellate division, Third department.

Certiorari by the people, on the relation of the American Soda-Fountain Company, against James A. Roberts, comptroller. From a judgment and order of the appellate division, reversing a determination of the comptroller assessing a corporation tax on the relator for three years ending November 1, 1898 (51 N. Y. Supp. 487), it appeals. Reversed.

The relator is a foreign corporation, organized under the laws of the state of New Jersey, with a capital of \$3,750,000, for the purpose of carrying on the business of "the manufacture and sale of soda and mineral water apparatus, and of supplies for dealers in, and dispensers of, soda and mineral waters," the manufacture and sale of various other articles pertaining to that business, and other business not directly connected therewith. Under its charter privileges, the relator acquired the business of James W. Tufts, of Boston, A. D. Puffer & Sons, of Boston, Charles Lippincott & Co., of Philadelphia, and the John Matthews Apparatus Co., of New York. It appears by the petition of the relator for a rehearing before the comptroller, by the affidavit of its secretary, and the testimony given upon such rehearing, that it was engaged in business in this state at three different places in the city of New York. It conducted business at First avenue, between Twenty-Sixth and Twenty-Seventh streets, under the name of the "John Matthews Apparatus Company," at 10 Warren street under the name of "James W. Tufts," and at 41 Centre street under the name of "A. D. Puffer & Sons." At its place of business on First avenue it manufactured and sold soda and mineral water apparatus, and the various articles, ornaments, and flavoring extracts used in and upon such apparatus. At the Warren and Centre street houses it was engaged in the business of selling merchandise of the same general character as that manufactured by the John Matthews Apparatus Company, but whatever was sold at those places was manufactured in Boston, at which place the relator has its principal place of business. At the Tufts and Puffer branches the relator had salesrooms in which samples of the goods manufactured in Boston were kept, and orders for such goods were generally filled by their being shipped from Boston, to which place all moneys received therefor were transmitted, but occasionally it sold articles that were kept in the New York stores as samples, and then

procured others to take the place of those sold. The relator had all its glass made by a company in Poughkeepsie, which it purchased and sold in connection with the apparatus it manufactured, and sometimes to supply customers who required the glass only. This business amounted to about \$6,000 annually, and the average stock of glass carried by the relator was of the value of from \$6,000 to \$7,000. It also imported marble, which it sold, and of which it carried a stock of the value of \$20,000. This marble was sawed and polished, and the slabs were furnished with the soda-fountain apparatus. During the years 1890, 1891, 1892, and 1893, the relator sold at the Tufts and Puffer houses some of its fountains on conditional sales by which it retained the ownership, the average value of which was about \$16,000. The value of the stock carried by the relator at its branches in New York was about \$10,000 at the Tufts branch, and about \$7,500 at the Puffer branch. It paid about \$3,000 a year rent for the place where the Tufts business was carried on, and about \$2,500 a year for the place where the Puffer business was transacted. The comptroller assessed upon the relator a tax for the three years, amounting to \$1,800, under chapter 542 of the Laws of 1880, as amended by chapter 522 of the Laws of 1890.

G. D. B. Hasbrouck, for appellant. John B. Green, for respondent.

MARTIN, J. (after stating the facts). The relator seeks to defeat this appeal upon the ground that the portion of its capital which was employed by it in this state was used in carrying on the business of manufacturing, and that, although it was also engaged in the business of selling in this state goods manufactured by it elsewhere, it was not liable to be assessed for a corporation tax, under the statutes relating to that subject. Laws 1880, c. 542; Laws 1890, c. 522. In other words, the relator claims that, so far as its capital was employed in this state in manufacture, it was exempt under the statute of 1890, and that its other business of selling goods manufactured elsewhere was interstate commerce, and therefore also exempt, because the legislature had no power to impose a tax upon that portion of its business. There seems to be no complaint as to the amount or method of making the assessment if the relator was properly taxable upon the portion of its capital employed in this state in manufacture, but its claim is that the portion of its capital thus employed was exempt under the statute, and that its business, other than manufacturing, was interstate commerce, and, consequently, also exempt.

The statute relating to the taxation of corporations, joint-stock companies, and associations, so far as material to the questions involved, declares: "Every corporation * * * (or) company * * * formed under, by or pursuant to law in this state or in any other

state or country, and doing business in this state, except only * * * banks, insurance companies, and "manufacturing or mining corporations, or companies wholly engaged in carrying on manufacture, * * * shall be liable to and shall pay a tax, as a tax upon its franchise or business, into the state treasury annually, to be computed as follows." The statute of 1880 was amended in 1890 (chapter 522) by inserting the words "wholly engaged in" before the words "carrying on manufacture." The obvious purpose of this amendment was to qualify and limit the exemption as it formerly existed. It is to be observed that, under the statute as it existed when this tax was imposed, a corporation, foreign or domestic, exempted from taxation, was only one which was "wholly engaged in carrying on manufacture * * * within this state." The plain reading of this statute, and, consequently, its evident purpose and intent, was to limit this exception to such corporations or companies only. Therefore the only ground upon which the relator can rely for exemption from taxation in this state is that it was "wholly engaged in manufacture." If it was engaged in manufacturing and other business as well, it is not protected by the exception, as the words "wholly engaged in" qualify the exemption as it previously existed, and limit it to corporations or companies whose corporate or company business is exclusively that of manufacture. *People v. Campbell*, 144 N. Y. 166, 38 N. E. 990; *Id.*, 145 N. Y. 587, 40 N. E. 239.

Manifestly, the business of the relator in this state was not confined to manufacturing alone. By its verified petition, by the affidavit of its secretary, and by his testimony given upon the hearing, it appears that it had at least two places within the state where it had capital invested and was engaged in business other than manufacture. It is, however, claimed that the other business carried on by it in this state was interstate commerce. Even if that were to be admitted, still, as the relator was engaged in business other than manufacturing, it was clearly not within the letter or spirit of the statute excepting manufacturing corporations or companies from taxation. Obviously, the relator was engaged in this state in other business than manufacturing, and therefore was not included within the exemption of the statute. *People v. Roberts*, 154 N. Y. 1, 47 N. E. 974.

Nor does the fact that the relator's business, other than manufacturing, was interstate commerce, prevent the state from subjecting its business to taxation, where there was no hostile discrimination against the relator in the assessment thereof. *People v. Wemple*, 138 N. Y. 1, 33 N. E. 720. We think that the imposition of a tax upon the relator's capital employed in manufacturing, when it was also engaged in selling goods manufactured outside, was not in conflict with the federal constitution, which prohibits the lay-

ing of any imposts or duties on imports or exports, and confers upon congress the power to regulate commerce. By this statute, domestic and foreign corporations are taxed alike upon their franchise or business transacted within the state, and, if they are engaged in state as well as interstate business, they are taxable upon both. *People v. Wemple*, supra; *People v. Roberts*, 158 N. Y. 162, 52 N. E. 1102. The judgment and order of the appellate division should be reversed, and the determination of the comptroller affirmed, with costs. All concur. Judgment and order reversed, etc.

(158 N. Y. 216)

In re **RANDEL**.

(Court of Appeals of New York. Feb. 28, 1899.)

ATTORNEY AND CLIENT—DECEIT—DISBARMENT—REFUSAL TO TESTIFY—REVIEW.

1. An attorney accepted from the sheriff the amount realized (less than its face) on his client's mortgage, depositing it to his own account, and at once checking the most of it out to his own use. He concealed the fact of payment from his client, and while the latter was in ignorance gave him his note for the face of the mortgage, and a guaranty to pay a sum in excess of the mortgage on the client's delivering the note and an assignment of the deficiency judgment. The note was never paid, but the attorney confessed judgment for the amount, and assigned a policy on his life to secure it. After the note was due, he represented to a friend of the client that he had loaned the money to one M., who would soon fall into a fortune, and repay it; but on the disbarment proceedings M. was not produced, and no effort made to prove the loan to him. *Held*, that the evidence was sufficient to sustain an order of disbarment on the charges of deceit and malpractice.

2. Where accused, in disbarment proceedings, refuses to testify in his own behalf, a legal presumption arises of the truth of the charges made out by the evidence.

3. Where it is not shown that a decision of the appellate division is unanimous, the court of appeals will review the evidence.

Appeal from supreme court, appellate division, First department.

Disbarment proceedings against William F. Randel, an attorney, on charges preferred by the Association of the Bar of the City of New York. From an order of the appellate division disbaring defendant, and removing him from office as an attorney and counselor at law (55 N. Y. Supp. 1147), he appeals. Affirmed.

T. Mitchell Tyng, for appellant. George C. Holt, for respondent.

BARTLETT, J. The material facts out of which this proceeding arises may be briefly stated. One John Magdalinski became the client of the defendant under the following circumstances: Magdalinski is a German musician, a man of little capacity for the transaction of business, and the referee states that in his appearance before him he was even dull in the comprehension of ordinary business terms. He had saved some \$2,000, and in

September, 1894, desired to invest it. He had a friend named Metzger, also a musician, who held a mortgage for \$2,000 as guardian for an infant, and wished to raise money for estate purposes by selling it. When Metzger learned that Magdalinski had this amount to invest, he suggested the purchase of the mortgage, and offered to take him to his attorney, the defendant, William F. Randel, where the transaction could be closed. Thereupon Metzger introduced Magdalinski to the defendant, and in the interview that followed the defendant told him that he knew all about the mortgage, and that it was a gilt-edge security. The mortgage was then assigned to Magdalinski, and he paid the \$2,000 to Metzger. Two or three months later a summons in a foreclosure suit upon a \$3,500 mortgage was served upon Metzger, who immediately notified Magdalinski, and urged him to protect his rights, as it was averred in the complaint that the mortgage was a first lien upon the same premises covered by Magdalinski's mortgage. The fact was that these mortgages were recorded at the same time, and were entitled to share pro rata in the money realized upon the sale. Magdalinski was made a party to the foreclosure suit. Both mortgages were foreclosed together, and the suit proceeded to judgment and sale. The proceeds of sale were insufficient to pay the liens in full, and the amount realized on Magdalinski's mortgage was \$1,480.21. The sale of the mortgaged premises took place on May 22, 1895, and on June 21, 1895, the sheriff gave the defendant, as Magdalinski's attorney, his check for this amount; also his costs in a separate check for \$213.45. It was proved by the check book of the defendant that these checks were deposited in his bank account the next day, June 22d. It also appears that the defendant on the same day drew a check to the order of one Capt. D. F. Edwards for \$1,250, which was in part payment for an interest he was purchasing in the brig *Sunlight*, owned by Capt. Edwards; it being a second payment on that account, he having the day before drawn a check to the order of Capt. Edwards for \$1,000. The greater part of the money received from the sheriff on the mortgage was necessary to make the \$1,250 check good. It further appears that between the day of the sale, May 22, 1895, and on the 17th of July, 1895, Magdalinski made many calls upon the defendant for the purpose of obtaining from him the proceeds of the sale of the mortgaged premises, and that the defendant, in none of these interviews, disclosed to him the fact that he had received the money from the sheriff. Magdalinski swears that about the middle of July, in ignorance of the fact that defendant had been paid by the sheriff, he received from the defendant his note for \$2,000, dated July 1, 1895, and payable five months after date; also received a written guaranty from the defendant agreeing to pay to Magdalinski, on December 1, 1895, the sum of \$2,264.65, upon surrender of the \$2,000 note, and executing an assignment of

his deficiency judgment in the foreclosure suit. The note and guaranty were never paid, except the sum of \$50, and this was the situation at the time these proceedings were instituted by the order of the appellate division, in October, 1897. The defendant declined to be sworn in his own behalf at the trial. This refusal to testify raises the legal presumption of the truth of these facts, which must have been known to defendant, and which he failed to contradict. *Wylde v. Railroad Co.*, 53 N. Y. 156. This is in no sense a criminal proceeding, and the statutory rule of no presumption in such cases does not apply.

It is contended, on behalf of the complainant, that the essential facts are uncontradicted; that no claim is made that the defendant was guilty of professional misconduct prior to the misappropriation, on June 22, 1895, of the money collected; that the proof is clear that on that day the defendant misappropriated nearly all of the \$1,480.21 which he had received as attorney for Magdalinski; and that any agreement made between the defendant and Magdalinski thereafter is immaterial, in view of the fact that the defendant fraudulently concealed from his client the payment of the money to him by the sheriff prior to the execution of the note and guaranty. This position is met by the claim that the moving papers do not sufficiently charge the defendant with deceit and malpractice, and that the agreement between the defendant and Magdalinski, resulting in the note and guaranty, was not induced by any fraudulent concealment on the part of the defendant; that there is no evidence to support such a conclusion.

The order of the appellate division does not show that the decision was unanimous, and we are thus required to look into the record to determine whether there is any evidence supporting the findings of fact by the referee and the decision of the court below. In addition to the facts already stated, it appears that the defendant confessed judgment for this indebtedness; also that he assigned a policy of insurance on his own life as collateral security. It was apparently the effort of the defendant, throughout this transaction, to establish the fact that Magdalinski, with full knowledge of the situation, was willing that he should retain the proceeds of the mortgage sale as a loan, upon his promise to pay him \$2,000 and interest in five months. On the other hand, the complainant's position is that throughout his entire negotiation with the defendant, resulting in the note and guaranty, he had no knowledge of the fact that the money had been actually paid to defendant by the sheriff, but that he was told by the defendant that the original plaintiff in the foreclosure suit, having been the purchaser of the property, was able to put off the closing of the matter. There is a significant fact in the case which goes far to characterize the defendant's good faith in this transaction. After the note had fallen due and was not paid, he gave Metzger, who called upon him in Magdalinski's

interest, to understand that he had loaned this money to a man by the name of Morningstar, who was a legatee under a will, and that he was expecting a considerable payment from him immediately, and that he would then be able to pay Magdalinski the amount of his claim. Morningstar was not produced at the trial, and no effort was made by the defendant to prove a loan to him. As already pointed out, the record discloses that the greater part of the money was immediately paid out on account of the purchase of an interest in the brig *Sunlight*, and that the defendant admitted the fact by the production of his check book before the grievance committee of the Association of the Bar of the City of New York, when it was making the preliminary examination of this charge. The record shows that just prior to the close of the trial the referee asked the defendant if he did not wish to be voluntarily sworn, and the latter replied: "No, sir; I shall contend that the proofs, as they now stand, and in fact at the conclusion of the petitioner's case, fully established every fact set forth in the answer to the petition." If there was any possible statement that the defendant could have made, calculated to explain his conduct, and relieve himself from the serious consequences of the facts as disclosed by this record, he should have taken the stand, made a full statement, and submitted himself to cross-examination. We are satisfied that there is evidence to support the decision of the court below, the material facts being substantially uncontradicted. The order appealed from should be affirmed. All concur. Order affirmed.

(158 N. Y. 187)

PEOPLE ex rel. TERRY v. KELLER,
Commissioner of Public Charities.

(Court of Appeals of New York. Feb. 28, 1899.)

MUNICIPALITIES — CIVIL SERVICE — COMPETITIVE CLASSES.

1. Laws 1898, c. 186, amending Laws 1883, c. 354, giving municipal employes in competitive classes the right to be heard before removal, does not apply to the city of New York, since the Greater New York charter provided a special civil service system for that city. Per Gray, J.

2. The position of a city employé was on March 5, 1898, changed from the competitive to the noncompetitive class. On March 31st went into effect Laws 1898, c. 186, amending Laws 1883, c. 354, giving employes in competitive classes the right to be heard before removal. On July 1st, the employé was removed, without opportunity to be heard. *Held*, that the failure of the state civil service commission to approve the classification of March 5th, as required by chapter 186, did not restore the employé to the competitive class, and hence he was not in a position to invoke the aid of the statute. Per Gray, O'Brien, and Haight, JJ.

Bartlett, J., dissenting.

Appeal from supreme court, appellate division, First department.

Mandamus by the people, on the relation of John W. Terry, against John W. Keller, commissioner of public charities. From an or-

der denying the writ, affirmed by the appellate division (54 N. Y. Supp. 1011), relator appeals. Affirmed.

Julius M. Mayer, for appellant. Theodore Connolly, for respondent.

GRAY, J. The relator applied for a writ of mandamus commanding the respondent to reinstate him in his former position of superintendent of the almshouse, in the city of New York. The application was denied at the special term, and the order there entered was affirmed at the appellate division of the supreme court in the First department. Prior to January 1, 1898, the relator had held such a position under the former city government, and when the Greater New York charter went into effect on that date, pursuant to the provisions of section 1536, he was transferred to a similar position in the department of public charities of the new city. That position, from January 1, 1898, to March 5, 1898, was classified as competitive, pursuant to the civil service regulations of March 4, 1897; but, under the regulations adopted by the municipal civil service commissioners of the new city, which went into effect on March 5, 1898, the position was classified within Schedule A, as not subject to competitive examination. On March 31, 1898, chapter 186 of the Laws of 1898 went into effect, which amended sections 8 and 13 of the general civil service act of 1883. Those sections, as amended, changed the manner in which rules and regulations for appointments and promotions in the civil service should be adopted and put in force, and they gave the right to persons holding positions subject to competitive examination to be heard in explanation, before removal from, or reduction in, office. On July 1, 1898, the relator was removed from office, without notice, or an opportunity to be heard.

It is the claim of the relator that the provisions of the amendatory act of 1898 applied to those of the Greater New York charter, which regulated the civil service system in that city, and that, therefore, as the rules and regulations of March 5th had not been approved by the state civil service commission, as required by the act, they were of no effect on and after July 1st, "and either the rules of March 4, 1897, were again in force, or there were no rules in force in the city of New York." That is the situation which the appellant's counsel, in his brief, defines as existing on July 1st, and he argues that, if the rules of 1897 became again effective, his place was within the competitive class, and his removal was, therefore, illegal; or, if there were no rules then in force, that he must be deemed to be a person holding a position subject to competitive examination. When the Leet Case, 157 N. Y. 90, 51 N. E. 431, was decided, the question of the effect of the act of 1898 upon the civil service provisions of the Greater New York charter was discussed in the opinion; but the decision of the case was

placed, by a majority of the members of the court, upon the other ground of the opinion, that the act of 1898 was prospective in its operation, and recognized to be valid and in force existing city civil service regulations, for the period of time specified in the act as that within which rules and regulations were to be established having the approval of the state board. Leet had been removed from office within that period of time, and it followed that his removal was lawful, because effected under regulations at the time valid. It was held that by the act of 1898 a period of time of two months was provided for, within which the mayor of a city was to perform the duty of making regulations and classifications for the civil service system, and that, upon the expiration of that period, the state board had a period of one month within which to take action upon the rules and regulations promulgated and submitted; so that a period of three months would, or might, elapse before the new legislation could affect such rules as were then in force. In the present case, the question is squarely presented for determination whether the act of 1898 applied to the city of New York, and, in respect to the matters therein enacted, affected its charter provisions. Reflection confirms me in the opinion which I entertained and expressed in the Leet Case, and I can add little, if anything, to what was said there, or in the opinions delivered at the appellate division. I think that when the Greater New York charter went into effect, on January 1, 1898, it provided for an elaborate civil service system, which, by reason of its features differing from the system provided for in the general act of 1883 in marked and jurisdictional respects, rendered it special and exclusive. The very enactment of the chapter on civil service in the Greater New York charter seems to prove the legislative intent to have been to make a distinct and local system, and that construction is re-enforced by the marked and substantial differences apparent in the legislation. If the city of New York was to remain under the operation of the general act of 1883, it was unnecessary to enact the elaborate provisions for a civil service system in the charter. It seems to me to be perfectly clear that the civil service provisions of the charter constituted a special law, as a part of the system of local administration. When the act of 1898 was passed, there was nothing in its language to suggest an intention on the part of the legislature that it should apply to the city of New York. Its title expresses, as does its first section, the sole purpose to be to amend two of the sections of the act of 1883. In no part of it is there any reference to the Greater New York charter, and the only reasons for making the act applicable must be that the city still continued under the operation of the general act of 1883, or that a reasonable intendment of the enactment, from the subject-matter, could only be accomplished by giving it an application to the city of

New York. As to the first reason, I need say no more than what has already been said. As to the second reason, it finds no support in the settled rule of law in such cases. Furthermore, it seems to me to be without force, inasmuch as there appears to be a purpose in making the act solely applicable to the other cities of the state. The amendments applied to the other cities some new features, viz. those which had been inserted in the Greater New York charter relating to the appointment of commissioners by the mayors of the cities and to the admission of laborers into the civil service system. Section 1618 of the Greater New York charter expressly provides that neither the act, nor any section or provision thereof, should be deemed to be repealed or amended by any act of the legislature unless it be so expressly stated, or the legislative intent to that effect be unmistakable. That provision is in clear accord with the settled law of the state that a special statute providing for a particular case or class of cases is not repealed by a subsequent statute, general in its terms, unless the intention to repeal is manifest from the language, although, in terms, the subsequent statute is broad enough to cover the particular case. The two laws may stand together; the one as a general law of the state, and the other as the law of the particular case. This proposition should be regarded as indisputable, and it has the support of numerous cases, not only in this state, but in other states, which are referred to in the opinion in the Leet Case, and in the opinion of the appellate division. I am quite unable to find a theory to make the act of 1898 fit the case of the city of New York which will stand the test of the settled rules of law.

But, upon the view that the act of 1898 does apply to the city of New York, the relator's case will not be aided. If, by reason of the failure to establish civil service rules and regulations, approved both by the mayor of the city and by the state board, those existing prior to July 1st had become invalid and of no effect, then there were no rules or regulations in existence, and, consequently, there was no classification of positions in the civil service of the city. The rules and regulations of March 5, 1898, had superseded those which had been established in 1897, and they constituted the only ones regulating the administration of the civil service system. We held in the Leet Case that the act of 1898 was only prospective in its operation, and that, as the regulations of March 5th were validly made under the provisions of the Greater New York charter, they alone applied to appointments and classifications within the period of the three months prescribed for the promulgation of new regulations under the approval of the state board. What, therefore, was the situation on July 1st, unless that of an absence of any rules or regulations regulating appointments and promotions in the civil service? The provisions of the act of 1898 were ineffectual of themselves

to aid the relator. The classification of his position as in the noncompetitive class had not been changed, and the act of 1898, *ex proprio vigore*, could not place it in the competitive class. His appointment to office had been made in accordance with a classification which was valid at the time, and that classification remained good; the legislation did not change it. All that it did was to impose a duty upon the mayor which had not been performed. The utmost that can be claimed for the act is that it operated to protect positions which had been classified as competitive; but it did not abrogate the regulations which had been made at the time of its passage. To the contrary, it recognized their validity. If its commands with respect to the promulgation of new rules and regulations were not complied with, the courts were open to compel that compliance; but it is certain that it had no effect, of itself, to classify, or to affect any existing classifications. Therefore, as the relator, at the time of his removal from office, was in a position in the noncompetitive class, there was neither rule nor regulation in existence to prevent the exercise of that arbitrary power of removal which is the usual accompaniment of the power of appointment, and by no construction could the provisions of the act of 1898 amending section 13 of the act of 1883 be made applicable to a position in the noncompetitive class. I cannot see how the relator could be regarded as entitled to the writ he demanded, whether we hold that the act of 1898 applied to the city of New York or not; and, therefore, I think that the order should be affirmed, with costs.

O'BRIEN, J. It is admitted that the facts in this case are in all respects identical with the Leet Case, 157 N. Y. 90, 51 N. E. 431, except here the relator was removed on the 1st of July, 1898, whereas, in the Leet Case, his removal was on the 1st of April, 1898. When the latter case was before this court, I preferred to place the decision upon the second ground stated in Judge Gray's opinion. With respect to the proposition discussed in the first part of his opinion, namely, that chapter 186 of the Laws of 1898 was not applicable to New York City, I entertained then, and still entertain, very grave doubts. There are considerations and arguments against that view that are very difficult to answer; still, I would, if necessary, be inclined to concur with him, rather than to become responsible in any degree for throwing the affairs of a great city into inextricable confusion. To turn out all, or at least a great number, of the persons now engaged in the civil service of the city, and to put others in their places, would produce a condition of things somewhat akin to anarchy. It is hardly possible to foresee the consequences that would flow from such a decision. It is entirely safe to say that, whatever effect it might have upon the affairs of the city, it

would produce a brood of litigations that would trouble the courts for a long time to come. The general proposition that a statute, general in terms, does not repeal, or in any way affect, a local statute embodied in a city charter, is, of course, perfectly correct. That, however, is not so when the language of the general law is such that it can be seen that the legislature intended to repeal or change the local statute; so that all depends upon the question whether that intention is necessarily expressed in the act in question. If that legislation was not aimed at New York City, it is very difficult to perceive what the purpose of the legislature was. I yield, however, to the argument of Judge Gray on that question, for the reasons that I have already stated, but only on the grounds and with the qualifications hereafter stated. It is proper to say, however, that this is not the only ground upon which I am moved to concur in the decision below. There are other grounds that seem to me not only entirely satisfactory, but much clearer and conclusive, and I will proceed to state them in as brief a manner as possible.

It is admitted that on the 1st of January, 1898, when the new charter of the city of New York went into complete effect, the relator was in the employ of that city as superintendent of the almshouse. That place was then classified by the civil service rules in force as one subject to competitive examination, and all the consequences that follow. But on the 5th of March, 1898, new regulations for the civil service were made, and approved by the mayor, whereby the place which the relator held was put in the noncompetitive class. No one now questions the power of the city authorities to make that classification. They acted within the scope of the authority conferred upon them by the city charter. The classification, therefore, was perfectly legal and effective, and it had the effect of making the relator's position noncompetitive. Now, the sole question in this case is whether the relator's position was in the noncompetitive class on the 1st of July, 1898, when he was removed. If it was, then it is admitted that there was power to discharge him without any trial or hearing. We have seen that, by the act of the civil service commission and the mayor, the relator was placed in the noncompetitive class on the 5th of March, 1898, preceding his removal. It is, therefore, incumbent upon him now to show that in some way, subsequent to that date and prior to the 1st day of July, he was taken out of the noncompetitive class and placed in the competitive class, since, unless it can be shown that he was in the competitive class at the time of his removal, the decision of the court below was unquestionably correct. The old classification existing in New York City prior to the consolidation was superseded by the classification of March 5, 1898, and thereupon ceased to have any force or effect whatever,

and has never been revived. The latter classification, consequently, still remains in full force and effect, unless it has been set aside by some competent authority. It will not aid the relator to say, as his counsel has attempted to show, that after the passage of chapter 186 of the Laws of 1898, no rules or regulations whatever concerning the civil service have been in force in New York City, since, in the absence of such rules, the authority that had the power to appoint the relator could also remove him. The power of appointment, in the absence of express statutory restrictions, includes the power of removal. What the relator needs is not a decision that all rules were abolished, but that some rule was in force on July 1st that put him into the competitive class. The learned counsel for the relator has not attempted to show how his client, who was placed in the noncompetitive class on the 5th of March, 1898, got into the competitive class on or before the 1st day of July following. His argument is entirely silent on that vital question. It is quite clear, I think, that this result was impossible, in view of the situation in this case, and all this can be shown by the aid of principles well established.

It is necessary, in the first place, to get a clear notion with respect to the nature of the act which the civil service commissioners of the city of New York, with the approval of the mayor, performed on the 5th of March, when they made the classification that took the relator out of the competitive class and placed him in the noncompetitive class. In the case of *Chittenden v. Wurster*, 152 N. Y. 362, 46 N. E. 862, this court held that "such a classification is not void; it may be voidable, for his action is subject to review; but, until it is judicially determined that his classification was erroneous, it is a protection to the subordinate heads of departments and employees acting thereunder. The appointments were made in accordance with the statute and the classification as it then existed." This court was then dealing with the classification made by the mayor of Brooklyn, in which certain positions were omitted from the competitive schedule and placed in another schedule where competitive examinations were not necessary. That is precisely what was done in this case, and, although it was contended in that case that the classification was repugnant to the provisions of the constitution, yet the court held that it was good, and protected everybody until it was set aside. In that case, it was also held that the remedy in such cases was to institute judicial proceedings to correct the classification. This is the language which the court used on that point, and which is correctly expressed in the headnote to the case: "The people are not, however, without a remedy. There is one which is very simple and effective. If the mayor refuses to do his duty, or if he does it improperly, he may be compelled by direct proceed-

ing, as by mandamus, or perhaps in some cases by certiorari, instituted by any resident citizen, to do it, in accordance with the requirements of the constitution and of the statute. The courts have the power to compel the discharge of such duties" by making the classification conform to the statute. It is true that the doctrines of the case I have cited were combated by a minority of the court, but they were approved by the majority, and therefore made the law of the land in the same sense as if all the members of the court concurred. The principles of that case became a rule of action for the guidance of the authorities of cities, the whole public, and the legislature itself, and we must assume that they were accepted and acted upon. One of the most important of these rules was that a classification once made was good until set aside or modified by some judicial proceeding, and, so long as it remained unchanged by the action of some judicial authority, it bound every one and protected every one acting under it or holding a place under it. The classification which placed the relator in the noncompetitive schedule has not been changed or set aside by any such proceeding; and the inquiry is, how has it been affected so as to take the relator out of the schedule in which he had been placed, and put him into another schedule where he was not placed? Obviously, if that has been done at all, it has been done by the legislature in the enactment of chapter 186 of the Laws of 1898; but that statute cannot properly receive any such construction. In the first place, the classification of March 5th, having been made in pursuance of statutory authority, and being reviewable by certiorari or enforceable by mandamus, was a duty imposed upon the mayor and the civil service commissioners judicial in character. Of course, if it was reviewable by certiorari it must have been a judicial act, since an executive, legislative, or ministerial act is not so reviewable. The power of the legislature is restricted to the enactment of laws, or, in other words, to powers that are legislative in character. It cannot set aside, annul, or correct a judicial act; and it had no more power to set aside this classification than it had to set aside a judgment of the courts. The act of making the classification could be affected only by some judicial proceeding; it could not be reviewed or corrected, if erroneous, by the legislature. The legislature has no power to appoint or remove an officer or employé of a city. A statute passed to turn out one class of officers and employés in a city, and to put some other class in, is not a legitimate or constitutional exercise of legislative power. It is a usurpation of the executive or judicial power. A statute to annul or change a judicial determination once made, whether by a court or some other body, in the performance of a duty authorized or required by law, and judicial in its nature, is

open to the same objection. The courts should always construe a statute as an exercise of legislative power within the restrictions of the constitution, and not as an exercise of some other power which the legislature does not possess. While the legislature had no power to review or set aside a classification already made, it had the power to provide in the future for a different method of classification; that is to say, it had the power to provide that in the future all classifications made should have the approval, not only of the mayor of the city, but of the civil service commissioners of the state. That is the power which it attempted to exercise. We should also always construe a statute to be prospective in its operation, rather than retroactive. Hence, it is plain that the legislature must be deemed to be enacting a rule to take effect in the future, and not to set aside or abrogate something that had been done by the municipal authorities previously under existing laws. The legislature had power to enact that thereafter classifications should be made upon certain principles, and approved by certain state authorities, and then it becomes the duty of the civil service commissioners to make new rules or modify the old ones, and submit them to the state civil service commissioners for approval; but, until they perform that duty, either voluntarily or by the direction of the courts, the classification of March 5th remained in full force, and, consequently, until that change was made, the relator remained in the noncompetitive schedule. In the enactment of the statute in question the legislature exercised that power, and nothing more. It certainly made no new classification, but devolved that duty upon the local authorities, and a new one was necessary in order to take the relator out of the noncompetitive class and put him into the competitive class. The relator's appeal must fail unless he is able to show, what obviously cannot be shown, that the legislature had not only the power to abrogate, and did abrogate, the classification of March 5th, but actually made a new classification for itself, in which the relator was taken from the noncompetitive list and put into the competitive list. The learned counsel for the relator will search in vain for either the power to thus annul an act held to be judicial in its nature, or for any language in the statute to show that the legislature had the slightest intention to do any of these things. The problem that faces the relator at every stage of the argument is to show how and when he got out of the noncompetitive schedule and got into the competitive one, since, unless he was in the latter schedule when removed, his removal was clearly legal.

On a careful reading of the act of 1898, it will be seen that the purpose which the legislature had in view was to require the local authorities to change the rules, and not to annul an act which had already taken effect



judicial in character. The statute provides that within two months after its passage it shall be the duty of each of the mayors of cities, in and by regulations, to cause to be arranged in classes the several clerks and persons employed or being in the public service of the cities. Now, manifestly, this was a legislative requirement that upon a designated day in the future the mayors of cities should classify the persons in the civil service in a particular manner, which was to be approved by a particular authority, which the existing law did not require. But, while it prescribed a new rule of action for the authorities in cities, it did not abrogate any rule which was then in force. If the mayors within the times designated did not proceed to enact the new rules, or to have the old ones modified and approved by the state civil service commissioners, they could be compelled to do so, but in the meantime the old classification existed and stood in full force. It is too plain for argument, as it seems to me, that this statute could not and did not take the relator's position out of the non-competitive schedule, where it was placed by the classification of March 5th; and much less did it put the place in some other schedule.

The statute also contains this provision, which, perhaps, is the most important in the whole chapter: "Such regulations herein prescribed and established, and all regulations now existing for appointment and promotion in the civil service of said city and any subsequent modification thereof shall take effect only upon the approval of the mayor of the city and of the New York civil service commission." This language obviously refers to regulations "herein prescribed," and also to regulations "now existing," and then provided that they "shall take effect only," etc. This language cannot, by any fair construction, be deemed to annul a classification that had already taken effect. It speaks of something that shall take effect, and consequently did not refer to a thing that had already gone into effect. It imposed a duty on the local authorities to modify the existing rules under which the various persons in the public service were classified, or to make new rules, and that neither the old rules as modified, nor the new rules when made, should take effect until approved by the state civil service commission. The whole purpose of the statute was to set the local authorities again in motion, and require them to do their work over again by making another classification more satisfactory to the legislature. But in the meantime the civil service of the city was not remitted to chaos, since the rules and classifications of March 5th were in full force until superseded by the new or modified rules which the legislature evidently thought to be necessary. The law avoids an interregnum in government, in which no law is in force and society is reduced to anarchy, just as nature abhors a

vacuum. So that, upon a careful reading of the statute, the conclusion is plain that the legislature were not seeking to annul or set aside any act, judicial or otherwise, that had already been performed and had gone into effect, but was providing for a new rule to be enacted by the local authorities to become operative in the future. The day within which it became their duty to act was fixed, and, if the city authorities refused to comply with the new law, they could be compelled by judicial proceedings. This seems to me to be a more reasonable construction of the work of the legislature than to hold that it was not engaged in legislation at all, properly speaking, but was seeking to set aside and annul a classification already made, under which the relator's legal status as an employé of the city was fixed. In a word, this statute, I repeat, did not take the relator's place out of the noncompetitive schedule and place it in the competitive schedule, and it is necessary for him to establish that proposition in order to succeed upon this appeal. It may be added that his counsel has very wisely refrained from even the discussion of such a proposition; so I arrive at the conclusion that the decision of the court below was correct, and ought to be affirmed.

BARTLETT, J. (dissenting). The court having decided that chapter 186, Laws 1898, which took effect March 31, 1898, and amended the civil service law of 1883, applies to the city of New York, the rights of relator are to be considered in the light of that statute. *People ex rel. Leet v. Keller*, 157 N. Y. 90, 51 N. E. 431; *People v. Dalton*, 158 N. Y. 175, 52 N. E. 1113. In cases cited we held, construing the act of 1898, that, as the new civil service regulations for the city of New York took effect March 5, 1898, and the act of 1898 did not become a law until March 31, 1898, the act gave 90 days in which the regulations could be approved by the state civil service commission, and that they were in force in the meantime. In the case at bar, we have a relator whose classification was changed from the competitive to the noncompetitive list by these new regulations, but his removal did not take place until July 1, 1898, when the time to obtain the approval of the state civil service commission had passed without securing it. The act provides in its first section: "Such regulations herein prescribed and established, and all regulations now existing for appointment and promotion in the civil service of said city and any subsequent modification thereof shall take effect only upon the approval of the mayor of the city and of the New York civil service commission." Under this provision the civil service rules of the city of New York of March 5, 1898, being "regulations now existing," could only survive the 1st day of July, 1898, by having the approval of the mayor and the state civil service commission. I cannot agree with the suggestion in one of

the prevailing opinions that it was only the existing regulations as modified that were to be approved. Such a construction is not only contrary to the plain letter of the statute, but leads to the manifest absurdity that in the city of New York all that was necessary in order to defeat the act of 1898 and continue in full force and effect the city regulations of March 5, 1898, was to do nothing.—Ignore the legislative command. In my opinion, there have been no civil service regulations in existence in the city of New York since July 1, 1898, by reason of the failure to obtain the approval of the state civil service commission. The result is that at the time the relator was removed the regulation that fixed his position as noncompetitive had ceased to exist with the others of which it was a part. It is this phase of the case that renders the principle laid down in *Chittenden v. Wurster*, 152 N. Y. 345, 46 N. E. 857, wholly inapplicable, to the effect that an exempt classification is voidable, but not void until judicially declared erroneous. The rules of classification in that case survived,—were in full force and effect. In the case at bar, the regulations and classifications thereunder had ceased to exist by legislative command. In this situation the relator rested solely upon his constitutional rights. The constitution of this state provides (article 5, § 9), among other things, that appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive. This court held (*People v. Roberts*, 148 N. Y., at page 366, 42 N. E. 1084), in construing these provisions of the constitution, that, if "the legislature should repeal all the statutes and regulations on the subject of appointments in the civil service, the mandate of the constitution would still remain, and would so far execute itself as to require the courts, in a proper case, to pronounce appointments made without compliance with its requirements illegal." Invoking this principle, and in view of the fact that the relator's position was unclassified after July 1, 1898, the presumption would be, under these provisions of the constitution, that he was entitled to a competitive examination. The presumption is in favor of the general policy of the constitution, rather than of its limitations and exceptions. The relator filled a position on July 1, 1898, subject to competitive examination, and for which he had been examined, and, consequently, he was entitled to have the reasons for his removal stated in writing, and an opportunity afforded him to make an explanation under the act of 1898. The order should be reversed, with costs.

GRAY and O'BRIEN, JJ., read for affirmance. PARKER, C. J., and MARTIN and VANN, JJ., concur in result. HAIGHT, J.,

concur in second ground stated in opinion of GRAY, J. BARTLETT, J., files dissenting memorandum.

Order affirmed, with costs.

(153 N. Y. 176)

PEOPLE ex rel. FLEMING v. DALTON,
Commissioner of Water Supply, et al.
(Court of Appeals of New York. Feb. 28,
1899.)

MUNICIPALITIES — CIVIL SERVICE — COMPETITIVE
CLASSES—REMOVAL.

Laws 1898, c. 186, § 3, amending the general civil service act (Laws 1883, c. 354), giving municipal employes in competitive classes the right to be heard before removal, applies to the city of New York, notwithstanding the Greater New York charter contains many civil service regulations.

Gray and O'Brien, JJ., dissenting.

Appeal from supreme court, appellate division, Second department.

Mandamus by the people, on the relation of William R. Fleming, against William Dalton, commissioner of water supply, and another. Relator appeals from an order of the appellate division, Second department (54 N. Y. Supp. 1112), reversing an order of the special term granting an application for a peremptory writ of mandamus commanding the respondents to reinstate and employ relator in the position of foreman of the Eastern district repair yard department of water supply, borough of Brooklyn, from which he was removed on April 11, 1898, and for further appropriate relief. Reversed.

Samuel H. Ordway, for appellant. Theodore Connolly and William J. Carr, for respondents.

BARTLETT, J. The relator, on January 1, 1898, passed from the employ of the late city of Brooklyn to that of the city of New York, in pursuance of section 1536 of the Greater New York charter, continuing in the same position he had held prior to that time. Relator's position was subject to a competitive examination under the civil service regulations of the city of Brooklyn, and also under the new civil service regulations of the city of New York, adopted March 5, 1898. On April 11, 1898, the relator was summarily removed from his position, without charges made against him, and in this mandamus proceeding the regularity of the removal is challenged. It is argued on behalf of the relator that he was protected from such summary removal by chapter 186 of the Laws of 1898, entitled "An act to amend chapter three hundred and fifty-four of the Laws of eighteen hundred and eighty-three, entitled 'An act to regulate and improve the civil service of the state of New York.'" Section 3 of the act of 1898 amends section 13 of the act of 1883 by adding thereto the following: " * * * And if a person holding a position subject to competitive examination in the civil service

of the state or of a city shall be removed or reduced the reasons therefor shall be stated in writing and filed with the head of the department or other appointing officer, and the person so removed or reduced shall have an opportunity to make an explanation." It is insisted on behalf of the respondents that the Greater New York charter creates a distinct and separate civil service system for the new city, which is governed exclusively by the provisions of the charter and the civil service regulations prescribed by the commissioners under the charter, and approved by the mayor; that the existing general laws of the state have no application thereto, and that as the act of 1898 is amendatory of the general civil service law of 1883 it does not apply to the city of New York.

The question presented by this appeal is one of far-reaching importance, and involves the unity and integrity of the civil service system in this state. If it be true that the legislature has provided a separate and distinct civil service system for the city of New York, we should find it written in statutory provisions that admit of no other construction. On turning to the Greater New York charter, we find no chapter, or title of a chapter, that deals with and creates a complete civil service system; but, on the contrary, we discover that sections 123-126, 304, 727, 728, and 1536 are not in any sense a complete civil service system, but contemplate an effective administration of the general civil service laws of the state as modified by the charter, without great or radical changes. When the act of 1883, as amended in 1884 (chapter 410), is compared with the charter, it will be seen that there is little difference. The act of 1883, as amended in 1884, vested in the mayors of cities the power to make regulations to promote the efficiency of the civil service, but such regulations were subject to the approval of the New York civil service commission, and all examinations conducted thereunder were subject to the inspection of the commission. This approval and supervision of the state commission originated in the amendatory act of 1884. The Greater charter provides (section 123): "The mayor shall appoint three or more suitable persons as commissioners to prescribe and amend, subject to his approval, and to enforce regulations," etc. It is argued that the change from the provisions of the general law, which required the mayor to make regulations, to the scheme of the charter, which imposes upon the mayor the duty of appointing commissioners to prescribe regulations, subject to his approval, is significant, and evinces a change of system. We are unable to so regard it, but consider it an enactment substantially in harmony with the general law. It contains provisions as to commissioners, calculated to relieve the mayor of a great city like New York from the labor of preparing regulations, and also permits him to call in to his assistance experienced men; but the entire work

is subject to his approval, and is as much under his control as before.

The few sections relating to the civil service are scattered through the charter, and were evidently inserted to place in convenient form such provisions of the general law as were peculiarly applicable to the city. Sections 123 to 126 are found in chapter 5, entitled "The Mayor." Section 304 is found in chapter 8, entitled the "Police Department." Sections 727 and 728 are in chapter 15, "Fire Department"; and section 1536 in chapter 22, "General Statutes," dealing with retention of old clerks in territory consolidated. As before stated, there is no general scheme disclosed to create a separate and distinct civil service system for the city of New York. The charter is destitute of any such provisions.

In addition to this, an examination of the general civil service laws of the state, in connection with the charter, makes it manifest that the legislature never contemplated that two warring and inconsistent civil service systems should exist side by side in the state, so that an act may be performed with impunity in the city of New York which is a misdemeanor in the state at large. The learned counsel for the appellant, in his able brief, has, by his industry, greatly aided the court in this connection. He points out that the report of the charter commission, through its committee on draft, said, "A civil service commission has been created on the lines of the present law." Section 124 of the charter provides for open competitive examinations, and a variety of other matters contained in the law of 1883, which apply particularly to the administration of the civil service in the city of New York, and were evidently placed there for convenience. This same section (124) provides for two changes, viz. the competitive examination of applicants for employment as laborers is made obligatory, subject to certain exceptions; promotions in office are on the basis of ascertained merit and seniority in service, and upon such examination as may be for the good of the public service. In construing the general civil service laws of the state, in connection with the Greater charter, the proper rule of construction is that any provisions in the general law inconsistent with the charter are repealed by implication so far as the city is concerned. As to all other provisions of the general law, they are as applicable to the city of New York to-day as to any other part of the state. There are many provisions of the general law not mentioned in the charter that are applicable to the city of New York. Such are the provisions of section 5, in regard to the corrupt conduct of examinations, and towards persons examined; the provisions of section 9, prohibiting recommendations from a senator or member of assembly; the provisions of sections 11 and 12, prohibiting political assessments; the provisions of section 14, prohibiting corrupt use of authority or influence to procure appointments; and especially the provisions of sec-

tion 8, exempting from civil service rules and regulations and from examinations officers elected by the people, and a number of other persons mentioned. There are many other provisions of the general law which might be mentioned, constituting a part of the civil service system of the state, and essential to its unity and integrity, that are still binding upon the city of New York.

We come now to consider the act of 1898 (chapter 186), but before doing so will refer to our decision in the case of *People ex rel. Leet v. Keller*, 157 N. Y. 90, 51 N. E. 431, which seems to have been the subject of considerable misapprehension. The relator in that case was superintendent of the city hospital in the old city of New York, and his position was subject to a competitive examination. On January 1, 1898, he was transferred to the employment of the new city, and was thereafter removed, to take effect April 1, 1898. On March 5, 1898, new civil service regulations went into effect in the present city of New York, under which the position of the relator was classified as noncompetitive. Relator defended on the ground that he was removed without the reasons being stated in writing, filed, and opportunity for him to make an explanation, as provided in the act of 1898. The two questions before us in that case were: First, did the act of 1898 apply to the city of New York? and, second, was it a defense under the facts disclosed? If the act did not apply to the city of New York, there was no necessity to construe it; but a majority of the court decided, by construing it, that it did apply, and held that, as the new civil service regulations for the city of New York took effect March 5, 1898, and the act of 1898 did not become a law until March 31, 1898, the act gave 90 days in which the new and existing regulations might be approved by the state civil service commission, and that they were in force in the meantime. This resulted in our holding the removal of the relator regular on April 1, 1898. The opinion, in the first ground discussed, expresses the views of the dissenting judges, and in the second ground deals with the decision of the court. The case at bar presents a very different question than the *Leet Case*, just referred to, but does involve the applicability of the act of 1898 to the city of New York. We have treated the latter question as if open, in order to discuss it. In the case before us the relator's position was not only competitive under the regulations of the old city, but was classified as competitive under the civil service regulations of the present city. It therefore follows that, if the act of 1898 applies to the city of New York, the relator was improperly removed, as under that act he was entitled to have the reasons for his removal stated in writing, filed, and an opportunity afforded him to explain.

As we have reached the conclusion that there is no separate and distinct civil service system provided for the present city of New York in its charter, and that the general civil

service laws of the state are applicable to that city, save where repealed directly or by implication by that charter, it follows, subject to this limitation, that the act of 1883 (chapter 354), as amended by various acts, and finally amended by the act of 1898 (chapter 186), is applicable to the city of New York. The act of 1898 modified and repealed the provisions of the Greater New York charter so far as inconsistent with it, and subjected the present city to new civil service provisions by amending the act of 1883. The respondents' argument rests on the rule, about which there is no difference of opinion, that a special and local statute, providing for a particular case or class of cases, is not repealed by a subsequent statute, general in its terms, provisions, and application, unless, by the language used, the intent to repeal or alter is manifest. There are several very conclusive answers to this position.

First. In amending the general civil service laws of the state which are applicable to the city of New York, as well as the state at large, it is very doubtful whether the rule invoked is to be applied, in view of the fact that the charter creates no separate system.

Second. It is clear on the face of the act that the legislature intended that it should apply to the entire state, including the city of New York. The act not only is an amendment of the law of 1883, thereby being applicable to the city of New York by virtue of that fact, but it deals directly with section 8 of the act of 1883, as amended by the act of 1884, and changes it in most important particulars. It requires the mayor "of each city in this state" to appoint and employ suitable persons to prescribe, amend, and enforce regulations for examinations and classifications in the civil service, so that the charter of New York is no longer different in that respect from those of other cities. The classifications were to be made within two months after the passage of the act. After the termination of three months from the passage of the act, no appointments or promotions could be made except in conformity with such regulations. Then follow these most significant words: "Such regulations herein prescribed and established and all regulations now existing for appointment and promotion in the civil service of said city and any subsequent modification thereof, shall take effect only upon the approval of the mayor of the city and of the New York civil service commission." We have here the clear intention of the legislature that every city of the state should conform to the provisions of section 8 of the act of 1883, as amended in 1884, by still further amending the same, and by a more stringent enactment compelling obedience by the officials of all cities. After providing for classification within two months, and prohibiting appointments or promotions after three months, the legislature declares that the regulations so prescribed and established, and

"all regulations now existing," and any subsequent modification thereof, "shall take effect only" upon the approval of the mayor and the New York civil service commission. The act also provides that the regulations in each city shall no longer exclude from classification certain subordinates of elective officers, or the subordinates and employees of the educational department, and places the limitation on the power of removal already commented upon, as contained in section 3, amending section 13 of the act of 1883. We are of opinion that the legislative intention is clearly manifested to make this act general and applicable to the entire state. "A general statute will repeal special or local acts without expressly naming them, where they are inconsistent with it, and where it can be seen from the whole enactment that it was the intention of the legislature to sweep away all local peculiarities thus sanctioned by special acts, and to establish one uniform system." Black, *Interp. Laws*, § 153. "There is no rule of law which prohibits the repeal of a special act by a general one, nor is there any principle forbidding such repeal without the use of words declarative of that intent. The question is always one of intention, and the purpose of abrogating a particular enactment by a later general statute is sufficiently manifested when the provisions cannot stand together." *Suth. St. Const.* § 159. See, on this point generally, *In re Dobson*, 146 N. Y. 357, 40 N. E. 988; *People v. Jaehne*, 103 N. Y. 182, 8 N. E. 374; *Board v. Burtis*, 103 N. Y. 136, 8 N. E. 482.

Third. If there was any doubt as to the meaning of the act of 1898, or the intention of the legislature in passing it, recourse might be had to the records and journals of that body, showing the history of the measure, and the debates thereupon, for the purpose of ascertaining that meaning and intention. *Coutant v. People*, 11 Wend. 511; *Warner v. Beers*, 23 Wend. 103; *People v. Purdy*, 2 Hill, 31, 37; *Sixth Ave. R. Co. v. Gilbert El. Ry. Co.*, 3 Abb. N. C. 372; *Blake v. National Banks*, 23 Wall. 307. It is a common practice in this court to have recourse to the debates of the constitutional convention in order to decide questions of difficult and doubtful construction. The counsel for appellant has submitted, as part of his brief, a copy of the minutes of the debate on the act of 1898, taken by the official stenographer of the assembly. These minutes disclose that the entire debate proceeded upon the assumption that this act applied to the city of New York, and was brought forward to meet the opinion of the corporation counsel of the city of New York that the provisions of the charter of the city should prevail over the general civil service laws of the state. There can be no doubt that the legislature was fully advised as to the situation of affairs in the city of New York that led to the enactment of this law,

and that members voting against it did so because it applied to the city, and was likely to limit, to some extent, its existing charter.

There are other points discussed, but it is unnecessary to consider them.

There is one suggestion made by the counsel for appellant that bears very strongly upon the intention of the legislature in passing the Greater New York charter. Section 127 of the charter applies only to those veterans actually in the employ on January 1, 1898, of any municipality included in the consolidated territory. As to all veterans not in the employ of the new city, it must be assumed, in view of the declared policy of the people, that the legislature considered them within the protection of the general veteran laws of the state. If the framers of the charter had contemplated a separate and distinct civil service system for the city, it may be safely assumed they would have enacted along with it, as a distinct veteran system, the general laws known as the "Veteran Acts," which afford protection to those who are so peculiarly the objects of popular solicitude that their rights under the civil service laws have been guarded by constitutional amendment. We are of opinion that the relator was removed without due warrant of law, as the new civil service regulations of the city of New York were in force at that time, April 11, 1898, and classified his position as subject to competitive examination. He was, therefore, entitled, under section 3 of the act of 1898, amending section 13 of the act of 1883, to have the reasons for his removal stated in writing, filed, and an opportunity afforded him to make an explanation. The order of the appellate division should be reversed, and the order of the special term affirmed, with costs in all the courts.

GRAY, J. (dissenting). I dissent from the conclusion reached by Judge BARTLETT that the order of the appellate division should be reversed, upon two grounds. In the first place, chapter 186 of the Laws of 1898 did not apply to the city of New York; my reasons for that statement being given in the *Leet Case*, 157 N. Y. 90, 51 N. E. 431, and again, somewhat more fully expressed, in the *Terry Case* (decided at this term) 52 N. E. 1107. In the second place, the act of 1898, referred to, was prospective in its operation, and did not affect the civil service rules and regulations which were adopted by the municipal civil service commissioners of the city of New York on March 5, 1898, and which were existing at the time; nor would affect them until the expiration of three months, when they would cease, if not previously approved by the state board. Therefore the removal of the relator on April 11, 1898, because effected under regulations at the time not affected by the amending act of 1898, was valid. This ground is also covered by the discussion in

the Leet and Terry Cases, *supra*. I think that the order of the appellate division should be affirmed, with costs.

O'BRIEN, J., concurs.

All concur (PARKER, C. J., in result) with BARTLETT, J., for reversal, except GRAY and O'BRIEN, JJ., who file dissenting memorandum. Order reversed, etc.

(158 N. Y. 221)

PEOPLE *ex rel.* BAIRD *et al.* v. NIXON *et al.*

(Court of Appeals of New York. Feb. 28, 1899.)

MUNICIPAL CORPORATIONS—BRIDGE COMMISSIONERS—REMOVAL BY MAYOR.

1. Laws 1895, c. 789, as amended by Laws 1896, c. 612, providing for the construction of a bridge between New York and Brooklyn, authorized the mayor of each city to appoint three persons, who, with the mayors, were to constitute commissioners to control the construction of the bridge. They were to take possession of real estate in the name of the two cities, the cost of construction was to be paid equally by the two cities, and control of the bridge, when completed, was to be vested in the commissioners and their successors. The public officers' law (Laws 1892, c. 681) provides that the term "local officer" includes every officer limited in execution of his functions to a portion only of the state. *Held*, that the commissioners were local, and not state, officers.

2. Greater New York Charter, § 95, authorizes the mayor to remove any officer holding by appointment from the mayor, with certain exceptions. *Held*, that the mayor had power to remove the bridge commissioners.

3. Greater New York Charter, § 95, providing that, within six months after commencement of his term, the mayor, elected for a full term, may remove any public officer holding by appointment from the mayor, with certain exceptions, authorizes the first mayor to remove the officers indicated within the time stated.

4. The commissioners appointed under Laws 1895, c. 789, by the mayors of New York and Brooklyn, for the control of the construction and maintenance of the bridge between the two cities, are not subordinate officers, within the meaning of the veterans' act.

Appeal from supreme court, appellate division, Second department.

Quo warranto by the people, on the relation of Andrew D. Baird and others, against Lewis Nixon and others, to oust respondents from, and restore relators to, the office of bridge commissioners of the city of New York. From a judgment of the appellate division setting aside a verdict directed for plaintiff, and dismissing the complaint (53 N. Y. Supp. 230), relators appeal. Affirmed.

H. C. M. Ingraham, for appellants. William C. Trull, for respondents.

BARTLETT, J. This action is in the nature of a quo warranto, to oust the defendants from, and restore the relators to, the office of bridge commissioners, held by them prior to their removal by the mayor of the city of New York on January 19, 1898. The

only question presented upon this appeal is as to the power of the mayor of the city of New York to remove the relators and appoint the defendants. The power of the mayor to make this removal and appointment is based mainly on section 95 of the charter of Greater New York, which reads: "At any time within six months after the commencement of his term of office the mayor, elected for a full term, may, whenever in his judgment the public interests shall so require, remove from office any public officer holding office by appointment from the mayor, except members of the board of education and school boards, and except also judicial officers for whose removal other provision is made by the constitution."

In order to clearly apprehend the question presented, it is necessary to examine with some care the acts of the legislature under which the bridge commissioners were appointed, and from which they derive their powers. The first act is chapter 789 of the Laws of 1895, entitled "An act to authorize the construction of a bridge over the East river between the cities of New York and Brooklyn." This act provides for the construction of a suspension bridge over the East river, between the cities of New York and Brooklyn, from at or near the foot of Broadway, in the city of Brooklyn, to at or near the foot of Grand street, in the city of New York. The first section provides that, immediately after the passage of the act, the mayor of the city of New York shall appoint three persons, and the mayor of the city of Brooklyn shall appoint three persons, who, with the mayors of said cities, respectively, shall constitute a commission for the purposes of the act. Section 3 provides for the adoption of plans, etc., necessary and convenient to establish the objects contemplated. The commissioners may enter upon such real estate, sites, and locations selected, and take possession of the same in the joint names of the city of New York and the city of Brooklyn. The act further provides that the title to all such real estate or interest therein shall be taken to and in the name of the trustees of the New York and Brooklyn Bridge. Sections 3, 4, and 5 contain a variety of details not necessary to be considered at this time. Section 6 enacts that the cost of construction and the compensation of the commissioners shall be borne in equal shares by the city of New York and the city of Brooklyn; also, that the commissioners, except the mayors of the respective cities, shall receive for their services \$3,000 per annum. It is to be observed in this connection that the mayors of the two cities, under the provisions of section 1, are excluded from the privilege of holding the offices of secretary and treasurer. This provision, taken in connection with the one just quoted in reference to the mayors not being entitled to salaries, would seem to indicate that their presence upon the commis-

sion is purely *ex officio*. Section 7 provides that when the work shall be completed, the accounts filed, and all payments made, the bridge shall become a public highway for the purpose of rendering travel between the city of New York and the city of Brooklyn safe and certain at all times, and the care, management, and control thereof shall be vested in the trustees of the New York and Brooklyn Bridge, who shall possess, in relation thereto, like powers as are vested in them in relation to the New York and Brooklyn Bridge. The following year the legislature amended this law in several important particulars by chapter 612 of the Laws of 1896. By section 1 it amended section 3 of the act of 1895 by repealing the provision that title to real estate or interest therein should be taken in the name of the trustees of the New York and Brooklyn Bridge, and providing that such title be taken to and in the corporate name of the cities of New York and Brooklyn as joint tenants. Section 4 of the act amended section 7 of the act of 1895 by repealing the provision that the bridge, when completed, should pass under the management and control of the trustees of the New York and Brooklyn Bridge, and providing that "the care, management, and control thereof shall be vested in the commissioners and their successors, who shall possess, in relation thereto, like powers as are at the time of the passage of this act vested in the trustees of the New York and Brooklyn Bridge, unless the legislature shall otherwise provide therefor."

It will be observed that, under the act of 1896, the commissioners, upon the completion of their work, were to turn the bridge over to an independent management and control, while under the act of 1896 they are to continue in the care and management of the completed structure. In the one case their tenure of office was limited to the completion of the bridge, while in the other its duration is indefinite. We have here a commission that is indeed created by the legislature, and two of its members—the mayors of the respective cities—are named in the act, but the balance of the board are appointed, three each, by the mayors respectively, for the discharge of duties clearly pertaining to a city purpose, and the performance of functions limited in their execution to a portion, only, of the state. The fact that on the 1st of January, 1898, the charter of Greater New York went into effect, and the municipal corporation known as the "City of Brooklyn" ceased to exist, does not alter the local situation. The proposed bridge structure, instead of connecting two independent municipalities, was on and after that date destined to become a public highway between different portions of one municipality known as the "City of New York"; but the scheme of erecting the bridge was none the less a city purpose, and the commissioners to carry the legislative provisions into effect

were clearly local officials, under article 1, § 2, of the public officers' law (Laws 1892, c. 681), where state and local officers are thus defined: "The term state officer includes every officer for whom all the electors of the state are entitled to vote, * * * and every officer, appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political subdivision of the state, except United States senators, members of congress, and electors for president and vice-president of the United States. The term local officer includes every other officer who is elected by the electors of a portion only of the state, every officer of a political subdivision or municipal corporation of the state, and every officer limited in the execution of his official functions to a portion only of the state. * * *"

The contention of the learned counsel for the relators is that the authority given by the act of 1895 to the mayors to appoint commissioners was given to them as state agents, and not as city officers, and was to be exercised by them immediately, and to be exhausted as soon as exercised; also, that, whatever power was given to these mayors by the amending act of 1896 was to fill vacancies, and not to make vacancies, and, if such power has survived the consolidation of the cities, it has passed under the public officers' law (section 6) to the governor of the state, and not, either by statute or implication of law, to the mayor of the new city. The learned counsel for the relators has argued these propositions at great length, both at the bar and in an able and interesting brief, but we are so convinced that these commissioners are municipal officers, under the provisions of the statutes already quoted, that we do not feel called upon to deal with his argument in detail. There are many minor provisions of the acts of 1895 and 1896 that render this conclusion inevitable. We have already pointed out that the cities took title to the real estate and paid the salaries of the commissioners, but there are further provisions that are pertinent. The commissioners must present a monthly statement of receipts and expenditures to the mayors; they are to file all plans with the commissioner of public works of the two cities, respectively; the commissioners of the land office of the state are authorized to convey to the city such land under water as is needed wherever it is property of the state; in the purchase of a charter of another corporation, necessary in the prosecution of the work, it must be with the express consent of the mayors and comptrollers, and the purchase money is to be provided by the two cities; the cost of the bridge is a city charge, and no money can be paid on account thereof except as the mayors approve. There are many other minor provisions that might be referred to, in these and other acts, not di-

rectly involved in this litigation, that show beyond all question the municipal character of these commissioners.

The counsel for the relators argues that, whatever authority to remove officers may be contained in the charter of Greater New York (section 95), it does not refer to the first mayor of the consolidated cities, but only to appointees of the first mayor, who may be removed by his successor in office. We are unable to adopt his view, as this court has already decided that the section in question does confer upon the mayor of the city of New York the power to remove the officers therein indicated during the first six months of his term. *People v. Feitner*, 30 App. Div. 241, 51 N. Y. Supp. 1094, affirmed on opinion below, 156 N. Y. 694, 51 N. E. 1093; *People ex rel. Jacobus v. Van Wyck*, 157 N. Y. 495, 52 N. E. 559. In the *Feitner* Case the relator, removed by the mayor, was an assessor appointed by the mayor of the city of Brooklyn. In the *Jacobus* Case the relator was an assessor appointed by the mayor of the former city of New York. These removals were both sustained under the provisions of section 95 of the charter of Greater New York.

The counsel for the relators further insists that the action of the mayor in regard to the commissioners is void, because the relator *Baird* was a veteran of the late Civil War. This point is also disposed of by the recent decisions of this court. In *People v. Morton*, 148 N. Y. 156, 42 N. E. 538, Chief Judge Andrews said, at page 162, 148 N. Y., and page 539, 42 N. E., commenting on the veterans' act: "It is apparent that the legislation culminating in the act of 1894 has nothing primarily to do with what is called the 'civil service system.' It was intended to create a privileged class, entitled to preferential employment in subordinate positions in the public service. * * * The act applies to employes of every grade in the public service, or on the public works of the state and the cities, towns, and villages thereof." The position of bridge commissioners is not a subordinate position contemplated by the veterans' act. *People ex rel. Jacobus v. Van Wyck*, 157 N. Y. 495, 52 N. E. 559.

If a further authority is needed, outside of the very explicit provisions of the acts of 1895 and 1896, as to the duties and functions of the bridge commissioners being purely municipal in character, it is to be found in cases construing the powers and liabilities of the trustees of the New York and Brooklyn Bridge. In the case of *Walsh v. Trustees*, 96 N. Y. 427, the plaintiff sought to recover damages for personal injuries sustained by him. Upon a demurrer to the complaint, this court held that after the legislation which extinguished the old bridge corporation, and vested all its property in the two cities, the board of trustees were merely agents for, and representatives of, the two cities, and

as such they were entitled to the immunities of public agents, and therefore an action would not lie against them for personal injuries. The plaintiff, *Walsh*, afterwards recovered a verdict in another action brought against the two cities. 107 N. Y. 220, 13 N. E. 911. In the case at bar the relators occupy a position not to be distinguished from the present trustees of the New York and Brooklyn Bridge. See, also, as to the bridge being a city purpose, *People v. Kelly*, 76 N. Y. 475.

In the view that we entertain of this case it is unnecessary to examine the further point taken by the defendants' counsel, that the mayor has power to remove the relators under article 10, § 3, of the constitution, which reads: "When the duration of any office is not provided by this constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment." Counsel have submitted an elaborate argument on this point, but we prefer to rest this decision upon the powers conferred on the mayor of the city of New York by section 95 of the charter of the greater city.

The judgment of the appellate division should be affirmed, with costs. All concur. Judgment affirmed.

(158 N. Y. 204)

PEOPLE ex rel. TATE v. DALTON,
Commissioner.

(Court of Appeals of New York. Feb. 28, 1899.)

GREATER NEW YORK CHARTER—VETERANS' ACTS
—CONSTRUCTION—REMOVAL OF OFFICERS—RE-
INSTATEMENT—MANDAMUS—WATER DEPARTMENT
—CONFIDENTIAL POSITIONS.

1. Greater New York Charter, § 1536 (Laws 1897, c. 378), requires subordinate employes of each component municipal corporation to be assigned as near as may be to the same service under the new city. *Held*, that where the water registrar of the city of Brooklyn was transferred to the water department of the new city, being assigned to duty as a clerk in the branch office for the borough of Brooklyn, he became an employe of the new city.

2. Laws 1887, c. 708, a local act applying to the city of Brooklyn, prohibited removal of veterans from office except for cause shown on hearing, and was incorporated by Laws 1888, c. 588, into the city charter. Laws 1887, c. 464, amending Laws 1884, c. 312, and applying to all cities, including Brooklyn, required that veterans be preferred in appointment to office. Act 1884, c. 312, was amended by Laws 1894, c. 716, which latter act was amended by Laws 1896, c. 821, limiting the power of removal of veterans to incompetency or misconduct shown on hearing, but excepting veterans holding a confidential position, and repealing all inconsistent acts. By Greater New York Charter, § 1615, Brooklyn ceased to exist as a corporation, and became a part of New York. *Held*, that Laws 1894, c. 716, was intended to supersede Laws 1887, c. 708, and that, with the consolidation of Brooklyn with New York, the former's charter disappeared, leaving Laws 1894, c. 716, as amended, in force and applicable to the new city.

3. After the passage of the local act, and be-

fore it was incorporated into Brooklyn's charter, as above stated, Laws 1888, c. 119, was passed, applying to all cities, and prohibiting removal of veterans except for cause shown, but excepting persons holding a confidential position. *Held*, that the fact that the local act was incorporated into the charter after the general act was passed indicated an intent that the latter was not to apply to Brooklyn; nevertheless the general act (Laws 1888, c. 119), which was amended by Laws 1890, c. 67, Laws 1892, c. 577, and Laws 1898, c. 184, was in force and applicable to Greater New York after the consolidation.

4. Under Laws 1896, c. 821, requiring preference to veterans in appointment to municipal offices, and prohibiting removal except for incompetency or misconduct, and providing that a refusal to allow the preference shall be deemed a misdemeanor, and that the veteran shall have a remedy by mandamus for righting the wrong, a veteran wrongfully removed is entitled to mandamus to compel his reinstatement.

5. Greater New York Charter, § 456, provides that the water commissioner may appoint the necessary subordinates in his main office, and that a deputy commissioner shall, subject to the commissioner's approval, appoint subordinates in his department for his borough. Section 1536 requires persons occupying positions in any of the component cities to be assigned to similar positions under the new city, and provides that every officer given power to appoint subordinates may remove any person assigned to service under him. *Held*, that the water commissioner had no power to remove a subordinate assigned to the branch department for a borough, and such subordinate did not hold a confidential position to the commissioner.

6. Greater New York Charter, §§ 451, 452, 456, authorize the water commissioner to locate branch offices in boroughs and appoint deputy commissioners therefor, who are given power to appoint and remove subordinates. *Held* that, in mandamus by a subordinate in a branch office to compel the commissioner to reinstate him, it would be assumed that a deputy for such branch office had been appointed and was in charge.

7. Mandamus will not issue to compel the water commissioner of Greater New York to reinstate a subordinate in a branch office of the department, where he was removed by the commissioner, who, however, had no authority to appoint or remove such subordinate, and hence no authority to reinstate him.

Appeal from supreme court, appellate division, Second department.

Motion by the people, on the relation of Augustus C. Tate, against William Dalton, commissioner of water supply, for a peremptory writ of mandamus to compel respondent to reinstate relator as water registrar for the borough of Brooklyn. An order denying the writ was affirmed by the appellate division (53 N. Y. Supp. 1060), and relator appeals. Affirmed.

Joseph A. Burr, for appellant. William J. Carr, for respondent.

HAIGHT, J. The relator is an honorably discharged soldier of the Union army in the late war of the Rebellion, and the respondent, since the 2d day of January, 1898, has been the commissioner of water supply of New York. On the 1st day of February, 1894, the relator was appointed by the commissioner of city works of the city of Brooklyn to the position of water registrar in that city, at a

salary of \$4,000 per year. He continued in that position until the 1st day of January, 1898, at which time he was transferred into the department of the commission of water supply in the city of New York, and assigned to duty as a clerk in the branch office of that department located in the borough of Brooklyn. The duties which he was required to perform were substantially the same as those performed by him as water registrar under the charter of the city of Brooklyn. He continued in the latter position until the 7th day of April, 1898, at which time he was removed by the respondent, the commissioner of water supply. He then moved, upon an order to show cause, for a peremptory writ of mandamus to compel his reinstatement.

It becomes important, in the first place, to ascertain what statutes are in force under which the rights of the relator are to be determined. He was transferred into the department of water supply of the city of New York, pursuant to the provisions of section 1536 of chapter 378 of the Laws of 1897, known as the "Greater New York Charter." Under the provisions of that section, all of the subordinate employes in every branch of the public service in each of the municipal corporations consolidated by the provisions of the charter were, so far as practicable, required to be assigned as nearly as may be to perform the same service and in the same part of the city, and to hold the same relative rank or position in the greater city, as the individual had performed and held previous to the consolidation of the municipal corporations. The heads of every department, however, and every other officer given power by the provisions of the act to appoint and remove subordinates, were given the power, at any time after assuming office, to remove any person assigned to service under him. It is thus apparent that, under the provisions of this act, the relator, after the 1st day of January, 1898, became an employe of the city of New York, and that his position of registrar of the city of Brooklyn at that time ceased and determined.

Under chapter 708 of the Laws of 1887, "all persons holding position in the city of Brooklyn, or county of Kings, receiving salary from said city and county treasury, who shall be an honorably discharged soldier or sailor of the late war of the Rebellion, shall not be removed from such position, except for good cause shown, after a hearing had." The provisions of this act were incorporated into the charter of the city of Brooklyn. Laws 1888, c. 583. In the laws of the same year (chapter 119), a similar statute was passed applying to all of the cities and counties of the state, but containing the provision that it should not apply to persons holding a confidential relation to the appointing officer. This chapter was amended in 1890 (chapter 67), and again in 1892 (chapter 577), in particulars which it is not necessary now to consider. The provisions of this act, though

general and in terms applying to all of the cities of the state, are in conflict with the provisions of the local act applying to the city of Brooklyn, in this: That under the local act no veteran could be removed without a cause shown, after a hearing had, even though he occupied a confidential relation to the appointing officer, while under the general act, if the person occupied such a relation, he could be removed without cause shown or a hearing had; and the fact that the local act was incorporated into the charter of the city of Brooklyn after the adoption of the general act of 1896 (chapter 119) indicated, as has been held below, a legislative intent that the provisions of the general act were not intended to apply to the city of Brooklyn. At the time of the adoption of these acts there were other statutes in force with reference to veterans, which it now becomes important to consider. By chapter 312 of the Laws of 1884, it was provided that, "in every public department and upon all public works of the state of New York, honorably discharged Union soldiers and sailors shall be preferred for appointment and employment. Age, loss of limb or other physical impairment, which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the other requisite qualifications." In 1887 (chapter 464) this act was amended so as to apply to all the cities, towns, and villages in the state. It will be observed that this act was adopted prior to chapter 708 of the Laws of 1887, and that it applied to the city of Brooklyn as well as the other cities of the state. It was not in conflict with the provisions of the later and the local act, for the reason that that pertained to the removal of veterans, and the provisions of this act had reference to the preferring of them for appointment. The provisions of this act were amended in 1894 (chapter 716), in which the power of removal was limited to incompetency, and conduct inconsistent with the position held by the employé or appointee, but the provisions of the act were not to apply to persons holding a strictly confidential position, and all laws or parts of laws inconsistent with the provisions of this law were repealed. This act was again amended in 1896 (chapter 821), in which the power of removal was limited to incompetency or misconduct shown, after a hearing, upon due notice, upon the charge made, again repealing all acts or parts of acts inconsistent with the provisions of this act.

It will thus be seen that the amendment of the general act in 1894 places a limitation upon the power of removal to incompetency and conduct inconsistent with the position held. This we do not think is in conflict with the provisions of the general act of 1888 (chapter 119), or of the local Brooklyn act. Those acts, it will be observed, limited removals to cause shown after hearing had, but do not specify what shall constitute cause. This act supplies that defect, and specifies incompeten-

cy and conduct inconsistent with the position held. It does not, however, apply to persons holding a strictly confidential position.

It is not our purpose or desire to in any wise limit or impair the rule that a general act of the legislature will not be deemed to repeal a local act unless it be so expressly stated or the legislative intention so to do is apparent; but here we have a general act, applying to the city of Brooklyn as well as to all of the cities of the state, amended by limiting the power of removal of soldiers in the late war of the Rebellion to causes specified, which, in substance, embrace all of the provisions included in the Brooklyn act, and are in harmony with it, containing the provision that it shall not apply to a person holding a strictly confidential position.

These facts, taken in connection with the express provision of the act that "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed," indicate to our mind a legislative intent that the provisions of the local act should be superseded by that of the general act covering the same subject. This, however, is not all. The provisions of the general act applied to the city of New York before the Greater New York charter went into force. Under the provisions of that charter, the city of Brooklyn was consolidated with, and became a part of, the city of New York, and, under section 1615 of the act, the corporation itself ceased to exist, and all of the offices forming a part of its local government were abolished. We no longer have a city of Brooklyn, or officers or employes thereof. The effect of the consolidation was to wipe out its old charter, and substitute in its place the charter of the Greater New York. With the departure of the old charter there disappeared whatever remained of the local veterans' act, and in place of it there came into force the provisions of the statute applicable to the Greater New York. By section 124 of the act, honorably discharged soldiers and sailors in the army and navy of the United States in the late Civil War shall be entitled to preference in appointment and promotion from any list from which an appointment or promotion is to be made, without regard to their standing on such list. By section 127, all veterans, either of the army or navy, in the service of either of the municipal corporations consolidated by the provisions of the act, shall be retained in like positions, and under the same conditions, by the greater city. Chapter 119 of 1888 was again amended in 1896 (chapter 184), after the Greater New York charter went into effect, retaining the provision with reference to confidential positions, and that act now applies to the Greater New York, even assuming that, prior to the last amendment, it did not apply to the city of Brooklyn. The Laws of 1884, as amended by chapter 716 of the Laws of 1894, and as amended by chapter 821 of the Laws of 1896, also apply and are in force in the Greater New York. Under these statutes, veterans in office

at the time of the consolidation of the cities are entitled to be retained in like positions and under the same conditions. At the time the charter went into effect they could not be removed except for incompetency or misconduct shown after a hearing, upon due notice, upon charge made, unless the person removed was a private secretary or deputy of an official or department, or a person holding a strictly confidential position.

The motion for a mandamus in this case was opposed upon the ground that relator occupied a strictly confidential position to the respondent. The appellate division refused to consider this question, and held that the remedy of the relator was not by mandamus, but that he must resort to an action in the nature of a quo warranto. 34 App. Div. 6, 53 N. Y. Supp. 1060, citing *People ex rel. Wren v. Goetting*, 133 N. Y. 569, 30 N. E. 968. The decision in the *Wren Case* was rendered in April, 1892. At that time no remedy by mandamus had been given by any express provision of the veteran statute. In 1894 it was given inferentially, and in 1896 it was expressly provided that a veteran improperly removed should have "a remedy by mandamus for righting the wrong." This provision of the statute seems to be a complete answer to the position taken by the appellate division.

The question then arises as to whether the relator occupies a strictly confidential position. It may be that he does to the deputy commissioner of the borough of Brooklyn, but we think not to the respondent in these proceedings. The relator's position is one of trust and confidence, and he has the handling of money in considerable sums. While these proceedings are not based upon the civil service statutes, those statutes furnish a guide, which we think may be safely followed, in determining whether the relator's position is confidential. In that statute (Laws 1864, c. 410, § 8), it is provided that "officers elected by the people and the subordinates of any such officer for whose errors or violation of duty such officer is financially responsible, * * * and any subordinate officer who by virtue of his office has personal custody of public moneys or public securities, for the safe-keeping of which the head of an office is under official bonds, shall not be subject to the regulations prescribed pursuant to this section." In other words, such subordinates were deemed to occupy confidential relations to the appointing officer, and were not subject to the civil service regulations. But the record does not satisfy us that the commissioner is financially responsible for the acts of the relator. Ordinarily, the head of a department is only responsible for the action of his subordinate when he has the power to appoint and remove. The commissioner has no power to appoint a person to fill the position occupied by the relator or to remove an occupant therefrom. That power is given to another. He may "appoint such clerks and subordinates as may, in his judgment, be necessary in his main

office, and may fix and regulate their salaries, within the limits of the appropriation duly made therefor. A deputy commissioner in charge of a branch office of a department shall, subject to the approval of the head of his department, appoint such clerks and subordinates of his department, in and for his borough, as may in his judgment be necessary, and fix and regulate their salaries, within the limits of the appropriation duly made therefor." Greater New York Charter, § 456. The position occupied by the relator, as we have seen, was under the deputy commissioner of the branch office within the borough of Brooklyn, and his position can only be filled by an appointment from that officer to whom the appointee is directly responsible. It is true that the appointment must be with the approval of the commissioner, but this does not invest him with the power to appoint or to make him responsible for the acts of the appointee. *People v. Hyde*, 89 N. Y. 11. Under section 1536 of the act, "the head of every department, and every other officer by this act given power to appoint, remove and fix and regulate the salaries of his subordinates, appointees and employees shall have power, upon assuming office, or at any time thereafter, to remove any person assigned to service under him." The commissioner is the head of the department, but his power to remove under this provision is limited to the cases in which he is given the power to appoint, and, if he is not given the power to appoint, he does not possess the power to remove. The above provision has reference to cases in which the statute interposes no other limitation upon the power of removal. In the case of veterans other limitations are imposed by section 127 of the act, and in removing them from their positions the officer must conform to the provisions of the statute to which we have called attention. Our conclusion is that the relator was not a confidential servant or appointee of the commissioner, and that he had no power to remove him.

The point is made that the record does not show that there was a deputy commissioner in charge of the Brooklyn office. The statute requires that the main office of the department shall be located in the borough of Manhattan, and that branch offices may be located within such other boroughs as may be deemed advisable by the commissioner, who is authorized to appoint one or more deputy commissioners, one of whom shall be located at the main office of such department, and there may be a deputy in each borough in which is located a branch office. To the deputy commissioner in charge of the branch office is given the power to appoint such clerks and subordinates in his department as he may, in his judgment, deem necessary, with the approval of the commissioner. Greater New York Charter, §§ 451, 452, 456. The record does disclose the fact that the commissioner of water supply did establish a branch office in the borough of Brook-

lyn, and that the duties and services of the relator were rendered and performed in that office. The commissioner, in establishing a branch office in the borough of Brooklyn, of necessity must have placed it in charge of some officer. The officer designated by the statute for the care of such an office is a deputy commissioner. We think we may assume, therefore, that such an officer was in charge of the office.

The Speight Case, 157 N. Y. 676, 51 N. E. 1093, as the record stands, differs from this case in a material point. In that case we held that it did not appear from the record that the position was strictly confidential, within the meaning of the statute. Speight was the collector of fees of the Wallabout market. Under the charter, the comptroller was required to establish in his department five bureaus, one of which was to be known as the "Bureau for the Collection of the City Revenue of Markets," the chief officers of which were to be the collector and a superintendent of markets. Speight was the collector. He filled an office which was created by the statute, and, under the ordinances of the city passed January 3, 1898, was required to give a bond to the city for the faithful discharge of the duties of his office. He was not a mere clerk or subordinate of an officer, but was himself a chief officer, the head of a bureau. So far as we could gather from the record in that case, it did not appear that the comptroller was financially responsible for the action of Speight, any more than the mayor would be financially responsible for the heads of departments which the charter requires him to fill by appointment.

The deputy commissioner of the borough of Brooklyn has not, so far as the record discloses, ever removed the relator from his position. The action of the commissioner, being unauthorized, must be treated as void and a nullity, and the relator still entitled to his position. But the commissioner, not having the power to appoint or to remove, has no power to reinstate, and for this reason a mandamus will not issue commanding him to do that which he has not the power to perform. The order of the appellate division should be affirmed; but, inasmuch as the questions herein considered are new and were not discussed below, we think the affirmance should be without costs. All concur. Order affirmed.

MEMORANDUM DECISIONS.

ANDREWS et al., Appellants, v. McNAMARA et al., Respondents. (Court of Appeals of New York. Jan. 31, 1899.) John Andrews, Jr., in pro. per. Alfred E. Mudge, William J. Carr, and John Whalen, for respondents. No opinion. Judgment affirmed, with costs. All concur.

BARR, Respondent, v. FISH et al., Appellants. (Court of Appeals of New York. Dec. 6, 1898.) Motion to dismiss an appeal, by permission, from a judgment of the late general term of the supreme court in the Fifth judicial department, entered July 13, 1895 (87 Hun. 522, 34 N. Y. Supp. 489), affirming a judgment in favor of plaintiff, entered upon a verdict rendered at the Monroe county court, and affirming an order denying a motion for a new trial. The motion was made upon the ground that no question of law was involved which could be reviewed by the court of appeals. John A. Collier Wright, for the motion. Frederick A. Mann, opposed. No opinion. Motion denied, with costs.

BECK, Appellant, v. BOARD OF SUP'RS OF ERIE COUNTY, Respondent. (Court of Appeals of New York. Jan. 17, 1899.) No opinion. Motion for reargument denied, with \$10 costs. See 157 N. Y. 151, 52 N. E. 5.

In re BOARD OF STREET OPENING & IMPROVEMENT OF CITY OF NEW YORK. (Court of Appeals of New York. Jan. 24, 1899.) Edward F. O'Dwyer, for appellants. Theodore Connolly and John P. Dunn, for respondent. No opinion. Appeal dismissed, on the ground that the order is not a final order in a special proceeding, with costs. All concur. See 33 App. Div. 137, 53 N. Y. Supp. 354.

BOYER et al., Appellants, v. EAST et al., Respondents. (Court of Appeals of New York. Feb. 3, 1899.) Motion to prefer, under section 791 of the Code of Civil Procedure, an appeal from a judgment of the appellate division of the supreme court in the Fourth judicial department, entered February 18, 1898 (25 App. Div. 625, 49 N. Y. Supp. 1132), affirming a judgment in favor of the defendants, entered upon a decision of the court dismissing the complaint on trial at special term. Hubbell & McGuire, for the motion. No opinion. Motion granted, and case given preference upon the next calendar of the court to be made April 17, 1899, under subdivision 10 of section 791 of the Code of Civil Procedure.

BUFFALO CEMENT CO., Limited, Appellant, v. McNAUGHTON et al., Respondents. (Court of Appeals of New York. Dec. 6, 1898.) No opinion. Motion for reargument denied, with \$10 costs. See 156 N. Y. 702, 51 N. E. 1089.

BUSHWICK SAV. BANK v. TRAUM et al. (Court of Appeals of New York. Jan. 24, 1899.) William L. Mathot, for appellants. J. Stewart Ross, for respondent. No opinion. Order affirmed, with costs, on opinion below. 26 App. Div. 532, 50 N. Y. Supp. 542. All concur, except PARKER, C. J., and BARTLETT, J., dissenting.

CAMACHO. Appellant, v. HAMILTON BANK-NOTE ENGRAVING & PRINTING CO., Respondent. (Court of Appeals of New York. Jan. 17, 1899.) Motion to dismiss an appeal from a judgment of the appellate division of the supreme court in the First judicial department, entered May 7, 1897 (2 App. Div. 369, 37 N. Y. Supp. 725), affirming a judgment of the late court of common pleas for the city and county of New York in favor of defendant, entered upon a decision of the court at a trial term dismissing the complaint upon the merits. The action was originally brought in the Second judicial district court of the city

of New York, and by order was removed to the late court of common pleas. The motion was made upon the ground that the action was commenced in a district court of New York City, and the necessary certificate and order have not been made, and cannot now be made, by the appellate division. William L. Turner, for the motion. Eustace Conway, opposed. No opinion. Motion granted, and appeal dismissed, with costs and \$10 costs of motion, on authority of *Sidwell v. Greig*, 157 N. Y. 30, 51 N. E. 287.

CONNOLLY, Respondent, v. CENTRAL VT. R. CO., Appellant. (Court of Appeals of New York. Jan. 31, 1899.) Louis Hasbrouck, for appellant. J. A. Smith, for respondent. No opinion. Judgment and order affirmed, with costs. All concur, except GRAY, J., dissenting. See 4 App. Div. 221, 38 N. Y. Supp. 587.

CURTISS, Appellant, v. MOTT, Respondent. (Court of Appeals of New York. Jan. 18, 1899.) George J. Kilgen and John R. Tressider, for appellant. Lemuel Skidmore, for respondent. No opinion. Appeal dismissed on argument, with costs. See 90 Hun, 439, 35 N. Y. Supp. 983.

DRAKE et al., Respondents, v. VILLAGE OF PORT RICHMOND, Appellant. (Court of Appeals of New York. Dec. 13, 1898.) Almet F. Jenks, for appellant. Benjamin Estes, for respondents. No opinion. Judgment affirmed, with costs, on opinion below. 1 App. Div. 243, 37 N. Y. Supp. 191. All concur, except GRAY, J., absent.

In re EDGERTON'S ESTATE. (Court of Appeals of New York. Jan. 31, 1899.) Emmet R. Olcott, for appellant. William B. Hornblower, Howard A. Taylor, and Lewis B. Woodruff, for respondents. No opinion. Order affirmed, with costs. All concur. See 35 App. Div. 125, 54 N. Y. Supp. 700.

EDWARDS, Appellant, v. NIAGARA FIRE INS. CO. OF CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Dec. 13, 1898.) Marcus T. Hun, for appellant. Franklin M. Danaher, for respondent. No opinion. Judgment affirmed, with costs. See 91 Hun, 637, 36 N. Y. Supp. 1124. All concur, except GRAY, J., absent.

In re FALES. (Court of Appeals of New York. Dec. 6, 1898.) Hector M. Hitchings, for appellant. J. Alexander Koonen, for respondent. Orders affirmed, with costs. No opinion. See 33 App. Div. 611, 53 N. Y. Supp. 1046. All concur, except GRAY, J., absent.

FRENCH, Appellant, v. SEAMANS, Respondent. (Court of Appeals of New York. Dec. 6, 1898.) John F. Little, for appellant. John F. Parkhurst, for respondent. No opinion. Appeal dismissed, with costs, on Van Arsdale v. King, 155 N. Y. 325, 49 N. E. 866. All concur, except GRAY, J., absent. See 27 App. Div. 612, 50 N. Y. Supp. 776.

In re GIBSON'S WILL. (Court of Appeals of New York. Dec. 6, 1898.) Motion to amend remittitur by inserting, after the words "with costs," the following words: "To each respondent appearing in this court by separate attorneys, to be paid by the appellant." See 157 N. Y. —, 51 N. E. 1000. No opinion. Motion granted.

In re GRISCOM. (Court of Appeals of New York. Dec. 13, 1898.) Rudolf Dulon, for appellant. Charles M. Hough, for respondent. No opinion. Appeal dismissed, with costs. See 28 App. Div. 72, 50 N. Y. Supp. 893. All concur, except GRAY, J., absent.

HIRSHFELD, Respondent, v. FITZGERALD et al., Appellants. (Court of Appeals of New York. Dec. 16, 1898.) Motion for reargument denied, and motion to amend remittitur so as to read "without costs to either party" granted. See 157 N. Y. 166, 51 N. E. 997.

HUTCHINSON, Respondent, v. ROOT, Appellant. (Court of Appeals of New York. Feb. 3, 1899.) George H. Adams, for appellant. William R. Wilder and Frederic D. Phillips, for respondent. No opinion. Judgment affirmed, with costs, on opinion below. 2 App. Div. 584, 38 N. Y. Supp. 16. All concur.

IASIGI, Respondent, v. ROSENSTEIN, Appellant. (Court of Appeals of New York. Feb. 3, 1899.) H. Aplington, for appellant. Joseph Kling and Coudert Bros., for respondent. No opinion. Judgment and order affirmed, with costs, on opinion below. 3 App. Div. 500, 38 N. Y. Supp. 354. All concur.

JONES, Respondent, v. ROCHESTER GAS & ELECTRIC CO., Appellant. (Court of Appeals of New York. Feb. 3, 1899.) Albert H. Harris, for appellant. W. Martin Jones, in pro. per. No opinion. Judgment and order affirmed, with costs, on opinion below. 7 App. Div. 474, 39 N. Y. Supp. 1110. All concur.

JONES, Respondent, v. TOWN OF TONAWANDA et al., Appellants. (Court of Appeals of New York. Jan. 24, 1899.) Motion to place on the calendar and prefer an appeal from a judgment of the appellate division of the supreme court in the Fourth judicial department, entered December 19, 1898 (35 App. Div. 151, 55 N. Y. Supp. 115), affirming a judgment in favor of plaintiff, entered upon the report of a referee. The motion was made upon the ground that the questions involved are of public importance, and that the speedy hearing of the appeal will prevent numerous litigations. John Cunneen, for the motion. No opinion. Motion granted.

LEVY et al., Respondents, v. DEAN, Appellant. (Court of Appeals of New York. Jan. 31, 1899.) H. Aplington, for appellant. Meyer Auerbach and Henry L. Scheuerman, for respondents. No opinion. Judgment and order affirmed, with costs, on opinion below. 85 Hun, 289, 32 N. Y. Supp. 1023. All concur, except PARKER, C. J., not sitting.

McGUIRE, Respondent, v. HARTFORD FIRE INS. CO., Appellant. (Court of Appeals of New York. Feb. 3, 1899.) Horace McGuire, for appellant. George F. Decker, for respondent. No opinion. Judgment affirmed, with costs. All concur, except PARKER, C. J. and GRAY, J., dissenting. See 7 App. Div. 575, 40 N. Y. Supp. 300.

MATTLAGE, Respondent, v. NEW YORK EL. R. CO. et al., Appellants. (Court of Appeals of New York. Dec. 16, 1898.) Julien T. Davies, J. C. Thomson, and Charles A.

Gardiner, for appellants. Charles D. Ridgway, for respondent. No opinion. Order affirmed and judgment absolute ordered against the defendants on the stipulation, with costs, on opinion below. 14 Misc. Rep. 291, 35 N. Y. Supp. 704. All concur, except GRAY, J., absent.

In re MAYOR, ETC., OF CITY OF NEW YORK. (Court of Appeals of New York. Jan. 24, 1899.) Appeal, by permission, from an order of the appellate division of the supreme court in the First judicial department, entered October 19, 1898, affirming an order of special term taxing appellant's fees as a commissioner in a street opening proceeding. The question certified was as follows: "Does section 998, tit. 4, c. 17, of the Greater New York charter, take in connection with section 1448, c. 21, section 1608, and section 1614 of said charter, determine that the compensation of the commissioners in this proceeding, appointed in 1897, under the provisions of the consolidation act (chapter 410 of the Laws of 1882), shall be at the rate of six dollars per day for services rendered subsequent to January 1, 1898, instead of at the rate of ten dollars per day, as theretofore fixed by law?" Edward B. Whitney and Arthur Berry, for appellant. Theodore Connolly and John P. Dunn, for respondent. No opinion. Order affirmed, with costs, and the question certified answered in the affirmative, on opinion below. 33 App. Div. 865, 53 N. Y. Supp. 875. All concur.

MERRILL, Respondent, v. BLANCHARD, Appellant. (Court of Appeals of New York. Feb. 3, 1899.) Charles P. Rogers and William M. Safford, for appellant. Edward A. Hibbard and E. W. Tyler, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 7 App. Div. 167, 40 N. Y. Supp. 48.

MYERS et al., Respondents, v. BOLTON et al., Appellants. (Court of Appeals of New York. Jan. 17, 1899.) No opinion. Motion for reargument denied, with \$10 costs. See 157 N. Y. 393, 52 N. E. 114.

NEW YORK CENT. & H. R. R. CO., Respondent, v. DAVIS, Appellant. (Court of Appeals of New York. Jan. 31, 1899.) J. M. Stephens, for appellant. Albert H. Harris, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 86 Hun, 86, 34 N. Y. Supp. 206.

O'CONNOR, Appellant, v. WALDO et al., Respondents. (Court of Appeals of New York. Jan. 31, 1899.) John R. Abney and Charles E. O'Connor, for appellant. Charles E. Miller and Henry W. Goodrich, for respondents. No opinion. Order affirmed, and judgment absolute ordered for defendants, on the stipulation, with costs. All concur, except PARKER, C. J., not sitting. See 83 Hun, 489, 31 N. Y. Supp. 1105.

O'MALLEY, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Court of Appeals of New York. Jan. 31, 1899.) John T. Little, Jr., and Henry A. Robinson, for appellant. Charles J. Patterson, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 3 App. Div. 259, 38 N. Y. Supp. 456.

PALMER, Respondent, v. NEW YORK NEWS PUB. CO., Appellant. (Court of Ap-

peals of New York. Jan. 17, 1899.) Motion to dismiss an appeal from a judgment of the appellate division of the supreme court in the First judicial department, entered July 11, 1898 (31 App. Div. 210, 52 N. Y. Supp. 539), affirming a judgment in favor of plaintiff entered upon a verdict. The motion was made upon the grounds that the action was an action for damages for libel; that the decision of the appellate division was unanimous; and that no appeal has been allowed by the appellate division or by a judge of the court of appeals. Tracy, Boardman & Platt, for the motion. No opinion. Motion granted and appeal dismissed, with costs.

In re PALMER'S ESTATE. (Court of Appeals of New York. Jan. 24, 1899.) Emmet R. Olcott, for appellant. Lemuel Skidmore, for respondent. No opinion. Order affirmed, with costs, on opinion below. 33 App. Div. 307, 53 N. Y. Supp. 847. All concur, except VANN, J., not voting.

PEARL, Appellant, v. CITY OF MT. VERNON, Respondent. (Court of Appeals of New York. Feb. 3, 1899.) Joseph S. Wood, for appellant. William P. Fiero and William J. Marshall, for respondent. No opinion. Judgment and order affirmed, with costs. All concur. See 83 Hun, 250, 31 N. Y. Supp. 395.

PEOPLE ex rel. DANIELS, Appellant, v. KEARNY, Commissioner, Respondent. (Court of Appeals of New York. Jan. 24, 1899.) George F. Langbein, for appellant. Theodore Connolly, for respondent. No opinion. Order affirmed, and judgment absolute ordered for defendant on the stipulation, with costs. All concur. See 34 App. Div. 630, 55 N. Y. Supp. 1145.

PEOPLE ex rel. FULLER, Appellant, v. COLER, Comptroller, et al., Respondents. (Court of Appeals of New York. Jan. 24, 1899.) John McG. Goodale and William C. Wallace, for appellant. William J. Carr, for respondents. No opinion. Order affirmed, with costs, on opinion below. 33 App. Div. 617, 53 N. Y. Supp. 1090. All concur.

PEOPLE ex rel. INTERNATIONAL CONTRACTING CO., Appellant, v. ROBERTS, Comptroller, Respondent. (Court of Appeals of New York. Jan. 24, 1899.) John B. Green and Edmund L. Cole, for appellant. G. D. B. Hasbrouck and J. C. Davies, for respondent. No opinion. Judgment and order affirmed, with costs, on opinion below. 27 App. Div. 400, 50 N. Y. Supp. 302. All concur.

PEOPLE ex rel. PERCIVAL et al., Appellants, v. CRAM et al., Commissioners, Respondents. (Court of Appeals of New York. Jan. 24, 1899.) James M. Kerr, for appellants. Theodore Connolly, for respondents. No opinion. Judgment and order affirmed, with costs, on opinion below. 32 App. Div. 414, 53 N. Y. Supp. 110. All concur.

PEOPLE ex rel. WHITE, Appellant, v. YORK et al., Police Commissioners, Respondents. (Court of Appeals of New York. Jan. 31, 1899.) James C. Church, for appellant. William J. Carr and John Whalen, for respondents. No opinion. Order affirmed, with costs, on opinion below. 35 App. Div. 800, 55 N. Y. Supp. 10. All concur.

ROBERT, Appellant, v. BOARD OF SUPRS OF KINGS COUNTY et al., Respondents. (Court of Appeals of New York. Jan. 31, 1899.) Sidney V. Lowell, for appellant. William J. Carr and John Whalen, for respondents. No opinion. Judgment affirmed, with costs. All concur. See 3 App. Div. 368, 38 N. Y. Supp. 521.

RYAN et al., Appellants, v. PISTONE, Respondent. (Court of Appeals of New York. Dec. 6, 1898.) Ralph Hickox, for appellants. Raymond O. Haff, for respondent. No opinion. Order affirmed, and judgment absolute ordered against the plaintiffs on the stipulation, with costs, on opinion below. 89 Hun, 73, 85 N. Y. Supp. 81. All concur, except GRAY, J., absent.

SAGE et al., Respondents, v. SHEPARD & MORSE LUMBER CO., Appellant. (Court of Appeals of New York. Jan. 31, 1899.) Charles E. Patterson, for appellant. Hamilton Harris, for respondents. No opinion. Judgment affirmed, with costs, on opinion below. 4 App. Div. 290, 89 N. Y. Supp. 449. All concur.

SAGE et al., Respondents, v. WHEELER et al., Appellants. (Court of Appeals of New York. Feb. 3, 1899.) Hiram H. Ryel and Charles S. Mereness, for appellants. Lansing & Lansing, for respondents. No opinion. Order affirmed, and judgment absolute ordered for respondents on the stipulation, with costs. All concur, except MARTIN and VANN, JJ., not sitting. See 3 App. Div. 38, 87 N. Y. Supp. 1107.

SELPHO et al., Appellants, v. CITY OF BROOKLYN, Respondent. (Court of Appeals of New York. Jan. 31, 1899.) Sidney V. Lowell, for appellants. William J. Carr and John Whalen, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 5 App. Div. 529, 89 N. Y. Supp. 520.

SKELLY, Appellant, v. METROPOLITAN EL. RY. CO. et al., Respondents. (Court of Appeals of New York. Feb. 3, 1899.) Eugene D. Hawkins and Edward W. S. Johnston, for appellant. Sidney Smith, Julien T. Davies, and Charles A. Gardiner, for respondents. No opinion. Order affirmed, and judgment absolute ordered for defendants on the stipulation, with costs, on opinion below. 1 App. Div. 51, 87 N. Y. Supp. 7. All concur, except MARTIN and VANN, JJ., dissenting.

SMITH, Jr., Respondent, v. CROCKER et al., Appellants. (Court of Appeals of New York. Jan. 24, 1899.) Motion to dismiss an appeal from a judgment of the appellate division of the supreme court in the First judicial department, entered February 18, 1897 (14 App. Div. 245, 43 N. Y. Supp. 427), affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial. The motion was made upon the grounds that the judgment is not appealable; that the court has no jurisdiction to review it, and that the exceptions are frivolous. James A. Dennison, for the motion. Charles K. Beekman, opposed. No opinion. Motion denied, with \$10 costs.

SOCIETE DES HUILES D'OLIVE DE NICE, Appellant, v. BORKE, Respondent.

(Court of Appeals of New York. Feb. 3, 1899.) James & Thomas H. Troy, for appellant. George A. Strong and Martin & Smith, for respondent. No opinion. Judgment and order affirmed, with costs, on opinion below. 5 App. Div. 175, 89 N. Y. Supp. 28. All concur.

STRADER, Respondent, v. NEW YORK, L. E. & W. R. CO., Appellant. (Court of Appeals of New York. Dec. 16, 1898.) Henry Bacon, for appellant. O'Neill & Royce, for respondent. No opinion. Judgment affirmed, with costs, on opinion below. 86 Hun, 613, 83 N. Y. Supp. 761. All concur, except GRAY, J., absent.

TOMPKINS, Respondent, v. TOMPKINS et al., Appellants. (Court of Appeals of New York. Feb. 3, 1899.) Francis Larkin and Richard N. Arnow, for appellants. William P. Fiero, for respondent. No opinion. Judgment and order affirmed, with costs. All concur. See 89 Hun, 608, 34 N. Y. Supp. 1032.

TROWBRIDGE et al., Respondents, v. TROWBRIDGE et al., Appellants. (Court of Appeals of New York. Feb. 3, 1899.) James L. Bishop and Charles W. West, for appellants. Benjamin F. Blair, for respondents. No opinion. Judgment affirmed, with costs, on opinion below. 5 App. Div. 318, 39 N. Y. Supp. 241. All concur.

WELLS, Respondent, v. TOLMAN, Appellant. (Court of Appeals of New York. Feb. 3, 1899.) No opinion. Motion for reargument denied, with \$10 costs. See 156 N. Y. 636, 51 N. E. 271.

WHITE, Respondent, v. JEFFERS et al., Appellants. (Court of Appeals of New York. Feb. 3, 1899.) M. P. O'Connor, for appellants. Chas. S. Taber, for respondent. No opinion. Judgment and order affirmed, with costs, and 10 per cent. damages, under subdivision 5, § 8251, Code Civ. Proc. All concur. See 3 App. Div. 620, 88 N. Y. Supp. 1150.

In re WILLIAMS. (Court of Appeals of New York. Dec. 6, 1898.) G. W. O'Brien, for appellant. M. E. Driscoll and J. R. Shea, for respondents. No opinion. Order affirmed, with costs. All concur, except GRAY, J., absent. See 24 App. Div. 247, 48 N. Y. Supp. 475.

In re EAST 168TH ST. In re MAYOR, ETC., OF CITY OF NEW YORK. (Court of Appeals of New York. Dec. 16, 1898.) Appeal by the city of New York from an order of the appellate division, First department, affirming an order of the special term (52 N. Y. Supp. 588), directing the commissioners of estimate and assessment heretofore appointed in this proceeding to acquire title to the lands required for the opening of 168th street. Affirmed. Theodore Connolly and John P. Dunn, for appellant. James A. Deering, for respondent.

HAIGHT, J. We think that the provisions of chapter 1006 of the Laws of 1895 are within the constitutional powers of the legislature, and that the order in this case should be affirmed. It is doubtless true that some of the provisions of the act pertaining to the acquiring of the fee and easements in discontinued streets, if they stood alone, might be construed as authorizing the taking of property

for a private use; but, when these provisions are considered in connection with the other provisions of the act, we find that they all aim at one object, and that is the laying out and opening of the streets and avenues of a city according to a plan adopted. Confessedly, this is for a public purpose, and we think that the acquiring of the fee and easements in the old roadways which are discontinued should be treated as incident and necessary to carry out the public improvement authorized by the provisions of the act. We have not thought it necessary to enter upon a discussion of this question, for the reason that the very able opinion written below, in which we fully concur, covers all the points involved. The order appealed from should be affirmed, with costs, and the questions certified answered in the affirmative. All concur, except GRAY, J., absent. Order affirmed.

NO. 2 INDIANA MUT. BUILDING & LOAN ASS'N v. CONDON. (Supreme Court of Indiana. Feb. 22, 1899.) Appeal from circuit court, Fulton county; A. C. Capron, Judge. Action by No. 2 Indiana Mutual Building & Loan Association against Henson C. Condon and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed. McBride & Denny, Essick & Mitzler, and Elliott & Elliott, for appellant. Holman & Stephenson, for appellee.

MONKS, C. J. The questions in this case are the same as those decided in *Association v. Plank* (Ind. Sup.) 52 N. E. 991; and, upon the authority of that case, this case is reversed, with instructions to overrule the demurrer to the complaint.

CHICAGO, B. & Q. R. CO. v. PEOPLE ex rel. KINZIE, County Collector. (Supreme Court of Illinois. Feb. 17, 1899.) Appeal from Mercer county court; J. H. Connell, Judge. Proceeding by the people, on the relation of Charles Kinzie, county collector of Mercer county, to enforce delinquent taxes. From a judgment against property of the Chicago, Burlington & Quincy Railroad Company for certain school taxes, it appeals. Reversed. Grier & Stewart, for appellant. James M. Brock, State's Atty., for appellee.

PHILLIPS, J. The questions presented on this record are identical with those presented in *St. Louis, R. I. & C. R. Co. v. People* (Ill. Sup.) 52 N. E. 364. It is unnecessary to repeat the reasoning of that opinion. What is there said is conclusive of this case, and the judgment of the county court of Mercer county is reversed. Judgment reversed.

HOYT et al. v. CHICAGO, M. & ST. P. RY. CO. (Supreme Court of Illinois. Feb. 17, 1899.) Appeal from appellate court, First district. Action by Alfred M. Hoyt and others against the Chicago, Milwaukee & St. Paul Railway Company. A judgment for plaintiffs was reversed by the appellate court, and plaintiffs appeal. Affirmed. Osborne Bros. & Burgett and Robert F. Pettibone, for appellants. Edwin Walker (John W. Cary, of counsel), for appellee.

CARTWRIGHT, J. This is one of three actions of covenant brought by appellants in the superior court of Cook county, against appellee, on a lease and agreement executed February 18, 1880, by appellee, as party of the first part, and Alfred M. Hoyt, George L. Dunlap, and others, as parties of the second part. Plaintiffs recovered judgments in the superior court, which were reversed by the appellate court. *Railway Co. v. Hoyt*, 50 Ill. App. 583. The cases were not remanded, and

appeals were prosecuted to this court. The lease and agreement were construed, and the questions involved in all the cases were decided in the case of *Dunlap v. Railway Co.*, 151 Ill. 409, 38 N. E. 89. The decision in that case, in which an opinion was filed, controls this case, and the judgment of the appellate court will therefore be affirmed. Judgment affirmed.

KIROHGRABER et al. v. COVENANT MUT. LIFE ASS'N et al. (Supreme Court of Illinois. Feb. 17, 1899.) Error to city court of Mattoon; James F. Hughes, Judge. Bill by John Kirchgraber and others against the Covenant Mutual Life Association and others. A motion to dismiss the bill for want of equity was sustained, and complainants bring error. Dismissed. Dundas & O'Hair and Eads & Eads, for plaintiffs in error. T. A. Moran, G. W. Wall, and W. C. Calkins, for defendants in error.

PER CURIAM. This case involves the same questions which were involved in *Rowell v. Association*, 176 Ill. 557, 52 N. E. 271, in which an opinion was filed dismissing the appeal. The decision in that case is conclusive of the questions involved here; and, for the reason stated in the opinion in that case, the writ of error will be dismissed. Writ dismissed.

NORTON et al. v. STATE BANK OF FREEPORT. (Supreme Court of Illinois. Feb. 17, 1899.) Appeal from appellate court, Second district. Action by the State Bank of Freeport against Oscar Norton on a note. From an order of the appellate court reversing an order vacating a judgment for plaintiff by confession (78 Ill. App. 174), defendant and another appeal. Affirmed. A. D. Early, for appellants. William Marshall, for appellee.

PHILLIPS, J. The questions presented on this record are the same as those presented in *Blake v. Bank* (Ill. Sup.) 52 N. E. 957; and what is said in that case is conclusive of the questions here presented. The judgment of the appellate court of the Second district is affirmed. Affirmed.

SOUTH PARK COM'RS v. CHICAGO REAL-ESTATE BOARD et al. (Supreme Court of Illinois. Dec. 21, 1898.) Appeal from circuit court, Cook county; E. F. Dunne, Judge. Bill by the Chicago Real-Estate Board and others against the South Park commissioners. There was a judgment for plaintiffs, and defendants appeal. Affirmed. Green, Honoré & Peters, for appellants. Wilson, Moore & Melvaine, for appellees.

PER CURIAM. This case was before us at the April term, 1898, and is reported as *Knopf v. Board*, 173 Ill. 198, 50 N. E. 658. By the decision in the latter case the decree of the circuit court was reversed, upon the ground that the South Park commissioners had not been made parties to the suit, and the cause was remanded to the court below for further proceedings. After the case went back, the bill was amended by making the South Park commissioners parties defendant thereto, and was demurred to, and the demurrer overruled, and the same decree entered, enjoining the levy of the two-mill tax, as was entered upon the first hearing of the cause. The present appeal is prosecuted from the second decree, thus entered after the present appellants were made parties to the bill in the court below. The tax involved in this case is the same tax as is referred to in the case of *South Park Com'rs v. First Nat. Bank of Chicago*, 177 Ill. 234, 52 N. E. 365. The decision in the latter case

disposes of the question which arises upon the record in the present case. Accordingly, the decree of the circuit court is affirmed. Decree affirmed.

TOWN OF KANKAKEE v. LEGRIS.
(Supreme Court of Illinois. Feb. 17, 1899.)
Appeal from Kankakee county court; Eben B. Gower, Judge. Action by H. J. Legris against the town of Kankakee. Judgment for plaintiff. Defendant appeals. Affirmed. W. R.

Hunter, for appellant. Granger & Davidson, for appellee.

PER CURIAM. It was stipulated by the parties that this cause should be determined and governed by the decision rendered by this court in the case of *Town of Kankakee v. McGrew*, 178 Ill. 74, 52 N. E. 893. The said cause of *Town of Kankakee v. McGrew* having been carefully considered, and the judgment therein appealed from affirmed, the judgment here appealed from is also affirmed. Judgment affirmed.

END OF CASES IN VOL. 52.

